

# SAFEGUARDING FREEDOM OF SPEECH IN REGULATING ONLINE POLITICAL ADVERTISING



# **SAFEGUARDING FREEDOM OF SPEECH IN REGULATING ONLINE POLITICAL ADVERTISING**

**IN THE WIDER CONTEXT OF THE DIGITAL  
SERVICES ACT**

Referenda, political realities in the national context of EU Member States and the EC proposal on transparency and targeting of political advertising

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# 1. Introduction

The European Commission presented a proposal for a harmonised set of rules on the transparency and targeting of political advertising (2021/0381 (COD)). These rules would apply to both online and offline political advertising. The proposal is currently under discussion in the European Parliament and the Council, under the ordinary legislative procedure.

The overall background of this proposal is to prevent mass-manipulation of voters by political actors in or outside the EU who do this to influence election results. The fact that online political advertising is cross-border by its very nature means that national legislation has a very limited effect. Moreover, given that there are significant diaspora communities from several Member States in other Member States, creates a cross-border element to many election campaigns in Europe<sup>1</sup>.

The proposal would cover all political advertising in the EU aimed to ‘influence the outcome of an election, a referendum, a legislative or regulatory process, or voting behaviour in general, even if they do not come from a political actor’ (article 2(2) of the proposal).

The focus in this publication will be on two specific (and interacting) elements from the Commission proposal: referenda and the role of the national authorities within the scope of this proposed EU legislation.

There is a clear impact of elections in the Member States and the functioning of the EU as a whole. The composition of the Council depends on elections in the Member States and the political dynamics in Member States. These political dynamics mean that even regional elections can have serious political consequences.

However with referenda this impact is less clear and therefore it is valuable to consider the background of inclusion of referenda in EU legislation that are taking place in Member States. Connected to that and in conjunction with the Irish case study included in this report, the question on enforcement of the EU regulation must be asked.

While it is an EU regulation, the enforcement of this regulation will not be in the hands of any EU body but in the hands of the competent national bodies or authorities. Therefore the questions on how these bodies operate, who appoints them

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1. See also the Impact Assessment Report on this EC proposal (SWD(2021) 355 final).

and controls their work are key for the implementation of this regulation. These bodies do not work in isolation and it matters how the surrounding society deals with democratic plurality and plurality of opinions.

This publication is rooted in these principles of democracy and pluralism that are ultimately founded upon human dignity. Human dignity as expressed in article 1 of the Charter of Fundamental Rights of the European Union means that every human being matters and is therefore of equal value. Subsequently, all opinions deserve space in the public debate as long as they do not have the purpose to undermine the human dignity of other people. Therefore, democracy is always based on human dignity.

Articles 10 (freedom of religion and thought), 11 (freedom of expression), 12 (freedom of assembly and association), 21 (non-discrimination) and articles 39 & 40 (right to stand for EP and local elections) are jointly reflecting this core notions of democracy and pluralism<sup>2</sup>. The preamble of the Charter is helpful in this regard where it states (among others): „*Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*”

Here the fact that the EU is based on democracy and that this is connected to the value of the individual, is clearly stated. Moreover it is expressed explicitly under Article 10 of the Treaty where it is stated that ‘*The functioning of the Union shall be founded on representative democracy*’. The EU would simply not be the EU without these principles. The EU cannot maintain its character if it does not consider these principles whenever relevant.

Their relevance here is clear. The enforcement of EU rules that upend elections and referenda must always respect these principles of democracy and pluralism. This in order to avoid a situation in which the conduct of democracy is overridden by the ultimate effects of any regulation, regardless of the good intentions of the regulation concerned. If bodies who are authorised to control political advertising are biased, their enforcement of this regulation may harm the democratic process. It is correct to state that the Commission proposal does not touch the content of political advertising (as explained in the next chapter), it does however put national bodies in a strong oversight role over how political advertising will function. In politics the line between content and process is very thin and often blurred and that

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2. Charter of Fundamental Rights of the European Union

justifies a critical evaluation of the position of these bodies.

Aside from the question why referenda are included in the proposal of the Commission, the most pressing question is therefore whether the enforcement of this proposed regulation might pose a risk to pluralism and therefore to the conduct of democracy. This is why the case study is of key importance here to be able to understand the potential interaction between the Commission proposal and the national context. This will be essential in order to draw some conclusions and recommendations.

## 2. The inclusion of referenda in the EC proposal for a regulation on the transparency and targeting of political advertising

The Commission summarizes the proposal as follows:

*'The proposal establishes limited transparency obligations for all providers of political advertising services involved in the preparation, placement, promotion, publication and dissemination of political advertising, including the keeping of records of their involvement in the specific political advertisement. Advertising publishers, which are in direct contact with the citizens, must in turn comply with specific transparency obligations, including the preparation and publication of a transparency notice for each advertisement published.'*<sup>3</sup>

The Commission underlined the fact that the proposal is focused on the transparency and transmission of the political advertising as follows:

*'The proposed Regulation does not go beyond what is necessary and in particular does not address other issues related to political advertising beyond transparency and the use of targeting techniques. It does not interfere with other aspects regulated at national level like the legality of the content of political advertisement and the periods during which advertisements are permitted, or the nature of participants in the democratic process.'*

*This proposed Regulation does not necessarily provide for the creation of any additional authorities or bodies at Member State level. It entrusts the supervision and enforcement of its provisions to relevant competent national authorities, including those with designated tasks under existing related Union legislation. Member States may therefore appoint and draw upon the expertise of existing sectorial authorities who will also be entrusted with the powers to monitor and enforce the provisions of this Regulation. Member States will be responsible to ensure that these authorities have the necessary*

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3. EC proposal on transparency and targeting of political advertising (2021/0381 (COD)), Explanatory Memorandum p. 8

*capacity to ensure the protection of citizens' rights in the context of transparent political advertising.*

*Member States will rely on cooperation structure designated at Union level. They will have to designate the authorities under the Regulation (EU) 2016/679 to monitor compliance with the provisions on targeting established by this regulation. The European Data Protection Board and the consistency mechanism established under that Regulation will apply accordingly.'*<sup>4</sup>

The Commission is clear in its motivation for the proposal as a whole. In the Impact Assessment it is clarified as follows:

*'Online political ads are commonly targeted at groups of users, based on the processing of personal data. Targeting (directing an ad to a specific group of people based on some shared characteristics) can be very sophisticated. While this can be beneficial in addressing political messages to concerned citizens, the Cambridge Analytica scandal revealed a need to address this phenomenon. It brought to light unauthorised interference in elections (including by foreign state actors), exploitation of online social networks to mislead voters, and manipulation of the debate and their choices, using psychographic profiling and opaque practices that conceal or misrepresent key information. Other techniques are also used to spread or amplify manipulative political ads. The application of opaque algorithms and the analysis of personal information allow the tailoring and targeting of political ads, which can exploit vulnerabilities of voters, including in another Member State.'*<sup>5</sup>

On the cross-border dimension the Commission emphasizes throughout the same Impact Assessment that by their very nature, online political ads can be spread over Member States. While there are regulations in place in different Member States regarding political advertising, they differ between Member States.

As an example the Impact Assessment mentions the following:

*As an example of the potential effect of differing definitions, online audio-visual ads prepared in the Netherlands with a political aim but without affiliation to a specific political party would not be subject to the rules applying to political campaigns if disseminated into Denmark, but would be subject to such rules if they were disseminated into Ireland or Cyprus. Publishers and campaign agencies need to ensure that ads are adapted to*

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4. EC proposal on transparency and targeting of political advertising (2021/0381 (COD)), Explanatory Memorandum p. 7

5. Impact Assessment Report on this EC proposal (SWD(2021) 355 final), p. 3 & 4

each jurisdiction's transparency requirements, such as on logos, affiliation and funding, but also to related obligations e.g. connected to access to the media. In this respect, political ads offered across borders in the internal market differ from commercial ads, where such rules are (largely) harmonised<sup>6</sup>.

However the Commission motivation is very limited in one aspect, which is the basic question: 'why should the EU as EU be concerned with national elections and referenda?'. While the cross-border aspect of political advertising is clear and while the proposal is building on the existing Digital Services Act, the fundamental reason for the EU to consider political advertising in national elections and referenda an issue of concern is hardly explained.

The Impact Assessment states that the proposal aims: 'to promote high European standards of transparency in political campaigning and free and fair elections in the EU level, strengthen the resilience of democratic processes in the EU and combat disinformation, information manipulation and interference in elections.'<sup>7</sup>

Regarding this aspect, the actual EC proposal only mentions in the explanatory memorandum that:

*'The proposal is in line with the election package presented in September 2018 including the Recommendation on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns which promotes cooperation among competent authorities at national and Union level to protect elections and contains specific recommendations aiming at fostering the transparency of political communication as well as the guidance on the application of Union data protection law supporting compliance with Regulation (EU) 2016/679.'*<sup>8</sup>

*The European Democracy Action Plan includes a number of initiatives to help protect election integrity and promote democratic participation.'*<sup>9</sup>

There is however no further explanation on why it is necessary for the EU to ensure that national elections (or referenda) are protected.

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6. Impact Assessment Report on this EC proposal (SWD(2021) 355 final), p. 10

7. Impact Assessment Report on this EC proposal (SWD(2021) 355 final), p. 3

8. EC proposal on transparency and targeting of political advertising (2021/0381 (COD)), Explanatory Memorandum p. 4 (The wording 'to protect elections' is of particular relevance)

9. EC proposal on transparency and targeting of political advertising (2021/0381 (COD)), Explanatory Memorandum p. 5

The EC chose to base the proposal on a single market-oriented approach. The Commission presents the main legal basis for the proposal as follows:

*The legal basis for the proposal is in the first place Article 114 of the Treaty on the Functioning of the European Union ('TFEU'), which provides for the adoption of measures to ensure the establishment and functioning of the internal market.'*<sup>10</sup>

Moreover the proposal complements the Digital Services Act which is also referred to in this publication as an important factor.

