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L&RS Note

# The regulation of online political advertising

## Evaluating the Government's proposals

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## Introduction

The *General Scheme of the Electoral Reform Bill 2021* (Part 4, Heads 120-130) proposes to regulate online political advertising. The proposals build on the *Online advertising and social media transparency Bill PMB 2017* which was debated extensively in the 32nd Dáil,[1] the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation and its Report (2018), and a public consultation on the regulation of transparency of online political advertising which was held at the end of 2018. L&RS Bills Briefing page (2021) provides background material for Members on all parts of the General Scheme of the Electoral Reform Bill.

This L&RS Note:

- Sets out the legislative and policy context and the purpose of regulating online political advertising (Sections 1 and 2);
- Sets out policy options and examines the proposals in the General Scheme (Part 4) (Section 3);
- Evaluates the proposals for whether they are likely to achieve these goals and, in doing so,, highlights **key issues** for the consideration of all Members on examination of Part 4 of this General Scheme (Section 4 below).

The General Scheme, published on 8 January 2021, is under scrutiny by the Joint Committee on Housing, Planning and Local Government (January – February 2021). **Key issues identified throughout this *Note* are summarised overleaf.**

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## Key Issues identified in the evaluation of the General Scheme (Section 4 of this Note)

1. As the reach of digital media is becoming increasingly broad, the question as to why online political advertising is not aligned with broadcast media arises. In examining the General Scheme's proposals, Members may wish to consider whether this alternative policy option – to place a ban on online political advertising as is the case with broadcast media - has been examined in detail [Key Issue 1]
2. Members may wish to consider the rationale for confining the application of transparency requirements to online political advertising commissioned for placement during the election period, and whether the legislation is more likely to meet its policy goals –transparency - were the regulations to apply at all times [Key Issue 2, 3 & 4].
3. As currently drafted, it is not clear that online platforms/sellers would be obliged to use the identification and verification procedures (Heads 122-125) outside of the electoral period; if not obliged to do so, it would remain possible for foreign nationals to purchase online political advertising and target it (without attribution) at Irish citizens outside of election periods. Members may wish to seek clarification on this question.
4. To achieve transparency goals, it is important that all online political advertising circulating during a campaign, and regardless of when it was commissioned or first placed, is subject to transparency and other regulations set out in the General Scheme.
5. It is not clear who will assess whether 'online advertising with a political purpose' commissioned by 'persons' is seeking to influence the outcome of an election or a referendum. It is possible that this provision, if not clearly defined or enforced, could enable avoidance of the regulations. [Key Issue 5]
6. In order to ensure that full information on micro-targeting is disclosed, it may be useful to insert the word 'all' before 'the criteria for micro-targeting" and to require that 'all of the characteristics used to create a 'look alike' targeting list be disclosed [Key Issue 6 & 7].
7. Concerning the archive required under Head 120, it may be advisable to include additional specifications on how the information must be provided so that it is complete, accessible and easy to search, or to indicate that Ministerial Guidelines/Electoral Commission Guidelines to this effect will be issued.
8. In order to maximise transparency, it may be necessary to make it clear that publishing the archive in the way set out in the legislation (or by Guidelines) is an obligation for online platforms/sellers [Key Issue 8].
9. Members may wish to consider that regulations/guidelines issued on procedure for investigations by the Electoral Commission include proactive and *reactive* triggers for an investigation [Key Issues 9&10]
10. The effectiveness of the enforcement regime (in terms of deterring breaches) (whereby breaches investigated by the Commission must be brought to the Court with the permission of the DPP rather than providing for administrative financial sanctions) could be examined, by making the regime subject to review a short time-period after the legislation has commenced.
11. The Government, or the Electoral Commission when established, may wish to examine the practicality of legislation which allows online political advertising, but limits micro-targeting, with a view to reducing its potential to facilitate the spread of dis-information [Key Issues 11 & 12].
12. The Government, or the Electoral Commission when established, may wish to bring forward and examine the practicality of proposals to address the spread of disinformation online (outside of online political advertising) and the challenges it presents to democracy (e.g. requiring user interfaces which facilitate reporting of disinformation; providing for oversight of recommendation algorithms).

## 1. Legislative and policy context and the objective of this proposal

Electoral competition is a central feature of a democratic society. The regulation of political advertising aims to create a fair and transparent environment in which electoral competition occurs. Political advertising is banned on broadcast media in Ireland (with the exception of free party-political broadcasts – see below), while political advertising in print media is regulated under the *Electoral Act 1997* to ensure transparency i.e. it must be made clear that the content is an advertisement and the identity of the sponsor must be disclosed.

**Proponents of the ban** of political advertising on broadcast media argue that, while freedom of expression is central to the democratic process, unlimited and unregulated paid advertising gives better-funded candidates, parties and campaign groups an unfair advantage and can lead to a political dependence on campaign fundraising, undermining the integrity of the democratic system.[2] The purpose of the ban is to prevent the dominance of campaigns and public opinion by the wealthy, and thereby to reduce the pressure on political parties and campaign groups to raise campaign finance to influence politics.[3] According to Judge Barrington in a High Court case which upheld the legality of the ban in 2000 (Colgan v IRTC)[4] 'rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals.[5]

The ban tends to be in in place in countries with a long tradition of public ownership of broadcasting such as France, the UK and Denmark.[6]' An animal's rights group in the UK challenged the legality of the ban in European Court of Justice (2013) on the grounds that it violated its right to freedom of expression. The Court upheld the ban and argued that the 'prohibition cannot be considered to amount to a disproportionate interference with the application's right to freedom of expression.[7]

**The goal of requiring transparency around political advertising** in print media is to make the public aware that the content they are reading is paid for, and to make the identity of the purchaser known: informed citizenship enhances electoral integrity and to be informed, citizens must know who is funding political campaigns.[8] Transparency can give important context to the communication in the advertisement.

**The regulation of political finance** – how politics is funded and how money is spent – aims to reduce the influence that unlimited access to money can have on politics. Central to Ireland's electoral code, these regulations affect expenditure on political advertising. Set out in the Electoral Act 1997 (as amended), the political finance regime provides important context for this proposed legislation. Each is set out in turn.

### 1.1 Ban on political advertising on broadcast media

Under s41 of the Broadcasting Act 2009 political advertising is prohibited on any radio or television station licensed by the Broadcasting Authority of Ireland (BAI) to broadcast and distribute content to people in Ireland. Under s41(3) a 'broadcaster shall not broadcast an advertisement which is directed towards a political end, or which has any relation to an industrial dispute.'[9]

The interpretation of 'a political end' is set out in Guideline Notes issued by the Broadcasting Authority of Ireland (BAI), the agency with statutory responsibility for regulating broadcasting content of Irish-licenced broadcasters (both programming and commercial content). (Box 1).

Included in the definition of advertisement is 'advertising matter contained in sponsored programmes' (programmes supplied for advertising purposes or by or on behalf of an advertiser) The ban does not apply to party political broadcasts which are permitted during electoral campaigns (see s39(2) of the Act) provided that the broadcaster does not give unfair preference to any political party (nor to advertisements aired at the request of the Referendum Commission). Precisely how the ban on political advertising on broadcast media is enforced is discussed in the analysis of this General Scheme below (Section 3).

**Box 1: BAI Definition of 'a political end'**

BAI *Guidance Notes for the General Commercial Communications Code* state that a political end encompasses advertisements directed towards:

- Furthering the interests of a particular political party;
- Procuring changes in the laws of this country or countering suggested changes to those laws;
- procuring changes in the laws of a foreign country or countering suggested changes in those laws;
- procuring a reversal of government policy or of particular decisions of governmental authorities in this country or countering suggested reversals thereof; or
- procuring a reversal of governmental policy or of particular decisions of governmental authorities in foreign countries or countering suggested reversals thereof.

### 2.2 Political advertising on print media, fliers, posters and promotional material

Political advertising is permitted in **print media** although there are transparency requirements designed to ensure accountability as noted above. There is no regulation of content.

Under s140 of the *Electoral Act 1992*, as amended, every notice, poster or similar document having reference to a General Election, or distributed for the purpose of furthering a particular result, **must** bear the **name and address of the printer and publisher.** An advertisement in print media is interpreted as a notice.[10] It is an offence under the Act to print (other than copying by hand), publish, post or cause to be printed, published or posted any notice, poster or similar document, which does not bear this information. A person found guilty of an offence under s.140 is liable on summary conviction to a fine not exceeding €2,500 and/or to imprisonment for a period not exceeding three months. Section 6 of the Referendum Act 1994 (as amended) applies these provisions to every poster having reference to a referendum or distributed for the purpose of furthering a particular result in a referendum. The same rules also apply to political advertising during local and European Parliament elections.[11] Enforcement mechanisms for transparency in print media are included in the discussion of this General Scheme below (Section 3).

