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Risky Business: Freedom of Expression vs. Harmful Content in Ireland's Online Safety and Media Regulation (OSMR) Act

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Abstract

This article applies a critical perspective to provisions of Ireland's Online Safety and Media Regulation (OSMR) Act which may undermine the right to freedom of expression. This article narrows its focus to specific provisions of this legislation which may be used to restrict access to harmful—but potentially legal—online communications. Special focus is on potential application of these provisions to offensive political commentary and associated risks to the right to freedom of expression. This article begins by providing an overview of the legislative development and context preceding the OSMR Act. Focus is not only on the justifications for this legislation but also on analogous domestic legislative frameworks—specifically the United Kingdom's Online Safety Act—which has seen proposals for legally binding obligations for online media platforms to restrict access to harmful but legal online communications. Focus then shifts to the relevant provisions of Ireland's OSMR Act surrounding harmful online communications under Part 11 of this legislation. Identifying how specific obligations may be used to restrict access to

offensive political communications online, this article then maps standards surrounding the right to freedom of expression which are instructive in this context. Drawing exclusively from the analytical framework of Article 10 of the European Convention on Human Rights (ECHR), key focus here is on relevant jurisprudence of the European Court of Human Rights (ECtHR) in case law wherein the Strasbourg Court has examined the right to disseminate polemic statements in political environments under the Article 10 ECHR framework. Focus is also given to relevant jurisprudence wherein the ECtHR has demonstrated reluctance to endorse restrictions on access to lawful online communications. Filtering these standards, this article concludes by assessing how the operationalisation of Ireland's OSMR Act may require—or indirectly encourage—restrictions on access to legal communications in a manner that may contravene the right to freedom of expression under Article 10 ECHR. Accordingly, this article provides timely analytical insights regarding the extent to which current and future online safety measures under the OSMR Act's framework are likely to ensure compatibility with the right to freedom of expression.

Keywords
Online safety; freedom of expression; political expression

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1 Introduction

The Online Safety and Media Regulation (OSMR) Act was signed into law in December 2022.[1] The development of this legislation was informed by a range of legal and civil society proposals.[2] This commenced in 2013 when Ireland's Minister for Communications commissioned the Internet Content Advisory Group (ICAG) to examine potential inadequacies in Ireland's legislative framework for electronic communications.[3] The ICAG recommended to update Ireland's communications legislation to account for 'effects of technological change on media.'[4] The ICAG recommended legislative updates to 'address the issue of availability of age-inappropriate content regarding minors' and for the Irish government to strengthen the role of the Office for Internet Safety to achieve this.[5] This was followed by recommendations in 2016 by the Law Reform Commission (LRC) to modify statutory rules to protect vulnerable internet users from 'harmful digital communications.'[6] The LRC further suggested that a new

[1] Hereinafter OSMR Act or merely 'OSMRA'; It must also be acknowledged here that, at the time of writing, Ireland's Media Commission has since published its first 'Work Programme' (June 2023) <https://www.cnam.ie/wp-content/uploads/2023/06/Coimisiun-na-Mean-Work-Programme-_Web.pdf> accessed 12 December 2024; Since the time of writing this article, the Media Commission has also since launched its first public consultation for online safety codes and has subsequently published a draft of this code, see Coimisiún na Meán, 'Draft Online Safety Code' (27 May 2024) <https://www.cnam.ie/wp-content/uploads/2024/05/Online-Safety-Code_vFinal.pdf> accessed 12 December 2024.

[2] See useful overviews of OSMRA developments, Etaoine Howlett and Ivan Farmer, 'Insights into the OSMR Bill Part 1: Introduction and Background' (*Houses of the Oireachtas*, 15 February 2022) <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2022/2022-02-22_l-rs-note-insights-into-the-osmr-bill-part-1-introduction-and-background_en.pdf> accessed 12 December 2024.

[3] Department of Communications, Energy and Natural Resources, 'Report of the Internet Content Advisory Group' (May 2014), 5 <https://arrow.tudublin.ie/cgi/viewcontent.cgi?params=/context/cserrep/article/1052/&path_info=InternetContentGovernanceAdvisoryGroup_copy.pdf> accessed 12 December 2024.

[4] Ibid 9.

[5] Ibid 8-11 (also highlighting need to combat cyberbullying).

[6] Law Reform Commission, 'Report on Harmful Communication and Digital Safety', LRC 116 – 2016 (27 September 2016)

statutory body should oversee 'an efficient and effective take down procedure in relation to harmful digital communications.'[7] Following recommendations from these bodies, two senior Ministers commissioned an 'open policy debate on online safety' in 2017.[8] A key output from this debate was the establishment of the National Advisory Council for Online Safety (NACOS) in 2018. This group was tasked with identifying emerging issues surrounding online safety that could require legislative intervention.[9] The recommendations of NACOS to address online safety issues coincided with a Ministerial announcement in 2019 to update Ireland's legislative framework in this area.

Having now been signed into law, Ireland's OSMR Act is not the first instance of European online safety legislation. An instructive domestic example is the United Kingdom's Online Safety Act.[10] This legislation, in particular its previous incarnations, has attracted considerable scrutiny for its proposed obligations for online platforms—not only technological giants such as Meta and Twitter (now X) but also smaller platforms—to restrict access to harmful online communications. Early versions of the UK legislation distinguish between

<https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf> accessed 12 December 2024.

[7] Ibid [3.6.6].

[8] The Minister for the Environment, Climate and Communications and the Minister for Justice and Equality and Minister for Children and Youth Affairs; See Department of Communications, 'Climate Action & Environment: Annual Report 2017' (1 January 2018, last updated on 11 January 2021) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/77117/68ef7a85-51e1-4fbb-8aac-76bb7f7c289d.pdf#page=null> accessed 12 December 2024. This report aimed to establish a 'coherent plan' to 'protect children and adults in their online engagement' through Irish legislation, see at page 15.

[9] See National Advisory Council for Online Safety, 'Progress Report February 2019' <https://assets.gov.ie/76743/ab7813dd-366b-4e8b-a0f1-e1310fa3c6a3.pdf> accessed 12 December 2024; National Advisory Council for Online Safety, 'Progress Report May 2020' <https://www.gov.ie/pdf/?file=https://assets.gov.ie/76744/6446ed60-6998-4eee-b010-29fbf1acf872.pdf#page=null> accessed 12 December 2024.

[10] Which can be accessed here <https://bills.parliament.uk/bills/3137> accessed 12 December 2024; Hereinafter the 'UK Act.'

'category 1' and 'category 2' service providers but propose a 'duty of care' for both categories of providers to mitigate exposure to harmful content on their service.[11] Significantly, the UK Act not only applies duties for Category 1 and Category 2 providers in respect of illegal material but also supervises Category 1 providers in respect of lawful communications that may harm children and adults.[12] The duties for platforms to combat lawful communications under the UK legislation are triggered where Category 1 providers have 'reasonable grounds to believe' that content poses a 'material risk of significant harm' to adult or child safety.[13] Importantly, this risk based standard has elicited criticism from proponents of the right to freedom of expression. When assessing an earlier version of the then Online Safety Bill, for example, Smith posits that the UK legislation imposed a 'duty-triggering threshold' for harmful online communications that 'expressly bakes in over-removal' of lawful or even legitimate forms of political communications.[14] Moreover, Harbinja and Leiser highlight that the UK Act's risk based threshold is prone to outsourcing content removal decisions to platforms' 'subjective view about the desirability of what is to be gained or lost by the decision.'[15] These authors further argue that—if applied to lawful content—the UK Act's duties may incentivise providers to restrict access to legitimate political communications in a manner that could frustrate the right to freedom of expression.[16]

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[11] *Category 1* involves 'user to user' services (hosting user-generated content); *Category 2* involves search engine services.
[12] Section 54 UK Act.
[13] Section 54(1) (3)(a) UK Act.
[14] Graham Smith, 'Mapping the Online Safety Bill' (*Cyberleague*, 27 March 2022) <https://www.cyberleagle.com/2022/03/mapping-online-safety-bill.html> accessed 12 December 2024.
[15] Edina Harbinja and Mark R. Leiser, '[Redacted]: This Article Categorised [Harmful] by the Government' (2022) 19(1) SCRIPTed 88.
[16] Ibid.

The precarious relationship between potentially harmful communications that pose risks and the right to freedom of expression is further evidenced in the European Union's approach to harmful digital online communications. For example, the EU's Artificial Intelligence Act has now come into force as of 1st August 2024.[17] This legislation explicitly distinguishes between four classifications of AI systems on the grounds of what level of 'risk' AI systems pose in terms of causing harm to individuals, public interest, and fundamental rights.[18] Moreover, the EU's risk-based approach to harmful communications is further epitomised in the Digital Services Act (DSA).[19] The EU regime for intermediary liability has long exempted platforms for liability for lawful communications under the Articles 12-15 of the E-Commerce Directive.[20] The DSA updates the broader framework of the E-Commerce Directive but, crucially, maintains this liability standard. However, Article 2 of the DSA defines illegal content as content which is unlawful at the EU or Member State level 'irrespective of the precise subject matter or nature of that law.'[21] The significance here is that—in contrast to the induction of the E-Commerce Directive in 2000—various forms of objectionable online content may be legal under EU law but illegal in EU Member States. One example which epitomises this tension is the problem of political disinformation. As O'Faithigh highlights, several European states have

[17] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L, 12.7.2024.

