



Rialtas na hÉireann  
Government of Ireland

# Regulatory Impact Assessment

Online Safety and Media Regulation Bill

November 2020



## 1. Summary

<b>Department:</b> Communications, Climate Action and Environment	<b>Title of legislation:</b> The Online Safety and Media Regulation Bill
<b>Stage:</b> General scheme of Bill	<b>Date:</b> 17/12/2020
<b>Available at:</b> <a href="https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/">https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/</a>	
<b>Related Publications:</b> <ul style="list-style-type: none"><li>• The revisions to the Audiovisual Media Services Directive, Directive (EU) 2018/1808 (Available at: <a href="https://eur-lex.europa.eu/eli/dir/2018/1808/oj">https://eur-lex.europa.eu/eli/dir/2018/1808/oj</a>)</li><li>• The codified version of the Audiovisual Media Services Directive, Directive (EU) 2010/13 (Available at: <a href="https://eur-lex.europa.eu/eli/dir/2010/13/2018-12-18">https://eur-lex.europa.eu/eli/dir/2010/13/2018-12-18</a>)</li><li>• Explainer – The transposition of the revised Audiovisual Media Services Directive in Ireland (Available at: <a href="https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/">https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/</a>)</li><li>• Correlation table between the revised Audiovisual Media Services Directive and the General Scheme of the Online Safety and Media Regulation Bill (Available at: <a href="https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/">https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/</a>)</li><li>• The Action Plan for Online Safety 2018-2019 (Available at: <a href="https://www.gov.ie/en/campaigns/be-safe-online/">https://www.gov.ie/en/campaigns/be-safe-online/</a>)</li><li>• Thematic Analysis of the responses to the public consultation on the transposition of the revised Directive and the regulation of harmful online content (Available at: <a href="https://www.dccae.gov.ie/en-ie/communications/publications/Pages/Thematic%20Analysis-of-Public-Consultation.aspx">https://www.dccae.gov.ie/en-ie/communications/publications/Pages/Thematic%20Analysis-of-Public-Consultation.aspx</a>)</li><li>• Responses to the public consultation on the transposition of the revised Directive and the regulation of harmful online content (Available at: <a href="https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Regulation-of-Harmful-Online-Content-">https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Regulation-of-Harmful-Online-Content-</a></li></ul>	

[and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.aspx](#))

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**Policy Objectives:**

The key objectives of the proposed Bill are to establish a Media Commission to regulate audiovisual media services, sound media services and designated online services. The Bill will implement EU law to improve consumer protection standards for people accessing audiovisual media services, for example television broadcasting services and services like the RTÉ Player and commercial on-demand services. It will increase protection for users of video sharing platform services and provide a regulatory framework to address the spread and amplification of certain harmful online content. This will be achieved by:

1. The transposition of the revised Audiovisual Media Services Directive, Directive (EU) 2018/1808,
2. The establishment of a regulatory framework for online safety, and,
3. Providing for the functions arising from the transposition of the revised Directive and the regulatory framework for online safety to be carried out by a regulatory body with appropriate and robust structures, powers and capacity.

**Policy Options:**

1. Do nothing
2. Transpose the revised Directive through a statutory instrument, assign the regulatory functions arising from transposition to an existing regulatory body and either:
  - a. Assign the oversight of the regulatory framework for online safety to the same regulatory body, or,

- b. Establish a new regulatory body to oversee the regulatory framework for online safety.
- 3. Transpose the revised Directive through primary legislation, assign the regulatory functions arising from transposition to an existing regulatory body and either:
  - a. Assign the oversight of the regulatory framework for online safety to the same regulatory body, or,
  - b. Establish a new regulatory body to oversee the regulatory framework for online safety.
- 4. Transpose the revised Directive through primary legislation, establish a new regulatory body to carry out the functions arising from transposition and either:
  - a. Assign the oversight of the regulatory framework for online safety to the same new regulatory body, or,
  - b. Establish another separate new regulatory body to oversee the regulatory framework for online safety.

**Preferred Option:** Option 4a is preferred as, among other things, this option adequately and robustly transposes the revised Directive, aligns the national regulatory response to online safety matters with the online safety related requirements of the revised Directive under a single robust, adaptable and proportionate regulatory framework for online safety, establishes an adaptable structure for media regulation, provides greater clarity and protection to the citizen and minimises costs to the exchequer.

<b>Options</b>			
	<b>Costs</b>	<b>Benefits</b>	<b>Impacts</b>
<b>1</b>	Cost to citizens of not addressing potentially negative aspects of the activities of audiovisual media services and online services. Cost to exchequer from fines arising from failure to transpose Directive.	No additional regulatory burdens on the exchequer or industry	Negative aspects of the regulated sectors not addressed; EU obligations not met; Reputational damage. Government commitments regarding online safety not realised

<b>2a</b>	Cost to citizens of not adequately addressing negative aspects of regulated sectors; Funding costs on exchequer given limitations of statutory instruments, which can't be used to create industry levies	Limited amount of progress in addressing negative aspects of regulated sectors	Negative aspects of the regulated sectors not adequately addressed; EU obligations not adequately met; Government commitments regarding online safety not adequately realised; Significant costs on exchequer
<b>2b</b>	Cost to citizens of not adequately addressing negative aspects of regulated sectors; Funding costs on exchequer given limitations of statutory instruments, which can't be used to create industry levies; Cost to exchequer of funding two regulatory bodies; Lost synergies between EU and national online safety matters	Limited progress in addressing negative aspects of regulated sectors	Negative aspects of regulated sectors not adequately addressed; EU obligations not adequately met; Government commitments regarding online safety not adequately realised; Significant costs on exchequer arising from funding two regulatory bodies
<b>3a</b>	Cost to citizens arising from difficulties in addressing negative aspects of regulated sectors due to the ill-suited structures of existing regulatory bodies for taking on new functions; Start-up/bridging funding required from exchequer	Progress in addressing regulatory requirements; Cost of regulation borne by the regulated sectors in accordance with the principle of proportionality	Negative aspects of the regulated sectors addressed in principle but progress hampered by existing regulatory structures; EU obligations adequately met in principle with gaps arising in practice; Government commitments regarding online safety realised in principle with gaps arising in practice; Costs to exchequer minimised
<b>3b</b>	Cost to citizens arising from difficulties in addressing negative aspects of regulated sectors due to	Progress in addressing regulatory	Negative aspects of regulated addressed in principle but progress

