

IRELAND

Although the term “digital sovereignty” has received limited attention in Irish public discourse to date, this concept may have important implications for many of Ireland’s key interests.

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Introduction

In Ireland's public discourse to date, there has been little public commentary on the concept of European digital sovereignty by Irish politicians or officials. This is despite the phrase's increasing prominence among many EU policymakers.⁴⁶ While the concept lacks a precise definition, European Commission President Ursula von der Leyen has written that digital sovereignty "describes the capability that Europe must have to make its own choices, based on its own values, respecting its own rules."⁴⁷ Nonetheless, there are some significant policy topics associated with the term "digital sovereignty" which are particularly important for Ireland or upon which an official Irish perspective exists. Throughout, Ireland has consistently emphasised the importance of Europe's digital and economic openness, favouring an 'open' model of strategic autonomy, and sought to ensure that digital sovereignty does not lead to a protectionist approach for Europe.

Irish policymakers have made little explicit commentary on the concept of European digital sovereignty, and the country's most recent digital strategy dates from 2013. Nonetheless, it is possible to identify aspects of digitalisation related to EU digital sovereignty which are particularly relevant for Ireland's interests or upon which an official Irish view exists. First, this paper will examine Ireland's approach to the promotion and regulation of digitalisation where this is relevant to EU policy. Then three key topics of particular relevance to Ireland's interests will be examined. The first is freedom of cross-border data flows between the EU and the rest of the world, particularly the US and UK, Ireland's two largest trade partners. A second subject is Ireland's special regulatory responsibility for the data protection of European citizens, a special role which is now increasingly challenged. Third is the European Commission's proposal for a digital levy, which may disproportionately affect more companies based in Ireland than elsewhere in Europe. Overall, the developing concept of European digital sovereignty and the role it

may play in shaping European digital policy may have important implications for the future of Ireland's society and economy.

Key Topics of Relevance for Ireland

Promoting and Regulating Digitalisation

Ireland has a clear position on the importance of investing in digital technologies both nationally and at EU-level.⁴⁸ In Ireland's domestic policy this is reflected by initiatives such as the "Disruptive Technologies Innovation Fund", worth €500 million (which invests in digital technologies in addition to non-digital technologies)⁴⁹ or in Ireland's plans to use 32% of its EU-supported National Recovery and Resilience Plan - €295 million - for "accelerating and expanding digital reforms and transition."⁵⁰ This figure is significantly more than the minimum of 20% that Member States are required to invest in digitalisation. Ireland's plan focuses on six digital priorities: (i) a shared government data centre to support the digitalisation of public services; (ii) ensuring broadband connectivity and ICT equipment for schools; (iii) establishing an online census option; (iv) promoting 5G technologies; (v) supporting eHealth initiatives and (vi) a grants scheme to support the digitalisation of businesses and digital innovation hubs throughout Ireland. The importance of digital inclusion and digital skills is also emphasised in this plan. Despite this focus on digitalisation however, Ireland's most recent national digital strategy dates from 2013 and is now clearly outdated.⁵¹ A public consultation on developing a new national digital strategy was held in 2018, but as of early 2021 no new national digital strategy has been released.⁵² Nonetheless, an Irish AI strategy has recently been published and Ireland has a 2019-2024 national Cyber Security strategy.⁵³ Ireland also supports ambitious spending at a European level. In June 2021, the Taoiseach (Irish Prime

Minister), Micheál Martin, described Europe's current funding for innovation and the digital and green transitions as inadequate and he expressed support for an even more ambitious European approach.⁵⁴

Broadly, with regard to the regulation of digitalisation, Ireland supports a regulatory environment that it deems innovation-friendly and which would avoid over-burdensome regulation. This focus is prominent in Ireland's submissions on the Digital Services Act package and on the EU White Paper for Artificial Intelligence.⁵⁵ Both of these submissions demonstrate the Irish concern that the European proposals could risk overregulating and harming innovation. With regards to the Digital Services Act, a joint letter by Ireland, Sweden and Finland in June 2021 raised concerns regarding free speech implications about certain aspects of the proposed Act.⁵⁶

Domestically, Ireland has been particularly active regarding the regulation of harmful online content. In Ireland, numerous pieces of legislation (including an Online Safety Bill among others) are seeking to address issues including online harassment, intimate imagery, hate speech, and transparency for online political advertising. However, concerns have been raised by a variety of stakeholders about conflicts or problematic interactions between domestic Irish legislation and upcoming European legislation when it comes to online content regulation.⁵⁷ Recently, cybersecurity has become a more prominent topic in Ireland, following a major cyberattack against Ireland's healthcare system which caused major disruption.⁵⁸ Overall, Ireland has a clear position on the importance of promoting and investing in digitalisation and in ensuring an effective and innovation-friendly regulatory framework.