[18] See in particular Articles 6-9 of the AI Act which respectively set out classifications and compliance requirements for 'high-risk' AI systems.

[19] Hereinafter DSA.

[20] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1.

[21] Article 2(g) DSA.

not only made the spread of disinformation illegal but also a criminal offence.[22] Conversely, the EU's disinformation policy has been to classify disinformation as a form of lawful communications which may have disruptive effects in the democratic process.[23] As Hoboken et al. posit, such developments highlight divergence from the overarching EU policy 'premise' that disinformation may often consist of lawful communications.[24] This divergence potentially presents an 'acute danger of European and national policy-makers focusing on a notion where there already exist very broad and vague laws open to particular abuse.'[25] It must further be highlighted here that certain DSA provisions—such as Articles 34 and 35—require large platforms to identify and mitigate 'systemic risks' that may arise from use of their services.[26] Such risks may not only include 'intentional manipulation' of services but also activity which has 'actual or foreseeable effects related to electoral processes and public security' or 'civic discourse.'[27] Moreover, Article 36 DSA grants the European Commission extensive powers to identify and delineate 'crisis' protocols which enable the Commission to expedite ad hoc guidelines for platforms to modify content recommendation systems.[28] A core concern with the potential applications of these provisions is whether vaguely framed risk based obligations may require—or indirectly encourage—online

[22] Ronan Ó Fathaigh et. al, 'The perils of legally defining disinformation' (2021) 10(4) Internet Policy Review <https://policyreview.info/articles/analysis/perils-legally-defining-disinformation> accessed 12 December 2024. For example, Hungary and Czech laws introduce criminal offences that may result in up to 5 years in prison for disseminating false information.
[23] See: Commission, 'A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation' (2018), 5 <https://op.europa.eu/en/publication-detail/-/publication/6ef4df8b-4cea-11e8-be1d-01aa75ed71a1/language-en> accessed 12 December 2024.
[24] Joris van Hoboken and Ronan Ó Fathaigh, 'Regulating Disinformation in Europe: Implications for Speech and Privacy' (2021) 6 UC Irvine J. Int'l Transnat'l and Comp. L. 9.
[25] Ibid.
[26] Article 34, 35 DSA.
[27] Ibid.
[28] Article 36 DSA.

platforms to restrict access to lawful communications in a manner that may undermine the right to freedom of expression.

Such concerns are fundamental to this article's inquiry. As will be dissected in the following section, Ireland's OSMR Act entails provisions which may require restrictions on harmful—but potentially legal—online communications. Mapping these provisions, a key inquiry is not only whether OSMR obligations may restrict access to lawful communications but also whether the criteria which enable such restrictions will risk obscuring access to legitimate forms of democratic communication. This is not a purely hypothetical concern. For example, there is extensive empirical evidence that online intermediaries engage in 'over-removal' of legal communications when following laws to curtail access to illegal communications.[29] Moreover, several forms of potentially harmful communications—such as electoral disinformation—may often arise in political environments.[30] Restrictions on access to such communications require identifiable standards and proportionate responses. Accordingly, it is vital to map the applicable standards surrounding the right to freedom of expression. Focus here must not only be given to standards surrounding restrictions on access to legal communications online but

[29] Judith Townend, 'Online chilling effects in England and Wales' (2014) 3(2) Internet Policy Review <https://policyreview.info/articles/analysis/online-chilling-effects-england-and-wales> accessed 12 December 2024; John Leyden, 'How to kill a website with one email: Exploiting the European E-commerce Directive' (14 October 2004) <https://www.theregister.com/2004/10/14/isp_takedown_study/> accessed 12 December 2024; Rishabh Dara, 'Intermediary Liability in India: Chilling Effects on Free Expression on the Internet 2011' <https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf> accessed 12 December 2024; Jennifer M. Urban and Laura Quilter, 'Efficient Process or "Chilling Effects?" Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara High Tech. L.J. 621.

[30] Fabian Zimmermann and Matthias Kohring, 'Mistrust, disinforming news, and vote choice: A panel survey on the origins and consequences of believing disinformation in the 2017 German parliamentary election' (2020) 37(2) Political Communication 215; Deen Freelon and Chris Wells, 'Disinformation as political communication' (2020) 37(2) 145.

also to the crucial need for protection of polemic and offensive political communications in democracies. Before mapping these standards, relevant provisions of Ireland's OSMR Act must be probed.

2 Tackling Harmful But Legal Content in the OSMR Act

The OSMR Act was initiated in January 2022 and passed by Seanad Eireann in July 2022.[31] It consists of seventeen parts. Key elements include:

- The establishment of a new media commission.
- A register for providers of audio-visual on demand media services.
- Online Safety provisions.
- Duties, codes, and rules applying to media service providers and sound broadcasters.
- Powers for a new media commission to investigate and sanction for non-compliance.

An overarching reform is that the OSMR Act replaces the Broadcasting Authority of Ireland (BAI) with a new Media Commission.[32] The new Commission now regulates activities of 'designated media service providers' and may enforce sanctions for non-compliance with OSMRA requirements.[33] The new Commission further subsumes several key functions of the BAI. For example, it

[31] Online Safety and Media Regulation Act 2022 (Act 41 of 2022) Online Safety and Media Regulation Bill 2022 (Bill 6 of 2022), available at <https://www.oireachtas.ie/en/bills/bill/2022/6/> accessed 12 December 2024.

[32] Referred to as '*Comisiún na Meán*'; BAI established under the Broadcasting Act 2009.

[33] As required by the Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69 (hereinafter 'AVMSD'), the term 'media service providers' includes video sharing platforms that enable user generated content.

is empowered to devise codes of practice and apply these codes to media providers.[34] It may further apply fines to broadcasters that fail to disseminate political and current affairs programmes in an impartial manner.[35] Unlike the BAI, however, the new Commission is structured with three 'Commissioners' whose functions will be overseen by an executive chairperson.[36] At present, these consist of a 'broadcasting Commissioner' to continue the BAI's existing role, an 'on-demand audio-visual services Commissioner' to oversee regulation of on-demand media, and an 'online safety Commissioner.'[37] The OSMR Act does not designate any Commissioner with explicit functions to oversee the regulation of harmful political communications. However, this may change in the future as the OSMR Act makes provision for the possibility of introducing up to six Commissioners.[38] This mechanism is explicitly designed allow the Media Commission 'to react and adapt to changing circumstances' in the online media environment.[39] It is plausible that this could be expanded to account for harmful political communications such as electoral disinformation. Arguably, however, this may not come to fruition as Ireland has also recently passed its Electoral Reform Act 2022 which explicitly addresses that problem.[40]

It must also be highlighted that the OSMR Act transposes revised provisions of the EU's AVMSD. These revisions were devised to address the 'ongoing convergence' between broadcast and online media services and now require EU Member States to apply updated rules regarding broadcasting in

[34] Section 139K, OSMRA; Section 42 Broadcasting Act 2009.
[35] See Part 3, Section 39 Broadcasting Act 2009 and then Section 46L of the OSMRA.
[36] See visual breakdown by Government of Ireland, 'Structure of the Media Commission' <https://assets.gov.ie/76725/61834cef-c977-4a66-9b97-95cf03216c2c.pdf> accessed 12 December 2024.
[37] Ibid. The online safety commissioner will have the most extensive powers under the OSMRA.
[38] Section 6, OSMRA.
[39] Government of Ireland (n 36).
[40] See Part 5, Electoral Reform Act 2022.

Europe and expand the application of AVMSD rules to a wider range of 'media service providers.'[41] For example, the revised Directive expands the application of provisions surrounding the protection of minors from inappropriate content to 'on-demand audiovisual media services.'[42] AVMSD revisions also permit Member States to derogate from provisions that prohibit restrictions on the retransmission of audio-visual media services from other Member States.[43] Importantly, the revised AVMSD also requires that Member States 'shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect' users from specific forms of 'harmful content.'[44] These are listed explicitly as:

- Programmes, user-generated videos and audio-visual commercial communications which may impair the physical, mental or moral development of minors.
- Programmes, user-generated videos and audio-visual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter.
- Programmes, user-generated videos and audio-visual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist-offences, offences

[41] Term used in the AVMSD but hereinafter abbreviated as 'media providers' or 'providers': For example, terms such as 'audio-visual media service' and 'programme' are replaced by terms such as 'video-sharing platform service' and 'user-generated video.
[42] Recital 20 AVMSD.
[43] See Article 3 AVMSD. This applies specifically to content that incites hatred.
[44] Recital 47 AVMSD.