	the ill-suited structures of existing regulatory bodies; Start-up/bridging funding required from exchequer for two regulatory bodies; Increased public sector obligations costs on exchequer; Lost synergies between EU and national online safety matters	requirements; Cost of regulation borne by the regulated sectors in accordance with the principle of proportionality	hampered by existing regulatory structures; EU obligations adequately met in principle with gaps arising in practice; Government commitments regarding online safety realised in principle with gaps arising in practice; Further costs on exchequer arising from public sector obligations to two regulatory bodies
<b>4a</b>	Start-up/bridging funding required from exchequer.	Significant progress in addressing regulatory requirements Cost of regulation borne by the regulated sectors in accordance with the principle of proportionality	Negative aspects of the regulated sectors robustly addressed; EU obligations adequately met; Government commitments regarding online safety substantially realised; Costs on exchequer minimised
<b>4b</b>	Start-up/bridging funding required from exchequer for two regulatory bodies; Increased public sector obligation costs on exchequer; Lost synergies between EU and national online safety matters	Significant but disjointed progress in addressing regulatory requirements; Cost of regulation borne by the regulated sectors in accordance	Negative aspects of regulated sectors only partially addressed due to lost synergies; EU obligations adequately met; Government commitments regarding online safety substantially realised with gaps arising in practice; Further costs on exchequer arising from public sector

		with the principle of proportionality	obligations to two regulatory bodies
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## **2. Statement of policy issue and objectives**

### **Policy Context**

The EU has adopted a new Directive, revising the existing Audiovisual Media Services Directive to reflect the rapid changes that the video media market was and is experiencing. The revised Directive updates the rules and requirements for television broadcasting services and on-demand audiovisual media services like the RTÉ Player.

The revised Directive also requires Member States to ensure that video sharing platform services take appropriate measures to protect minors from harmful content and all users from hate speech and certain criminal content.

These provisions are required to be provided for in Irish law.

At the same time, online safety is increasingly recognised as one of the great challenges facing our society. The online world touches upon all aspects of Irish society and is no longer a separate space from our everyday lives. As recognition of the challenges posed by the online world has grown, so too have calls for increased regulation to improve the safety of our citizens online.

There are already significant regulatory and legal frameworks in place in relation to many online issues, including data protection and criminal justice responses to illegal activities online. However, there is a serious gap in the Irish legal framework when it comes to the spread and amplification of harmful online content. This is an area that until now has been left up to online services to self-regulate.

To address this gap the Government has committed to establishing a regulatory framework for online safety.

### **Policy issue**

1. The obligation to transpose the revised Audiovisual Media Services Directive, Directive (EU) 2018/1808, into Irish law
2. The Government commitment to establish a regulatory framework for online safety
3. The need to ensure that appropriate regulatory structures are in place to address both 1 and 2
4. The need to ensure consistency and synergy between the implementation of the online safety related provisions of the revised Directive, i.e. in respect of the

regulation of video sharing platform services, which will have an EU wide impact and any national online safety measures

## Objectives

### **Short term**

- Adequately transpose the revised Directive into Irish law
- Establish a regulatory framework for online safety to address the spread and amplification of certain harmful online content
- Identify or establish appropriate regulatory structures to carry out the functions arising from the transposition of the revised Directive and to oversee the regulatory framework for online safety in an effective manner

### **Medium/long term**

- Ensure that the regulatory framework for online safety is effective, adaptable and does not become quickly obsolete as technology and behaviour changes over time
- Ensure that the regulatory structures assigned the functions arising from the transposition of the revised Directive and oversight of the regulatory framework for online safety are capable of adapting to changing circumstances, including technological change, the rise of new media platforms, and further media and online safety regulation arising at both a national and EU level.

### 3. Summary of the Online Safety and Media Regulation Bill

The proposed Online Safety and Media Regulation Bill addresses the transposition of the revised Audiovisual Media Services Directive and the Government commitment to establish a regulatory framework for online safety as encompassed by a number of actions from the Action Plan for Online Safety. Further information about the revised Directive and the Action Plan can be found at **appendices 1 and 2** respectively.

Broadly speaking, the proposed Bill would:

- Establish a Media Commission which will have all the present functions of the Broadcasting Authority of Ireland,
- Dissolve the Broadcasting Authority of Ireland,
- Transpose the revised Audiovisual Media Services Directive, including those provisions of the Directive relating to the regulation of video sharing platform services,
- Establish a framework for the regulation of online safety to address the proliferation of harmful online content, encompassing the regulation of video sharing platform services, to be administered by an Online Safety Commissioner as part of the wider Media Commission,
- Establish a framework for the regulation of on-demand audiovisual media services to be administered by the Media Commission,
- Provide the Media Commission with appropriate compliance powers, including the power to issue information requests, initiate authorised officer led investigations and to audit the complaint or issues handling mechanisms operated by online services, and,
- Provide the Media Commission with appropriate sanction powers, subject to court oversight, including administrative financial sanctions, the power to compel compliance and the power to block online services.

The drafting of the general scheme of the proposed Bill was informed by a significant degree of stakeholder consultation and substantial policy analysis, as detailed below, and is in line with the preferred approach of Option 4a outlined in section 1 this paper.