As noted in the Initial Appraisal by the European Parliamentary Research Service (EPRS) of the Commission proposal, this has been criticized by the French Senate<sup>11</sup>. They questioned this as in their opinion as follows:

*'the legal basis for EU intervention in national and local election campaigns and for imposing obligations on national election candidates and political parties seems very fragile: Article 114 TFEU, which provides for the adoption of measures to ensure the establishment and functioning of the internal market, is an insufficient legal basis for proving the necessity of the proposed regulation.'*

*Despite its length (224 pages), the impact assessment does not prove the current threats to the internal market that would justify this text. Moreover, the "fragmentation" denounced by the proposal cannot be summed up as an internal market problem: in fact, it is more often than not the result of the differences in institutional systems (bicameral or unicameral, etc.), political traditions and electoral calendars between the Member States that underpin their democratic life.'*

This point raised by the French Senate rhymes with the questions that this publication asks. The core issue is ultimately regarding democracy and political life and not an economic issue related to the internal market that happens to be connected to elections.

It is clear that the Commission recognizes that fact as it refers to misinformation and manipulation and the protection of elections. At the same time the Commission does not deliver a clearer and more in-depth explanation on why and how this proposal is relevant for European democracy and how it would protect democracy.

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10. EC proposal on transparency and targeting of political advertising (2021/0381 (COD)), Explanatory Memorandum p. 5

11. <https://secure.ipex.eu/IPEXL-WEB/document/COM-2021-731/frsen>

The Commission did not choose to base the proposal (also on) Article 10 of the Treaty that says:

1. *The functioning of the Union shall be founded on representative democracy.*
2. *Citizens are directly represented at Union level in the European Parliament.*

*Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.*

3. *Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.*
4. *Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.*

However as the Treaty states in Article 10, this is how the EU actually functions. It is both prescription and description in that regard. This democratic reality of the EU explains why national elections matter for the functioning of the EU. The key sentence here is: *'themselves democratically accountable either to their national Parliaments, or to their citizens.'*

If democracy does not function properly (for example due to external election interference), the EU will have a problem in its own functioning. At the very least a question mark will be raised over whether the decision-making in the EU is indeed done in a representative way.

As stated in the introduction, democracy is ultimately a vehicle that allows representation of the political will of the citizens based on the notion that all citizens have equal human dignity.

If it becomes uncertain (due to malign election interference) that those elected indeed represent the actual 'political will' of the citizens, the democratic credibility of the EU decision making will be fundamentally put into question. This is especially relevant if people have been deliberately misled by unknown actors who have a specific interest in undermining the EU and its Member States (Russia is a well-known example of such an actor).

However how we define 'misleading' is an almost impossible task. What the one deems false, another deems the actual truth. It is therefore better to ensure that cit-

izens know who is spreading certain information so that the actor and its interests or agenda (of any kind) are clear.

The Commission rightly chose to focus on the latter and does not want to create in this proposal rules that would touch the content of political messaging as explained above.

While the Commission did not explain the relevance of this proposal in terms of the functioning of European democracy, it is clear from the above that it is relevant and possible to do so. For this publication this is the core issue that is further being explored.

The outstanding question remains why referenda have been included in the proposal.

The Initial Appraisal by the EPRS states that: *'The description of the scope of the proposal (Article 2) includes cross-border political advertising activities linked not only to the European Parliament elections and European parties, but also to national and regional elections and referendums (notably, when a national party targets a diaspora community in another Member State). The scope of the proposal is, however, not clearly explained.'*<sup>12</sup>

The EPRS appraisal relates furthermore this to the relation with existing EU rules but this critique is equally applicable to the fact that the scope in terms of types of elections covered is not explained either.

While it is relatively simple to see the connection to national and even regional elections, it is not immediately obvious why the EU would see referenda in Member States as area of concern for the EU.

However this can be explained through the following constitutional realities in - and examples from - the Member States.

Through its Constitution Ireland is bound to have a referendum in order to accede to major international and EU Treaties (or changes in these Treaties). Referendums on European Treaties were held on the Maastricht Treaty (in 1992), on the Amsterdam Treaty (in 1998), on the Nice Treaty (in 2001 and in 2002), and on the Lisbon Treaty (in 2008 and in 2009). Referendums were also held to allow the State to

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12. EPRS Initial Appraisal of a European Commission Impact Assessment Transparency and targeting of political Advertising, p. 7



be bound by the Good Friday Agreement in 1998, and to ratify the International Criminal Court in 2001 and the Stability Treaty in 2012.

Under certain conditions the Danish Constitution requires that a referendum be held on EU issues. After 1972, Denmark has held 7 referenda related to the EU.

Other EU Member States however may decide to opt for referenda, either through a decision by the government or through popular demand.

In Spain, France, the Netherlands and Luxembourg referenda were held in 2005 over the proposed treaty establishing a constitution for Europe.

At 6 April 2016 referendum on the EU - Ukraine Association Agreement was held in the Netherlands by popular demand. The 'no' side won which had impact on the relation with Ukraine. This is a very relevant example as there is suspicion that Russia influenced both the realization and the campaign of this referendum<sup>13</sup>.

All in all according to a recent study of the EPRS, 58 referendums on EU matters, concerning membership, treaty ratification or specific policy issues (e.g. adoption of the euro) have been held since 1972 in EU Member States<sup>14</sup>. It shows that referenda in EU Member States can have a direct impact on the functioning of the EU.

In a more indirect way, this can also apply to referenda being held on issues that affect the Constitution of Member States (for example electoral law) and thus affect the democratic system of the Member States. In turn this has an impact on EU decision making.

From the above it is possible to draw the conclusion that the inclusion of referenda in the Commission proposal is justified. This answers the first question raised in the introduction of this publication.

However it would have been valuable and helpful if the Commission proposal had not only been based on Article 114 TFEU but also on Article 10 of the TFEU. Especially given the fact that the proposal will have impact on the functioning of democracy in the EU.

The democratic angle is of key importance for the major question raised in the

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13. 'Fake News, Fake Ukrainians: How a Group of Russians Tilted a Dutch Vote', *New York Times*, 16 February 2017

14. EPRS study 'Referendums on EU issues, fostering civic engagement', April 2022

introduction of this publication. This question is how the political environment in the Member States will influence the enforcement of the proposed EU legislation given that this will be entrusted to national authorities.

To explore that question it is of critical importance to 'feel' the environment in which an election or referendum takes place and how that affects already existing relevant regulatory bodies. This is best tested on issues that lead to highly emotional debates as impartiality is then more difficult to maintain. For that reason the following case study on the abortion referendum in Ireland is very relevant in answering the key question of this publication. This case study will also take the DSA and DMA into account.

# 3. Case Study: Social Media and the Irish Abortion Referendum (2018) and Beyond

## Introduction

There are growing tensions globally over the attitude towards permissible speech adopted by private corporations for use on their respective social media platforms versus the fundamental rights and state policy on speech contained in democratic countries' constitutions and set down in laws produced by the elected representatives of the citizens. These burgeoning tensions frequently relate to issues surrounding popular access to information and its impact on democracy itself. Increasingly, political campaigns – be they referenda or elections – are fought on new digital media. Set-piece campaign speeches and even canvassing are increasingly considered an 'old' way of doing politics. In recent years, arising tensions have prompted debate on the need for legislative action at the state level in various countries. The introduction of the Digital Services Act and Digital Markets Act at the European Union level presents an effort to regulate the 'wild west' of the unregulated internet. Whilst there is a need for central and accountable regulation of internet services, particularly social media, rather than leaving corporations to determine their own policies without scrutiny, the DSA and DMA may have a deleterious impact on European citizens' freedom of expression.

In Ireland, the charged abortion referendum in 2018 presented a case where social media tried to self-regulate, which posed challenges to those engaged in campaigning and generated public confusion and accusations of spreading 'misinformation'. At the time, there were calls for the introduction of legislative measures similar to those contained in the new DSA and DMA. This owed partly to a recognition that the nature of political campaigning has fundamentally changed and a greater role is now being played by the media and social media. In the most recent Irish general election (February 2020), various suppositions about the fundamental nature of electoral politics were upended when several hitherto largely unheard-of candidates were elected in many constituencies not for their local profile or history of service to the constituency, but for their party affiliation. The phenomenon of the Sinn Féin (GUE/NGL) 'wave' at the last general election was largely media-driven, which focused attention – not all of it good – on the party as an insurgent challeng-

er to the established political orthodoxy. This points to the shifting scales in how Irish and international politics is conducted. The role of social media corporations in influencing the democratic process has become widely recognised.

During the Irish abortion referendum of 2018, the influence of social media tech giants hung over the referendum campaign. Millions of euro was spent by both sides on social media advertising for political purposes. Several major corporations, including Facebook, used the Irish abortion referendum as a test case for new sets of policies regarding their attitude towards political advertisements. There was a further controversy during the referendum surrounding advertisements targeted at influencing Irish voters being paid for and emanating from foreign sources, most commonly from advocacy groups abroad. Amid the referendum campaign, proposals were made by the Fianna Fáil (Renew Europe) parliamentarian James Lawless for the introduction of a Social Media Transparency Bill which would legislate for 'much needed regulation to political campaigning on social media.' Calls also came from a law lecturer at University College Cork, Dr Seán Ó Conaill, who argued in favour of legislation that would regulate the policy of social media companies in the context of referenda.<sup>15</sup>

Ireland's abortion referendum presents a case study for observers in the increasingly obscured overlap between state policy on speech and campaigning during elections and referenda and the increasingly powerful influence of private foreign corporations. Advances in technology have thus posed new challenges to traditional modes of democratic campaigning, which must be examined and inform future state and EU-level policy to ensure the integrity and equity of election and referendum campaigns into the future.

Underlining the impetus from the European Union to introduce the new Digital Services Act and Digital Markets Act is an avowed commitment to protect the 'fundamental rights' of online users: 'to create a safer digital space in which the fundamental rights of all users of digital services are protected.' Relatedly, the other chief objective is 'to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.' In July 2022, both texts of the proposed laws were adopted as part of the Digital Services Package in its first reading at the European Parliament. Now they have been adopted by the Council of the European Union. The laws will come into force from 1 January 2024 at the latest. Its enactment will place significant obligations on 'very large online

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15. *EveningEcho*, 12 May 2018.

platforms and very large online search engines.<sup>16</sup> The measures have implications for fundamental rights related to freedom of expression for EU citizens across the member states.