> concerning child pornography, and offences concerning racism and xenophobia.[45]

A pivotal feature of the OSMR Act is that this legislation does not merely regulate the above listed categories but also tackles a range of legal content.[46] Part 11 introduces legally binding obligations for 'designated media service providers' to restrict access to 'harmful online content.'[47] Section 139A distinguishes between two types of content. The first is illegal online content which fits into 'offence-specific categories.'[48] Schedule 3 of the OSMR Act exhaustively lists Irish legislation applicable to 'offence-specific' content.[49] For example, these include the Prohibition of Incitement to Hatred Act 1989 and the Harassment, Harmful Communications and Related Offences Act 2020.[50] The second type of harmful content under Section 139A is that which 'falls within one of the other categories' of harmful—but potentially legal—communications.[51] These categories, none of which are referenced in the revised AVMSD, include:

- Content by which a person bullies or humiliates another person.
- Content by which a person promotes or encourages eating disorders.
- Content by which a person promotes or encourages self-harm or suicide

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[45] Without prejudice to the requirements of the E-Commerce Directive under Article 12-15.

[46] It may be argued that the OSMRA applies the term 'content' more broadly than the AVMSD by regulating a range of human communications. See on this point Digital Rights Ireland, 'Submission to Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht: General Scheme of the Online Safety and Media Regulation Bill' (March 2021) <https://pdfhost.io/v/9TbpIu6L4_Microsoft_Word_OSMR_submission_Digital_Rights_Ireland_finaldocx.pdf> accessed 12 December 2024.

[47] The Commission may 'designate' new media providers subject to Part 11 obligations. Per Section 139E, the Commission must 'have regard' to several factors before designation. These are: nature and scale of providers' services; availability of harmful content on providers' services; risk of exposure to harmful content from providers' services; rights of providers and of users.

[48] Section 139A (1) OSMRA.

[49] Schedule 3 OSMRA.

[50] Ibid.

[51] Section 139A (2) OSMRA.

- Content by which a person makes available knowledge of methods of self-harm or suicide.[52]

The inclusion of some of these categories under Section 139A may be seen as unsurprising. As referenced in the introduction to this article, the development of the OSMR Act was preceded by concerns by civil society stakeholders surrounding access to dangerous information by vulnerable and young internet users. Addressing legal forms of communication which encourage suicide or eating disorders is an empirically justified goal.[53] Significant to this article, however, is that Section 139A also lists harmful online content which any content by which a person 'bullies or humiliates' another person.[54] The choice of this terminology is notable for several reasons. First is that the Law Reform Commission(LRC)—when anticipating how Ireland's online safety legislation could apply to harmful but non-criminal communications—explicitly cautioned against the use of the term 'grossly offensive' communications in this legislation.[55] Crucial here was the LRC's contention that 'communications which are grossly offensive' but still legal 'require a high threshold and in many cases prosecution will not be in the public interest.'[56] Second is that offensive and humiliating communications may be used against political figures in a functioning democracy. This not only requires tolerance but may also assist in

[52] Other content may be considered as non-offence specific communications if it is 'reasonably foreseeable that it involves 'any risk to a person's life' or 'a risk of significant harm to a person's physical or mental health.' This 'shall be determined on the balance of probabilities.'
[53] Victor Suarez-Lledo and Javier Alvarez-Galvez, 'Prevalence of health misinformation on social media: systematic review' (2021) 23(1) J Med Internet Res, e17187 <https://www.jmir.org/2021/1/e17187/PDF> accessed 12 December 2024.
[54] Section 139A(3)(a) OSMRA.
[55] Law Reform Commission (n 6), [1.78].
[56] Ibid.

facilitating citizens with information which informs their electoral choices.[57] The distinction between harm and mere offensive may often be challenging to interpret in political environments. An example of dangerous activity here was seen in September 2022 when several extremist groups physically harassed and made false accusations at several Irish legislators.[58] This may be contrasted with the polemic 'baby balloon' which depicted Donald Trump in a satirical manner on the former US President's trip to London in 2018.[59] This depiction was designed to humiliate another person but in a specific satirical and political context. That this stunt may cause humiliation does not negate its potential to mobilise political engagement in democracy.

Humiliating communications are not the only forms of potentially legal content which may be restricted under Part 11 of the OSMR Act. Section 139A may ultimately apply to a non-exhaustive range of content which poses 'a risk of significant harm to a person's physical or mental health' provided that 'the harm is reasonably foreseeable.'[60] Furthermore, Part 11 empowers the Media Commission to 'specify' new categories of communications as 'other harmful content.'[61] Section 139B enables the new Commission to 'make a proposal to the Minister that a category of online content should be specified for the purposes of section 139A.'[62] The Minister, in turn, may 'make an order giving effect to the

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[57] Bruce W Hardy et. al, 'Stephen Colbert's Civics Lesson: How Colbert Super PAC Taught Viewers About Campaign Finance' (2014) 17(3) Mass Communication and Society 329.

[58] Mark Hillard, 'Paul Murphy TD says he was assaulted by members of far-right group' (*Irish Times*, 14 September 2022) <https://www.irishtimes.com/ireland/social-affairs/2022/09/14/members-of-far-right-group-accused-of-seeking-to-disrupt-not-our-fault-protest/> accessed 12 December 2024.

[59] Silvia Amaro, '"Trump Baby" balloon takes flight in central London amid protests' (13 July 2018) <https://www.cnbc.com/2018/07/13/trump-baby-balloon-takes-flight.html> accessed 12 December 2024.

[60] Section 139B(4) OSMRA.

[61] Section 139B OSMRA.

[62] Section 139B (4) OSMRA.

proposal.'[63] Prior to submitting proposals, the Commission must publish proposal drafts to the public and disclose how citizens 'may submit comments' in response to these drafts.[64] Before accepting or rejecting proposals, the Minister must consult the Joint Oireachtas Committee and 'consider' the substance of proposals 'in the light of that consultation.'[65] Throughout this procedure, the new Commission and Minister must 'have regard' to specific factors when proposing to specify new forms of harmful online content. These are:

- Levels of availability of online content on relevant online services.
- Levels of risk of exposure to online content when using relevant online services.
- Levels of risk of harm, and in particular harm to children, from the availability of content or exposure to content.
- Changes in the nature of online content and in levels of availability and risk.
- The impact of automated decision-making in relation to content delivery and content moderation by relevant online services.
- Rights of providers of designated online services and of users of those services.

Providing that the above criteria are satisfied, it is possible that the new Commission and Minister could explicitly designate certain forms of offensive political communications—or alleged political disinformation—as harmful online content under Part 11 of the OSMR Act. This is not a far-fetched prospect.

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[63] Ibid.

[64] Section 139C (1) OSMRA.

[65] Section 139C (2) OSMRA; Consultation with the Oireachtas is important because this body must have responsibility for defining new forms of harmful content while balancing the right to freedom of expression: See Gerard Hogan et al., *Kelly: The Irish Constitution*, (5th edn., Bloomsbury Professional 2018), [7.6.07]-[7.6.136].

For example, several third-party stakeholders advised that political disinformation should be expressly included as a listed form of harmful online content during the OSMR's pre-legislative scrutiny.[66] Several legislators raised similar proposals during Oireachtas debates on this legislation.[67] Moreover, various public figures have made calls for the online 'trolling' of politicians to be made a criminal offence in Ireland.[68] The point here is not to underestimate the potentially harmful effects of such communications but to illustrate the prospect that harmful content may be identified in political environments.

The potential for Section 139 to apply to offensive political communications is further significant when considering the extensive powers for the new Commission under Part 11 of the OSMR Act. Section 139K empowers the new Commission to develop mandatory 'online safety codes' to ensure that

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[66] DCU Institute for Future Media, Democracy and Society and National Anti-Bullying Research and Resource Centre, 'The General Scheme of the Online Safety and Media Regulation Bill: Submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht' (March 2021), 4 <https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_tourism_culture_arts_sport_and_media/submissions/2021/2021-11-02_submission-dcu-institute-for-future-media-democracy-and-society-national-anti-bullying-research-and-resource-centre_en.pdf> accessed 12 December 2024; Irish Human Rights and Equality Commission, 'Submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht on the General Scheme of the Online Safety and Media Regulation Bill' (March 2021), 28 <https://www.ihrec.ie/app/uploads/2021/03/IHREC-Submission-to-the-Joint-Committee-on-Media-Tourism-Arts-Culture-Sport-and-the-Gaeltacht-on-the-General-Scheme-of-the-Online-Safety-and-Media-Regulation-Bill-FINAL.pdf> accessed 12 December 2024.

[67] See Houses of the Oireachtas, 'Seanad Eireann debate – Tuesday, 22 Feb 2022: Vol. 283 No. 1' <https://www.oireachtas.ie/en/debates/debate/seanad/2022-02-22/10/> accessed 12 December 2024; Houses of the Oireachtas, 'Seanad Eireann debate – Tuesday, 31 May 2022: Vol. 285 No. 10' <https://www.oireachtas.ie/en/debates/debate/seanad/2022-05-31/26/> accessed 12 December 2024.