Ireland and cross-border data flows between the EU, US and UK

A critical issue for the European digital sovereignty initiative is personal data flows between the EU and the rest of the world. It was following the Edward Snowden leaks

concerning the misuse of personal data in 2013 that "digital sovereignty" became a prominent term in European policy discourse.⁵⁹ In accordance with the EU's GDPR, generally, the transfer of personal data outside of the EU is highly restricted, unless the third country in question is deemed to have equivalent levels of data protection, or unless a special mechanism exists to uphold the data protection rights of European citizens. For Ireland, the flow of personal data between the EU and two of the EU's most important partners, the United States and the United Kingdom, is a particular concern, as these countries are Ireland's two largest trading partners.⁶⁰

The EU-US Privacy Shield framework that facilitated the transfer of personal data between the EU and the US was invalidated by the Court of Justice of the European Union in July 2020, creating serious difficulties for transatlantic data transfers.⁶¹ The Court's judgement was prompted by concerns regarding domestic US legislation and mass US security surveillance.⁶² Currently, many companies continue to transfer personal data between the US and the EU using Standard Contractual Clauses (SCCs). However, there is ongoing legal debate regarding the validity of SCCs to transfer personal data in this way and the future use of SCCs is actively challenged.⁶³

Following Brexit, an initial European Commission draft data adequacy decision which proposed enabling free flows of personal data between the EU and the UK⁶⁴ was met with significant concerns in the European Parliament and by the European Data Protection Supervisor.⁶⁵ When the European Commission finally adopted the data adequacy decision in June 2021, it came with significant caveats. Most importantly, the data adequacy decision can be reviewed if UK data protection law is changed, and the data adequacy decision will automatically expire after four years.⁶⁶ As leading British policymakers have openly discussed diverging from the GDPR following Brexit, difficulties for UK-EU data flows may follow in the future.⁶⁷

Impediments to the free flow of personal data between the EU and the US or UK could have negative consequences for a wide range of economic sectors in Ireland.⁶⁸ This is particularly true for Ireland's digital sector which accounts for approximately 13% of Ireland's GDP and 26% of Ireland's exports according to Technology Ireland.⁶⁹ The value of digitally-enabled service exports from Ireland, which frequently rely on data transfers, was estimated to be \$171.9 billion in 2018 (€145 billion) - the second highest figure in the EU after Germany.⁷⁰ In 2020, Host in Ireland had predicted €7 billion of investments in data centres in Ireland over the next five years; however some of this investment may be predicated on the continued free flow of cross-border data.⁷¹

Some studies have estimated that the total prevention or major restriction of data flows for the EU could cost the EU economy as a whole as much as €300 billion.⁷² While, such an extreme loss may be unlikely in practice, these figures show the potential scale of the economic impact. A 2021 global study by the Irish law firm William Fry found that for data-related investments, investors ranked the data-related regulatory regime as the most important investment factor to consider - and more important than talent, ease of doing business, and taxation policy, even though taxation policy was the most important consideration for investors in 2016.⁷³ The continuing uncertainty regarding personal data transfers thus poses particular risks for the Irish economy.

Ireland's Data Protection Role

Under the GDPR's "One Stop Shop Mechanism", Ireland is effectively the lead data protection regulator of the world's largest digital technology companies for their conduct throughout the EU, as many of these companies are headquartered in Ireland. Politico has thus described Ireland as "the Western world's first line of defence against misuses of people's data."⁷⁴ Since the implementation of the GDPR, Ireland's data protection regulator,

the Data Protection Commission (DPC), has experienced one of the largest increases in staff relative to population in the EU,⁷⁵ however due to its cross-border responsibilities it faces a disproportionately high number of cases to regulate. In the Irish Government's Budget 2021, the DPC received an allocation of €19.1 million in funding, an increase of €2.2 million over the previous year.⁷⁶ The additional funds, however, were just over half of the €4.16 million that the DPC had requested.⁷⁷ Ms Dixon had stated that the DPC needed these additional resources because it sits at the "frontline of EU data protection regulations" and is acutely strained by the "disproportionate resources" of the multinational corporations it must regulate, warning that the DPC's ability to operate effectively would affect Ireland's credibility on the world stage.⁷⁸ Privacy activists both in Ireland and abroad, and other European data protection regulators, have criticised the Irish DPC claiming that the DPC's processes and procedures are inefficient and hinder adequate GDPR enforcement.⁷⁹ Despite hundreds of complaints on cross-border data cases, some by other European regulators, as of mid-2021 the DPC had only ever issued one cross-border GDPR fine.⁸⁰ Commissioner Dixon has argued that enforcement is difficult due to the DPC's constrained resources, the complexity of the cases and the bureaucracy involved with the "one stop shop mechanism", in which other regulators in Europe have allegedly been slow in cooperating with and providing required information to the DPC.