## 4. Stakeholder engagement

### Public consultation

On 4 March 2019 the Minister for Communications, Climate Action and Environment, Richard Bruton, TD, announced proposals for an Online Safety and Media Regulation Bill to transpose the revised Directive and to address the gap identified within the Irish legal framework regarding the proliferation of harmful online content.

At this time the Minister launched a public consultation on the regulation of harmful online content and the implementation of the revised Directive to gather feedback to inform the development of the proposed legislation.

The public consultation closed on 15 April 2019. A total of 84 submissions were received in response, including from members of the public, commercial organisations and industry groups, public bodies, and NGOs. Of these responses, 40 were from members of the public, 21 were from commercial organisations and industry groups, 7 were from public bodies and 16 were from NGOs. These were published on 27 June 2019.<sup>1</sup>

### Thematic analysis

An extensive thematic analysis of the submissions identifying key themes and issues was published on 25 July 2019.<sup>2</sup> Key issues identified as running through responses to the consultation included:

- Overarching issues regarding the need for consistency in legislation and regulation, particularly given the complexity of the online landscape,
- That the regulatory framework for online safety established by the legislation should be future-proof to the greatest extent possible so that it can adapt and will not quickly become obsolete, and,
- That there is a need for significant safeguards in legislation to prevent unintended consequences and to avoid imbalances in the consideration of fundamental rights, including in relation to freedom of expression, the right to privacy, the right to communicate, freedom of religion, freedom of assembly and other key rights.

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<sup>1</sup> <https://www.gov.ie/en/consultation/430do-regulation-of-harmful-online-content-and-the-implementation-of-the-revised-audiovisual-media-services-directive/>

<sup>2</sup> <https://www.gov.ie/en/consultation/430do-regulation-of-harmful-online-content-and-the-implementation-of-the-revised-audiovisual-media-services-directive/>

These key themes, especially the consideration of matters of fundamental rights, have been of principal importance during the drafting of the general scheme of the Bill. It is difficult to overstate the necessity of addressing these issues in providing for a sound legal framework.

## Stakeholder workshops

The commencement of further stakeholder engagement in the form of roundtable workshops was delayed by the restrictions brought about in response to the Covid-19 pandemic. To adapt to these new circumstances, the Department has arranged for these workshops to take place using videoconferencing tools.

A workshop on the regulatory framework for online safety took place on 18 June 2020. Engagement with stakeholders on audiovisual media services has commenced and a workshop on the regulation of audiovisual media services is also planned.

## Ongoing engagement

In addition to the public consultation and workshops, the Department has and continues to engage with relevant stakeholders on a bilateral basis and with relevant stakeholder groups, including:

- The National Advisory Council for Online Safety,
- Relevant Government departments, including the Department of Justice and Equality,
- Relevant state bodies, including the Broadcasting Authority of Ireland, the Central Bank, the Data Protection Commission and An Garda Síochána,
- The European Commission,
- Relevant stakeholder groups such as the Children's Rights Alliance and Technology Ireland,
- Non-governmental organisations concerned with consumer protection, the protection of minors, and the vindication of the rights of citizens and civil liberties, for example the Irish Council for Civil Liberties,
- Representatives of large and small commercial organisations active in the provision of audiovisual media services and online services, and,

- National and international experts, including a number of academics and organisations such as the Carnegie Trust UK and Global Partners Digital.

## **5. Summary of policy analysis**

The Department prepared an extensive series of policy papers to inform decision making on the approach to drafting the general scheme of the proposed Online Safety and Media Regulation Bill. Aspects of these papers were informed by previous analyses and decision-making. This section summarises the issues and options explored by these papers and the accompanying recommendations. The recommendations made in these papers are informed by an extensive consideration of the issues and options and by multi-criteria analysis where appropriate.

The draft provisions arising from these recommendations were subsequently nuanced by further legal advice, technical policy analysis and stakeholder consultation and form the bulk of the general scheme of the proposed Bill.

Eight policy papers were prepared by the Department, as follows:

1. Regulatory structures and functions paper 1
2. Regulatory structures and functions paper 2
3. Regulatory powers and sanctions
4. Defining harmful online content
5. Approach to the regulation of harmful online content
6. Services in scope of the regulatory framework for online safety
7. Approach to funding regulation
8. Approach to the regulation of audiovisual media services

These policy papers can be in the accompanying annex to this regulatory impact analysis

## Regulatory structures and functions: Papers 1 & 2

**Related heads of the general scheme:** Heads 6-10; 19-39; 41-48

### **Summary: Regulatory Structures and Functions Paper 1**

This paper outlined the rationale for the multiperson media commission structure and discussed pertinent issues around the implementation of such a structure, including:

- Issues around appointment of Commissioners;
- Role of the Online Safety Commissioner;
- Establishment of advisory committees;

The paper recommended that it would be prudent to opt for a multi member commission model, given the diverse range of complex issues likely to fall under the Commission's regulatory remit. The OECD's *Making Reform Happen: Lessons from OECD countries* (OECD, 2010) notes that the great majority of independent regulators in OECD countries have a multi member board or commission structure, and that this model is considered more reliable for decision making as collegiality is expected to ensure a greater level of independence and integrity. It also provides a greater level of expertise and decision making capacity, and ensures there is a joined up approach given increasing integration and convergence across services within the sector. Accordingly, it was proposed that the BAI Authority and Statutory Committees established under the Broadcasting Act 2009 would be replaced by the new Commission. The new Commission would operate on a full time basis, as opposed to the part time board model currently employed by the Broadcasting Authority of Ireland. The new Commission would be overseen by an executive chairperson, who would have responsibility for the general management and control of the organisation and be answerable to the Public Accounts Committee. .