[68] See Steven Heaney and Cate McCurry, 'Online trolling of public figures "should be considered a hate crime"' (*Irish Examiner*, 4 February 2022) <https://www.irishexaminer.com/news/arid-40800300.html> accessed 12 December 2024; See also Philip Ryan, 'Sinn Féin proposes legislation to expose anonymous online trolls' (*Irish Independent*, 24 March 2022) <https://www.independent.ie/irish-news/politics/sinn-fein-proposes-legislation-to-expose-anonymous-online-trolls-41482774.html> accessed 12 December 2024.

media providers 'take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content.'[69] These codes may provide 'standards that services must meet, practices that service providers must follow, or measures that service providers must take' to minimise availability of harmful online content on their services.[70] Section 139K further states that codes may elucidate standards that providers must adopt to minimise 'the risk' of harmful content 'being available.'[71] Moreover, codes may require providers to report to the Commission surrounding the measures providers take to reduce access to harmful content and may further detail how providers must handle user complaints.[72] The procedure for devising new codes mirrors the procedure that the new Commission must follow when specifying new forms of harmful online content.[73] Stated differently, the risk of exposure to harmful content is a paramount factor. Importantly, the Commission has extensive powers to audit and enforce compliance with codes. For example, Section 139O empowers this statutory body to notify any provider with requests for any 'information relating to the provider's compliance with an online safety code over any period.'[74] This is complemented by Section 139P which enables the Commission to appoint periodic independent audits of providers.[75] The stated purpose of these audits is to 'enable the Commission to assess compliance' by providers with an online safety code and to obtain 'information to identify any trends in complaints or other matters raised by such communications that may be relevant to the

[69] Section 139K (2)(A) OSMRA.
[70] Section 139L OSMRA states that codes may apply to any provider the Commission designates.
[71] Section 139K (4) OSMRA.
[72] Ibid.
[73] Listed under Section 139N and 139M OSMRA.
[74] Section 139O (1) OSMRA.
[75] Section 139P OSMRA.

Commission's functions.'[76] In the event of non-compliance with any of the above elements under Part 11, the Commissioner can:

- Issue administrative financial sanctions up to €20m, or 10% of the entity's turnover from the previous financial year.
- Seek leave of the High Court to compel internet access providers to block access to a designated online service in the State.
- Require a designed online service to either remove or disable access to harmful content.[77]

The crucial observation here is not goal under Part 11 to restrict access to harmful content. It is the potential for obligations under this Part to apply to offensive online communications in contexts which may engage the right to freely receive and impart political information. This potential is not only crystallised by the vague language surrounding 'humiliation' under Section 139 but also through designations of such communications as harmful content on the grounds of 'risk' based assessments. Considering this important context, the following section now maps and identifies the applicable standards surrounding the right to freedom of expression and how this right applies to offensive but potentially legal forms of online political communications.

It must be highlighted at this point that the Media Commission, at the time of writing, has now published a draft of the first online safety code under the OSMR Act framework.[78] This code, which the Commission published a draft of in May 2024, is now in the process of being submitted to the European Commission today under the EU's Technical Regulations Information System

[76] Ibid.
[77] Section 139Z OSMRA.
[78] See here Coimisiún na Meán (n1).

(TRIS) Directive process, which involves a standstill period of 3-4 months before the Media Commission can apply it in practice. While this author acknowledges that debates are ongoing regarding the extent to which this first drafted code is sufficiently extensive in the variety of harmful content that it seeks to address, this article does not analyse this online safety code in detail.[79] This article does acknowledge, however, that the first drafted online safety code addresses both unlawful and potentially lawful communications while simultaneously making several explicit references to how the Media Commission and affected platforms must balance harmful content moderation with the protection of freedom of expression and democratic values.[80] It is with the acknowledgement of this critical balance that the analysis in the following section proceeds.

3 Freedom of Expression and Offensive Communication

As this article has now introduced, Part 11 of the OSMR Act entails obligations for a range of media providers to restrict access to harmful—but potentially lawful—online communications. As has further been identified, provisions under Part 11 may potentially apply to offensive online communications which may humiliate political figures. Accordingly, it is now vital to map standards surrounding the right to freedom of expression which are applicable in this area.

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[79] See Kate McDonald, 'Not enough or too much? The blow-up over the Online Safety Code' (*RTE News*, 27 May 2024) <https://www.rte.ie/news/primetime/2024/0527/1451557-not-enough-or-too-much-the-blow-up-over-the-online-safety-code/#:~:text=Ms%20McDonald%20says%20the%20code,choices%20here%2C%22%20she%20added.> accessed 12 December 2024.

[80] See, for example, at [12.9] of the first drafted online safety which states: 'When deciding on suspension, a video-sharing platform service provider shall have due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter of Fundamental Rights of the European Union'.

The right to freedom of expression is enshrined under several legally binding documents which have applications to Irish legislation. Article 40 of the Irish Constitution protects 'the right of the citizens to express freely their convictions and opinions.'[81] Article 11 of the Charter of Fundamental Rights of the European Union ('EU Charter') similarly states that 'everyone has the right to freedom of expression' and the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[82] Moreover, Article 10 of the European Convention on Human Rights (ECHR) states that the right to receive and impart information 'shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[83] This section narrows its focus to the interpretive framework of Article 10 ECHR and associated case law of the European Court of Human Rights (ECtHR).[84] This is justified for several key reasons. Standards surrounding the protection of Article 10 ECHR provide minimum baseline standards for the protection of the right to freedom of expression under European Union law. Article 52 of the EU Charter explicitly states that all EU fundamental rights 'correspond to rights guaranteed by' analogous rights under the ECHR.[85] Moreover, the Court of Justice of the European Union (CJEU) has explicitly relied on standards surrounding Article 10 ECHR when applying the right to freedom of expression under Article 11 of the Charter.[86] Also important here is that Irish courts and

[81] Article 40 (6)(1).
[82] Article 11 EU Charter.
[83] Article 10 ECHR.
[84] Hereinafter ECtHR.
[85] Article 52(3) EU Charter.
[86] Cases C-34/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB* and C-35/95 and C-36/95 *TV-Shop i Sverige AB* [1997] ECR I-3843; Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG* [2021] ECLI:EU:C:2021:503.

public bodies have legally binding obligations to ensure interpretive consistency with Convention standards. This is provided for under the European Convention on Human Rights Act 2003.[87] As Kilkelly highlights, this legislation was adopted to 'bring about meaningful alignment of Ireland's human rights obligations and domestic law and practice.'[88] Section 2 of the 2003 Act places interpretive obligations for Irish courts and certain public bodies to interpret legislation 'in a manner compatible with the State's obligations under the Convention provisions'. Further, Section 5 enables certain Irish Courts to issue a 'declaration of incompatibility' to the Irish government if courts identify that a domestic 'statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions'. Further justifying ECtHR jurisprudence as the authoritative framework for freedom of expression is the far-reaching influence of the ECtHR's extensive jurisprudence when applying this provision. As Costa posits, ECHR provisions provide a 'skeleton' of interpretive guidance on how Contracting Parties may protect—or restrict—Convention freedoms.[89] Importantly, however, it is the ECtHR's role to 'put flesh on these bones.'[90] Spano describes the ECtHR as an authoritative 'setter of minimum standards' surrounding the protection of the right to freedom of expression.[91] As O' Faithigh and Voorhoof state, the Court's role as a 'standard setter' not only informs

[87] Article 40(6)(i).
[88] Ursula Kilkelly (ed), *ECHR and Irish law*, (2nd edn., Jordans 2009).
[89] See speech by Jean-Paul Costa, 'The links between democracy and human rights under the case-law of the European Court of Human Rights' (Speech in Helsinki, 5 June 2008) <https://www.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf> accessed 12 December 2024.
[90] Ibid.
[91] Robert Spano, 'The future of the European court of human rights—Subsidiarity, process-based review and the rule of law' (2018) 18 Human Rights Law Review 473.