When it comes to the content of political advertising, there is no regulator responsible for ensuring that political advertising is 'legal, decent, honest and truthful**.'** This contrasts with commercial advertising, where the Advertising Standards Authority of Ireland plays this role (Box 2). This has been highlighted [12]as a regulatory gap[13] which is increasingly problematic in the era of online political advertising where the volume and targeted nature of advertising makes it easier to spread mis or dis-information (Box 2)**.[14]**

**Box 2: Is a political advertisement 'legal, decent, honest and truthful?'**

The Advertising Standards Authority of Ireland is an independent self-regulatory body set up and financed by the advertising industry and committed, in the public interest, to promoting the highest standards of marketing communications, that is, advertising, promotional marketing and direct marketing (including 'online behavioural advertising'). It publishes a code which aims to ensure that all commercial marketing communications are 'legal, decent, honest and truthful' and to which all of its members should adhere, and it handles complaints regarding alleged breaches of the code. It publishes a list of complaints and the verdict (complaint upheld or not) as regular Bulletins. However, the ASAI Code does not apply to political advertising.

### 1.3 Political finance legislation

The regulation of **political finance,** and the application of restrictions on expenditure at elections, affect parties, candidates and third parties' investment in political advertising. The regulation of political finance aims to reduce the potential for corrupt relationships to develop between business, sectional interests and political actors.[15] Aiming to reduce the influence of money in politics, the regulations tend to either prohibit or place a cap on (limit the amount of) certain types of political donations to political parties, candidates or campaign groups and/or require disclosure of other types of donations so that the public is aware of who is funding different parties and candidates and their campaigns. The *Electoral amendment (political funding) Act 2012 Act* substantially reduced the permissible amount of a donation 'for a political purpose' to a party or candidate as well as reducing disclosure limits. (Box 3). The definition of 'for a political purpose' is set out in the

**Box 3: Political finance regimes**

There are several dimensions to political finance regimes. They include:

1. The **regulation** of donations to, and expenditures by, political parties and candidates. Regulations frequently include caps on the value of, or the outright banning of certain types of donations;
2. The application (and enforcement) of rules for reporting and disclosing political donations and expenditure to increase the **transparency** of the financing process with a view to enhancing the accountability of political actors;
3. Public funding for parties.

The legislation in Ireland **prohibits certain types of donations** – anonymous donations over €100; cash donations of over €200 and foreign donation (donations which are not from an Irish citizen or corporation).

**Caps are placed** on other donation: €2,500 to a party and €1,000 to a candidate/ politician or third party;

**Disclosure limits: any donation** to a political party in excess of €1, 500, and to an individual candidate in excess of €600, must be disclosed by the recipient to SIPO. And a corporate body must register with the Standards in Public Office Commission (SIPO) if it makes a donation in excess of €200. As such, all corporate

*Electoral Act 1997*[16] and is important context for the proposals on online political advertising in this General Scheme.

The *Electoral Acts* further aim to protect the democratic electoral process from foreign interference and, for this purpose, **donations from non-Irish citizens or organisations are prohibited.**

Further, the *Electoral Act 1997 (Part V)* **restricts expenditure** by candidates during electoral periods; candidates may spend a maximum of €30,150 in a three-seat, €37,650 in a four-seat and €45,200 in a five-seat constituency and provides that this includes expenditure by the candidate and by the central party on the candidate's behalf. **Outside of the formal campaign period, there are no restrictions on what parties, selected or prospective candidates can spend - including no restrictions on spending on online political advertising.** While expenditure limits do apply at Presidential Elections, expenditure limits do not apply to referendums i.e. parties and campaign groups may spend an unlimited amount of money during a referendum campaign.[17]

In sum, the *Broadcasting Act 2009* and the *Electoral Act 1997* (as amended) set a context for electoral competition which aims to preserve the integrity of the process by limiting the influence of money on political competition and reducing the incentives for corrupt relationships in politics. They do so by banning certain practices – large donations from private interests or any donation from foreign entities to actors engaging in political competition and political advertising on broadcast media - and bringing transparency to others - requiring those engaging in competition to disclose their sources of money (e.g. for corporate donations over €200) and to disclose who is paying for their political advertising. Yet online political advertising, which now constitutes an increasingly important part of electoral competition, is unregulated. The proposal to regulate online political advertising should be seen in the context of these laws.

## 2. Policy need: purpose of regulating online political advertising

There are several reasons to regulate online political advertising, some which relate to bringing it into line with other political advertising, others related to the specific, different challenges posed by political advertising which is online.

**Firstly, the absence of regulation is at odds with the regulation of political advertising and political finance described above;** there is a logic to the regulation of online political advertising if the broad thrust of this regime is to continue to shape political competition. After all, political parties, candidates and groups are increasingly using the internet to distribute advertising that cannot be placed on BAI-regulated media.[18] This practice, while within the law, is arguably against the spirit of the regime created by the Acts described above; there are good reasons why parties and candidates are prohibited from placing advertisements on broadcast media.

**Secondly, at present** online political advertising is not even subject to transparency requirements. This means that anyone, in any place, who has a credit card can purchase a political advertisement (including purchasing the services of a social media/marketing company to build up a following on a social media page) and pay for it to be targeted at a specific group of Irish citizens (users of social media) identified as persuadable voters.[19] Anyone seeking to take part in political advertising anonymously may sidestep existing regulations and place the political advertisement online. In sum, in the present unregulated environment, citizens are unable to evaluate political advertising online as they are not offered consistent information on its provenance. Journalists cannot offer citizens comprehensive analysis of campaign messages and activities as **much activity is undetectable and untraceable.**[20]

Unregulated online political advertising poses different, and arguably greater, risks to electoral integrity and to the democratic process than political advertising on other mediums because of its opaque nature and broad reach. Online advertising is distinguishable from traditional advertising in a number of respects which presents challenges to effective regulation.

A popular selling-point for online political advertising is **micro-targeting.** Unlike traditional political advertising, where anyone who reads the publication in which an advertisement is placed can see it, an online political advertisement is generally micro-targeted at carefully-selected (often described as persuadable) audiences identified using the user data the online platform has amassed and analysed. And the user who receives an online political advertisement tends to be unaware of why he or she received it, unaware of who else did, and may be unaware of other advertisements issued by the same party or candidate which may give a different message. While micro-targeting can also happen in the off-line world (as noted by the Data Protection Commissioner in her submission to the Public Consultation in 2018), online advertisements can be micro-targeted in more ways, has a larger potential reach and is less subject to public scrutiny. With no regulator responsible for ensuring that content in political advertising is truthful (see Box 2 above), and very little public scrutiny, online political advertising may facilitate the spread of mis or dis-information. Effective regulation aims to reduce the extent to which online political advertising facilitates the spread of disinformation.

A practice which further contributes to opaqueness is the blurring in the distinction between content which is clearly an advertisement, and political content which is promoted for a fee but appears like a post or an article. For example, a person or an organisation pays an online platform to help it build up a following (a target audience of potentially persuadable voters) and subsequently unpaid political content is pushed out to this audience during a campaign. The process of paying to build up a target audience and a following for a fee is a service offered by many online platforms. Yet this practice online poses problems for representative democracy similar to those posed by unattributed and micro-targeted political advertising except that it is even more opaque i.e. users may genuinely be unaware that they are receiving the content as a result of a transaction which identified them as a likely or persuadable voter.

Where an organisation uses a pre-programmed robot/automated account to amplify a political message, masquerading as a real person and sending it to users with particular characteristics on the basis of an algorithm poses further challenges in that it elevates the apparent importance of the content. This is the deliberate manipulation of social media via bots - a type of software capable of autonomously performing actions such as tweeting, re-tweeting, liking or directing messaging to other accounts or other fake media accounts, to amplify messages.[21]

Further, there is the challenge to the regulation of online content presented by the global nature of the internet and the online platforms hosted. In Ireland, it is illegal for a party or a candidate to accept a ‘foreign donation’ meaning a donation from a person or a body residing outside of the State (unless that person is an Irish citizen, a company with an office registered in the State or a European political party). However, online political advertising may be generated by persons or groups abroad. The extent to which legislation can prohibit political advertising generated from abroad and targeted at Irish citizens for the purposes of influencing the outcome of an election or referendum, is central to addressing this policy problem.