Cases like Ireland's abortion referendum illustrate the need for an equitable and fair-minded regulation of social media to ensure its role as a genuine public forum for free discussion is upheld.

## Free Speech and referenda in Ireland

The right to freedom of speech has always been a brittle feature of the Irish Constitution. First adopted in 1937 at a deeply polarised time in Irish society, the present Constitution provides for a qualified right to freedom of expression. Article 40.6.1<sup>o</sup> (i) reads:

The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.<sup>17</sup>

There is a considerable degree of difference between the above cited article and the First Amendment of the US Constitution, which has often served as the touchstone for constitutional protections on freedom of speech and expression. The American Constitution provides that Congress shall 'make no law respecting an establishment of religion or prohibiting its free exercise. It protects freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances.'<sup>18</sup>

At the time the Irish Constitution was adopted by popular referendum on 1 July

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16. 'The Digital Services Act package', *European Commission*, 5 July 2022, (<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>).

17. Constitution of Ireland, Article 40.6.1<sup>o</sup> (i).

18. 'The Constitution', *WhiteHouse.gov*, (<https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/>), (16 September 2022).

1937, 'free speech' was extremely contentious, and the political culture was largely tone-deaf to such principles. An oft-repeated slogan of the time was 'No Free Speech for Traitors', which reflected the continuing bitterness of the Irish Civil War (1922-23). The Irish Constitution provides for a heavily centralised State and qualified fundamental rights, as set out in Articles 40-44. The device of a referendum is required to alter the Constitution, which must be initiated by a Bill to amend the constitution in the parliament (upper and lower house).

In 1983, the Constitution was amended to insert an overt protection for the unborn in an effort to offset the possibility that a ruling similar to in the United States could materialise in Ireland and legalise abortion over the heads of the people and their elected representatives. The Eighth Amendment to the Constitution was adopted by popular referendum by a margin of 2:1 in 1983 and effectively kept abortion laws off the statute books for the next thirty-five years. It was altered in a set of referenda held in the aftermath of the 1992 X Case.

The X Case was a supreme court ruling, which stemmed from an appeal lodged against an injunction granted by the high court which prevented a 14 year old pregnant rape victim from travelling to Britain for an abortion on the grounds that suicidal ideation did not permit a woman to obtain an abortion. The supreme court judgement reinterpreted Article 40.3.3<sup>o</sup> to emphasise that the mother's life would be given due regard. Chief Justice Finlay defined that abortion could indeed be constitutionally permissible if it is established as a matter of probability that there is a real and substantial risk to the life as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy.<sup>19</sup> This reinterpretation of the Irish Constitution generated calls for the parliament to legislate for the X Case, which became a repeated pro-abortion demand throughout the proceeding years.

The presence of the constitutional protections for the unborn ensured that the issue of abortion in Ireland could only be decided by a popular vote. A landmark 1995 Supreme Court ruling, *McKenna v. An Taoiseach*, found that it was unconstitutional for the Government of the day to allocate and spend public money on campaigning in a referendum to change the Constitution.<sup>20</sup> This led to the setting up of the Referendum Commission, which would oversee future referenda, although its function has changed and developed over the years since its creation. For example, in the aftermath of the Government's defeat in the 2001 Nice Treaty referendum, the Referendum Commission's brief was altered and it dropped its function of inform-

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19. *Attorney General v X*, [1992] IESC 1; [1992] 1 IR 1

20. *McKenna v An Taoiseach* (No.2) [1995] 2 IR 10

ing the electorate of ‘Yes’ versus ‘No’ arguments and instead focused on providing an awareness campaign and encouraging people to cast a vote.<sup>21</sup> A foundational recognition in the context of Irish referenda has been that the people have the right to a fair and independent source of information, which can inform and underpin their educated decision to cast their vote for or against a proposed alteration to the Irish Constitution.

As the Irish state broadcaster, Raidió Telefís Éireann (RTÉ), receives public funding, it is compelled to abide by the judgement handed down in *McKenna v. An Taoiseach* and chart a largely neutral course in its coverage and commentary during referenda. However, there has been considerable doubt cast over the extent to which this has been properly honoured during recent referenda, notably the 2015 referendum to insert a constitutional clause giving recognition to same-sex relationships as marriage and, significantly, the 2018 referendum to repeal Article 40.3.3° of the Constitution (which was inserted in 1983 to prohibit abortion) and replace it with a provision empowering the Irish parliament alone to make laws related to abortion.

The history of Ireland’s relationship with referenda has been complicated and has often evolved due to repeated legal challenges, which have shaped the process. In the 2012 decision, *McCrystal v. The Minister for Children and Youth*,<sup>22</sup> the Supreme Court drew significant attention towards best practice on the functioning of referenda abroad and particularly to the *Code of Good Practice on Referenda*, adopted in 2006 by the European Commission for Democracy Through Law (Venice Commission). The *Code* recognised that ‘in conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audio-visual media, with regard to the referendum campaign and to advertising, for all participants in the referendum.’ Whilst the modern conception of social media was in its infancy at the time of the adoption of the *Code*, it was significant that it observed that privately owned corporations bore a responsibility to provide at least a minimum of access to competing referendum campaigns in the interests of upholding democratic integrity. This has implications for contemporary social media corporations. The *Code* also affirmed: ‘Democratic referenda are not possible without respect for human rights, in particular *freedom of expression and of the press*, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties.’<sup>23</sup> The observations contained within the *Code* have theoretically informed

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21. Referendum Act, 2001, s. 1.

22. *McCrystal v The Minister for Children and Youth* [2012] IESC 53.

23. ‘Code of Good Practice on Referendums’, *European Commission for Democracy Through Law (Venice*

the Supreme Court’s attitude towards best practice in the conduct of referenda.

Social media began to play a more significant role in Irish public life in the 2010s. In the aftermath of the 2011 general election, a coalition government was formed between Fine Gael (EPP) and the Labour Party (S&D), the two largest parties in the parliament. Fianna Fáil, for decades the party which consistently won the most seats at general elections, was relegated to third place. The sheer size of the new coalition government’s majority was unprecedented. Shortly after the formation of the government, several Labour politicians demanded that the government legislate for the 1992 X Case. Simultaneously, the Women’s Human Rights Alliance, convened by the state-funded National Women’s Council, launched an online campaign which advocated for abortion. In 2012 it claimed to have sent some 76,000 emails from 17,000 people, ‘calling on TDs and senators to bring forward legislation’ on the X Case and to legislate for abortion. They self-described their use of social media as ‘promoting discussion on abortion from a feminist perspective, clarifying myths and misinformation circulating in the public domain for our many members and friends.’<sup>24</sup> Thus, from an early stage in the 2010s and the lifespan of the new government, social media was seen by pro-abortion advocates as a tool to be utilised. Conversely, the pro-life side also utilised social media tools to present a pro-life message, and there was considerable public lobbying of politicians to uphold Ireland’s pro-life public policy.

## Campaigning in Irish referenda

The Standards in Public Office Commission (SIPO) is an oversight organisation backed by the State which oversees the administration of legislation in four distinct areas: the Ethics in Public Office Acts, the Electoral Act 1997, the Oireachtas (Ministerial and Parliamentary Activities) (Amendment) Act 2014, and the Regulation of Lobbying Act 2015. Importantly, the Electoral Act 1997 (as amended) prohibits accepting donations from foreign sources, whilst also regulating the amount of money that can be legally received by a candidate from one individual or organisation.

In the context of referenda, SIPO requires that individuals or organisations which receive donations over the minimum sum of €100 must register as a Third Party with SIPO for political purposes. Political purposes include any efforts to effect legislative or policy change in Ireland, including in the context of ‘seeking to influence

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*Commission*), Study No. 371/2006, pp. 8 & 10.

24. Aideen Quilty, Sinéad Kennedy, Catherine Conlon (eds.), *The Abortion Papers Ireland: Volume 2* (Cork, 2015), p. 208.

the outcome of an election or referendum.<sup>25</sup>

Although the State has sought to delimit the boundaries of acceptable referendum campaigning in the context of expenditure and the acceptance of donations (depending on amount and origin source), the presence of social media companies and digital technology in setting their own parameters in referendum campaigns has become a wildcard. Monitoring this has been difficult and poses a challenge to Irish law. The growing issue impacts upon themes of democratic accountability and impartiality in the public square. This issue was recognised by SIPO, which recommended in its 2020 Annual Report that ‘an electoral commission should be established, and a comprehensive review of the Electoral Act should take place. Provisions should be included to provide for regulation of digital means of influence in an electoral or referendum campaign.’<sup>26</sup>

Traditional methods of campaigning in Ireland have undergone significant changes, leading to an increased importance of the media. However, Irish elections and referenda are still distinguished by the use of physical, mostly coriboard posters which are generally elected on lampposts across towns, villages, roadways and other thoroughfares. The Litter Pollution Act 1997 and the Electoral (Amendment) (No. 2) Act 2009 state that election posters may be erected 30 days prior to the date of the poll and must be removed within seven days of polling day.

Posters are regarded as particularly important in giving coverage to candidates, parties, and certain sides of a debate which may not otherwise gain sufficient media coverage – on television, radio, newspapers, and increasingly on social media. In several towns across Ireland, local committees, particularly Tidy Towns committees, have passed resolutions calling for their areas to be ‘poster free’ and asking campaigners not to erect posters during elections or referenda. In one town in County Laois in June 2018, such a motion was passed by the means of a Facebook poll on a local community page with four thousand followers – which indicated eighty-seven per cent of people agreed with a poster ban. A spokesperson told the local newspaper that posters ‘add nothing to the town and with social media, there is no need.’ She felt such a measure was needed, ‘particularly after the recent referendum’ on abortion, adding that ‘we are encouraging people to use social media or the local papers’ instead.<sup>27</sup> Whilst good intentioned, straw polls and community declarations

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25. ‘Third Party’, *Standards in Public Office Commission*, (<https://www.sipo.ie/resources/third-party/>), (16 September 2022).

