



Notification Number: 2022/184/IRL

## DETAILED OPINION from the Commission

Message 317

Communication from the Commission - TRIS/(2022) 02357  
Directive (EU) 2015/1535  
Notification: 2022/0184/IRL

Detailed opinion from the Commission regarding a rule on services (article 6, paragraph 2, third indent, of Directive (EU) 2015/1535). This detailed opinion extends the standstill period until 05-10-2022.

Comunicado detallado - Podrobné vyjádření - Udførlig udtalelse - Ausführlichen Stellungnahme - Üksikasjalik arvamus - Εμπειριστωμένη γνώμη - Detailed opinion - Avis circonstancié - Parere circostanziato - Detalizēts atzinums - Detali nuomonė - Részletes vélemény - Opinioni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Podrobný úsudok - Podrobno mnenje - Yksityiskohtainen lausunto - Detaljerat yttrande - Подробно становище - Aviz detaliat - Aviz detaliat.

Abre el plazo de statu quo - Zahájení doby pozastavení prací - Fristen for proceduren indledes - Beginn der Verfahrensfrist - Ooteaja avamine - Έναρξη της προθεσμίας διαδικασίας - Opening of the standstill period - Ouvre le délai de statu quo - E aperto il termine di procedura - Bezdarbības perioda sākums - Atidėjimo periodo pradžia - A halasztási időszak megnyitása - Ftuħ tal-perijodu ta' waqfien - Begin van de termijn voor de procedure - Otwarcie okresu odroczenia - Abre o prazo de procedimento - Otvorenie pozastavenej periódy - Uvedba obdobja mirovanja - Menettelyn määraaika alkaa - Inleder förfarandets frist - Откриване на периода на прекъсване - Deschiderea perioadei de stagnare - Deschiderea perioadei de stagnare.

Die Kommission hat diese ausführliche Stellungnahme am 05-07-2022 empfangen.  
The Commission received this detailed opinion on the 05-07-2022.  
La Commission a reçu cet avis circonstancié le 05-07-2022.

(MSG: 202202357.EN)

1. MSG 317 IND 2022 0184 IRL EN 05-10-2022 05-07-2022 COM 6.2(3) 05-10-2022

2. Commission

3. DG GROW/E/3 - N105 04/63

4. 2022/0184/IRL - SERV60

5. article 6, paragraph 2, third indent, of Directive (EU) 2015/1535

6. Within the framework of the notification procedure laid down by Directive (EU) 2015/1535, the Irish authorities notified to the Commission on 4 April 2022 the draft "Electoral Reform Bill 2022 (Part 4 - sections 117 to 139 inclusive)" (hereinafter the "notified draft").

The Commission services addressed to the Irish authorities a request for supplementary information on 16 May 2022. The answers provided by the Irish authorities on 30 May 2022 are taken into account in the following assessment.

In the notification message, the Irish authorities explain that the primary purpose of the notified draft is to



provide for transparency in political advertising in the online sphere, considered necessary to support open political discourse in democratic processes and protect the integrity of the electoral processes. In addition, your authorities explain that the requirements set out in the notified draft would only apply during electoral periods. The notified draft applies to the purchase for placement, display, promotion or dissemination, directly or indirectly including through an intermediary, of an online political advertisement during an electoral period. As notified, Part 4 of the Electoral Reform Bill 2022 would impose requirements on online platforms and on the buyers of political advertising.

The Commission acknowledges and shares the objectives pursued by the notified draft. The Commission has also been working on creating a harmonized regulatory framework on the transparency and targeting of political advertising in the EU. The Commission welcomes the support expressed by the Irish authorities in their replies to these initiatives.

Nevertheless, on the basis of the analysis of the notified draft, and the responses to questions from the Commission provided by the Irish authorities, the Commission considers that some of the measures included in the notified draft – concerning their intended practical interpretation – are incompatible with Articles 14(1) and 15(1) of Directive 2000/31/EC.

Examination of the notified draft and replies provided by the Irish authorities have prompted the Commission to issue the following detailed opinion.