A key test of the Government’s proposed legislation (set out in the General Scheme) is if it can address these challenges which unrestricted online political advertising creates for democracy.

# 3. How do the General Scheme's proposals address these challenges?

## 3.1 Policy options

To mitigate the potential risks to electoral integrity posed by un-regulated online political advertising (described above) policy makers face options. As with political finance regimes, the options centre on a few core instruments, some of which may be used together:

(i) **Place a ban/prohibition on online political advertising -** a full ban would mirror the ban on political advertising in broadcast media.

(ii) **Place a partial prohibition or ban (i.e. a ban on certain type of political advertising online) -** prohibit certain types of online political advertisement e.g. ads that are paid for by a sponsor residing outside of the State; ads that are micro-targeted; online political advertising outside of 'the electoral period.'

(iii) **Introduce caps or some type of limit on online political advertising -** limit/place ceilings on expenditure on online political advertising by political actors.

(iv) **Introduce measures to bring full or partial transparency to online political advertising -** set out information which must be disclosed when publishing and promoting an online advertisement and measures which ensure that the public can easily access this information; these requirements may be permanent or during election periods.

If the decision at point (i) is made to restrict - rather than to ban - online political advertising, policy-makers are likely to select one or a combination of options at points (ii)-(iv) above. In other words, caps or limits on certain types of online political advertising may be in place alongside other policy instruments designed to bring transparency to online political advertising.

The Government proposes to regulate, rather than to place an outright ban on online political advertising. Looking at options (ii) – (iv), the Government is opting to introduce transparency requirements for online political advertising (iv), while banning foreign advertisements in line with political finance regulations(ii).

Regardless of the policy options selected, the scope provided by the **definition of online political advertising** (which determines to which advertisements the regulations will apply), as well as the **effectiveness of the enforcement regime**, will be critical to the success of any legislation.

Following a summary of the General Scheme's provisions on online political advertising (3.2), we discuss the extent to which the Government's proposals are likely to achieve the policy objective (of addressing the challenges to electoral integrity posed by online political advertising). Key issues **for Members' consideration** during the scrutiny process are highlighted through the discussion (Section 4).

## 3.2 Government's policy: proposals as set out in the General Scheme (Part 4)

**Head 120** provides for the circumstances under which the regulations in Part 4 (regulations on online political advertising) will apply i.e. it defines when an advertisement is an online political advertisement. **Head 121** sets out the information which must be disclosed and must appear when such an online political advertisement is published/promoted/distributed and the format in which this type of information must be provided.

**Head 122** sets out the identification and verification duties of the 'responsible person' who must (under the regulations) be appointed by an online platform/the seller of the online political advertisements. **Heads 123 and 124** respectively set out procedures which must be used to identify and verify a buyer prior to placing an online political advertisement and with how to deal with advertisements commissioned from outside the State (to ensure that they are permissible). Non-compliance with Heads 122-124 is an offence for the online platform/seller. **Head 127** places statutory duties on the purchasers of online political advertisements (the persons listed in Head 120).

**Head 125** sets out discretion for the responsible person to apply due diligence in his/her verification process and **Head 126** sets out exceptions in the case of public information advertisements (e.g. by Electoral Commission, by Returning Officers). **Heads 128 and 129** set out the enforcement regime regulated by the Electoral Commission and **Head 130** punishments for offences.

**Table 1 : Summary of provisions re. online political advertising the General Scheme**

| Head | Purpose of the Head |
|---|---|
| Head 2 and Head 120 | **Definition of political advertising**<br>Any form of communication in a digital format commissioned for political purposes[1] for placement, display or promotion on an online platform[2] *during an electoral period* and for which a payment is made to the online platform (Head 2);<br>Under Head 120 the provisions of Part 4 (i.e. the new regulations) apply when an online political advertisement (defined above) **is directly or indirectly commissioned** by:<br>- A candidate (or person acting on behalf of a candidate) in any election or referendum;<br>- An elected Member (or person acting on behalf of) a member of elected institutions (including the President);<br>- A registered political party and a European political party;<br>- A third party[3]; and<br>- Such 'other person or entity' seeking to influence the outcome of an election (at national or candidate level) or a referendum. |
| 121 | **Transparency requirements for an online political advertisement:**<br>An online political advertisement must include a Transparency Notice (in real time 2(3)) with the following information: |

[1] Head 2 (interpretation) 'for political purposes' has the meaning assigned to it by s22(2) of the Electoral Act 1997 [which is the meaning used for a political donation i.e. a donation for political purposes is a donation for the purposes of '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.' SIPO recommended aligning these definitions in its submission to the Consultation process in 2018.

[2] Head 2 (interpretation) defines as any public-facing website, web application, or digital application, including a social media network, advertising network, search engine or the seller of an online political advertisement which has a 10,000 or more unique monthly visitors in 12 months period preceding date of commencement of election period and receives payment for the placement, display or promotion of an online political ad.

[3] Within meaning of the Electoral Act 1997: any person, other than a registered political party or a candidate at an election, who accepts, in a particular year, a donation given for political purposes, the value of which exceeds €100 [*Section 22(2)(aa)*]. See SIPO *Guidelines to election to 33rd Dáil* p.20

| | |
|---|---|
| | A button, icon, tab or hyperlink with the text Political Advert in an easily visible place; this links to a Transparency Notice which must include:<br>- *Name, postal and email addresses, website of the purchaser where applicable;*<br>- *Confirmation of whether micro-targeting was applied in the placement, display and promotion and, if so, a description of the criteria used for any such micro-targeting;*<br>- *Confirmation of whether the target audience used a 'look alike' targeting list and, if so, a description of the characteristics;*<br>- Amount paid for the online ad including for content creation, online placement, display and promotion and<br>- Number of days during which it will be live on the platform; the number of user impressions that the ad is intended to reach and active engagements by user.<br><br>The Transparency Notice must be notified to the Electoral Commission.<br><br>Online platforms must establish and maintain an Archive of political advertisements and transparency notices which must be in a manner set out in Head 121 (6) and to which all political advertisements must be transferred on expiration. |
| 122 | Obliges online platforms to appoint a 'responsible person' to ensure compliance with Heads 123,124 and 125 (below) i.e. to ascertain and verify the identity of the buyer of online political advertising and the information provided for the purpose of placing, displaying or promoting an online political advertisement *prior* to placing the advert online. Failure to comply is an offence. |
| 123 & 124 | The responsible person must, prior to placing any advertisement, determine whether the buyer resides outside of the State. If this is the case, the responsible person must verify that the buyer is:<br>- An Irish citizen (or entitled to be) or<br>- A body corporate or unincorporated body of persons that keeps an office in the island of Ireland (from where it directs its principal activities);<br>- a European political party in accordance with EU regulation.<br><br>124(7) states that no person except those outlined above (in Head 124 (3) may directly or indirectly commission an online political advertisement. Failure to comply (i.e. it is an offence to sell political advertising to a person or entity residing abroad *without* verifying that they are permitted to place the advertising using the process set out in Head 124. |
| 125 | Gives the responsible person the discretion to apply additional due diligence to support transparency, including for the identification and verification of the buyer. It makes it an offence for a buyer who fails to comply with a measure [according to the General Scheme's notes, this would only apply where the responsible person believes that false or misleading information has been provided or that a person from outside of the State is attempting to place an online political advert in the State]. |
| 126 | Provides exemptions to application of the transparency requirements in situations of public information e.g. Communications from Electoral Commission and Returning officers. |
| 127 | Places an obligation on the buyers of online political advertising to provide the information required in Head 121 (2) to the online platform and to comply with requests under Heads 123-125 (verification). It is an offence for a buyer not to comply with these provisions. |
| Heads 128-130 | Enforcement |

## 4. Analysis of proposed provisions in light of the policy goals

The Government's proposals aim to address the risks which unregulated online advertising pose by bringing full transparency to the online political advertising campaign and by ensuring that online political advertising is not placed from abroad (except where permitted). Below the proposals in the General Scheme are evaluated in light of these policy goals, highlighting ten Key Issues which Members may wish to consider in their scrutiny of the legislation.