26. ‘Annual Report 2020’, *Standards in Public Office Commission*, (<https://www.sipo.ie/reports-and-publications/annual-reports/2020-SIPOC-ARFinal-English-Web.pdf>), (16 September 2022), p. 35.

27. *Leinster Express*, 12 June 2018.

which seek to create ‘poster free zones’ are contributing to a trend whereby social media corporations gain an even larger foothold over democratic discourse. During the Covid-19 pandemic, this was highlighted during the Dublin Bay South by-election in July 2021 when door-to-door campaigning was severely restricted due to public health measures, the importance of the media (including social media) in influencing the by-election’s outcome was strikingly apparent.

## Influences in the Irish abortion referendum

In laying the parliamentary groundwork which led to the abortion referendum, Billy Kelleher, a Fianna Fáil member of parliament (and later a pro-Yes campaigner) and member of the parliamentary Oireachtas Eighth Amendment Committee, argued that restrictions similar to those imposed on broadcast stations should be applied to social media. He decried ‘keyboard warriors’ and said the amount of on-line campaigning ‘was worrying’, arguing that restrictions may need to be imposed ‘to ensure accurate information is published.’<sup>28</sup> Kelleher’s comments foreshadowed a theme which became part of the story of the referendum campaign: highlighting the spread of ‘disinformation’ in the abortion referendum. Reports of such ‘foreign groups’ meddling in the referendum process intensified as the poll date approached. This prompted a reaction from social media corporations to adopt new policies on political advertising, which has since become a standard policy for most major social media corporations. For example, in August 2018 the *Washington Post* reported that Twitter would introduce requirements on ‘some organisations that purchase political ads on topics such as abortion, health-care reform and immigration to disclose more information about themselves to users, part of the tech giant’s attempt to thwart bad actors, including Russia, from spreading propaganda ahead of the 2018 [US mid-term] election.’<sup>29</sup>

The topic of foreign influence in Western politics and discourse has become a recurrent theme of discussion since 2016. As part of an increasingly globalised world, Ireland has followed this trend and it has been reported that the malignant interference of foreign propaganda has tried to shift Irish social discourse. As recently as September 2022, for example, an article in the *Evening Echo* newspaper reported that TikTok was ‘riddled with misinformation’, including on topics such as Covid-19 vaccinations, ‘the 2020 election’ [despite Ireland also having a general election that year, this is more likely a reference to the United States presidential election], cli-

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28. *Irish Examiner*, 2 October 2017.

29. *The Washington Post*, 30 August 2018.

mate change, and abortion.<sup>30</sup> Regrettably, it is often suggested that pro-life viewpoints are part of broader disinformation campaigns, often promoted by bad actors on the international stage for self-serving reasons. This relates to the increasingly hostile treatment of pro-life views, which has been a theme of increasing importance in Ireland and internationally. In the Irish context, several formerly pro-life politicians have had occasion to recant their former pro-life views and instead now take strongly pro-abortion stands – often driven by pressure from media elites and non-governmental organisations.

During the Irish abortion referendum, a flurry of international media interest focused on Ireland and described the presence of foreign interference in the referendum. Overwhelmingly, these reports narrowly focused on highlighting alleged foreign links of the No campaign and suggested there was immense global interference in Ireland's referendum to perniciously aid the No campaign. This reflected the overwhelmingly liberal viewpoints of the journalists and newspapers in question. Whilst some cases of gratuitous and unwanted involvement in Ireland's referendum to supposedly help the No side were legitimately raised, their significance was vastly exaggerated and overrated. A typical report of this nature appeared in the *Guardian* newspaper (UK) a fortnight before the referendum which featured the headline, 'Revealed: the overseas anti-abortion activists using Facebook to target Irish voters.'<sup>31</sup> A *New York Times* article reported that 'today's anti-abortion activists are... turning to social media tools', leading to 'growing fears' that 'similar tactics' to the 'misuse of Facebook data to sway Britain's referendum on European Union membership in 2016, and the United States presidential election later that year' could be employed in Ireland to generate a no vote in the abortion referendum.<sup>32</sup> By constructing an intricate web of conspiracy targeting Ireland to advocate a rejection of the proposed constitutional amendment, the media largely implanted a narrative that was not really there. There was an irony in this as the abortion referendum itself was being influenced by liberal-leaning foreign newspaper reports, which with the digital age are more widely read and shared online and therefore more read by Irish audiences than would have been the case in previous decades.

The elephant in the room when it came to the question of foreign fundraising and influence over Ireland's referendum and by extension democratic integrity was the financing made available to pro-abortion campaigners by international organisations like the Open Societies Foundation. In 2016 and 2017, Amnesty International

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30. *Evening Echo*, 16 September 2022.

31. *The Guardian*, 12 May 2018.

32. *The New York Times*, 26 March 2018.

Ireland used donations of €137,000 from George Soros' Open Societies Foundation in its pro-abortion campaigning. In August 2016 it was reported that Soros' organisation planned to fund Amnesty International Ireland, the Abortion Rights Campaign and the Irish Family Planning Association in their campaigns to reverse Ireland's constitutional prohibition of abortion. The document revealed this was as part of 'a strategy to force the repeal of the Eighth Amendment, potentially setting off a chain reaction in other strongly Catholic countries in Europe', with Poland specifically named. Each organisation confirmed that they had received donations from Soros' organisation. The Irish Family Planning Association admitted receiving €132,500 from the Open Societies Foundation.<sup>33</sup>

As Amnesty International actively lobbied the Irish government to introduce a constitutional amendment to undo the abortion ban, using the money provided by Soros, the activity came to SIPO's attention. They instructed Amnesty's Executive Officer, Colm O'Gorman, to return the donation on the basis that the funds were clearly being used for political purposes 'to fund its campaign to overturn Ireland's abortion ban.' Amnesty International Ireland received the generous funding in August 2015 for its 'My Body My Rights' campaign, which advocates the repeal of the Eighth Amendment and the introduction of laws providing for abortion in Ireland.' It was a clear breach of Ireland's prohibition of foreign donations to fund political purposes, yet O'Gorman cried foul and claimed the law was violating 'human rights' and refused to return the money.<sup>34</sup> They distinguished their 2018 campaign, 'It's Time To Talk', from their 2017 campaign to overturn the Eighth Amendment by claiming the new campaign (launched in April 2018) was aimed at the electorate whereas the previous Open Societies Foundation-funded campaign was targeted at 'seeking to change Government's thinking on the whole issue of reproductive rights' and the two were 'completely different.' A court order was handed down from Mr Justice Seamus Noonan which reiterated SIPO's demand that the money must be returned, which Amnesty subsequently contested.<sup>35</sup> Eventually a legal decision was arrived at in July 2018, months after the referendum poll, which allowed Amnesty to keep the donations which had been used for pro-abortion lobbying campaign *before* the referendum had been announced. It also criticised SIPO's decision to rely on the leaked document from the Open Societies Foundation, which it claimed had been 'hacked by Russians.'<sup>36</sup>

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33. *Irish Independent*, 20 August 2016.

34. *The Irish Times*, 8 December 2017.

35. *The Irish Times*, 10 April 2018.

36. *Irish Examiner*, 31 July 2018.

Foreign influence weighed heavily over the Irish abortion referendum but the most powerful and impactful voices urged for a repeal of the constitutional protections for the unborn child and their replacement with a legalised on-demand abortion regime. The United Nations made frequent and repeated denunciations of Ireland's abortion policy before and during the abortion referendum, such as statements from the UN Human Rights Committee which characterised Ireland's abortion policy as 'inhumane and cruel' and amounting to a breach of the 'prohibition of torture, inhuman or degrading treatment, and the right to privacy.' The committee further accused Ireland of violating the right of non-discrimination.<sup>37</sup>

As such, the most pressing cases of foreign involvement in seeking to determine the outcome of the Irish abortion referendum came from the most powerful voices which sought to produce a Yes vote. Regrettably, media reports on the impact of foreign voices brushed over the considerable elite international voices and organisations backing a Yes vote to the hilt and instead overfocused on comparatively minor support received for the No campaign from organisations or individuals abroad. Disgracefully, there was frequently an effort to generate confusion and produce 'guilt by association', placing the Irish pro-life movement and No campaign in a constructed conspiratorial web linked to 'foreign and "alt-Right" activists' with murky backgrounds, as appeared in an April 2018 report by the website openDemocracy.<sup>38</sup> This UK-based site is largely funded by Soros' Open Societies Foundation (approaching \$750,000).<sup>39</sup> Despite the considerable amounts of foreign money, political pressure, and global media which impacted the Irish electorate's views on abortion generally and the Eighth Amendment in particular, the discourse surrounding the urgent need to regulate social media has tended to focus on combatting the spread or presence of the pro-life viewpoint. This is not an Irish-specific trend. Abroad, there has been a shift in the West away from antifragile liberal-democratic societies which tolerated the expression of 'conservative' viewpoints and which absorbed this dissent as part of the political process towards a more glaringly robust system which is characterised by extreme intolerance.

Whilst it is necessary that social media should be recognised as a public utility which is subject to statute that prioritises permitting freedom of expression, the

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37. 'Ireland's 8th amendment is a breach of its own human rights commitments', 24 May 2018, <https://theconversation.com/irelands-8th-amendment-is-a-breach-of-its-own-human-rights-commitments-97013#>.