Council of Europe (CoE) states but also assists in 'developing a global understanding' of principles surrounding this right.[92]

3.1 Freedom of Expression Under Article 10 ECHR

The text of Article 10 of the ECHR explicitly states that 'everyone has the right to freedom of expression' and further clarifies that this provision includes the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. As this language provision suggests, the right to freedom of expression under Article 10 is 'intended to be interpreted broadly.'[93] This is further evidenced in the ECtHR's application of this provision. The Court has confirmed that the right to freedom of expression applies to both natural and legal persons.[94] The Court has also confirmed that this provision not only covers the 'substance' of information but also the 'form' in which information is communicated.[95] Accordingly, the ECtHR has extended Article 10 to verbal statements,[96] news articles,[97] plays,[98] paintings,[99] and commercial advertisements.[100] This demonstrates what Wragg describes as the 'extensive broadness' of this provision's application.[101] Any provision of

[92] Ibid.
[93] See P. Bernt Hugenholtz, 'Copyright and freedom of expression in Europe' in Rochelle Cooper Dreyfuss et. al (eds), *Expanding the boundaries of intellectual property: Innovation policy for the knowledge society* (OUP 2001) 343.
[94] *Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979); *Autronic AG v. Switzerland* (1990) 12 EHRR 485; *The Observer and the Guardian v The United Kingdom* (1992) 14 EHRR 153.
[95] *Jersild v Denmark* (1995) 19 EHRR 1.
[96] *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015).
[97] *Sunday Times v. The United Kingdom* (n 94); *Dichand and others v. Austria* App no 29271/95 (ECtHR, 26 February 2002).
[98] *Unifaun Theatre Productions Ltd and others v Malta* App no 37326/13 (ECtHR, 15 May 2018).
[99] *Vereinigung Bildender Künstler v Austria* App no 68354/01 (ECtHR, 25 January 2007).
[100] *Sekmadienis v Lithuania* App no 69317/14 (ECtHR, 30 January 2018).
[101] Paul Martin Wragg 'Critiquing the UK Judiciary's Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?' (DPhil Thesis, Durham University 2009) 36.

online safety legislation which may lead to restrictions on access to information may therefore fall within the framework of this provision.

This is not to suggest that the right to freedom of expression under Article 10 ECHR is without limitations. Article 10(2) expressly lists criteria that Contracting Parties must adhere to when imposing any 'formalities, conditions, restrictions, or penalties' that may constitute an interference freedom of expression. The ECtHR has identified a broad range of potential circumstances that may give rise to a Contracting Party's interference with Article 10.[102] This includes—but is not limited to—circumstances where national authorities confiscate published materials,[103] restrict the dissemination of advertisements,[104] arrest protestors,[105] refuse to grant broadcasting rights,[106] and impose criminal convictions.[107] If the ECtHR confirms that a Contracting Party has interfered with Article 10, the Court then assesses whether the interference may be justified. Questions under this assessment, which Gerards describes as a 'triple test,' ask:[108]

- Is the interference prescribed by law?
- Does the interference pursue a legitimate aim?
- Is the interference necessary in a democratic society?

The ECtHR's examination of whether interferences with Article 10 are prescribed by law is generally broken down into two sub-questions of whether the legal

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[102] 'Contracting Party' is the term given to states which ratify the Convention.
[103] See *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976).
[104] *Murphy v Ireland* App no 44179/98 (ECtHR, 10 July 2003).
[105] *Éva Molnár v Hungary* App no 10346/05 (ECtHR, 7 October 2008), [42]; See also *Fáber v. Hungary* App no 40721/08 (ECtHR, 24 October 2012).
[106] *Schweizerische Radio-und Fernsehgesellschaft SRG v Switzerland* App no 34124/06 (ECtHR, 21 June 2012); *Autronic AG v Switzerland* (n 94).
[107] *Lindon and others v France* (2008) 46 EHRR 35, [59].
[108] Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466.

basis for the interference was accessible and foreseeable.[109] Underpinning these sub-questions are requirements that individuals must be able to comprehend how their actions could lead to a breach of the law and understand the law's consequences. As the ECtHR has explicitly opined, these requirements prevent 'arbitrary interferences by public authorities' with ECHR rights.[110] However, the Court has clarified that this does not require individuals to understand laws with absolute 'certainty'.[111] As Sales and Hooper posit, such a threshold may hinder states from adjusting laws in accordance with societal changes.[112] The need for accessibility and foreseeability merely requires that citizens reasonably understand how their actions could lead to an interference with their rights. Moreover, the ECtHR may deem that interferences are prescribed by law but still identify how elements of domestic legal frameworks could lead to uncertainty surrounding how laws may adversely affect the right to freedom of expression.[113] If the ECtHR agrees with a Contracting Party that an interference with the right to freedom of expression under Article 10 is prescribed by law, the Court proceeds to assess whether the interference pursues a legitimate aim. If a Contracting Party submits that an interference with Article 10 is based on multiple aims under Article 10(2), the Court can accept that one legitimate aim has been pursued but reject others.[114] These aims are explicitly listed under

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[109] See Talita de Souza Dias, 'Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?' (2019) 19(4) Human Rights Law Review 649.

[110] *Malone v the United Kingdom* (1984) 7 EHRR 14, [67].

[111] *Perinçek v Switzerland* (n 96) [131].

[112] See Philip Sales and Ben Hooper, 'Proportionality and the Form of Law' (2003) 119 LQR 426, 438-439.

[113] See *The Observer and the Guardian v United Kingdom* (n 94), [66], where the Court explicitly questioned 'whether the different aspects of common law applied in the present case were not "entirely clear"' but still found the interference to be prescribed by law.

[114] *Morice v France* App no 29369/10 (ECtHR, 23 April 2015), [170]; *Perinçek v Switzerland* (n 96), [146]-[154]; *Stoll v Switzerland* (2008) 47 EHRR 59, [54]; *Open Door and Dublin Well Woman v. Ireland* (1992) EHRR 244, [63].

Article 10(2).[115] However, this does not preclude the ECtHR from considering other aims which may not be expressly defined under this clause.[116]

If the ECtHR is satisfied that an interference with Article 10 is prescribed by law and pursues a legitimate aim, the Court then inquires whether the interference is 'necessary in a democratic society'.[117] As Kozlowski highlights, this inquiry 'occupies most of the ECtHR's judicial attention'.[118] Applying this inquiry in Article 10 cases, the ECtHR often examines whether 'sufficient and pertinent reasons' can justify a restriction with the right to freedom of expression and whether associated restrictions are proportionate to the legitimate aim pursued'.[119] Moreover, the Court may often question whether a 'pressing social need' may justify restrictions with Article 10.[120] Failure by a Contracting Party to satisfy the 'democratic necessity test' often relates to the proportionality of measures and where criminal sanctions are imposed.[121] It remains, however, that assessments by the ECtHR on restrictions on the right to freedom of expression are often closely linked to the nature and environment wherein information and ideas are exchanged. This must now be unpacked below.

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[115] They are the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[116] This will be assessed in this section.

[117] Article 10(2) ECHR.

[118] Dan Kozlowski, '"For the Protection of the Reputation or Rights of Others": The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)' (2006) 11(1) Communication Law and Policy 133.

[119] Dirk Voorhoof, 'The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society' (2014) Working Paper, EUI RSCAS, 2014/12, Centre for Media Pluralism and Media Freedom (CMPF).

[120] Ibid.

[121] *Castells v Spain* (1992) 14 EHRR 445; *Lingens v Austria* [1986] ECHR 7; *Gunduz v Turkey* App no 35071/97 (ECtHR, 14 June 2004); *Ukrainian Media Group v Ukraine* App no 72713/01 (ECtHR, 29 March 2005).

3.2 Offensive Political Criticism that receives protection

The ECtHR affords the most extensive protection to expression containing criticism of political figures. Underpinning this is the principle that political officials occupy positions which may require public scrutiny in democracies. Illustrative here is the case of *Lingens v Austria* which concerned a journalist who had been convicted for defaming Austrian politician Bruno Kreisky.[122] The applicant's articles condemned Kreisky's 'immoral' and 'undignified' support of former SS members participating in Austrian politics.[123] The ECtHR accepted that Austria's defamation penalty had been prescribed by law and based on legitimate aims to protect Kreisky's reputation.[124] Vital, however, was the applicant's role as a 'political journalist' commenting on 'political issues of public interest' in Austria.[125] The Court opined that the 'limits of acceptable criticism' are wider when directed as politicians—such as Kreisky—who 'knowingly' expose themselves 'to close scrutiny' by journalists and the wider public.[126] Finding a violation of Article 10, the ECtHR further highlighted that open political debate lies at the 'very core of' democracy and 'prevails throughout the Convention.'[127] The ECtHR again focused on the roles of politicians in *Castells v Spain* when examining Spain's criminal conviction of a Senator who publicly alleged that state officials facilitated abuses of Basque dissidents.[128] The Court found a violation of Article 10 because the applicant had been convicted without being given any opportunity to substantiate his claims.[129] This had particular

[122] *Lingens v Austria* (n 121).
[123] Ibid [9].
[124] Ibid [36].
[125] Ibid [37].
[126] Ibid [42].
[127] Ibid.
[128] *Castells v Spain* (n 121).
[129] Ibid [46].

significance because the applicant was a member of the political opposition who had accused political officials in a 'dominant position' of holding elected office.[130] Again highlighting the wider 'limits of permissible criticism' directed at politicians, the ECtHR clarified that 'actions or omissions' of political officials require 'close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.'[131] The Court further addressed the need for public scrutiny of political officials in *Manole and Others v Moldova* where applicants were editors of public media company.[132] They alleged that the company's programming had been edited censored due to state interference with editorial decisions surrounding political coverage. Agreeing that Moldova violated Article 10, the ECtHR reasoned that pluralism in democracy requires 'diverse' political viewpoints even if certain viewpoints 'call into question the way a State is currently organised, provided that they do not harm democracy itself.'[133]

The ECtHR places extensive scrutiny on underlying motives that appear to fuel the dissemination of political criticism. Pivotal here is that offensive—and even humiliating—materials may convey legitimate political grievances. *Incal v Turkey* concerned applicants from a Kurdish political party who had been convicted for distributed leaflets alleging a state campaign to expel Kurds from the Izmir constituency.[134] Turkey argued that this conviction responded to the dissemination of separatist propaganda and cited the leaflets' instructions to 'oppose' alleged expulsions and protect Izmir's Kurds.[135] Finding a violation of

[130] Ibid.
[131] Ibid [46].
[132] App no 13936/02 (ECtHR, 17 September 2009).
[133] Ibid 95.
[134] (2000) 29 EHRR 449, [10].
[135] Ibid.