The proposals are evaluated under 5 headings:

- 4.1 Fundamental policy choice – to ban or to introduce transparency and other measures
- 4.2 Definition assigned to 'online political advertising'
- 4.3 Transparency regulations
- 4.4 Ensuring compliance – creation of offences
- 4.5 Ensuring compliance – enforcement regime

### *4.1 Fundamental policy choice – to introduce transparency rather than a ban [Key Issue 1]*

The General Scheme opts to bring online media under transparency regulations without placing restrictions on the right to engage in online political advertising (bar foreign persons or entities).

The policy decision to regulate for transparency, rather than to impose a ban on online political advertising, is consistent with the *Online advertising and social media transparency Bill PMB* which played a key role in initiating this policy process. As noted in the BAI's submission to the Government's consultation process in 2018, the regulatory approach to online political advertising was focused on how rather than whether to implement transparency.[22] **T**he proposals opt to align the regulation of online political advertising with print, rather than with broadcast, media.

That political advertising is more heavily regulated on broadcast than in print media is explained by the broader reach, greater persuasive power and public nature of broadcast media (section 1).[23] As the **reach of digital media is becoming increasingly broad, the question as to why online political advertising is not aligned with broadcast media arises [Key Issue 1].**

**The increasingly broad reach of digital and social media** is evident from survey data. The most recent Reuters/You Gov Irish Digital Media Report (BAI and FuJo, DCU, 2020)[24] find that respondents' main source of news are now about half digital (digital and social media) and half traditional (Figure 1). While television is still the most popular source for news – preferred by 33% (down from 36%) - social media platforms are the main source of news for 20% of those surveyed (Figure 2). This has increased by 5% since 2016.[25] Further, the same report found that social media platforms are important sources of news for younger age groups: social media platforms are the main source of news for 43% of the 18 to 24 age group and 20% of the 35-44 age group in 2020.

**Figure 1: Main sources of news (digital vs tradition)**

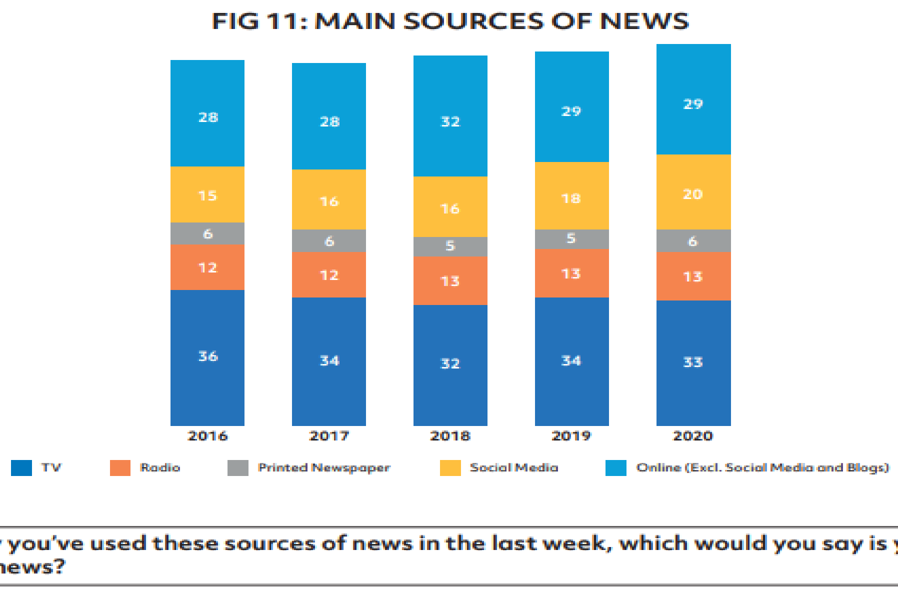
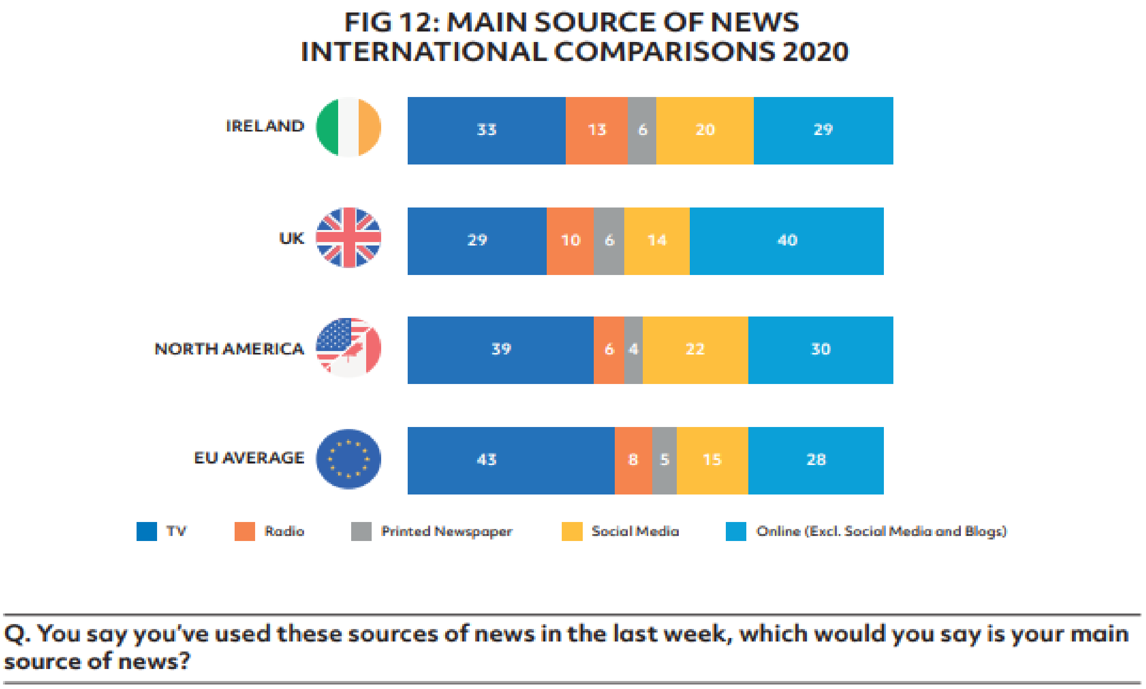



**Figure 2: Main sources of news**




Source (Figures 1 and 2): FuJo DCU and BAI Digital News Report Ireland' and Reutors/YouGov.

There are arguments for and against the banning of online political advertising.

On the one hand, there is the risk that banning political advertising online would push political and issue-based actors to rely on more opaque forms of promotion online to communicate their political message (e.g. the distribution of promotional content which is not an Ad using the targeting services of an online platform). Further, such a prohibition would require examination for its compatibility with freedom of expression under the Constitution.

On the other hand, digital media has an increasingly broad appeal which may rival that of broadcast media(see above), there is already a ban on political advertising on broadcast media which has been held up as constitutional in the courts (see above), and there appears to be some public support for prohibiting online political advertising. The Irish Digital News Report (2020) found 52% of surveyed adults were against allowing political advertising on social media, with 35% in favour, while 47% favoured allowing it on traditional broadcast media.[26] Further, the imposition of such bans is technically possible. Facebook in Ireland banned political advertising from foreign buyers two weeks before the referendum on the Repeal of the Eight in an effort to enhance electoral integrity amidst growing concern about the potential influence of unattributed, foreign-placed ads.[27] Google followed suit and banned all political advertising during the referendum campaign on 9 May 2018, including on YouTube (which it owns).[28] Twitter unilaterally decided in October 2019 to ban political advertising in general.[29]

If the legislation were to instead impose a ban on online political advertising, it would be necessary to set out an enforcement regime, including giving responsibility to a regulator and creating a system for dealing with breaches. There is a model in place for this already in the BAI's role with respect to political advertising on broadcast media.

**In examining the proposals in the General Scheme, Members may wish to consider whether this alternative policy option – to align political advertising online that that on broadcast media - has been examined in detail.[30]**

### 4.2 Definition of 'online political advertising – to what online advertisements will the regulations apply?

Of central importance to the overall implications of this proposed legislation is the **definition of 'online political advertising'** as this determines to which advertisements these regulations apply.

Under Head 120 there are two dimensions to an online political advertisement. The first pertains to its purpose and the second to the identity of the person or entity placing the ad. Both must apply for the advertisement to come under the provisions of the proposed law.

First, a political advertisement is one commissioned 'for a political purpose' which, under Head 2, has 'the meaning assigned to it by s22(2) of the Electoral Act 1997': a political purpose is one with '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.' This definition is quite broad and will encompass issue-based advertising i.e. advertising which aims to promote a policy outcome. The second dimension (Head 120.1(a) – (g)) is that to come under the provisions of the Bill, the online political advertisement must be commissioned for placement, display or promotion (directly or indirectly) by one of the persons or entities listed (see Table 1).