38. 'Foreign and 'alt-Right' activists target Irish voters on Facebook ahead of abortion referendum', 25 April 2018, <https://www.opendemocracy.net/en/5050/north-american-anti-abortion-facebook-ireland-referendum/>

39. <https://www.opendemocracy.net/en/supporters/>

increasingly lopsided views in most western countries of what constitutes 'freedom of speech', or 'freedom of expression' will have a deleterious impact on genuine freedom of expression. There has already been a worrying trend of various governments and supranational bodies refusing to countenance the very legitimacy of expressing pro-life viewpoints. This is seen in the move towards introducing 'censorship zones' around abortion-providing facilities. There is a fine line to tread between ensuring that social media companies are more accountable and enforce fundamental freedoms yet not risking the overactivity of the state – and temporal governments – in setting the limits of freedom of expression, particularly in the context of partisan campaigning and efforts to consign large portions of political speech as prohibited. Regrettably, the DSA and DMA is set to fail in the areas where it is most needed, namely siding with citizens' fundamental rights against the whims of private corporations, whilst simply encouraging social media corporations to be more censorious due to the hanging threat of fines and penalties for failure to swiftly remove content which may breach anti-free speech laws.

## Lessons learned for the implementation of the Commission proposal on transparency for political advertising

From the examples above it is clear that the transparency requirements as set out in the Commission proposal on transparency and targeting of political advertising should be welcomed. The reality in Ireland was that major outside donors funded one side of the campaign by donating to national organisations. Therefore it is indeed essential that the 'transparency notice' would give easy access to an overview of the donations that the sponsor of the political advertising has received in the past two years. Specific attention is needed on how campaigns intended to create a referendum are using social media and how these campaigns are funded. As mentioned above, the campaigns to push for a referendum were heavily funded by non-EU actors. Therefore transparency is indeed needed for a wide range of political advertising.

While SIPO indeed issued a demand to Amnesty to return the money, more decisive action was only taken months after the referendum took place. This leads to the conclusion that any national authority will need to take swift action if transparency requirements are breached.

## Use of social media in the Irish abortion referendum

The use of social media and its impact on the Irish abortion referendum largely re-

flected the growing importance of social media in people's daily lives. As social media has increasingly become a public utility through which people communicate, the growing reality that the major social media platforms which attract the most users are concentrated in the hands of numerically few conglomerates has caused concern. Meta oversees Instagram, Facebook and WhatsApp which accounts for a huge proportion of social media usage worldwide. Meanwhile, Google controls YouTube alongside its own popular search engine. This monopolisation poses a significant concern, particularly in light of increasingly censorious policies adopted by each corporation to police speech and expression on their respective services. It should be of little surprise that both Yes and No campaigns leaned on social media heavily throughout the referendum. Yet another factor which has often been highlighted was the organic discussions and debates which took place across social media between Irish people as the referendum approached, which simply re-enforces the notion of social media as a digital public forum.

With the passage of time, the Irish abortion referendum will be increasingly chronicled and historicised. It is imperative that a single version of the campaign will not be lazily repeated as the official, sanctioned narrative. There has already been a somewhat overrated emphasis in subsequent academic texts on the referendum of the differing social media strategies of the respective campaigns and also an emphasis on the impact of 'personal stories' on social media in producing the result. Sociologist David Ralph, in *Abortion and Ireland: How the 8<sup>th</sup> Was Overthrown*, wrote that 'the most prominent of all the online platforms depicting more positive representations of abortion was 'In Her Shoes – Women of the Eighth'. This was a Facebook page launched in January 2018 which invited women to 'anonymously submit accounts of their abortion experiences.' The stories were published anonymously on the page with an accompanying photograph from the waist down of a woman wearing a pair of shoes. The metaphor invited readers to place themselves 'in her shoes' and sympathise with the anonymous storytellers' experience. Over 100,000 people liked the page and it had 'an estimated reader reach of over four million per week.'<sup>40</sup> The extent to which such social media postings reflected an organic or spontaneous outpouring should be scrutinised, particularly in future analyses of the referendum campaign. However, the orthodox view which pervades Irish culture – influenced by media and political narratives – is that such social media pages were a decisive factor that influenced ordinary people to throw their lot in with the Yes campaign and vote to revoke the constitutional protections for the unborn child.

This 'mode of confessional public story-sharing around abortion experiences' became commonplace on social media. 'In Her Shoes' was probably the most suc-

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40. David Ralph, *Abortion and Ireland: How the 8<sup>th</sup> Was Overthrown* (London, 2020), p. 59.

cessful and memorable instance of this type of campaign, but it was complemented by a range of other social media pages, blogs, and trends like the Twitter hashtag #ShoutYourAbortion, the website *Imnotsorry.net* and the proliferation of 'images of women seizing bullhorns to roar slogans like "I Love Abortion" and "We Love Abortion Providers"'.<sup>41</sup> These social media trends and pages were often reported upon by the Irish media, which massively amplified their reach. As social media sites' policies try to present news to users from 'reputable' sources, to avoid the spread of fake news, the repeated write-ups in online editions of mainstream news sites of stories with their origin in such online campaigns led to a circular proliferation of the material to social media users. By comparison, pro-life personal stories were rarely given the same attention in the traditional media and when they were it was lumped in with referendum campaigning. Whether by design or by unspoken affinity, 'stories' about abortion which implied a pro-repeal message were spread by the Irish and international media whilst pro-life stories were regarded as partisan campaigning and given a lesser degree of credibility and attention. Already there has been a considerable rewriting of the very recent past and an overemphasis on the role of such social media 'stories', egged on by ordinary 'grassroots' activists in producing the result of May 2018. This narrative pitches the 'David' Yes campaign of grassroots feminists against the 'Goliath' No campaign of a powerful conservative elite. This canard needs to be seriously reviewed in future accounts and examinations of the referendum, which should include a more genuine appraisal of the impact of organic discussion on social media platforms or the sharing of personal stories.

During the Irish abortion referendum, social media also played a significant role in obscuring the nature of the issue and the approaching vote. A prominent example of this was the high-profile criminal trial involving several Northern Ireland professional rugby players accused of rape, dubbed the 'rugby rape trial', which understandably and justifiably incensed the public. Several large rallies were held in solidarity with the alleged rape victim in Dublin, particularly in reaction to the returned verdict by the jury of not guilty against rugby players Paddy Jackson and Stuart Olding. There was an unmistakable blurring of the lines between the concurrent Irish abortion referendum and the rugby rape trial, despite the two issues being totally unconnected in reality. *The Guardian's* coverage of the trial noted that 'at the time of the trial, feminists in the Irish Republic were fired up by campaigning in a referendum that would remove a constitutional ban on abortion. In May they succeeded.'<sup>42</sup> Undoubtedly, when many people cast their ballots in May's refer-

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41. *Ibid.*, p. 70.

42. *The Guardian*, 4 December 2018.



endum, the cultural impact of cases like the trial weighed on their minds and in a sense the referendum's options of 'no' or 'yes' could be transformed mentally into 'guilty' or 'not guilty'. Social media considerably contributed to this blurring of the lines during the period of the referendum.

With the spread of untruth and misinformation, narratives played out on social media which often mirrored the narratives presented in the traditional media. Perhaps one of the most prominent factors in generating 'momentum' at the political level for a referendum to repeal the constitutional protections for the unborn child came in the wake of the death of Savita Halappanavar in 2012. She was a dentist in Galway who died from a sepsis infection. She was miscarrying and had requested but was refused an abortion. Several pro-abortion journalists and activists claimed her death was the result of the inability of doctors to treat her miscarriage owing to Ireland's abortion laws. Whilst the doctors' conduct in this case was wrong and mistakes were made, the performance of an abortion would not have changed the fatal outcome. But a particular narrative of her tragic death was used by activists to push for the repeal of the Eighth Amendment, which they claimed was responsible for her death. In truth, three independent reports from the Health Service Executive, the Health Information and Quality Authority (HIQA) and the Coroner's Inquest all established that the actual cause of Savita Halappanavar's death was a sepsis infection with a virulent antibiotic resistant strain of E Coli, compounded by a series of systems failures that delayed the realisation by her medical team of the gravity of the risk to her life, and the timely implementation of the appropriate responses to it.<sup>43</sup> The doctors treating her did not blame Ireland's abortion laws for her death. The legacy of Savita Halappanavar has regrettably become synonymous with the campaign to introduce abortion in Ireland. On social media, her image was frequently shared and used very cynically as an icon of the pro-abortion Yes campaign. Her first name, 'Savita', was a household name related to Ireland's abortion debate – particularly due to the contemporary rolling media coverage of the case. Her tragic 'story' and the misinformation surrounding it overshadowed all other stories related to the abortion issue, with pro-life stories brushed aside as 'partisan campaigning'.

The social media campaign of the Yes side focused repeatedly on the '3 Cs' of 'Compassion, Care and Change', according to Lindsey Earner-Byrne and Diane Urquhart.<sup>44</sup> These phrases became buzzwords of the referendum period and beyond. They were repeated frequently on social media and to a large extent aided

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43. <https://prolifecampaign.ie/faqs-2/>

44. Lindsey Earner-Byrne and Diane Urquhart, *The Irish Abortion Journey, 1920–2018* (Basingstoke, 2019), p. 127.

in obscuring the fundamental nature and crux of the abortion referendum itself. There are various other cultural and sociological phenomena which contributed to shifting Irish attitudes towards abortion, with social media often being the digital centre-ground which re-enforced accepted truisms of the commentariat and broadcast media.

## Social media policies during the Irish abortion referendum

On 30 March 2018, it was reported that there would be 'no policing' by state bodies and watchdogs like SIPO or the Referendum Commission in overseeing the social media or advertising campaigns in the forthcoming abortion referendum. The chairwoman of the Referendum Commission, Justice Isobel Kennedy, spoke on behalf of the body when she announced it did not have 'any role in the regulation or oversight of campaign funding, spending or advertising. We have already received some queries asking us for our view on how Facebook and other social media platforms may be used by the various campaigns.' Since the first Nice Treaty referendum, the Referendum Commission has become increasingly toothless and unable to put forward 'the arguments on both sides of the campaign', and in the abortion referendum it would 'give a neutral and accurate explanation of the referendum proposal.'