Article 10, the ECtHR stated the particular importance of freedom of expression for minority 'political parties and their active members.'[136] Significantly, the Court rejected Turkey's argument that the applicants' use of political propaganda had formed an attempt to fuel insurrections and reasoned that the leaflets merely contained 'political demands.'[137] The Court placed similar focus on intentions behind offensive political criticism in *Oberschlick v Austria.*[138] This involved an applicant's conviction for defaming a politician who had glorified German soldiers in the Second World War.[139] The applicant had written that the politician was 'not a Nazi' but was an 'idiot.'[140] The ECtHR agreed with Austria that the article's remarks could 'certainly be considered polemical' but rejected that they were a 'gratuitous personal attack.'[141] Key here was the Court's view that the applicant had commented on actual statements 'derived' from the politician's speech.[142] Thus, his offensive insult had been based on an 'objectively understandable' form of political criticism.[143] The Court placed identical focus on the intentions underlying political criticism in *Lopes Gomes da Silva v Portugal.*[144] In that case, the applicant journalist was convicted for libel after describing a political chairman as 'grotesque' and 'buffoonish.'[145] The applicant himself acknowledged that his comments had been expressed in 'virulent and provocative' terms but maintained that they were 'justified in view of the equally virulent nature of the political ideology advocated by the targeted politician.'[146]

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[136] Ibid [46].
[137] Ibid [50].
[138] App no 20834/92 (ECtHR, 1 July 1997).
[139] Ibid [8].
[140] Ibid [9].
[141] Ibid [33].
[142] Ibid
[143] Ibid.
[144] App no 37698/97 (ECtHR, 28 September 2000).
[145] Ibid [10].
[146] Ibid [25].

Agreeing with these elements, the Court reasoned that the applicant's criticism did not:

> Convey a gratuitous personal attack because the author supports them with an objective explanation. The Court points out in that connection that, in this field, political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.[147]

As this language reveals, the ECtHR acknowledges that certain political communications—even if involving humiliation or mockery—require tolerance in democracy as they may often convey legitimate political grievances. This principle is epitomised by the Court's approach to political satire. In *Vereinigung Bildender Künstler v Austria,* the ECtHR found a violation of Article 10 after an applicant was ordered to suspend an art exhibition depicting public figures in sexually explicit positions.[148] The ECtHR highlighted that the exhibition did not intend to convey realistic portrayals but conveyed a 'caricature of the persons concerned using satirical elements.'[149] Highlighting the value of political satire in democracy, the Court stressed that:

> Satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.[150]

Notable here is the ECtHR's explicit recognition that even factual 'exaggeration'

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[147] Ibid [34].
[148] *Vereinigung Bildender Künstler v Austria* (n 99).
[149] Ibid [33].
[150] Ibid.

and 'distortion' may serve legitimate purposes in democracies.[151] This was further evidenced where the Court found a violation of Article 10 in *Alves da Silva v Portugal*.[152] The applicant was convicted for displaying a puppet at a festival depicting a mayor 'unlawfully' receiving sums of money.[153] The ECtHR accepted that Portugal had an interest in protecting the mayor's reputation but noted the crucial factor that the applicant's depiction was 'quite clearly satirical in nature.'[154] The Court further delineating political satire as a form of 'social commentary' that involved an 'exaggeration and distortion of reality' which required tolerance in democracies.[155] Such tolerance of vital importance considering the 'greater degree of tolerance towards criticism' of political officials.[156] These elements of the ECtHR's approach to satire indicates that polemic and exaggerated communications may have crucial value in democracy provided that they are couched alongside plausible political grievances. For example, *Muller v Switzerland* concerned an applicant's conviction for depicting well-known public figures in sexually explicit paintings.[157] In that case, the ECtHR agreed with Switzerland that the artwork was obscene and that the restriction on the right to freedom of expression was proportionate. Notably, the paintings made no reference to political figures and did not convey political criticism.[158] Further illustrative here is the Court's finding of a violation of Article 10 *Eon v France.*[159] Here, the applicant was a political activist convicted for

[151] Ibid.
[152] App no 41665/07 (ECtHR, 20 June 2009).
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid
[157] App no 10737/84 (ECtHR, 24 May 1988).
[158] Ibid.
[159] App no 26118/10 (ECtHR, 14 March 2013).

waving an incendiary placard at the French President.[160] The ECtHR accepted that the placard contained vulgar language but highlighted how it referenced a phrase that the President was widely known for uttering. The Court again described satire as a form of 'exaggeration' and 'distortion of reality' but accepted that the applicant's criticism may not receive protection under Article 10 if it has aimed to target the President's 'private life or honour.'[161] Finding a violation of Article 10, however, the Court highlighted the placard had not constituted a 'gratuitous personal attack' and had been disseminated by a political activist who had 'fought a long-running campaign in support of a family of illegal immigrants' before the state visit.[162] Thus, the ECtHR's extensive protection of political satire is not only linked to the need for open political debate but also to the potential for satire to air genuine political grievances through exaggerated means.

These elements of the ECtHR's approach to Article 10 raise significant concerns surrounding the OSMR Act and potential applications of Part 11 obligations to restrict content 'by which a person humiliates another person.'[163] The Court not only offers robust protection to political satire but also appears keen to suggest that the intentional mockery of political officials has beneficial effects in a democratic society.

3.3 Limits to Political Criticism

Not all forms of critical political commentary require protection in democracies. In the above-mentioned case of *Manole v Moldova*, the ECtHR made a pivotal distinction between communications which offend state officials and

[160] Reading '*Casse toi pov'con*' ('Get lost, you sad prick').
[161] Ibid.
[162] Ibid.
[163] Section 139A OSMRA.

communications which undermine 'democracy itself.'[164] This delineation is consistently evidenced in the Court's approach to anti-democratic propaganda. Instructive here is the ECtHR's application of Article 17 of the ECHR when confronted with communications which the Court interprets as destroying Convention rights. This provision, coined by Hannie and Voorhoof as the ECHR's 'abuse clause,' states that:[165]

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.[166]

The ECHR's application of Article 17 illustrates a key distinction between offensive political criticism and harmful totalitarian propaganda. The European Commission of Human Rights (ECommHR) first applied this provision in *Communist Party of Germany v the Federal Republic of Germany* where Germany dissolved the German Communist Party.[167] The Commission rejected admissibility under Article 10 due to the party's 'revolutionary' aim to promote 'dictatorship of the proletariat' and abolish Germany's 'liberal democratic order'.[168] The ECommHR assessed a different form of propaganda in *Glimmerveen and Hagenbeek v the Netherlands* where the applicants were election candidates who had been prosecuted for disseminating xenophobic pamphlets.[169] The

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[164] See above at 3.2, and App no 13936/02 (n 132).
[165] Hannes Cannie and Dirk Voorhoof, 'The abuse clause and freedom of expression in the European Human Rights convention: an added Value for Democracy and Human Rights Protection? Netherlands Quarterly of Human Rights' (2011) 29(1) Netherlands Quarterly of Human Rights 54.
[166] Article 17 ECHR.
[167] App no 250/57 (ECommHR, 20 July 1957).
[168] Ibid.
[169] App nos 8348/78 and 8406/78 (ECommHR, 11 October 1979).