Applying both dimensions means that the proposed regulations on online political advertising will apply to advertisements which seek to promote or procure a particular policy outcome which are commissioned by candidates, elected members[31], parties (as defined in the Electoral Act 1997), [32] third parties (as defined in Electoral Act 1997) or 'other persons or entities who seek to influence the outcome of an election or referendum.' The regulations would therefore apply to 'third parties' who engage in issue-based advertising (i.e. to promote a policy outcome) during an election or referendum campaign; and the regulations would apply to issue-based advertising commissioned by ‘other persons or entities seeking to influence the outcome of an election’ (i.e. who do not come under ‘third party’).

Three Key Issues for consideration arise with this definition:

- Application of the ‘electoral period’ and consequences for online political advertisements commissioned for placement, promotion or display outside of the electoral period [Key issues 2 and 3];
- Scope of the regulations as applied to ‘other persons or entities [Key issue 4]’

### 4.2.1 Applies to online political advertisement during the ‘election period’ [Key Issues 2,3&4]

Under Head 2 (which defines the ‘election period’) and Head 120, the regulations will apply to online political advertisements (defined in detail above) which are commissioned for placing, display or promotion *during* the election (or referendum) period. The election period is defined in the *Electoral Act* 1997 as (a) from 30 days before the poll date or (b) from the date the polling day order for the election has been made, whichever is shortest.

**Members may wish to consider the rationale for only requiring transparency around online political advertising during the short period running up to an electoral contest, and whether the legislation is more likely to meet its policy goals were the regulations to apply at all times [key Issue 2].**

As raised in the discussion above (Section 1), the effectiveness of the cap on electoral expenditure set out in the *Electoral Act 1997* is limited by its application to the official campaign period only, an argument noted on several occasions by the Standards in Public Office Commission.[33] It is possible to circumvent the regulations by frontloading expenditure prior to the commencement of the campaign. In the same way, limiting the application of the regulations to online political advertising commissioned to run during the election period may limit its effectiveness by encouraging buyers to frontload some of their placement, display or promotion of online political advertising to periods immediately preceding the formal election period (thereby avoiding disclosure requirements). BAI has also drawn attention to the limitations of confining controls to the election period; it has argued that this is ‘not likely to be wholly sufficient to protect citizens from the risks arising from online political advertising’ and suggesting they be applied on an ongoing basis.[34]

In its submission to the Government’s consultation (2018), the Institute for Future Media and Journalism (FuJo) noted that in some recent referendums over half of voters deferred their decision until during the electoral campaign.[35] They suggest that most political actors will therefore wish to run the bulk of their online advertising during the campaign period. However, it should be noted that other voters make decisions mid-term and are motivated by many different reasons from party attachment, to policy issues, to the performance of a local politician.[36] With a volatile electorate,[37] and with no restriction on online political advertising, there is a clear incentive for most parties to engage in online political advertising mid-term. Yet under the proposed legislation, unattributed online political advertising can be targeted at citizens throughout this period. In spite of the intention to bring transparency to the online campaign, there may be little or no possibility for citizens to gain an understanding of how online political advertising mid-term or just prior to a formal campaign is affecting electoral competition.

If, on the other hand, the regulations were applied during all periods, the incentive to front-load online political advertising prior to the commencement of an official electoral or referendum campaign to avoid transparency requirements would not exist. There would be transparency on online political advertising for citizens, without interfering with freedom of expression as the proposed regulations *do not place any restrictions* on the content of online political advertising.

Applying the regulations on an ongoing basis would place greater burdens on stakeholders – the online platforms and the purchasers of online political advertisements. However, these may not be insurmountable as it will be necessary for stakeholders to create systems and structures to comply with the legislation during electoral periods in the first place

It is also important to consider how confining the application of the provisions to the electoral would affect the ability of foreign entities or persons to purchase and target online political advertising to Irish citizens. If, as Head 120 suggests, the regulations apply only to the election period, it appears that online platforms and sellers of political advertising are only required by law to apply the identity and veracity checks set out in Heads 122, 123 and 124 during the election period**. As currently drafted, it is not clear that online platforms/sellers would be obliged to use the identification and verification procedures (Heads 122-125) outside of the electoral period; if not obliged to do so, it would remain possible for foreign nationals to purchase online political advertising and target it (without attribution) at Irish citizens outside of election periods. Members may wish to seek clarification on this question**. **[Key Issue 3]** The General Scheme notes that Heads 122-125 (which oblige online platforms to verify identity of buyer, including ensuring a buyer from outside the State is a permissible buyer, is modelled on the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.* Under this Act, it is an ongoing obligation of the service provide to conduct transaction and business assessments.

If the proposals on the time frame for the application of the regulations remains unchanged in the Bill. If the regulations apply to the electoral period only (as currently envisaged in the GS), it will be important to ensure that online political advertising which is commissioned and even placed, displayed or promoted prior to the election period, but which circulates during the election period, is subject to the regulations. Head 120 does appear to provide for this scenario in that it says the regulations apply to advertising "commissioned for placement, promotion of display during an election period." Without this requirement there could be a further incentive to commission online political advertising immediately prior to the campaign period. These online ads would run without being subject to the regulations throughout the election campaign. **If it is to achieve its purpose, the legislation should ensure that all online political advertising circulating during a campaign is subject to the transparency and other regulations [Key Issue 4].**

### 4.2.2 Scope of legislation with respect to other persons or entities [Key Issue 5]

How the proposed legislation will apply to third parties and 'other persons or entitles seeking to influence the outcome of an election or referendum' requires further consideration.

There has been some debate in Ireland on the appropriateness of applying regulations on political finance to third parties. Some groups who qualify as third parties (in that they accept a donation 'for political purposes' of over €100 in a calendar year) argue that the statutory limits on the size of the donations which they may accept affect their capacity to engage in lobbying and advocacy activity (€2,500 is the maximum which can be received by any one donor). The *Electoral Amendment (civil society engagement) PMB 2019*[38] proposes to exempt third parties from these regulations so that they could raise funds freely (without the cap on the amount and the disclosure requirements) to finance issue-based campaigns. The difficulty with this approach is that it can result in a situation whereby donating to third parties becomes an indirect way for those with money to seek disproportionate influence over the policy and electoral process (i.e. a way to avoid the caps and disclosure).

The General Scheme proposes to apply the regulations to online advertising with a political purpose commissioned by:

- ‘third parties’ and (Head 120 1(f);
- persons who indirectly place an advertising on behalf of anyone listed in Head 120;
- other persons or entitles seeking to influence the outcome of an election or referendum’ (Head 120 1(g)).

The incentive for political actors to encourage online political advertising by groups loosely connected to a party, candidate or to an issue on which they stake a stand, is reduced as these ‘third parties’ are also subject to disclosure requirements. If such groups are not officially ‘third parties,’ they may be interpreted as indirectly placing an advertisement on behalf of an entity listed in Head 120. There is a question, however, about who makes this judgement (i.e. is the purchaser buying advertising on behalf of an entity or person listed in Head 120).

There is a further question, about the application of the regulations to online political advertising commissioned by ‘other persons or entities seeking to influence the outcome of an election or referendum’ (Head 120 1(g)). **It is not clear who will assess whether ‘online advertising with a political purpose’ commissioned by ‘persons’ is seeking to influence the outcome of an election or a referendum. It is possible that this provision, if not clearly defined or enforced, could enable avoidance of the regulations [Key Issue 5].** As when online political advertising commissioned by these persons or entities is considered ‘not to seek to influence the outcome,’ it would not be subject to the regulations in the General Scheme (even if it has a political purpose). **This is an important consideration given how research on campaign finance regulations in other states have found several un-intended consequences (see below).**

Loopholes and un-enforced provisions in campaign finance laws in the USA have had unintended consequences which have elevated the importance of ‘dark money’ in politics. Super PACs (Super Political Action Committees) and ‘Social Welfare Organisations’ established under Section 501(c) of the US Federal Tax Code are not subject to the same campaign finance disclosure requirements as are parties, candidates and groups directly associated with their campaign.[39] These groups can support issues and candidates by running ads or engaging in other traditional political activity *without* being subject to the disclosure requirements, so long as there is ‘no coordination between the campaign and the group.’ However, this latter provision regarding connections is not well enforced and, as a result, political campaigns can be dominated by ‘dark money’ i.e. donors are not disclosed.[40]

Evidence from the application of the EU’s Code on Disinformation also suggests that this is an important issue. In its research on the application the EU’s Code on Disinformation to the European elections in Ireland (2019), Kirk, Culloty et al (2019)[41] found that the effectiveness of the regulation was diminished by the different approaches taken by platforms to identifying issue-based advertising. Facebook did not differentiate between political advertising and issue-based advertising (and labelled all the same), while neither Twitter nor Google identified issue-based ads (only identifying ads which clearly refer to a candidate or a party in an election). With either approach, the authors concluded that it was difficult to discern from the information provided the extent to which ads carrying campaign issues were circulating and affecting the campaign. The lack of clarity obscured transparency.