Both the Irish and European parliaments have recently begun scrutiny of the Irish DPC. Privacy activists have warned the Irish parliament that the alleged inefficacy of the Irish DPC poses significant reputational risks for Ireland.⁸¹ In May 2021, the European Parliament passed a resolution calling upon the European Commission to take infringement proceedings against Ireland because of what it deemed to be an "insufficient level of enforcement of the GDPR."⁸² National data protection regulators in other EU states have also sought the capability to launch cases of their own against Irish-based companies.⁸³ As

a result of such steps, in June 2021 the Court of Justice of the European Union clarified that in certain specified circumstances, data protection supervisory authorities can take cases against firms located in other countries for cross-border GDPR cases.⁸⁴ It is likely that as Europe focuses on digital sovereignty and citizens' control over their data, Ireland's role in data protection will come under increasing scrutiny and pressure.⁸⁵

Ireland and the European Digital Levy

The European Commission's work to develop a proposal for a European digital levy is premised on the view that many digital corporations produce revenues and profits online in countries in which they are not physically present and therefore do not pay the same level of tax as their physical counterparts.⁸⁶ The European Commission proposal for a digital levy had previously been expected for July 2021 but is now postponed until at least Autumn 2021 to prioritise a focus on the OECD-led international talks on corporation tax reform.⁸⁷

In the OECD-led international talks on corporation tax reform, Ireland's corporate tax policy has provoked some controversy. Ireland considers its corporate tax policy to be an important attraction for foreign investment in Ireland, and corporate tax paid by multinational corporations, including digital multinationals, is a major source of Irish government revenue.⁸⁸ Under proposals discussed in the ongoing OECD-led tax talks, the Irish Department of Finance has predicted that Ireland could lose out on over €2 billion of revenue per year, or a fifth of Ireland's corporate tax intake.⁸⁹ Ireland has expressed considerable reservations on aspects of proposals emerging in the OECD-led talks.

Ireland is similarly concerned about the implications of a European digital levy, which might potentially either reduce Ireland's attractiveness as an investment location or reduce Ireland's corporate tax revenues. A previous European Commission proposal for a digital services tax in 2018 was blocked by a number of Member States including Ireland.⁹⁰

However, some individual EU Member States have introduced digital taxes or levies, which has prompted tensions with the US, which believes that such taxes disproportionately target American companies. The US has threatened trade tariffs against a number of individual European nations for the introduction of digital services taxes or levies, prompting concerns of a potential trade war.⁹¹ In contrast, the European Commission has indicated that the digital levy would apply to hundreds of companies, most of which would be European.⁹² In March 2021, Ireland argued that the timing of the EU's move towards a digital levy risked undermining the OECD-led international tax talks and could rekindle trade tensions with the US.⁹³ In June and July, the US likewise urged the EU to delay the release of its digital levy proposal, arguing that the European initiative could undermine the OECD-led talks on corporate taxation reform.⁹⁴

The international context of ongoing OECD-led international tax talks potentially makes the upcoming EU digital levy proposal even more sensitive for Ireland, as it comes at a time of possible disruption to Ireland's corporate tax policy. However, the precise details of this levy, and how it will interact with the OECD-led corporate reforms, remains to be seen.

Conclusion

The digital policies that Europe pursues in the years ahead may have a significant impact on the future of the Irish economy and society. The precise nature and role of digital sovereignty in shaping Europe's approach to digital policy may thus have important implications and potentially poses both possible risks and benefits for Ireland.

One possible risk is a reduction in Europe's openness. Key European policymakers have highlighted that they seek an EU that is both digitally open and digitally sovereign. They have argued that there is no contradiction between these goals. Nonetheless the risks of increased digital or trade barriers between the EU and its partners could arise as an unintended outcome of other policy goals.

For example, the divergence in data protection standards between the EU and its British and American counterparts could potentially result in obstacles for cross-border data flows, effectively creating unintentional *de facto* trade barriers. Europe's move towards a digital levy might potentially mean that Ireland risks becoming less attractive as an investment location or risks a reduction in corporate tax revenues. However, it could also potentially create EU-US trade tensions.⁹⁵ An increasing European focus on data protection enforcement also poses potential risks for Ireland, including reputational risks, the possibility of infringement proceedings or the possibility of Ireland's regulatory role being undermined. With regards to the regulation of online content, possible contradictions or conflicts may arise between Irish and European legislation.

However, other aspects of European digital sovereignty may well be more positive for Ireland. Major European investments and support for digital innovation have been strongly supported by Ireland. Improvements in Ireland or Europe's capabilities to supervise and enforce the GDPR might enhance data protection for all European citizens. Ireland could potentially play a role in finding a solution that enables certainty of free data flows from the EU to the US and UK while maintaining data protection standards. Regardless of the outcome, Ireland may be well positioned to become a competitive data centre hub for firms seeking to ensure GDPR compliance. Elsewhere, Ireland has welcomed European digital initiatives that will enhance the capabilities of Member States to cooperate on and address challenges such as cybersecurity threats or harmful online content. This is particularly welcome for Member States like Ireland that may be otherwise too small to act alone.

Overall, the emerging shape of Europe's digital sovereignty paradigm will play an important role in influencing the future of Ireland's digital economy and digital society. Ireland could benefit from developing this discussion nationally, to facilitate its active role in influencing the emerging shape of the European digital sovereignty agenda.

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