Commission rejected admissibility under Article 10 because the pamphlets called for expulsions of non-whites from the Netherlands.[170] That they had disseminated their views 'in the context of elections' did not mean they had been contributing valid political communications to the electoral process.[171] Conversely, the Commission identified that the pamphlets contained ideas that were 'inspired by the overall aim to remove all non-white people from the Netherlands'.[172] Such ideas were 'aimed at the destruction of any of the rights and freedoms' in the Convention.[173] This reasoning was further epitomized by the ECommHR's use of Article 17 to curtail Nazi propaganda. For example, the Commission rejected admissibility under Article 10 in *B.H, M.W, H.P and G.K. v Austria* where Austria had prevented neo-Nazi politicians from disseminating conspiratorial pamphlets.[174] Central to the Commission's application of Article 17 was that ideas expressed in pamphlets were 'inspired by National Socialist ideas' which were 'incompatible with democracy'.[175] Importantly, the Commission further stressed how the applicants had disseminated the pamphlets in Austria. Thus, domestic authorities were ideally placed to interpret this propaganda 'in view of the historical past forming the immediate background of the Convention itself'.[176] The Commission expressed similar deference towards national authorities in *Kühnen v Germany* where a proponent of a renewed Nazi party disseminated pamphlets excoriating 'Zionism' and 'masses of foreign workers'.[177] Applying Article 17, the Commission not only stated that the

[170] Ibid [3].
[171] Ibid.
[172] Ibid.
[173] Ibid [11].
[174] App no 12774/87 (ECommHR, 12 October 1989).
[175] Ibid [3].
[176] Ibid.
[177] App no 12194/86 (ECommHR, 12 May 1988).

pamphlets could undermine the 'basic order of democracy' but also referenced how 'reinstitution' of the Nazi party could 'revive' the 'state of violence and illegality which existed in Germany between 1933 and 1945.[178]

The fact that individuals may use political environments to spread anti-democratic propaganda does not negate the potential harms that such communications may cause. It is even arguable that the ECtHR identifies specific harms that may arise where influential leaders spread propaganda. *Le Pen v France* concerned the conviction of a politician for inciting hatred towards Muslims through public statements.[179] Le Pen—a former president of the National Front Party—proclaimed that 'the day there are no longer 5 million but 25 million Muslims in France, they will be in charge'.[180] The ECtHR stated that it attaches the 'highest importance' to freedom of expression in the context of political debate and accepted that the applicant was an elected representative who had probed matters of public interest.[181] However, it rejected admissibility under Article 10 because he had used political debate to denigrate French Muslims.[182] Crucial here was that Le Pen's influential position could 'generate misunderstanding and incomprehension' and may potentially stir up 'feelings of rejection and hostility' for Muslims.[183] As his comments were presented as 'as an already latent threat to the dignity and security of the French people,' the Court reasoned that national authorities required 'considerable latitude' to assess whether prosecution for the comments was justified'.[184] The ECtHR expressed

[178] Ibid.
[179] App no 18788/09 (ECtHR, 7 May 2010).
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.

similar reasoning when indirectly applying Article 17 in *Feret v Belgium*.[185] A parliamentarian had been prosecuted for inciting discrimination through electoral leaflets which presented immigrants as 'criminally-minded and keen to exploit the benefits they derived from living in Belgium'.[186] The ECtHR accepted that the right to freely express ideas was 'especially' important for 'an elected representative'.[187] However, the Court tempered this by stating that:

> It was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse was magnified in an electoral context, in which arguments naturally became more forceful.[188]

Significant here is that the Court does not merely appear concerned with political status but also with broader public influence. It is not only politicians who hold power to undermine democratic values but also well-known figures. Importantly, however, the ECtHR consistently identifies some form of overt incitement of discrimination before reaching a decision to reject admissibility under Article 10. In *Belkacem v Belgium*, the ECtHR rejected admissibility under Article 10 where the applicant incited religious hatred against through YouTube videos.[189] The videos encouraged listeners to 'dominate' and 'fight non-Muslim' groups.[190] The ECtHR held that such instructions constituted a 'vehement attack' which contradicted 'values of tolerance, social peace and non-discrimination which underlie the Convention.[191] Further notable here was that the applicant

[185] App no 15617/07 (ECtHR, 16 July 2009).
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] App no 34367/14 (ECtHR, 27 June 2017).
[190] Ibid [33].
[191] Ibid.

held an influential role as a Salafist leader.[192] The ECtHR also focused on the influential role of the speaker in the different circumstances of *Šimunić v Croatia*.[193] The applicant was a footballer who had been convicted for inciting discrimination by participating with fan chants which had infamous connotations to Croatian fascism and 'racist ideology'.[194] The Court highlighted that the player had not only repeated the chant four times but was also:

> A role-model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators' behaviour, and should have abstained from such conduct.[195]

One critical element which binds the ECtHR's reasoning in the above cases is the presence of some form of targeted harm directed at minority groups. The Court not only offers little protection to explicitly discriminatory speech in political contexts but appears reluctant to even give legitimacy to applications by considering applications under Article 10 in such circumstances. It is further important to note that decisions involving anti-democratic propaganda typically involve some form of unlawful hate speech. A logical question which follows is whether—in political environments—the ECtHR appears willing to agree that certain forms of harmful political criticism may be restricted even if they do not contain elements of hate speech or discrimination targeting minority groups. This is important when considering how Ireland's OSMR Act does not limit its focus to such communications and defines harmful communications broadly. An instructive example which has relevance in the Irish context is the ECtHR's interpretive approach to misleading or deceptive communication in political

[192] Ibid [8].
[193] App no 20373/17 (ECtHR, 22 January 2019).
[194] Ibid [3].
[195] Ibid [45].

contexts. *Salov v Ukraine* concerned an applicant who was prosecuted for disseminating a false rumour about the death of a Presidential election candidate.[196] Notable here is that the Court explicitly identified Ukraine's desire to provide 'voters with true information' during elections as a legitimate aim underpinning the interference.[197] However, the Court observed that Article 10:

> Does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.[198]

Here, the Court noted that the rumour was false but had not been 'produced or published by the applicant himself' and had been 'referred to by him in conversations with others'.[199] It was crucial that he had 'doubted its veracity' and had merely passed on the rumour rather than producing it himself.[200] The ECtHR placed similar focus on the applicant's intention in *Kwiecień v Poland* where an applicant had been convicted for publishing an open letter containing spurious allegations of misconduct by an election candidate.[201] Finding a violation of Article 10, the Court focused squarely on the applicant's motivations and discerned that his 'general aim' had been to 'attract the voters' attention to the suitability of' an election candidate whom the applicant believed to be unfit for

[196] App no 65518/01 (ECtHR, 6 September 2005).
[197] Ibid [110].
[198] Ibid [113].
[199] Ibid.
[200] Ibid.
[201] App no 51744/99 (ECtHR, 9 January 2007).

office.[202] The 'thrust of his argument' was not to lie about the politician but to 'cast doubt' on his electoral suitability.[203] This aspect of the applicant's intention—even if some of his comments may have appeared 'far-fetched'—required close scrutiny due to the political context of his claims.'[204] The Court again focused on the applicant's intention when finding a violation of Article 10 in *Kita v Poland*.[205] The applicant had publicly accused high ranking municipality officials of misusing public funds.[206] The ECtHR agreed with Poland that the applicant's statements had not been 'based on precise or correct facts' but still found a violation of Article 10.[207] Crucial was the Court's interpretation that the 'thrust of the applicant's article was to cast doubt on the suitability of the local politicians for public office.'[208] The ECtHR again applied this reasoning but modified key language in *Brzeziński v Poland* where the applicant election candidate had been convicted for defamation after publishing a booklet accusing politicians of receiving unlawful subsidies.[209] Significantly, the Court explicitly accepted that Poland—and other Contracting Parties—had legitimate aims to 'ensure that 'fake news' did not undermine the 'reputation of election candidates' or 'distort' election results.[210] However, the Court still found a violation of Article 10 because Polish courts had 'immediately classified' his statements as 'malicious' lies without any delineation between confected allegations and good faith criticism of political officials.[211] This may be contrasted with *Staniszewski v*

[202] Ibid [51].
[203] Ibid.
[204] Ibid.
[205] App no 27710/05 (ECtHR, 22 July 2008).
[206] Ibid [8].
[207] Ibid [28].
[208] Ibid [51].
[209] App no 47542/07 (ECtHR, 25 July 2019).
[210] Ibid [5].
[211] Ibid.

Poland where the ECtHR finally found that Poland's application of its electoral law did not violate Article 10.[212] The applicant journalist alleged that a local Mayor had chosen a specific village for a regional harvest festival solely to generate support for his electoral candidacy. Identifying Poland's legitimate aim to protect 'the integrity of the electoral process' from 'false information' that could affect voting results, the Court noted that the applicant had not attempted to substantiate his 'untrue' claims in good faith.[213] This lack of good faith was crucial even though the applicant had disseminated his statements in an electoral—and therefore political—context.[214]

The ECtHR's reasoning in the above cases is vital when reflecting on OSMR provisions targeting harmful online content. Importantly, the Court draws explicit boundaries to its otherwise robust protection for political communications. This is not only seen in cases involving discriminatory political propaganda but also in cases involving deceptive communication. The central thrust behind the ECtHR's reasoning in these cases is that there may be limits to open political debate but only when national authorities identify some concrete incitement to discrimination or hate. Moreover, even when the ECtHR does not identify these elements, the Court's focus is firmly on whether applications disseminate offensive or misleading information about political officials in good faith. As will be discussed in the conclusion, it is highly doubtful that risk standards under Part 11 of the OSMR Act adhere to this key standard.