As the Government clearly aims to avoid such scenarios emerging from its regulation of online political advertising, it is important to close off possibilities to engage in what is effectively political advertising while not being subject to transparency regulations and veracity and identity checks.

Equally significant to the General Scheme's proposals on what type of online advertisement will be subject to the provisions of the legislation (discussed above), are the actual regulations themselves and whether they are sufficiently robust to achieve the policy goal. This is next evaluated (4.3).

### 4.3 Transparency Regulations [Key Issues 6&7]

The rationale behind disclosure regulations is that they **provide information and context for voters who receive online political advertisements.** Research on disclosure laws in the USA highlight two impediments to their achievement of policy goals. One, the cognitive limitations of the information recipients i.e. voters have limited time and capacity to digest and to consider the implications of vast amounts of disclosure information**.** Two, loose enforcement regimes with small punishments for breaches.[42] Disclosure regulations are more successful where information overload is prevented i.e. where the information is easily accessible and digestible; disclosure should ensure that voters, journalists, NGOs, fact checkers and society in general can with ease generate a picture of the political advertising online environment – who is paying for it, who is being targeted, how much money is being spent and by whom.[43] The extent to which the General Scheme's provisions will achieve these goals is considered below.

Head 121 sets out that a Transparency Notice with specified information must appear in a visible place on an online political advertisement. The list of information required is comprehensive and, if fully complied with by each online political advertisement, would provide transparency and context to online political advertisements for citizens and journalists, fact checkers and software engineers (who may help to analyse it). Importantly, information on whether and how an advertisement is micro-targeted is required and must appear in the Transparency Notice. **In order to ensure that full information on micro-targeting is disclosed it may be useful to insert the word 'all' before 'the criteria for micro-targeting." [Key Issue 6].** Research on the application of the *EU Code of Practice on Tackling Online Disinformation*[44] by online platforms[45] during the 2019 European election campaign in Ireland found that, in spite of the Code's requirement that signatories disclose micro-targeting information, the information provided was patchy; signatories only provided data on age, geography and gender, in spite of the fact that it is possible to micro-target ads in far more ways (e.g. according to political views). Micro-targeting of data by region disclosed by Facebook during the UK 2019 General Election was confined to England, Scotland, Wales and Northern Ireland.[46] By stipulating that all criteria for micro-targeting be specified, the legislation can ensure that this does not occur. For the same reason, **it might be stipulated that a description of all of the characteristics used to create a 'look alike' targeting list be disclosed (Head 121 2(c)].**

The archive of online political advertising which is a requirement under Head 121 (5) is a very significant part of bringing transparency. Its purpose is to enable society, including journalists, academic researchers and fact checkers, to gain a good understanding of the complexity of online political advertising and its role in an election campaign or its influence on politics in general. If this information is not presented in a searchable, user friendly way, it can be useless in achieving the policy goal of transparency. **It may be advisable to include additional specifications on how the information must be provided so that it is complete, accessible and easily to search, or to indicate that Ministerial Guidelines/Electoral Commission Guidelines will be issued. [Key Issue 7].** Further, whether all online political advertisements should be automatically placed in the archive on placement (rather than on expiration as set out in Head 121) might be considered; this could facilitate real-time research during an election campaign.

The significance of regulating how the information is provided in archives was highlighted by the authors of research on the EU Code on Disinformation (referred to above). FuJo found that the archive of online political advertisements provided by all three platforms examined (Twitter, Facebook, Google) was incomplete, difficult to search and that it was questionable whether the archives served their purpose - to have real-time information available about the nature, cost and extent of micro-targeting behind political and issue-based advertising.[47]

The information required on cost (Head 121(d) is for content creation and for online placement, display and promotion. The inclusion of 'content creation' was advised by FUJO in its submission to the public consultation in October 2018.

### 4.4 Ensuring compliance – creation of offences [Key Issue 8]

What happens if there is a breach of the legislation?

The General Scheme creates offences if the sellers and buyers of online political advertising fail to comply with their obligations as set out in the legislation.

Under Head 122, online platforms/sellers must appoint a 'responsible person' who has a duty to verify the information and documentation provided by the buyer (or one acting on behalf of, or in connected with the buyer) *prior to* the placement, display or promotion of any online political advertisement. The online platform is obliged to ensure the required information from the purchaser is provided: Head 122 (4) clearly states that except as provided for by head 126 (exempt bodies), an online platform which fails to comply with the provisions of this Head commits an offence.

This obligation extends to how verification by online platforms/sellers is undertaken. This is set out in detail in Heads 123 (identification and verification of buyers) and 124 (political advertisements commissioned from outside the state) and 125 (application of due diligence) and, according to the Notes in the General Scheme, it is modelled on existing legislation (*Criminal Justice (Money Laundering and Terrorist Financing) 2010*). If the responsible person is unable to apply these verification procedures, the online platform must not proceed with the transaction. Online platforms must monitor dealings with a buyer by scrutinising transactions to determine that they are consistent with the buyer's business and patterns of transactions and for any knowledge that the buyer may be seeking the service on behalf of a person residing outside of Ireland. Where the buyer resides outside of the State, the online platform must verify (in a manner set out in Head 124) that the buyer is a citizen of Ireland (or entitled to be), a body that keeps an office from which it carries out one or more it its principal activities on the island of Ireland; or a European political party (established in accordance with EU Regulations) before it can offer its online advertising service.

The General Scheme also obliges buyers of online political advertising to provide the information for display in a Transparency Notice and to comply with requests for information under Heads 123, 124 or 125 for the purposes of identifying and verifying the buyer. Head 127 (3) clearly makes it an offence not to do so.

**Returning to the question above we look at the consequences of several types of breaches:**

If an online political advertisement were circulating during the election period without a fully compliant Transparency Notice, it appears that both the purchaser and the online platform would be liable.

In the case of an online political advertisement with no Transparency Notice, it is probable that the online platform would be liable, for placing the advertisement, and the purchaser would be liable once the identity is uncovered.

In a third scenario – where it becomes clear that the purchaser of a placed online political advertisement resides abroad and should not have been permitted to buy online political advertising – it appears the online platform would be liable for selling the advertisement if it did not appropriately apply the verification measures as set out in Heads 122 and Head 124. Where the purchaser resides outside the State, and is a foreign national, it may be difficult – although not impossible - to enforce a judgment. This would apply to any situation where courts act to convict someone outside the jurisdiction. By making purchasers and sellers of online political advertising liable, and including detailed procedures for the verification of the identity of the purchaser (or one acting on behalf of, or connected to the purchaser), the proposals may minimise the number of times in which this would arise.

What happens if an online platform/seller either fails to publish the archive or publishes an incomplete or unsearchable archive?

Under Head 122 (4) the online platform/seller is obliged to ensure the required information from the purchaser is provided and this includes the information for the Transparency Notice. Under Head 127, the purchaser is obliged to provide this information. However, under the General Scheme, it is unclear if it would be an offence to publish archives that do not fully comply with the provisions of Head 121. As noted above (Section 4.3 on Transparency), to best serve its purpose – to bring the political advertising campaign under full public scrutiny – it is arguable that the archive must be transparent, complete and easy to search. **To ensure transparency in full, the legislation may need to be clear that this is an obligation for online platforms/sellers [Key Issue 7].**

### 4.5 Ensuring compliance - enforcement regime [Key Issues 9&10]

The General Scheme would require the identification of a natural or legal person who is to be the subject of the regulatory and enforcement regime.