Government ministers (Yes campaign) took the view that the Referendum Commission should step in to 'issue clarifications if necessary about claims made by campaigning groups'. They also warned about misleading claims, 'fake news', and the presence of 'bots' on social media. It was significant that much of this discourse came on foot of the Cambridge Analytica scandal. The report in the *Irish Times* referenced the comments by an unnamed minister who supported the Yes campaign that the Referendum Commission should step in to 'fact-check' claims made by the No campaign regarding the heightened rate of abortion for unborn babies diagnosed with Down syndrome.<sup>45</sup> The extent to which these were genuine expectations that the Referendum Commission would overstep its mark and take sides in the referendum campaign is doubtful, but rather such comments sowed confusion and implied that the No campaign was engaged in deception – with the aid of 'dark money' and tacit support from bots, trolls, and foreign bad actors. Casting doubts that facts promoted by the No campaign with regards to the abortion rate of babies diagnosed with Down syndrome became part of the discourse in the 2018 referendum, despite the reality that such a statistic is backed up by objective evidence from, amongst other places, a recent British parliamentary inquiry from

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45. *The Irish Times*, 30 March 2018.

2013.<sup>46</sup> The Yes campaign and the media worked in concert – whether by design of by coincidence – to pre-emptively delegitimise the arguments of the No campaign, which had a chilling effect on democracy and has undoubtedly led to heightened social polarisation in the aftermath of the May 2018 vote.

On 11 April 2018, Facebook held an ‘information event’ at its European headquarters in Dublin’s docklands which aimed to explain its social media policy to delegates from various campaigns involved in the abortion referendum. For Facebook, an international corporation, the Irish abortion referendum was to be a test case in its new approach to political advertising and content policies. A representative for Facebook explained that ‘sensational content’ and ‘divisive content’ would not be permitted under the new policy. They also intended to include an inbuilt fact-checker on content, which would be the first time this feature would appear and would only be in Ireland for a time. When queried on how they planned to audit the authenticity of content, the representative explained it was not Facebook’s duty to be the ‘arbiters of truth’.<sup>47</sup> Their rollout came later in April and saw Facebook introduce a tool to allow users to view more information about advertisements which appear on their newsfeed, pertinently information about who paid for them, in an effort to boost transparency. The Irish referendum was described by *Politico* as arriving ‘as politicians and the general public across the EU, United States and beyond grow increasingly alarmed about how political organizations use targeted digital advertising to woo potential voters.’

*Politico* also noted that, according to unspecified opinion polls, ‘when falsehoods do appear online... it often reinforces people’s existing preconditions and does not convince undecided voters to switch their political allegiances. And the reality is that Irish regulators are largely powerless to contain even lies in full view: As city councils field complaints about graphic images and inaccurate information on posters plastered across the country, they can be removed only if not hung correctly or lack the publishers’ name.’<sup>48</sup> It is difficult to verify the extent to which this is true, but it was undoubtedly the case that many people had determined their view on the issue long in advance of the polling date and would regard campaigning from the opposing side simply as ‘lies’. Rather than stimulating public debate or genuine discussion, uncomfortable facts about the scientific basis for the beginning of human life or troubling statistics from countries which allow abortion were frequently

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46. Parliamentary Inquiry into Abortion on the Grounds of Disability (United Kingdom), 2013.

47. Facebook Referendum Information Event, 11 April 2018.

48. ‘Irish abortion vote tests Facebook and campaign data’, 24 April 2018, <https://www.politico.eu/article/ireland-abortion-referendum-may-25-facebook-advertising-save-the-8th-repeal-the-8th/>.

dismissed as simply untrue. So much doubt and scepticism were deliberately sown and re-enforced by voices in high places that the democratic process during the referendum campaign was severely undermined.

In early May, Google made its own surprise announcement with regards to political advertising and campaigning in the context of the Irish abortion referendum on its platforms. It banned all adverts across Google search engine results and on YouTube. The announcement stated: ‘Following our update around election integrity efforts globally, we have decided to pause all ads related to the Irish referendum on the eighth amendment.’ Fianna Fáil parliamentarian James Lawless stated the decision had come ‘too late in the day’ and said: ‘Fake news has already had a corrosive impact on the referendum debate on social media.’ He stated the referendum campaign had proved the need for legislators to take steps to regulate political content on social media ‘in the same way that steps were taken in the past to regulate political advertising on traditional forms of print and broadcast media.’<sup>49</sup> The step by Google was dramatic as it shut down any advertising on the abortion referendum issue. Although the move was welcomed by pro-abortion campaigners, it was opposed by some No campaigners such as the Save the Eighth campaign. The decision severely constricted campaigning on the referendum issue on a valuable series of platforms. Whilst the print media accepted advertisements, several were particular about which adverts they would accept and when. Independent News & Media, Ireland’s ‘largest digital media platform’, stated they would only accept adverts which were ‘factual’ and were ‘not offensive’.<sup>50</sup>

Although scientific evidence weighs in heavily behind the pro-life position and unambiguously acknowledges that life and humanity begin at the very earliest stages of human development, this scientific evidence is largely cast aside by abortion advocates. This was seen repeatedly throughout the Irish abortion referendum whereby the inherent issues at stake in the vote – the measure of rights the Irish Constitution and ergo the law would afford to the unborn child in the context of the prospective introduction of an abortion policy – was ignored. Instead, debates focused on red-herrings and sub-issues, such as heavy criticism of the Roman Catholic Church in Ireland and the insinuation that pro-life policies were not designed to protect unborn human life but rather to oppress women. This contributed to a culture of confusion and distraction during the referendum period.

It was significant that the policies adopted by social media corporations were large-

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49. *The Guardian*, 9 May 2018.

50. *Irish Independent*, 10 May 2018.

ly self-directed. During the Irish referendum campaign, the area of social media was referred to by the *Irish Times*' Pat Leahy as 'the wild west of electioneering' due to the absence of regulatory bodies with sufficient powers to deal with social media campaigning.<sup>51</sup> For some, the lesson of social media during the referendum was that we should not rely on 'tech giants' to self-regulate and should instead move towards empowering state bodies to oversee campaigning on social media in addition to traditional print and broadcast media. Craig Dwyer, who co-founded the 'Transparent Referendum Initiative' in Ireland, expressed his view that 'self-regulation alone is insufficient' and argued that, owing to 'the rise of populism in Europe', the 'EU-28 should be looking at what steps need to be taken in order to ensure transparency for voters in the digital age.'<sup>52</sup>

## Lessons learned for the implementation of the Commission proposal on transparency for political advertising

The most important lesson here is the partisan position of the government in a referendum and how this influences the perception of how political advertising in social media has to be regulated and what focus the enforcement of such regulation should have.

The fact that Government Ministers were expressing their views on how the Referendum Commission should work while these same Ministers were part of the campaign is an issue of significant concern. If the Irish Government did not shy away to do this, one can imagine how this would play out in a country like Hungary. Such remarks by Government Ministers do create an environment in which the authority concerned will feel pressure on how it does its work.

Moreover the Commission proposal does give a role to the providers of social media. In light of the above it is clear that these providers are not necessarily neutral bodies. Their decisions can be biased or have a biased effect.

The above shows a significant influence of traditional media on how campaigns on social media are perceived and defined. That means that the overall political environment in which a campaign takes place can have impact on how the rele-

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51. *The Irish Times*, 31 March 2018.

52. Craig Dwyer, 'How Digital Threats to Democracy were Tackled During Ireland's Abortion Referendum', *London School of Economics blog*, 10 July 2018, <https://blogs.lse.ac.uk/medialse/2018/07/10/how-digital-threats-to-democracy-were-tackled-during-irelands-abortion-referendum/>.

vant bodies and providers will take their role in implementing the Commission proposal.

## Efforts to regulate social media

Steps have been taken recently in Ireland to regulate social media by establishing a new media commission, which will take over the duties of the Broadcasting Authority of Ireland. 'The media commission has the potential to be one of the most powerful regulators in the State as it will oversee all media, including tech companies.'<sup>53</sup> The measure was contained within the progressing Online Safety and Media Regulation Bill 2022, introduced in January 2022 by present Irish government – a coalition between Fianna Fáil, Fine Gael, and the Green Party (Greens/EFA). It was launched by Catherine Martin, a member of the Green Party and the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media.

The proposed Irish law is the culmination of calls from politicians which have been long in gestation, as seen during the 2018 abortion referendum. In the run up to the 2020 Irish general election, Fianna Fáil set out as part of its manifesto proposals for a 'Digital New Deal', declaring that the unregulated internet was 'a modern-day Wild West'. It promised that the party in government would 'regulate big tech and protect vulnerable users'. The manifesto reads:

The state has a far greater role to play in ensuring technology has a positive role to play in our lives and society on a whole. This will form the foundation of our Digital New Deal... Fianna Fáil is committed to working with our EU colleagues to ensure that large scale technology firms are not exempt from social concerns. We will work to ensure that we draw from the best of technology in bringing people together and opening up new business opportunities. This will be balanced by tackling market concentration and preventing the exploitation of vulnerable people such as children from the worst aspects of technology.<sup>54</sup>

It was clear for some time that the major political parties, in conjunction with the EU, were moving towards a policy of regulating social media. This would have implications not just for referendum and political campaigns, but for the expression of speech on social media platforms. Recent domestic Irish legislative efforts to get a handle over the Tech Giants mirrors the efforts at the EU level, with the approaching commencement of the new Digital Services Act and the Digital Markets Act.

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53. Irish Examiner, 12 January 2022.

54. Fianna Fáil, 'An Ireland for All: Manifesto 2020', [https://www.tcd.ie/Political\\_Science/people/michael\\_gallagher/Manifestoes2020/FFManifesto20.pdf](https://www.tcd.ie/Political_Science/people/michael_gallagher/Manifestoes2020/FFManifesto20.pdf), p. 118.