3.4 Protecting Access to Lawful Communications

The ECtHR has accepted that rapid and expanded access to information online

[212] App no 20422/15 (ECtHR, 14 October 2021).
[213] Ibid [19].
[214] Ibid [51].

may simultaneously expand and restrict political debate.[215] Importantly, the Court has also unequivocally confirmed that technological intermediaries have a duty under Article 10 to mediate access to potentially harmful information in political contexts. Critically, however, the Court has only applied this duty to communications which are unlawful in Contracting Party states. Instructive here is the Grand Chamber case of *Delfi AS v Estonia* where Estonia held an applicant online news portal liable for failure to pay damages for defamatory comments posted on the portal's comment section.[216] The comments contained insults and corruption allegations against a well-known shipping company and had remained online for six weeks before the applicant removed them upon explicit request from the company's representatives. However, the applicant did not pay the company requested damages. The ECtHR acknowledged the internet's potential to promote 'the free flow of ideas and information' but highlighted how the 'scope and speed of the dissemination of information on the Internet' may 'considerably aggravate the effects of unlawful speech on the Internet compared to traditional media'.[217] Importantly, however, the Court did not find that Estonia had not violated Article 10 by holding *Delfi* liable for the comments. A critical factor here was the Court's agreement with Estonia that the comments had been 'clearly unlawful' and 'on their face' were 'tantamount to an incitement to hatred or to violence.'[218] The ECtHR's focus on the unlawful nature of user generated comments was further visible in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*.[219] Here, the Court found that Hungary had violated

[215] *Times Newspapers v The United Kingdom* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009); *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05, [63]; *Willem v France* App no 10883/05 (ECtHR, 16 July 2009).
[216] App no 64569/09 (ECtHR, 16 June 2015).
[217] Ibid [147].
[218] Ibid [114].
[219] App no 22947/13 (ECtHR, 2 February 2016).

Article 10 for holding applicant news portals liable for defamatory user comments which had criticised well-known real estate companies.[220] Importantly, the Court distinguished the circumstances from *Delfi* by highlighting that 'the incriminated comments did not constitute clearly unlawful speech and they certainly did not amount to hate speech or incitement to violence'.[221] Absent this crucial element, the Court reasoned that the imposition of objective liability amounted to 'to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet'.[222] The ECtHR again focused legality when it found Hungary to have violated Article 10 in *Magyar Jeti Zrt v Hungary*.[223] Here, the applicant had been held liable for posting a hyperlink on its online portal which directed users to a YouTube interview containing defamatory statements surrounding involvements of right-wing politicians in the harassment of Roma students by football fans.[224] The Court again distinguished the circumstances from Delfi by focusing on how the 'utterances' in the linked interview 'could not be seen as clearly unlawful' by the journalist who had initially posted it.[225] Without a clear identification of this 'clearly unlawful' element, the Court opined that the application of:

> Objective liability may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable

[220] Ibid [42].
[221] Ibid [64].
[222] Ibid [82].
[223] Application no. 11257/16 (ECtHR, 4 December 2018).
[224] Ibid [8].
[225] Ibid [82].

> content they have no control. This may have, directly or indirectly, a chilling effect on freedom of expression on the Internet.[226]

Implicit in this reasoning is that uncertain or vague liability thresholds for harmful online communications may have unintended chilling effects on freedom of expression by encouraging excessive removal online information. The ECtHR addressed this in the electoral context of *Jezior v Poland*.[227] The Court found a violation of Article 10 where Poland had convicted the applicant for hosting false statements contained in user generated comments hosted on his website.[228] The ECtHR accepted that the speed of the internet communications could exacerbate the harm caused to the election candidate.[229] However, it highlighted how the applicant had integrated notification mechanisms to detect and remove defamatory content.[230] Acknowledging this as a good faith attempt to prevent the dissemination of harmful false statements, the Court disagreed with Poland that the applicant should be required to pre-monitor comments as this 'would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.'[231]

Notable in these cases is that the ECtHR has highlighted difficulties for online platforms to distinguish between clearly unlawful materials and potentially lawful materials. Such language reflects concerns from authors such as Keller that vague restrictions on access to online communications—without 'nuanced human judgment'—can be problematic when applied to legally

[226] Ibid [83].
[227] App no 31955/11 (ECtHR, 4 June 2020).
[228] Ibid.
[229] Ibid [21].
[230] Ibid.
[231] Ibid.

ambiguous content.[232] This is significant when reflecting on Part 11 of the OSMR Act. Recalling earlier discussions of Part 11 in this article, this legislation does not merely fail to make clear distinctions between unlawful and lawful content. It explicitly opens the door for obligations to restrict legal communications in vaguely defined language. This will now be further unpacked below.

4 Conclusion

This article has identified key provisions of Ireland's OSMR Act which address harmful online content and has considered the application of these provisions to lawful forms of offensive political communications. Identifying the vague and potentially wide-ranging nature of OSMR provisions under Part 11, this article has further mapped applicable standards surrounding the right to freedom of expression under Article 10 ECHR. Focus must now be given to several key conclusions that may be gleaned from this analysis.

The fact that the OSMR Act addresses lawful communications is perhaps unsurprising. As the introduction to this article outlined, it is not the first instance of European legislation which imposes requirements for online media providers to restrict access to harmful but legal content. This was not only discussed in the context of the UK's Online Safety Bill but also in certain provisions of the EU's Digital Services Act. It is notable, however, that the OSMR Act transposes the revised AVMSD in a manner that exceeds requirements under this EU Directive. As has been noted, the AVMS explicitly lists the content which is required Member States to regulate but makes no express requirement for Member States to develop rules for harmful but legal communications. The OSMR Act diverges

[232] Ibid.

from this by regulating legal content under vague and potentially-over inclusive terminology.

One critical finding from this article relates to the vague and potentially over-inclusive nature of obligations under Part 11 of the OSMR Act to restrict access to lawful communications. As has been probed, Section 139A not only addressed explicitly illegal content but also extends to 'other categories' of harmful online content. Arguably most concerning under this provision is the obligation for media providers to restrict access to content 'by which a person humiliates or bullies another person.'[233] Importantly, such criteria may lead to unjustified restrictions on the right to freedom of expression. As was identified, the right to freedom of expression under Article 10 ECHR extends to polemic and offensive forms of political criticism. The ECtHR—when applying this provision—not only offers robust protection for offensive political criticism but also stresses the valuable role that political satire may play in a democratic society. Arguably, the nebulous obligations to restrict humiliating communications under Part 11 of the OSMR Act not only opens the door to excessive removals of lawful content but also may chill legitimate political expression. This prospect is not hypothetical. As referenced, there is substantial evidence of 'over removal' of legitimate political communication based on vaguely defined legal requirements to restrict access to harmful online content.[234] Accordingly, the language of this provision should either be circumscribed to exclude political criticism or should be dropped entirely.

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[233] Ibid.

[234] See Dia Kayyali and Raja Althaibani, 'Vital Human Rights Evidence in Syria Is Disappearing from YouTube' (*VOX-Pol*, 22 November 2017) <https://www.voxpol.eu/vital-human-rights-evidence-syria-disappearing-youtube/> accessed 12 December 2024; Malachy Browne, 'YouTube Removes Videos Showing Atrocities in Syria' (*The New York Times*, 22 August 2017) <https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html> accessed 12 December 2024.

A further concern must be highlighted surrounding the potential for new forms of harmful but legal content to be addressed under Part 11 of the OSMR Act. As discussed in this article, Part 11 opens the door for the new Media Commission to designate a potentially wide range of harmful content to be restricted for the purposes of Part 11. This is not only seen in the new Commission's powers to specify new forms of harmful content under Part 11 but also through the Commission's powers to apply—and enforce compliance—with mandatory online safety codes. The key standard here does not require content to involve elements of illegal activity, targeted discrimination, or even bad faith behaviour. The key standard under Part 11 merely requires content to pose 'a risk of significant harm to a person's physical or mental health, where the harm is reasonably foreseeable.'[235] This represents a standard which appears far easier to satisfy than currently provided for in the established jurisprudence of the ECtHR surrounding the right to freedom of expression.

It is far from certain whether the risk-based standard under Part 11 of the OSMR Act will ensure effective protection of the right to freedom of expression. This is important when reflecting on the ECtHR's application of Article 10 ECHR. As assessed, any restrictions on the right to access information online must be based prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society. Moreover, even if the ECtHR agrees that communications may potentially pose harm in political contexts the Court is unlikely to agree with Contracting Parties that this should result on a restriction on access to lawful communications. In political contexts, the Court is consistently likely to find a violation of Article 10 ECHR unless there is some identifiably illegal element of harmful communications. This does not mean that all forms of potentially lawful

[235] Section 139B(4) OSMRA.

political communications may be permitted in a functioning democracy. Importantly, however, obligations for providers to restrict access to such communications must be narrowly defined and should only apply to circumstances whereby content involves targeted discrimination or some form of bad faith deception of the electorate. This is not only necessary to avoid excessive restrictions on lawful communications but also to avoid arbitrary chilling effects on legitimate democratic communications. The risk based standard Part 11 of the OSMR Act is likely to cause restrictions on access to offensive information in a manner that may likely diverge from these important human rights standards. The future operation of the OSMR Act in this manner will be heavily dependent on how the newly introduced Media Commission enforces this Part.