In relation to the appointment of Commissioners, the paper explored the issues around the appointment of Commissioners to the new Commission, including the maximum number of Commissioners in the new organisation, the selection criteria, expertise requirements, and terms for the appointment of Commissioners, and the proposal to appoint an executive chairperson to oversee and manage the organisation. The proposed Bill sets out the powers and functions of the Commission and provides that these may be delegated to individual Commissioners – for example, the Online Safety Commissioner – save for certain specified functions that are reserved to the Commission as a whole, i.e. the imposition of administrative financial sanctions. This framework is preferred to the approach of setting out the functions of individual Commissioners which would inhibit flexibility in the operation of the Commission and the assignment of responsibility for particular functions.

The paper discussed the establishment of advisory committees to provide advice to the Commission on certain matters. The paper considered the suggestion of statutory advisory committee that would sit alongside the Commission. The paper highlighted a number of issues with this approach, noting in particular that if advisory committee consultation is required on all significant decisions taken by the Commission this could hinder the speed at which the Commission can make decisions. The paper noted that it be preferable for the Commission to set up non-statutory advisory committees on an ad hoc basis.

The paper set out a proposed list of objectives and functions for the Media Commission, noting that objectives and functions should be drafted in such a way that ensures the Media Commission has scope to adapt to future developments in the online and media sectors.

## **Recommendations**

- It is recommended that Commissioners would be appointed for 5 years with the possibility of reappointment for a further 5 years. This is in line with standard practice.
- Given that the nature of the skills and experience required may vary somewhat between Commissioners (e.g. Online Safety vs Broadcasting), and also in light of the pace of change in the relevant sector, it is considered appropriate that the Public Appointments Service (PAS) determine appropriate criteria for the selection of Commissioners.
- It is recommended that standard provisions in relation to removal of Commissioners should be included in the draft Bill.
- In the interests of future proofing and flexibility, provision should be made for a maximum of 6 members to be appointed to the Commission. This is in line with the model used by the CCPC. It is envisaged that three Commissioners and an executive chair will be appointed initially.
- It would appear to be preferable to set up ad hoc advisory committees on a non-statutory footing in the interests of flexibility and simplicity. This will allow the Commission to establish committees to address any issues which require additional expertise or assistance while preserving the Commission's ability to make timely decisions.
- In the interests of future proofing, provision should be made for the Minister to assign additional functions to the Media Commission.

- In line with the provisions of the Competition and Consumer Protection Act 2014, provision should be made for a review of the legislation or any other statutory provisions relating to audiovisual media or online safety.

## **Summary: Regulatory Structures and Functions Paper 2**

This paper addressed issues around the transition to the Media Commission and structural issues including staffing, resources and governance. The paper also examined the changes required to the Broadcasting Act 2009 to implement a new regulatory structure.

The paper considered issues around the classification of staff as either civil or public servants. While there are merits to both approaches, the paper recommended that staff be classified as public servants as this is in line with most other regulatory bodies in Ireland and allows the regulator more discretion in terms of pay and conditions. In formulating approaches to the relevant issues identified, the paper drew on examples from comparator bodies such as CCPC, DPC, CRU and ComReg.

The paper explored issues around accountability, governance and financial management and made appropriate recommendations.

The paper set out proposals for the Media Commission to enter in cooperation agreements with other public bodies.

The paper made recommendations pertaining to future engagement with BAI on certain transitional matters, including workforce planning and future accommodation arrangements.

The paper also included a detailed analysis of the changes required to the Broadcasting Act 2009 in order to give effect to the transition from the BAI to the Media Commission.

## **Recommendations**

- It is recommended that staff of the Commission is classified as public servants.
- It is recommended that the chairperson of the Commission is accountable to the PAC and that individual Commissioners should be answerable to other Oireachtas Committees.
- It is recommended that provision is made for cooperation with other bodies.
- It is recommended that standard financial management and reporting provisions in line with other regulatory bodies are included in the heads of bill.

- It is recommended that the Department should carry out an analysis of workforce and resource requirements at a date closer to the proposed establishment of the Commission.
- It is recommended that the Department engage with BAI on this on future accommodation requirements once there is an indication of the staffing requirements for the Commission.

# STRUCTURE OF THE MEDIA COMMISSION

The overall focus of the Media Commission will be content regulation, which will enable important synergies between the work of each Commissioner

## BROADCASTING COMMISSIONER

Appointed by the Minister on the recommendation of the Public Appointments Service

Broadcasting Authority of Ireland staff

Current functions of Broadcasting Authority of Ireland

## ON-DEMAND AUDIOVISUAL SERVICES COMMISSIONER

Appointed by the Minister on the recommendation of the Public Appointments Service

Oversees the regulation of on-demand audiovisual media services

## KEY POINTS

Commissioners will be appointed by the Minister on the recommendation of the Public Appointments Service following an open recruitment competition.

The current staff and functions of the Broadcasting Authority of Ireland will reside under one Commissioner, the Commissioner for Broadcasting.

Further Commissioners may be appointed in the future, up to a maximum of six Commissioners in total. This will allow the Media Commission to react and adapt to changing circumstances, particularly in relation to online safety.

Commissioners will be appointed following a public competition held by the Public Appointments Service.



## EXECUTIVE CHAIRPERSON

Corporate functions

Co-ordinating shared functions

Human Resources

## ONLINE SAFETY COMMISSIONER

Appointed by the Minister on the recommendation of the Public Appointments Service

Oversees the regulatory framework for online safety



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## Defining harmful online content

**Related heads of the general scheme:** Heads 49A, 49B, 49C

### Summary

This paper examines what types of online content should be considered “*harmful online content*” under the regulatory framework for online safety to inform the regulation of online services by the Online Safety Commissioner.

In doing so the paper recognised that Article 28b(1) of the revised Audiovisual Media Services Directive effectively defines, for the purposes of regulating video sharing platform services, what the revised Directive permits Member States to consider “*harmful online content*”. Therefore, in order to limit potential conflict between EU and national law and to avail of the legal basis of the revised Directive, the paper examined the possibility of aligning a proposed definition of harmful online content with this provision.