A significant danger with the introduction of the DSA and DMA is that social media corporations, which are already highly censorious, will amplify their policing of public expression on their platforms due to the threat of fines which will hang over them like a sword of Damocles. The EU-level rules make no effort to enshrine a robust defence of freedoms of expression and freedom of speech, but instead arbitrary categorisations of certain speech as “harmful” will likely prompt a stricter clampdown on speech. Thierry Breton, European Commissioner for Internal Market, again used the tired analogy of the internet and social media as the ‘Wild West’ when he Tweeted that ‘a new sheriff is in town – and it goes by the name #DSA’. The target of the DSA was specified by Breton as ‘hate speech’, an amorphous and ill-defined term.<sup>55</sup> Legislative efforts to combat ‘hate speech’ and by extension to regulate freedom of expression online have been decried by civil libertarians and democrats as having a chilling effect on freedom of expression.

An alarming provision of the new DSA is the elevation of ‘trusted flaggers’, who will be empowered to ‘fact-check’ stories and speech.<sup>56</sup> The implications of this policy are staggering and could see a tiny political elite being empowered to draw the limits of ‘legitimate’ media/speech and ‘illegitimate’ media/speech. During the Irish abortion referendum, the news-blog *thejournal.ie* ran a ‘Fact Check’ on claims made during the course of the campaign. In one such instance, it found that the claim by a No campaigner that Ireland’s proposed abortion law could be more extreme than Britain’s was ‘false’, partially owing to the fact the proposed Irish abortion law ‘has a 72-hour waiting period for terminations up to 12 weeks.’<sup>57</sup> There is now a significant pro-abortion revisionism which advocates for the scrapping of this three-day waiting period and the introduction of instant abortion, alongside a range of other extreme measures. In each case, these advocates justify their proposals by citing the referendum result and making misleading claims that in 2022 Irish abortion policy has still not been properly implemented contra to the ‘will of the people’. Unfortunately, these are not fringe views but activist-academics who publicly express such extreme views have been invited by the present Minister for Health, Stephen Donnelly (Fianna Fáil), to oversee and lead the review into Ireland’s abortion laws. Incredibly, not a single pro-life perspective has been given even a perfunctory hearing by the Irish government as part of this legally mandated review

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55. <https://twitter.com/ThierryBreton/status/1483786510214303744>.

56. Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, p. 12.

57. Aoife Barry, ‘FactCheck: Is Ireland’s proposed abortion legislation more extreme than British law?’, *TheJournal.ie*, 22 May 2018, <https://www.thejournal.ie/factcheck-uk-ireland-abortion-law-4027157-May2018/>.

process. This represents a clear shift towards state-sanctioned intolerance of views which were previously the orthodox and considered both respectable and based on compassion and goodwill.

Providing biased fact-check services with unlimited powers to determine truth versus falsehood would present an immense danger to freedom of speech.

## After the Irish abortion referendum

On 25 May 2018, the Irish electorate voted by a margin of 2:1 to remove the constitutional protections for the unborn child from the Irish Constitution and replace it with an article reading: ‘Provision may be made by law for the regulation of termination of pregnancy’. 1,429,981 people (66.4 percent) voted ‘Yes’ whilst 723,632 (33.6 per cent) voted ‘No’. The result received favourable coverage for weeks afterwards in the Irish media. Mythmaking began almost immediately after the result. Dublin Castle became the site of ‘singing, dancing [and] tears’ as an immense celebration took place amongst ‘Yes’ activists and campaigners. Then Minister for Health, Simon Harris, and the Taoiseach Leo Varadkar arrived in great jubilation and received cheering from the crowd.<sup>58</sup> Their reception has drawn parallels with rockstars arriving at a concert. The ‘celebrations’ in Dublin Castle have become a key image of the campaign.

In Portobello, Dublin a mural of Savita Halappanavar with ‘YES’ emblazoned over it was painted on the wall beside the George Bernard Shaw pub to celebrate the result. According to several accounts, it became ‘a sort of shrine’ as ‘thousands of people visited this mural’ to leave flowers, candles, and ‘notes of sorrow and gratitude’ beside the mural.<sup>59</sup> It was reported that footfall by the road outside was so busy that traffic jams resulted.<sup>60</sup> There was a request that the Irish government would term the new abortion law “Savita’s Law”. Several government spokespeople said they would seriously consider the request and that ‘it would be an apt name for the new legislation.’<sup>61</sup> However, this did not materialise.

Almost immediately after the referendum, an uncomfortable triumphalism set in. Official narratives have negatively caricatured the No campaign whilst the Yes

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58. ‘There was talk that Dublin Castle would be muted. That is not what happened’, *TheJournal.ie*, 27 May 2018, <https://www.thejournal.ie/dublin-castle-repeal-the-eighth-4037521-May2018/>.

59. *The Irish Times*, 27 May 2018.

60. *Irish Examiner*, 26 May 2018.

61. *The Irish Times*, 28 May 2018.

campaign has been glowingly depicted. A Manichean portrayal of the campaign has been the subject of several subsequent books, reports, and documentary films. Beyond the cultural and media portrayal of the referendum, pro-life politicians and advocates have found themselves in a cold house. When efforts were made to include several minor pro-life amendments in the new abortion law during the legislative drafting phase, the proposers were heckled and jeered with taunts.

In 2021, a Bill was introduced by several parliamentarians which sought to review the issue of mandating precautionary pain relief in abortions for babies who have reached or exceeded 20 weeks of gestation. New scientific research underlined the basis to produce this change, most notably the peer-reviewed paper ‘Reconsidering fetal pain’ by Stuart Derbyshire and John Bockmann published in the *Journal of Medical Ethics* in 2020.<sup>62</sup> During the debate on the Bill on 15 December 2021, opponents of the Bill were scathing. One pro-abortion parliamentarian accused the sponsors of the Bill of intending to ‘deceive the public and rally anger.’<sup>63</sup> Another opposition parliamentarian stated the Bill was ‘sensationalism’ and part of ‘an anti-choice strategy’, stating triumphantly that ‘the days of this House controlling the bodies of women and girls has passed whether the sponsors of the Bill realise it or not.’<sup>64</sup> The Bill was defeated by a large margin (107-36) as the government proposed its own blocking amendment.

The Irish abortion law includes a provision which required that the Act be reviewed after three years, and a full report be provided to the Minister for Health including recommendations. The handling of this review process has showcased the utterly changed terrain in which pro-life advocates must operate. The Minister for Health, Stephen Donnelly, when determining how the review would proceed, held private meetings in early June 2021 with the National Women’s Council, the Coalition to Repeal the Eight, the Abortion Rights Campaign, the Irish Family Planning Association, the Southern Task-Force On Abortion & Reproductive Topics (START) Doctors, Disabled Women Ireland and a woman who had an abortion.<sup>65</sup> Each of these organisations are ardent pro-abortion lobby groups. Contrary to his own public statement on 8 December 2021 that appointing a chairperson to lead the review would require the position to be recruited by public tender, the Minister for Health imposed his own choice of chairperson in January 2022. The chairperson, Marie O’Shea, has a

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62. Derbyshire SWG and Bockmann JC, *Reconsidering fetal pain*, *J Med Ethics* 46, 3-6, 2020.

63. Thomas Pringle, *Dáil Éireann parliamentary debates*, 15 December 2021.

64. Holly Cairns, *Dáil Éireann parliamentary debates*, 15 December 2021.

65. Reply to parliamentary question 5536/22, 2 February 2022, <https://www.oireachtas.ie/en/debates/question/2022-02-02/154/>.

public social media footprint of supporting the Yes campaign in 2018. Alongside the chairperson, two research appointees were brought in to inform the review: two strongly pro-abortion academics, one of whom (Catherine Conlon) campaigned as an activist in the 2018 referendum.<sup>66</sup> The other (Deirdre Duffy) has engaged in efforts to foist extreme abortion policies on third world countries.<sup>67</sup> The three-year review of the Irish abortion law, which has incredibly been described as an ‘independent’ and ‘expert-led’ examination, has been led and driven by pro-abortion activists. There has been no engagement with the fact that abortion rates reached 21,000 in just three years, a massive seventy per cent increase in the number of Irish abortions taking place prior to the repeal of the amendment, e.g., those carried out in the United Kingdom on women with Irish addresses. Instead, the review has effectively been hijacked by the most radical elements of the pro-abortion movement with the subtle endorsement of Ireland’s allegedly ‘conservative’ political parties; meanwhile, pro-life voices have been deliberately shut out from the decision-making process.

During the abortion referendum and beyond, even the mildest pro-life arguments have been characterised as not being seriously grounded in genuine compassion for the lives of unborn children but rather in religious fanaticism, malignant narcissism, and misogyny. In Ireland the abortion procedure is euphemistically referred to as “TOP [termination of pregnancy] services” and increasingly as “abortion care”. Recently, a major priority for the Irish government has been to introduce criminal buffer zones of 100 metres surrounding any facility deemed to provide abortion. Minister Donnelly stated he would proceed with introducing these draconian laws despite receiving expert advice from the Commissioner of An Garda Síochána (the Irish police force), Drew Harris, who advised that such measures were unnecessary due to existing public order laws. Minister Donnelly undermined the commissioner’s authority by telling the senate: ‘A view has been expressed to me through the avenue of legal opinion, and it is also held by An Garda Síochána, that additional powers are not required. The current powers are sufficient. It is not a view I agree with and not one that I have accepted. It is not the view of this House or, I believe, of the Lower House. We are legislating. This is happening.’<sup>68</sup>

For many Irish elites of the media, political and NGO sector, pro-life speech is tantamount to ‘hate speech’. This is where a significant danger lies when it comes

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66. ‘TARTs for Repeal’: ‘Dr Catherine Conlon, School of Social Work & Social Policy’, <https://www.tcd.ie/trinitylonggroomhub/whats-on/details/event.php?eventid=127825667>.

67. ‘University research helps to decriminalise abortion in Colombia’, <https://www.mmu.ac.uk/research/news-and-events/story/?id=14933>.

68. Stephen Donnelly, *Seanad Éireann parliamentary debate*, 10 February 2022.

to efforts to regulate social media. Already we have seen efforts to denigrate the pro-life position as ‘misinformation’ and inimical to human rights. Videos on YouTube which cover the topic of abortion now carry an information box on abortion which cannot be hidden, akin to how information boxes appear on videos related to Covid-19 to stem the spread of ‘anti-vaccine conspiracy theories’ and ‘misinformation’. This is a deeply troubling development and an instance of social media corporations trying to actively direct public discourse. Moreover, it insinuates that the pro-life position is not a genuine or scientifically based ethical and moral worldview, but rather a fringe theory without substance. Measures like the Digital Services Act likely may exacerbate the censorious practices of ‘Big Tech’ and lead to a further erosion of freedom of expression.