For example, in the case of the ban on political advertising in broadcast media, the licensed television and radio broadcasters would be the legal persons (the subject of the legislation) and the BAI is central to the enforcement regime.[48] The *Broadcasting Act 2009* (ss 53-57) (the 2009 Act) sets out an incremental process for dealing with apparent breaches of the ban. First, a compliance notice is issued (to highlight an issue and to give the broadcaster the opportunity to comply); next, a compliance warning is issued (this requires the contractor to reply, outlining how it intends to remedy the situation and return to compliance). If these steps do not result in compliance, the BAI Compliance Committee (provided for under the 2009 Act) appoints an investigator, who would inform and provide documentation to the affected broadcaster covering the apparent breach, giving the broadcaster seven days to respond (which may be extended, but not beyond 21 days). The investigator would then report to the BAI Compliance Committee and, where it is concluded that a breach has taken place, the Compliance Commission would issue a notification of the breach, stating its intention to apply to the Court for a determination and indicating the proposed financial sanction. There is an option, if the broadcaster requests it, for the matter to be dealt with by the BAI through an administrative financial sanctions regime, avoiding an application to the Court.

In the case of the print media, the publisher and printer are liable for breaches. Cases are brought by the Garda to the Director of Public Prosecutions. There is no other regulatory body with a similar role to the BAI's role with respect to broadcast media.

In the case of political finance legislation, parties, candidates and third-party organisations are the primary legal persons (the subject of the legislation) and the Commission on Standards in Public Office (SIPO) as well as the Minister (in some cases) and the Garda and DPP form the enforcement regime. For example, in the case of the transparency requirement to furnish SIPO with annual accounts in the manner set out in the Guidance Notes, the ultimate sanction for non-compliance is withdrawal of public funding. This decision would be made by the Minister for Public Expenditure and Reform. In the case of the acceptance of an illegal donation or failure to provide donation documentation, proceedings are taken by, or with the approval of the DPP and those found guilty may be liable for a fine of up to €2,500.[49]

**What is the proposed enforcement regime for the regulation of political advertising?**

The proposed legislation sets out that the regulated entities comprise both the sellers *and* the buyers of online political advertising (listed in Head 120 and in Table 1 above). In regulating and creating offences (see above) for both parties to the transaction, the proposals create reciprocal offences. This may prove to be an effective way to ensure compliance. The regulator is the Electoral Commission in the first instance.

Heads 129 – 130 empower the regulator to appoint 'authorised officers' with relatively extensive powers to investigate. The proposals do not specify whether an investigation needs to be triggered in a pro-active way or in a reactive way (in response to a compliant). For effective enforcement, it would be important that both are possible. From the General Scheme it appears that this decision is taken at the discretion of the authorised officer (and the Commission). **Members may wish to consider that future regulations or guidelines issued under the legislation regarding the procedure for investigations include both triggers for an investigation [Key Issue 9].**

While the Commission is empowered, and is provided with tools to, investigate apparent breaches (Heads 128 – 129), the Commission is **not** empowered to adjudicate or to impose penalties. An 'authorised officer' in the Commission must have the consent of the DPP to commence a prosecution. This approach differs from the model applied in broadcast media where breaches are investigated, and financial penalties may be imposed, by the regulator (the BAI). The Data Protection Act 2018 is similar to the 2009 Act, in that administrative financial sanctions are applied by the Data Commissioner.

Empowering the Electoral Commission to apply administrative financial sanctions for breaches of the legislation (or at least for some breaches) may be a more efficient way to ensure compliance than requiring a criminal process. Administrative financial sanctions are seen by regulators to be an efficient and responsible tool to deter the wrongful conduct of people in a particular marketplace; they allow swift and meaningful intervention in the case of less serious breaches while reserving criminal proceedings for more serious cases.[50] The benefits of such sanctions must be balanced against the Articles 34 and 38 of the Constitution which direct that the administration of justice and the prosecution of criminal offences is reserved to the courts. The Oireachtas Library and Research Service published a *Spotlight on Administrative financial sanctions* which examines the advantages and disadvantages of this enforcement model and considers the constitutional questions that their use may raise. **The effectiveness of the approach proposed in the General Scheme (whereby breaches investigated by the Commission must be brought to the Court with the permission of the DPP) could be examined, by making the regime subject to review a short time-period after the legislation has commenced [Key Issue 10].**

**Head 130** sets out the possible penalties for breaches of the legislation. Under the proposals, it would be up to a judge to determine the penalty (up to Eur 5,000 and up to 12 months imprisonment on summary conviction and an **unlimited fine** or imprisonment for a term of up to 5 years if convicted on indictment).

## 5. Conclusion and broader challenges

This *Note* has focused on examining the Government's proposals (January 2021) for addressing the challenges which unregulated online political advertising pose to electoral integrity. The primary goal of the proposed legislation is to bring full and meaningful transparency to online political advertising, and to prevent foreign interference in elections through the targeting of online political advertising at the Irish electorate. If fully implemented, the proposals will go some way to achieving these goals and towards tackling the risks to Ireland's democratic elections. Our analysis has highlighted several Key Issues which, if addressed, should maximise the prospect that the legislation achieves its goals. They are summarised in the Table on p.2 of this *Note.*

One of the fundamental issues raised in respect of the General Scheme (Key Issue 2) is the risk that, in confining the proposed controls to the election period, their capacity to bring full transparency to online political advertising is limited. And there is the further question about whether online platforms must apply the verification mechanisms set out in the General Scheme at all times to ensure that the purchaser of online political advertising is not a person or entity residing outside the State who does not fall into the permissible categories. Further, we highlight that full transparency may be more achievable, if the legislation were to place an obligation on online platforms/sellers to ensure that the archives which they must publish (under Head 121) are accessible, complete, easy to search and suitable for analysis.

Credible enforcement is key to successful regulation; it should be clear to purchasers and sellers alike that consequences will apply for breaches of the regulations. The proposed legislation creates 'reciprocal' offences for buyers and sellers which should help to ensure compliance. Regarding who is responsible for raising and adjudicating breaches of the regulations, the Government has a choice between two core models. In one model, the regulator may investigate alleged breaches and apply financial penalties. In the other, alleged breaches must be brought to court by the DPP. The pros and cons of empowering the regulator to apply administrative financial sanctions are noted in section 4.5 above. The effectiveness of the approach proposed in the General Scheme (whereby breaches investigated by the Commission must be brought to court by the DPP) should be subject to review a short time-period after the legislation has commenced.

**There is a wider consideration of whether** requiring transparency in online political advertising, without restricting the right of any person or entity to commission online political advertising, can sufficiently address the challenges online political advertising can present to the electoral code (outlined at Section 2)? Are there **alternative approaches** and other issues which need to be addressed?

An alternative approach discussed was the regulation of online political advertising in the same way as political advertising on broadcast media. However, it was noted that this may incentivise buyers of online political advertising to adopt more opaque ways to communicate their message via online platforms (and could face a constitutional challenge regarding limitations on freedom of expression).

Another possible approach is to ban certain types of online political advertising alongside the application of transparency requirements for others. As micro-targeting and the creation of 'look-alike audiences' are features which contribute significantly to the opaqueness of online political advertising, **it is worth considering the practicality of legislation which permits online political advertising but bans its micro-targeting**. This proposal is not without precedent. A Bill proposing to do this was introduced to the US House of Representatives in 2020. *The Protecting Democracy from Disinformation Bill 2020 (HR7012)* [51] sponsored by Representative David Cicilline (Democrat), proposes to restrict the ability of online platforms and advertisers to target/disseminate political advertisements to a specific group of individuals based on online behavioral data.[52][**Key Issue 11]**

Finally, the risk **of misinformation and disinformation spread through social media, but not through advertising, during Irish electoral campaigns** are not addressed in this General Scheme. The European Commission's Consultation on the Digital Services Act 2020, and the Irish Minister for Justice's forthcoming proposals to tackle disinformation and hate speech online would be relevant context to any proposal to address these issues. In evidence to the USA House of Representatives Intelligence Committee in 2021 on the dangers of disinformation to democracy, Nina Jankowicz (author and Research Fellow with the Wilson Centre) [53] argues that a central obstacle to reducing the circulation of disinformation on social media is that the algorithms - which underpin how information circulates - reward virality; posts that go viral reach more people and result in more revenue. As such, many online platforms tweak their platform to promote engagement – and virality - and that these features can be quite easily gamed by a small number of people wanting to push a hidden agenda. Jankowicz suggests that as well as increasing transparency around political advertising:

- authorities need a greater understanding, and perhaps oversight, of recommendation algorithms, and
- outline platforms should tweak user interfaces to make reporting disinformation or misinformation easier.