To construct a proposed definition of “*harmful online content*” the paper examined the following questions:

- What the structure of the proposed definition should be, for example whether it should be comprised of specific categories of material;
- What the proposed categories of “*harmful online content*” should be, for example material which it’s a criminal offence to disseminate;
- What categories of material should be excluded from being considered “*harmful online content*” because they’re already dealt with under other areas of law, for example defamatory statements;
- Whether a separate definition of inappropriate online content would be useful in informing the Online Safety Commissioner’s work on online safety matters specific to children; and,
- What kind of process would be needed to futureproof the proposed definition of “*harmful online content*” and allow for the addition of new categories of material over time.

The paper used multi-criteria analysis, focusing on criteria such as clarity, rights balancing and effectiveness, to assess options and make recommendations.

## Recommendations

The paper recommended that “*harmful online content*” should be defined by reference to a number of defined categories of material and that these categories should encapsulate the following:

- Material which it is a criminal offence to disseminate,
- Cyberbullying material,
- Material promoting eating disorders, and,
- Material promoting self-harm and suicide.

In relation to the latter three categories of legal yet potentially harmful material, it’s intended that these categories will concern serious examples of such material and carefully formulated definitions of these categories are provided in head 49A of the general scheme of the proposed Bill. The paper also recommended the exclusion of certain categories of material from being considered “*harmful online content*”, including defamatory statements and violations of data protection law

The paper also recommended a process for the addition or removal of categories of “*harmful online content*”, which can be found in head 49b of the general scheme of the proposed Bill. Given the fundamental issues at stake in such matters this process involves a wide range of stakeholders, including the Minister and Joint Oireachtas Committee. Ultimately, the addition or removal of categories requires the agreement of the Oireachtas.

The paper further recommended a formulation of a definition of *inappropriate* online content to provide further clarity to the regulator in dealing with child related online safety matters. A definition of age-inappropriate online content can be found in head 49C of the general scheme of the proposed Bill. The purpose of the definition is to guide the Online Safety Commissioner in testing new and innovative approaches to protecting children online through online safety guidance materials. This may lead to new regulatory approaches to protecting children migrating from online safety guidance materials to online safety codes. It will also inform the Online Safety Commissioner in proposing the addition of new categories of “*harmful online content*” that relate to the protection of children.

# CATEGORIES OF HARMFUL ONLINE CONTENT

The purpose of the categories of harmful online content is to inform the making of online safety codes by the Online Safety Commissioner



## MATERIAL THAT IT'S CRIMINAL TO SHARE

For example child sex abuse materials and certain materials relating to terrorism



## MATERIAL THAT IS READILY IDENTIFIABLE AS SERIOUS CYBERBULLYING



## MATERIAL THAT IS READILY IDENTIFIABLE AS PROMOTING EATING DISORDERS



## MATERIAL THAT IS READILY IDENTIFIABLE AS PROMOTING, OR PROVIDING INSTRUCTIONS FOR, SUICIDE AND SELF-HARM

### KEY POINTS

The first category is about material which it is already, or which it may become, a criminal offence to share. The other categories are about material which is legal, and will remain so, but which can potentially cause serious harm.

The legal wording of categories about legal yet potentially harmful material contains thresholds about the likelihood of harm and the likely intention of the person sharing the material. This is to ensure a focus on material which is likely to cause serious harm.



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# PROCESS FOR ADDING NEW CATEGORIES OF HARMFUL ONLINE CONTENT



## KEY POINT

The same process can be used for removing categories if they are out of date or no longer relevant.



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# WHAT INFORMS THE ONLINE SAFETY COMMISSIONER IN PROPOSING NEW CATEGORIES OF HARMFUL ONLINE CONTENT?

There are many sources that will inform the Online Safety Commissioner's decision to propose new categories of harmful online content

Consultation with stakeholders, experts, relevant bodies and any advisory committees set up by the commissioner.



The Online Safety Commissioner's experience of regulating designated online services through online safety codes



The Online Safety Commissioner's experience of testing new approaches through regulatory sandboxes and online safety initiatives through online safety guidance materials, especially relating to age-inappropriate online content.



Cooperation with other regulatory bodies both in Ireland and abroad, especially with the EU.



Research conducted or supported by the Online Safety Commissioner.



New laws about legal yet potentially harmful material both from Ireland and the EU.

## KEY POINT

Special provision is made in the legislation for a definition of age-inappropriate online content to allow the Online Safety Commissioner to test new and innovative approaches to protecting children online through online safety guidance materials.



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## Approach to the regulation of harmful online content

**Related heads of the general scheme:** Heads 50A – 55

### Summary

This paper builds on the policy paper on defining “*harmful online content*” and considers how a regulatory framework could be constructed that would achieve the aim of minimising the availability of such content in an effective, appropriate and legally sound way. The paper acknowledges that there is little precedent in this area to draw from and that any approach adopted must respect EU law, the Irish legal and constitutional framework and the fundamental rights of all parties and must minimise the possibility of unintended consequences.

The paper addressed a number of questions, as follows:

- Whether it would be appropriate and useful to encompass the systems-focused regulation of video sharing platform services arising from the revised Directive under a wider regulatory framework online safety and, if so, to what degree?
- Whether the approach to regulation should include a form of systems-focused oversight through regulatory codes of the operations of online services given that the processes and policies these services adopt may contribute to the spread and amplification of “harmful online content”?
- How complaints handling could be incorporated into the regulatory framework, including whether individual complaints by individual persons regarding individual pieces of potentially “*harmful online content*”, a systems-focused super-complaints approach, or auditing of complaints-handling by online services would be most appropriate?
- What kinds of safeguards are needed in the regulatory framework to respect the fundamental rights of users and operators of online services and the general public and to prevent regulatory overreach?