The influential role of social media in the Irish abortion referendum and impacting the result has been widely stated. During the period of the referendum, the onus to control and direct the spread of information related to the topic of the vote on social media platforms fell largely to the corporations themselves. Several of the world’s social media titans’ European headquarters are in Dublin, such as Facebook and Twitter, partly owing to Ireland’s famously low corporate tax rate. Self-regulation was regarded by many politicians and media commentators as insufficient and underlined the need for firm legislation to regulate social media, particularly during political and referendum campaigns. Since the 2018 referendum, global trends have increasingly tended towards regulation at the state level of social media; however, measures like the Digital Services Act and Digital Markets Act have been roundly criticised for their chilling effect on freedom of expression. The regulations will likely act as a catalyst in accelerating the clampdown on free speech online.

A cautionary lesson from the Irish abortion referendum is to showcase the worrying trend towards intolerance of pro-life views, which are repeatedly caricatured and misrepresented in the traditional and new media. Moreover, at the political level any effort to examine the various excesses and flaws associated with the new abortion law are frequently derided as undermining the referendum vote, which is held up as sacrosanct. This revisionist reinterpretation of the referendum and what is signified should not be allowed to run roughshod over the democratic rights of pro-life citizens to voice their opinions and to demand fair representation. Increased efforts must be made in the context of new regulations of social media to ensure that ‘Big Tech’ adheres to civic democratic principles of freedom of expression. Allowing states to regulate and determine the levels of freedom of expression with social media corporations claiming they were only following orders represents a worrying overcentralisation of power and could be easily mismanaged to undermine the democratic process.

## Lessons learned for the implementation of the Commission proposal on transparency for political advertising

The Commission proposal states in Article 15.3 that:

*Each Member State shall designate one or more competent authorities to be responsible for the application and enforcement of the aspects of this Regulation not referred to in paragraphs 1 and 2. Each competent authority designated under this paragraph shall structurally enjoy full independence both from the sector and from any external intervention or political pressure. It shall in full independence effectively monitor and take the measures necessary and proportionate to ensure compliance with this Regulation.*

If a government is very biased against certain political positions the question is how it can be ensured that the competent authority that it appoints will indeed be impartial as the Commission (rightly) envisions it to be? The atmosphere after the referendum in Ireland shows how a whole government apparatus and political establishment can have such a biased view that it is questionable whether the appointment of such an authority will ensure that the people appointed to direct that authority will indeed be impartial towards all political views in their society.

If a review committee on a very sensitive topic that is announced as independent is clearly partisan, the question rises how the Irish government and any other government, defines ‘independence’. The Commission proposal does not require that those appointed in the competent authority are not themselves (party) political activists. So how the impartiality of the competent authority is ensured is very unclear.

## Conclusion on DSA and DMA and freedom of speech

In 1992, Ireland secured a protocol as part of the Maastricht Treaty which expressly protected Ireland’s constitutional prohibition of abortion to assuage concerns the Treaty would prompt an EU-led legalisation of abortion in Ireland.<sup>69</sup> A massive cultural shift has occurred in the thirty years since this protocol was included in the Treaty. As noted above, there are now increased efforts to negatively portray the pro-life position as tantamount to disinformation and ‘hate speech’. In July 2022, a resolution adopted by the European Parliament expressed regret at the overturning of Roe v Wade and noted their concern about ‘a possible surge in the flow of money

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69. Treaty on European Union, signed at Maastricht on 7 February 1992, C 191, Vol. 35, (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1992:191:TOC>).

funding anti-gender and anti-choice groups in the world, including in Europe.<sup>70</sup> This echoes many of the alarmist insinuations made during the 2018 referendum in Ireland. It points to the radical cultural shift across the world and illustrates the danger of the impact of supranational efforts (via the DSA and DMA in particular) to encourage the regulation of freedom of expression. This would undoubtedly impact the expression of pro-life views and illuminates the many dangers and negative consequences for fundamental human rights in the new DSA and DMA.

Although there is clearly a need to regulate social media. It cannot be completely left to the unfettered domain of corporations to regulate themselves, which has already had a demonstrably negative impact on certain political speech which betrays the political biases of these corporations. New regulations being considered by national legislatures and at the EU level should not simply provide tools to empower approved journalists to become the arbiters of truth and incentivise corporations to further police speech due to fear of penalties. New regulations should be guided by the principle that what is legal offline must also be legal online. Robust defences of freedom of speech and expression must be included within new regulations, and scaremongering about certain types of legal albeit ‘harmful’ speech must end. This sets dangerous precedents which erodes the freedoms of each citizen. Greater efforts should be taken at the national legislative and European levels by elected representatives to ensure that whilst the regulation of social media is needed, that it must copper-fasten an unambiguous protection of freedom of expression as one of its core components.

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70. European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU (2022/2742(RSP)), ([https://www.europarl.europa.eu/doceo/document/TA-9-2022-0302\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0302_EN.html)).

## 4. Conclusions and recommendations regarding the EC proposal on transparency and targeting of political advertising

Main conclusions from the previous chapter 3 will be presented here and this chapter will close with recommendations.

The main conclusions from the previous chapter were:

It is essential that the ‘transparency notice’ would give easy access to an overview of the donations that the sponsor of the political advertising has received in the past two years. Specific attention is needed on how campaigns intended to create a referendum are using social media and how these campaigns are funded.

Specific attention is needed on how campaigns intended to create a referendum are using social media and how these campaigns are funded.

Any national authority will need to take swift action if transparency requirements are breached.

A partisan position of the government in a referendum influences the perception of how political advertising in social media has to be regulated and what focus the enforcement of such regulation should have.

Government Ministers may very well create an environment in which the authority concerned will feel pressure on how it does its work. This concern becomes even more clear with regard to those Member States where there are already serious worries over the state of their democracy.

The overall political environment in which a campaign takes place can have impact on how the relevant bodies and providers will take their role in implementing the Commission proposal.

Providers of social media ('tech companies) are not necessarily neutral bodies. The concerns raised over the effects of the DSA and DMA underscore this. Their decisions can be biased or have a biased effect.

A whole government apparatus and political establishment can have such a biased view that it is questionable whether the appointment of such an authority will ensure that the people appointed to direct that authority will indeed be impartial towards all political views in their society.

## **Final recommendations**

The Commission proposal does not require that those appointed in the competent authorities are not themselves (party) political activists. So how the impartiality of the competent authority is ensured is very unclear. The proposal will need to be amended in the further deliberations in order to increase the impartiality of the authorities. Perhaps the delegated act can include specific requirements in this regard.

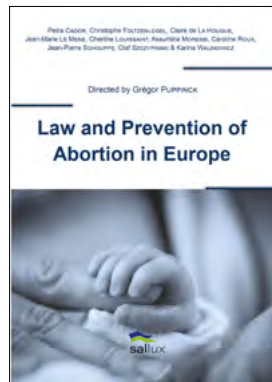
The age-old question 'who controls the controllers' needs to be raised here as well. The fact is that this is ultimately EU legislation and the Commission will need to take ultimate responsibility over its enforcement. Citizens, parties and political actors at EU level or in the Member States need to be able to address the Commission directly in case of shortcomings by national authorities in the enforcement of this regulation. Provisions to that effect need to be included.

## **Final conclusion**

The overall conclusion is that transparency regarding political advertising on social media is welcome but that the proposed way to enforce the proposed regulation raises concerns that need to be addressed and cannot be ignored. A 'democracy angle' is therefore necessary in the further deliberation and implementation of the proposed regulation. Otherwise core democratic values will come under serious pressure.



## Advertisement



## Law and Prevention of Abortion in Europe

By Grégor Puppincx.

This book is a study on abortion through different, sometimes new aspects, and aims at giving the conceptual and legal bases to a policy of prevention of abortion. It is not a book of appeal which would oppose, once more, a right to abortion of the mother to a right to life of the child. Freedom and dignity are often but words, if not slogans, wrapping up and hiding human realities without fully understanding them. This book wants to be realistic and aims at giving the basis of legal developments on an in-depth factual study of causes and consequences of abortion, written in the light of numerous recent scientific researches.

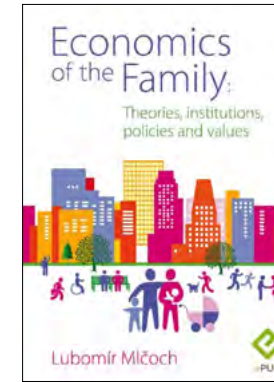
These causes and consequences incite to consider abortion not as an abstract freedom but much more as a social and public health problem, requiring a prevention policy. Such a policy was in fact what Simone Veil wanted when she refused any right to abortion and wanted only to tolerate it as the last solution, then a lesser evil. It is also and still how international and European laws consider it, both of them offering a strong legal support to a prevention policy, and even to a right not to abort. Against Mrs. Veil's declared intention, abortion slowly became not only tolerated but a freedom. This change of perspective had deep implications for the whole society and disrupted the legal order further than on the question of birth regulation and the question of the situation of women, this change also affects other rights and principles, such as the prohibition of sexual and genetic discriminations, the rights to life, to freedom of conscience, and also to freedom of speech and manifestation. All these aspects are chapters of this book.

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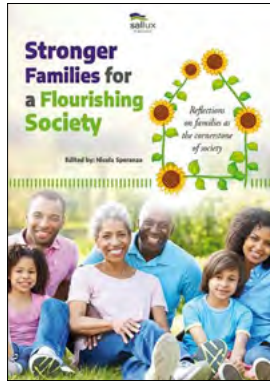
## Economics of the Family

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By Lubomír Mlčoch.

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## Advertisement



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**By FAFCE.**

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**This publication has been edited by Nicola Speranza**

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