(1) General remarks - Directive 2000/31/EC (the “e-Commerce Directive”)

The notified draft as well as the notification message indicate that the certain requirements therein would apply to “online platforms”. The notified draft provides a definition of online platforms for the purposes of the Electoral Reform Act, which encompasses providers of websites, web applications, digital applications or, more generally, other sellers of an online political advertisement accessible to the general public or a section of the public.

In their replies to the request for supplementary information sent by the Commission, the Irish authorities also clarify that the national measure transposing the e-Commerce Directive remains applicable to all online services in parallel and in addition to the obligations in the notified draft, which are confined to online political advertising during an electoral period.

Consequently, online platforms under the scope of the notified draft constitute information society services as defined in Article 1(b) of Directive (EU) 2015/1535 and therefore also within the meaning of Article 1 and 2 of the e-Commerce Directive, insofar as they fulfil the conditions mentioned therein (“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”). The applicability of the e-Commerce Directive to the notified draft also stems from the obligations included therein, which concern the taking up or pursuit of the activity of information society services. These obligations would thus fall within the coordinated field of the e-Commerce Directive as set out in its Article 2(h)(i) and, consequently, have been assessed against this Directive.

In the light of the definition of “online platforms” contained in the notified draft, the scope of the notified measure also includes providers of information society services, some of which are expected to qualify as intermediary service providers as per Section 4 of the e-Commerce Directive.

(2) Country of origin - the “e-Commerce Directive”

As regards territorial scope, Section 117 of the notified draft provides that the obligations for online platforms would apply to services that account for more than 10,000 unique monthly users in Ireland. In their replies to the request for supplementary information sent by the Commission, the Irish authorities confirm that notified draft would, in principle, be applicable to information society service providers not established in the territory of Ireland. However, the Irish authorities clarify that for information society services established in Member States other than Ireland, in the event that it was established that the provisions of the notified draft were stricter than those applicable in the Member State of establishment, the requirements would be altered and reduced to the requirements of the Member State of establishment.

The Commission takes note of this explanation and reminds the Irish authorities of their duty to ensure that the national measures in question fulfil substantive and procedural requirements of Article 3 of Directive 2000/31/EC.

(3) Compatibility with Articles 14 and 15 of the e-Commerce Directive



To the extent that the notified draft also applies to the providers of intermediary services falling under Section 4 of the e-Commerce Directive, the Commission has assessed these obligations against Articles 14 and 15 of the e-Commerce Directive and reached the following conclusions.

The notified draft imposes obligations on online platforms in the context of political advertising, but is unclear as to how online political advertising is to be identified, and by whom. When requested to provide more information on the scope of the obligations for online platforms stemming from the notified draft, the Irish authorities confirmed that the responsibility for ascertaining (i) whether an advertisement constitutes an online political advertisement, (ii) the identity of the buyers, and (iii) the residence of the buyers, will fall primarily on online platforms.

In this context, online platforms are obliged to consider certain documents which may be obtained from the buyer or gathered independently from the buyer to “ascertain and verify” of certain data and information provided by the buyer of advertising regarding its identity.

In particular, the notified draft lays down the following requirements for online platforms:

- Section 120 requires online platforms to apply the measures set out in section 121 to verify the identity of the buyer of an online political advertisement, and if for any reason it considers that the information and documents it obtains thereby are insufficient to verify the identity of the buyer of the online political advertisement, the online platform shall request and obtain any additional information as it is necessary for such verification, and failing that, shall not place, display, promote or disseminate the online political advertisement (section 120);
- Section 121 details the measures online platforms are required to take to identify and verify the buyers of online political advertisements. These include (i) ascertaining and verifying the identity of the buyer on the basis of official documents (whether or not available in electronic form); (ii) ascertaining and verifying the buyer’s address on the basis of official documents (where they contain address information) or statements from a regulated financial services provider; (iii) obtaining from the buyer a statement regarding the source of the funds used to purchase the advertising.
- Section 121(7) applies to cases where the online platform becomes aware of information on which there are reasonable grounds to consider that a buyer of an online political advertisement, or a person providing the funds, is a person prohibited by the notified draft from purchasing an online political advertisement. In such cases, it creates an additional obligation for online platforms to make such inquiries necessary to ascertain the accuracy of the information and veracity of the documents provided by the buyer.
- With reference to the condition in section 121(7), Section 123(1) sets out that buyers of online political advertisement from outside of Ireland are required to provide evidence in relation to citizenship or incorporation in the European Union. By a cross reference to Section 120 and 121, the notified draft extends the verification requirements of online platforms also to this evidence.
- Section 120(5), 121(9) and 123(6) state that it will be a criminal offence for an online platform not to comply with the provisions therein.