The paper examined a number of options for addressing these questions using multi-criteria analysis, focusing on criteria such as clarity, flexibility, rights balancing and effectiveness, to arrive at recommendations.

## Recommendations

The paper recommended that the regulation of video sharing platform services should be fully incorporated into a wider regulatory framework for online safety and that this framework would include:

- Provision for the Online Safety Commissioner to make online safety codes which online services must abide by in their operations in order to minimise the spread and amplification of “*harmful online content*”, which can be found in head 50A. These codes will focus on both content delivery and content moderation by online services and concern issues such as risk and impact assessments, complaints handling and measures to minimise the availability of “*harmful online content*”.
- Provision for the Online Safety Commissioner to have a range of compliance, enforcement and sanction powers to allow them to effectively oversee and ensure the compliance of online services with their obligations arising from online safety codes, provision for which can be found in head 50B and heads 53-55. This will include information requests, authorised officer led investigations, compliance and warning notices and administrative financial sanctions. The imposition of formal sanctions such as financial sanctions will be decision to be taken by the Media Commission as a whole on the recommendation by the Online Safety Commissioner, or indeed any Commissioner of the Media Commission in relation to their respective regulatory fields. The imposition of such formal sanctions will also require court confirmation.
- Provision for the Online Safety Commissioner to operate a systemic complaints system to receive complaints from nominated bodies and to audit the complaints and issues-handling systems operated by online services, which can be found at heads 52A and 52B. For a number of reasons, including poor scalability and effectiveness, a system of individual complaints by individual persons regarding individual pieces of potentially “*harmful online content*”, was not recommended. In coming to this recommendation, it was recognised that the very large volume of potentially harmful online content combined with the wide range of online services the Online Safety Commissioner may regulate, particularly the obligation to regulate large video sharing platforms for the whole of the EU, would risk giving rise to a very large ombudsman-like system, which would likely make very little progress in improving the safety of people online. On the other hand, an approach which focuses on holding regulated online services to account for the complaints handling and other systems they operate, has the potential to lead to improvements that benefit all users.
- Provision for Online Safety Commissioner to issue online safety guidance materials, which can be found in head 51. This will allow the Commissioner to test new

approaches to online safety regulation, particularly in relation to the protection of children, to elaborate on certain aspects of online safety codes and to lower the overall risk profile of online services.

These recommendations informed the resulting draft heads, which have been further refined over time prior to inclusion within the general scheme of the proposed Bill.

# ONLINE SAFETY CODES

The Online Safety Commissioner will make online safety codes that designated online services will need to comply with in their operations

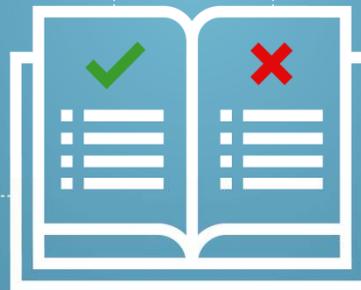


How designated online services handle complaints from users of their services and members of the public

How designated online services can assess the risk profile of their services



What designated online services can do to minimise the availability of harmful online content



What kind of reports do designated online services have to make to the Online Safety Commissioner



## KEY POINTS

The focus of the online safety codes will be on reducing the spread and amplification of harmful online content.

Online safety codes will address issues around content delivery and content moderation. This is how content reaches a user and what happens if that content is harmful.

Online safety codes will also address commercial communications, for example advertising, on designated online services.



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# ASSESSING COMPLIANCE

There are a number of ways that the Online Safety Commissioner can check if a designated online service is complying with its obligations



## KEY POINTS

If the Online Safety Commissioner is satisfied that a designated online service is or was not complying it can issue a compliance notice to the service.

If a compliance notice is not followed without good reason then the Online Safety Commissioner can issue a warning notice. A warning notice will state what actions the Commissioner will take if the notice isn't followed by the service. This may include formal legal sanctions.

The Online Safety Commissioner will decide what timelines will be attached to compliance and warning notices, allowing flexibility to deal with a wide range of issues.



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# SANCTIONING NON-COMPLIANT ONLINE SERVICES

The Online Safety Commissioner has a number of robust formal sanction powers



ADMINISTRATIVE  
FINANCIAL  
SANCTION



COMPELLING A  
NON-COMPLIANT ONLINE  
SERVICE TO TAKE  
CERTAIN ACTIONS



BLOCKING ACCESS TO  
THE NON-COMPLIANT  
ONLINE SERVICE IN  
IRELAND

## KEY POINTS

The purpose of the regulatory framework for online safety is to lower the risk of people being exposed to or negatively impacted by harmful online content. The Online Safety Commissioner will be tasked with achieving this ongoing goal in a practical, effective and proportionate way. This means that formal sanction powers will only be used in cases of wilful non-compliance or clear negligence.

To ensure legal robustness, the use of these sanctions requires court confirmation.



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## Services in scope of the regulatory framework for online safety

**Related heads of the general scheme:** Head 56

### Summary

This paper examines the range of services which should be in scope of the regulatory framework for online safety. In doing so, the paper builds upon a number of other policy papers, particularly the policy papers about defining “*harmful online content*” and the approach to regulating “*harmful online content*”.

The paper examined a number of questions as follows:

- How will online services be brought within the scope of regulation, for example whether there should be a wider “pool” of relevant online services from which the Online Safety Commissioner could designate online services to be subject to online safety codes, having regard to the recommendation in the regulation of “*harmful online content*” policy paper that video sharing platform services should be a category of regulated online services;
- How a wider pool of relevant online services could be defined, focusing in particular on the need for legal certainty and the adaptability of regulatory framework;
- Are there any categories of online services that should be excluded from the regulatory framework altogether?