Policy-makers, or the Electoral Commission when established, may wish to examine and bring forward policy proposals on how to deal with these risks **[Key Issue 12].**

## ENDNOTES

[1] See here for a link to the Bill and debates on the Bill.

[2] See Centre for Law and Democracy (March 2012) Regulation of Paid Political Advertising: a Survey. P. 1.

[3] Political scientist, Dr Eoin O'Malley (DCU), cited in Irish Times 29 April 2013 'European Court upholds ban on paid political advertising.'

[4] [2000] 2 IR 490

[5] Judgement is cited in Broderick and Ni Longaigh (March 2018). Ronan Daly Jermyn, Media Law 'Eighth Amendment: reporting restrictions on media coverage of referenda in Ireland.'

[6] ACE The Electoral Knowledge Network 'Media and Elections' p. 116

[7] 'European Court upholds ban on paid political advertising' *Irish Times* 29 April 2013

[8] Suiter et al (2018) FuJo submission to Public Consultation of online political advertising in Ireland (October 2018) p.3.

[9] A broadcaster is defined as 'a person who supplies a compilation of programme material for the purpose of its being transmitted, relayed or distributed as a broadcasting service (whether that person transmits, relays or distributes that material as such a service or not);'. The regulation applies to all broadcasters regulated by the BAI.

[10] While an article by Broderick and Ni Longaigh (March 2018) raised some questions about this interpretation, L&Rs has confirmed in a conversation with the Press Ombudsman (1 May 2018) that political advertisements are interpreted as "notices" by print media which applies the transparency regulations set out in the Electoral Acts.[10]

[11] Regulation 101 of the Local Elections Regulations 1995 provides that a poster having reference to **local elections** or distributed for the purpose of furthering the candidature of any candidate at a local election must have printed on its face the name and address of the printer and publisher. Rule 109 of the Second Schedule to the European Parliament Elections Act 1997 applies similar provisions to **European Parliament elections**.

[12] This was raised by the ASAI during the referendum campaign on the 8th Amendment as citizens contacted it regarding online political advertising. It was discussed at the Government's Open Policy Forum on Regulation of Transparency of Online political advertising (December 2018). See The Journal (27 December 2018) *Advertising watchdog should be beefed up so it can monitor online political ads'*

[13] See Report of the First Report of the Interdepartmental Group on Risks to the Electoral System and Disinformation (2018) p.14.

[14] This is also the case in the UK, an issue which is discussed in this Note from the House of Commons Library. It is explained that judgements on the content of political advertisements would likely come after an electoral event.

[15] See Van Biezen Ingrid (2010) _Campaign and Party Finance' in LeDuc, Niemi and Norris, (2010) *Comparing Democracies 3: Elections and Voting in the 21st Century* L.A., London, New Delhi, Singapore, Washington D.C, SAGE.

[16] As inserted by the *Electoral Amendment Act 2001 s49 (after point (f))*

[17] Note that while there is some transparency around the expenditure incurred by candidates or parties around a referendum campaign (because they are legally obliged to send annual accounts published on SIPO's website and which would give a good indication of this spend, there is no such obligation on third-party groups.

[18] Rafter Keven in Gallagher and Coakley (2018) *Politics in the Republic of Ireland 6th Edition* Routledge and IPA

[19] L&RS conversation with Liz Carolan, Transparent Referendum Initiative (April 2018). Leahy Pat, Irish Times, 21 March 2018 writes that the control of spending and traceability of campaigning materials are regulation of Irish elections and referendums rests on the control of spending, and the traceability of

campaigning materials are completely circumvented by online campaigning. Anyone can buy online ads; they can target them wherever they want.

[20] Transparency Initiative, Liz Carolan (October 2018) *Submission to Public Consultation on Transparency in online political advertising.*

[21] Ball J 'As our politics goes online can the laws keep up?' *Prospect Magazine* 19 January 2018.

[22] Broadcasting Authority of Ireland (October 2018) Response to Public consultation on regulation of transparency of online political advertising

[23] Centre for Law and Democracy cited above p. 5.

[24] Institute of Future Media and Journalism 'Digital News Report Ireland' in association with BAII and Reutors/YouGov.

[25] Kirk, Culloty et al, Institute of Future Media and Journalism DCU (2020) 'Digital News Report Ireland' in association with BAII and Reutors/YouGov.

[26] Opcit p. 35.

[27] 'Facebook bans foreign ads for eighth amendment referendum' *Irish Times* 8 May 2018. This was announced by Facebook at a hearing of the Joint Committee on the *Online Advertising and social media transparency bill 2017 PMB.*

[28] Oxford University Politics Blog (2018) 'Tracking the Twitter Conversation in the Irish abortion referendum'

[29] 'How Twitter Coaxed its Boss on Trump Ban' *New York Times* 17 January 2021.

[30] In its submission to the Government's Consultation on Transparency of online political advertising, BAI (2018) suggested that the decision to allow online political advertising raised the question as to whether political advertising should be permitted on broadcast media: to do so otherwise would seem problematic.

[31] Or someone on behalf of a candidate or elected member

[32] (i.e. those who are registered as third parties with SIPO – a requirement if a political donation over 100€ is received).

[33] SIPO (2017) Annual Report 2016

[34] BAI Submission to Government's Consultation on Transparency of online political advertising (2018) cited above.

[35] Research referred to by the Institute on Future Media and Journalism, DCU in its submission to the Department's Consultation (October 2018).

[36] See Cunningham and March (2018) *Voting Behaviour* in Gallagher and Coakley, edrs., *Politics in the Republic of Ireland* pp.137-163. London; Routledge

[37] Farrell, Marsh, Reidy (2017) 'The post-crisis voter'. The 2016 election is described as one of the most volatile elections in Ireland (and among one of the most volatile elections in Europe), leading to a very fragmented party system – the most fractionalized party system in the history of the state - and the emergence of new parties and groups, some of these of a 'populist' hue.

[38] See here for link to L&RS post on this Bill which links to the Bill and examines policy rationale and key provisions.

[39] Wood Abby K 'Campaign Finance Disclosure' *Annual Review of Law and Social Science Vol 14: 11-27*

[40] Wood Abby K cited above

[41] Kirk, Culloty et al (2019) ElectCheck: A Report on political advertising online during the 2019 European Elections. Institute of Future Media and Journalism, DCU and BAI.

[42] Wood Abby K 'Campaign Finance Disclosure' *Annual Review of Law and Social Science Vol 14: 11-27*

[43] Wood Abby K 'Campaign Finance Disclosure' *Annual Review of Law and Social Science*

[44] The Code was agreed to by big online platforms – Google, Facebook, Twitter, Mozilla – as well as by a key trade representative body for online platforms ( (EDIMA). It commits social media platforms to a range of actions designed to tackle disinformation and to bring transparency to online political advertising. The initiative commenced with the European Commission's Communication on Tackling Online Disinformation

issued in 2018) and the Code was published alongside an Action Plan on Tackling Online Disinformation. The research undertaken by FuJo concerned the application of the Code by online platforms in Ireland during the campaign for the European Parliamentary elections in 2019 (in particular the Code's commitments on online political advertising). Similar research was undertaken in 12 other states and the results were together published in a report by European Regulators Group for Audiovisual Media Services (ERGA) – which has been assigned a monitoring role in the Code.

[45] Online platforms, leading social networks, advertisers and advertising industry

[46] 'How technology is powering election coverage' *The Guardian* 19 January 2021. Software engineers working with the Guardian applied software solutions to delve into the demographics of parties' targeting during the campaign.

[47] Kirk, Culloty et al (2019) ElectCheck: A Report on political advertising online during the 2019 European Elections. Institute of Future Media and Journalism, DCU and BAI.

[48] BAI regulates the broadcasting sector and has a statutory duty to regulate broadcasting content of Irish-licenced broadcasters (both programming and commercial content). It investigates non compliance with the terms of a licence and for breach of duties as set out under the 2009 Act.

[49] Standards in Public Office Commission (2015) *Guidance Notes on Donations and Prohibited Donations*

[50] Oireachtas Library and Research Service (2019) Spotlight Administrative Financial Sanctions

[51] Congress Bills Tracker https://www.govtrack.us/congress/bills/116/hr7012/text/ih [accessed 2 February 2021]

[52] The Bill was introduced to the US House of Representatives in 2020 and was referred to the Administration Committee for scrutiny prior to the dissolution of Congress in January 2021.

[53] Reported in Australian Broadcasting Corporation (12 January 2021) *Storming of US Capitol and Donald Trump's Twitter ban will be tipping point for social media regulation, experts say'*

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