Article 14 provides for an exemption of liability for third party content hosted at the request of the recipient of the service for providers of hosting services. This is on condition that the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

However, the notified draft imposes criminal liability on those platforms that do not take measures against illegal advertisement where the online platform becomes or is made aware of information according to which there are reasonable grounds to consider that a buyer of an online political advertisement, or a person providing the funds, is prohibited by the notified draft. In such cases, the notified draft creates an additional obligation for online platforms to make such inquiries necessary to ascertain the accuracy of the information and veracity of the documents provided by the buyer.

The Commission considers that this imposition of liability must not be triggered by a lower knowledge standard than the “actual knowledge” requested by the e-commerce Directive. The Court of Justice of the European Union has interpreted that actual knowledge can be triggered by a notification, to the extent that it contains “sufficient information to enable the operator of that platform to satisfy itself, without a detailed legal examination, that that communication is illegal and that removing that content is compatible with freedom of expression”. In as much as, on the basis of reasonable grounds, the online platform would be required to carry



out a detailed examination of the facts to determine whether the buyer or provider of the funds is allowed under the law, the Irish draft appears to be lower than the knowledge standard set out in Article 14 of the e-Commerce Directive, as interpreted by the Court of Justice of the European Union.

Furthermore, Article 15 of the e-commerce Directive prohibits Member States to impose a general obligation on intermediary service providers to monitor the information that they transmit or store; or a general obligation actively to seek facts or circumstances indicating illegal activity. In this sense, the Commission has paid due regard to the interpretation of such general monitoring prohibition under CJEU case law.

While the notified draft does not make it clear how the political nature of a political advertisement is to be established, in their reply to the request for further information sent by the Commission the Irish authorities confirm that they intend that this should fall primarily on online platforms.

Therefore, in order to comply with the requirements under sections 119, 120 and 121, to obtain and provide information with online political advertising and to identify and verify the buyers (and in light of prospect of criminal liability for failure to comply), the online platforms would in practice, prior to displaying it, need to determine whether an ad constitutes a political advertisement according to the notion set out in the notified draft.

From the notified draft, it is unclear what actions or measures online platforms are expected to take in order to determine, ex ante and prior to displaying it in their services, the nature of the advertising and whether it constitutes a political ad for the purposes of the notified draft.

Consequently, as it stands, in order to ensure compliance and avoid liability, the notified draft is likely to require online platforms systematically to monitor all the advertisements available in their services, in real time and prior to their presentation, to assess whether it fulfils the notion of “for political purposes” as set out in the notified draft.

As regards the obligations of online platforms, concerning the information and documents obtained from a buyer of online political advertising, in cases where the online platform:

1. has reason to consider that the information that it receives is insufficient to verify the identity of the buyer of the online political advertisement; and
2. becomes or is made aware of information on which there are reasonable grounds to consider that a buyer of an online political advertisement or a person providing the funds to the buyer is prohibited from purchasing political advertising services;

The notified draft requires online platforms to respectively, (i) request and obtain such other information and documents from the buyer as are necessary and appropriate in order to verify the identity of the buyer, and (ii) make such inquiries as are necessary to ascertain the accuracy of the information and veracity of the documents provided by the buyer, without any further indications on the extent of the verification obligations for online platforms.