The paper used multi-criteria analysis, focusing on criteria such as clarity, adaptability and legal certainty, to assess options and make recommendations.

### Recommendations

The paper recommended that the Online Safety Commissioner should have the power to designate online services or categories of online services from a wider pool of relevant online services. In doing so, the Online Safety Commissioner must have regard to a range of matters, including:

- The nature and scale of online services,
- The impact of automated decision making in relation to content delivery and content moderation,
- The likely prevalence of harmful online content on online services,

- The protection of minors and the general public from harmful online content
- The risk posed by harmful online content to users of online services,
- The likelihood of users of the service being unintentionally exposed to harmful online content,
- The legal limits of liability, and,
- Issues of fundamental rights.

This approach may lead to a wide range of different kinds of services being considered for designation, including:

- Video sharing platform services,
- Social media services,
- Public boards and forums,
- Online gaming services
- E-commerce services,
- Private communication services (only criminal content on such online services may be addressed through online safety codes),
- Private online storage services (only criminal content on such online services may be addressed through online safety codes),
- Online search engines, and,
- Internet service providers.

However, the fact that such online services may be designated does not mean that they will be designated. The categories of online services listed above are simply examples of that are relevant for consideration by the Online Safety Commissioner for potential designation. It is only at the point of designation that online services will be subject to regulatory obligations.

In this regard, the paper also recommended the definition of a “relevant online service” should be based on adapted technical definitions from existing EU law to ensure the greatest possible certainty as to range of online services that may be designated.

The paper further recommended that the legislation should state that video sharing platform services are a category of designated online services.

Furthermore, the paper recommended that only those services subject to other regulatory frameworks under the proposed Bill - these being television broadcasting services and on-demand audiovisual media services - should be excluded from the possibility of being designated.

The paper also provided that the Online Safety Commissioner shall specify the online safety codes which will apply to an online service when it is designating them to ensure that the right rules apply to the right services. In this regard, the paper recommends that the Online Safety Commissioner be restricted from applying online safety codes about legal yet potentially harmful content to designated private communications services and private online storage services. This means that, while private communications services and private online storage services can be designated by the Online Safety Commissioner they are excluded from the aspects of the regulatory framework for online safety that relate to legal yet potentially harmful content. In other words, only criminal content on such online may be addressed through online safety codes. It was considered that, due to the increased relevance of the right to privacy in relation to such online services as opposed to public facing online services, it would be legally difficult to apply online safety codes about non-criminal material to such online services.

These recommendations were arrived at after analysis of the available options and the resulting draft head (head 56) and proposed approach have been further refined over time, particularly in respect of the designation process, which includes mandatory consultation, and the range of factors that the Online Safety Commissioner must consider when deciding whether to designate online services.

# DESIGNATION OF ONLINE SERVICES

The Online Safety Commissioner will designate online services from a defined pool of relevant online services. Designation is the start of active regulation of an online service by the Online Safety Commissioner



## KEY POINT

An online service is in the pool of online services that can be designated by the Online Safety Commissioner if the online service facilitates the dissemination of or access to user-generated content.



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# PROCESS FOR DESIGNATING ONLINE SERVICES



## KEY POINTS

When deciding what online safety codes apply to a newly designated online service the Online Safety Commissioner must also have regard to the same set of guiding principles and matters that guide their decisions on whether or not to designate an online service.

The Online Safety Commissioner can't make private communications services and private online storage services abide by online safety codes about the categories of harmful online content that aren't criminal in nature.

-  Compulsory Steps
-  Optional Steps



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# WHAT GUIDES THE DECISION TO DESIGNATE?

The European Union legal framework for online services, including the legal liability regime and the rules for video sharing platform services.



The size of online services.



The need for transparency from online services regarding content delivery and content moderation.



The impact of automated decision making on content delivery and content moderation.



The likely prevalence of harmful online content on online services.



The protection of minors and general public.



The full array of fundamental rights of users and operators of online services.



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## Regulatory powers and sanctions

**Related heads of the general scheme:** Heads 11-18

### Summary

The proposed Bill has four key elements; the introduction of national regulatory measures to improve online safety, implementation of new EU provisions in relation to rules for video sharing platform services located in Ireland, updating the regulation of on-demand audio visual media services as well as updating the regulation of television broadcasting services.

This paper considers the powers required by the Media Commission to effectively regulate these four key areas of responsibility. Drawing from the recommendations of Law Reform Commission (“LRC”) Report on Regulatory Powers and Corporate Offences a number of specific “core” enforcement and sanction powers are assessed. These being the power to:

- Issue compliance and warning notices;
- Develop, implement and monitor codes of practice;
- Conduct investigations;
- Appoint authorised officers with significant investigatory powers;
- Impose administrative financial sanctions, subject to court oversight;
- Prosecute summary offences;
- Licensing services;
- Require the registration of services.

The eight identified “core” powers are then critically analysed in the context of their use by other regulators such as Broadcasting Authority of Ireland, the Data Protection Commission (“DPC”), the Commission for Communications Regulation (“ComReg”), the Competition and Consumer Protection Commission (“CCPC”) and the Commission for the Regulation of Utilities (“CRU”). This analysis focuses on the appropriateness of these powers with respect to the four key areas addressed by the proposed Bill.

A number of different scenarios involving varying combinations of “core” powers are then analysed to assess the optimum powers for efficient and effective regulation by the Media Commission.

## **Recommendations**

This paper recommended that all of the eight powers should be assigned to the Media Commission. This recommendation was strongly tied to the Law Reform Commission’s recommendation that regulators should have available to them an appropriate “regulatory toolkit” to enable them to perform their functions effectively and efficiently.

Further to this it was recommended that the assignment of powers should be “tailored”. This means that certain powers would be assigned to the Media Commission generally: the power to issue compliance and warning notices, the power to devise, implement and monitor codes of practice, the power to conduct investigations, the power to impose administrative financial sanctions, and the power to prosecute summary offences, while other powers would relate to specific functional areas: the appointment of authorised officers, as well as licensing and registration powers.