In those cases, online platforms are therefore expected to carry out extensive and potentially costly cross-checking and fact-finding exercises in order to verify the information provided by the buyer of the advertisement, which would go beyond the best efforts that can reasonably be expected from online platforms in this context. This includes, according to the information made available to the Commission by the Irish authorities, gathering additional information, even when not available in electronic format, and resorting to any relevant database, which in the case of European elections might not be available in Ireland.

The Commission notes that the notified draft does not provide any additional explanations on the circumstances considered sufficient to understand that there are reasonable grounds to doubt the identity and address of the buyer of advertising or the person providing the funds and their lawfulness in accordance with the notified draft. In view of the foregoing, it follows that neither the wording of the relevant provisions of the notified draft, nor the replies provided by the Irish authorities provide sufficient safeguards on its compatibility with Articles 14 and 15 of the e-Commerce Directive. Therefore, in the Commission’s view, as it stands, the practical implementation of the obligations set out in the notified draft (Sections 120, 121, 123, as described above) would amount to a breach of the exemption of liability under Article 14(1) of the e-Commerce Directive and would entail a general monitoring and fact-finding obligation incompatible with Article 15(1) of the e-Commerce Directive.

Finally, it is recalled, from the CJEU case law that the prohibition to impose a general monitoring obligation enshrined in Article 15(1) of the e-Commerce Directive must also be assessed in the light of the Charter. In particular, when establishing measures, national authorities and courts must strike a fair balance between the



various conflicting fundamental rights that are often at stake in this connection, including the freedom of expression, the right to the protection of privacy and personal data, and freedom to conduct a business. The Irish authorities are thus advised, to consider the impact of the requirements under the notified draft on fundamental rights, in particular the freedom of expression and information and the freedom to conduct a business.

For the above reasons, the Commission issues a detailed opinion in accordance with Article 6(2) of Directive (EU) 2015/1535 to the effect that Sections 120, 121, 123 of the notified draft are not compliant with Article 14(1) and 15(1) of the e-Commerce Directive, as drafted and on the basis of the responses provided by the Irish authorities.

The Commission services stand ready to support the Irish authorities in complying with their obligations provided under Directive (EU) 2015/1535 and in ensuring the compatibility of the notified draft national law with EU law. In this context, the Commission services remain available to discuss regulatory solutions that, without amounting to a general monitoring obligation, impose on online platforms specific and proportionate duties of care that can reasonably be expected from them in order to detect and prevent non-labelled political advertisements or labelled advertisements with inaccurate information on provenance, such as an enhanced vigilance during sensitive electoral periods. Without imposing ex-ante fact-finding obligations, online platforms could be required to make reasonable efforts to ensure that the information provided by the advertiser is complete, via for instance a reasonable level of random checks proportionate to the needs in electoral periods, or other proactive measures, as an obligation of means rather than an obligation of results (as would be the case with a positive liability linked to a particular failure).

The Commission is conscious of the political importance attached to the Irish Electoral Reform Bill of which the notified draft is a part, and it shares the Irish authorities' objective to support free and fair elections and resilient electoral processes which provide a high degree of transparency to citizens, strengthen accountability, empower citizens and deter interference. The Commission would like to remind the Irish authorities that once the European Union adopts legislation on these matters introducing exhaustive harmonization, Member States are not allowed to maintain or introduce national rules on the issues covered by the harmonised rules of EU legislation. The Commission also reminds the Irish Government that, under the terms of Article 6(2) of the above-mentioned Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State, which has drawn up the draft technical regulation concerned, to postpone its adoption for four months from the date of its notification.

This deadline therefore comes to an end on 5 August 2022.

The Commission also draws the attention of the Irish Government to the fact that under the above-mentioned provision the Member State, which is the addressee of a detailed opinion, is obliged to inform the Commission of the action, which it intends to take as a result of the detailed opinion.

Should the Irish Government not comply with the obligations provided in Directive (EU) 2015/1535, or should the text of the draft technical regulation under consideration be adopted without account being taken of the above-mentioned objections, or be otherwise in breach of EU law, the Commission may commence proceedings pursuant to Article 258 of the Treaty on the Functioning of the European Union.

The Commission furthermore invites the Irish Government to communicate the adoption of the definitive text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

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