This tailored approach reflects a “behaviour based approach” which seeks to change the behaviour and culture within regulated entities. This means that the Media Commission will have a wide range of powers to engage constructively with regulated entities, but has robust sanction powers where required. . This is regulatory best practice and ensures that a positive regulatory ecosystem is created which will effectively protect the interests of users.

## Approach to funding regulation

### **Related heads of the general scheme:** Head 40

#### **Summary**

Regulators in Ireland are typically funded by industry through levies (as well as registration and licensing fees) or by the government by means of an Oireachtas grant.

It was recommended by the Media Commission Structures and Functions: Paper 1 that a function of the Media Commission will be the imposition of levies to fund its statutory functions. The Memorandum to Government on the OSMRB which was approved on 9 January 2020 provided that a function of the Media Commission would be:

“To impose a levy on regulated media services and designated online services in order to ensure it is sufficiently resourced to properly execute its statutory functions.”

This paper considered the main frameworks for the funding of regulators in Ireland: Government funding through Oireachtas grants and industry funding. It was concluded that industry funding is most appropriate based on a number of factors:

- Independence - the revised Directive places a strong emphasis on the requirement for regulators to be functionally independent of government,
- Future proofing - levy orders may be amended as required (within the bounds of the principles and policies in legislation), meaning that the regulator can respond to changing circumstances,
- Flexibility – delegation of responsibilities in relation to the creation of levy orders to a regulator means these powers may be exercised as the regulator deems appropriate based on the regulator's expertise and insight in the relevant market or sector (within the bounds of the principles and policies in legislation).
- Public acceptability – the funding of regulators by industry is the norm in Ireland and this model would likely satisfy the public and stakeholders who would regard it as appropriate that industry should bear the cost of regulation.

Further, this paper examines the legal issues relating to the provisions which underpin the levy powers of other regulators.

Levy orders are secondary legislation. They are underpinned by primary legislation (Acts of the Oireachtas). To ensure a levy order is legally robust it is necessary for the primary legislation to contain sufficient principles and policies for the making of those orders.

The legislative provisions underpinning both the Broadcasting Authority of Ireland's levy powers and those of relevant comparators, including the Data Protection Commission, the Broadcasting Authority of Ireland, the Competition and Consumer Protection Commission, the Central Bank, the Commission for the Regulation of Utilities, the Commission for Aviation Regulation, the Commission for the Regulation of Railways, and the Financial Services and Pensions Ombudsman, are analysed. From this analysis certain elements can be extracted from those provisions which are then considered in the context of the Media Commission.

This further analysis consisted of identifying and categorising 25 distinct elements of existing levy provisions in existing legislation and determining whether they would be necessary, desirable or undesirable in the context of the Media Commission. This formed the basis for the identification of three options for a levy provision containing these elements, ranging from minimalist to highly prescriptive, as follows:

- Two separate levy provisions, one to provide for broadcasting levies and a second to provide for levies of online services.
- A single levy provision containing only the legal elements which were deemed legally necessary.
- A single legal provision containing both the legal elements which were deemed legally necessary as well as those legal elements deemed to be desirable.

These options were then assessed against a number of relevant criteria, including complexity, clarity, legal robustness, legal justification and future proofing.

## **Recommendations**

This paper recommended that the third above option was most appropriate. It is recommended that the provision within the proposed Bill underpinning the Media Commission's levy powers, should be simple and non prescriptive and contain significant principles and policies to appropriately direct the Media Commission in the exercise of that power.

The principles and policies to be contained in the provision were identified by analysing the legislative provisions and levy orders of other similar regulators. From this analysis it could be seen which elements would be most appropriate to underpin the levy powers of the Media

Commission. The recommended approach contains significant principles and policies. These principles and policies will guide the Commission in the creation of levy orders. However, they do not unduly fetter the discretion or independence of the Commission. This ensures that the levy powers of the Commission are flexible and future proof.

Head 40 provides, in summary, that:

- The Media Commission may make levy orders,
- Regulated entities must comply with levy orders,
- The Media Commission may make separate levy orders for different categories or classes of regulated entities that it sees fit,
- The Media Commission may amend or revoke levy orders,
- There are matters that levy orders made by the Media Commission may provide for, including, among other things:
  - Who is subject to a levy,
  - The amount of the levy,
  - How the levy is calculated,
  - An appeal of inclusion in a levy order by a regulated entity, and,
  - Thresholds
- Where levy obligations are based on multiple classes or categories of regulated entities it will ensure that expenses in respect of such classes or categories will be assessed separately,
- The information that regulated entities shall provide to the Media Commission to inform the making of levy orders,
- What may the Media Commission do with any surplus monies raised from levy orders after its running costs have been accounted for, and,
- There is a process for how the Media Commission may notify a regulated entity of their obligation to pay a levy.

As stated above, in line with standard legislative practice the methods by which levies on regulated entities are calculated is delegated to the Media Commission. The Department is examining whether it would be necessary to insert a reference to the basis for the design of such calculations, for example turnover, into head 40 or whether existing standard accounting practices and governing legislation are sufficient to provide legal certainty in that regard.

Head 40 would replace section 33 of the Broadcasting Act, 2009, which solely provides for the imposition of levies on broadcasting services by the Broadcasting Authority of Ireland, and provide for the imposition of levies on broadcasting services, on-demand audio visual media services and designated online services to fund the activities of the Media Commission.

## Approach to the regulation of audiovisual media services

**Related heads of the general scheme:** Heads 57-78

### Summary

This paper explored the policy and legislative implications of the revised Audiovisual Media Services Directive on the regulation of television broadcasting and on-demand audiovisual media services in Ireland.

This paper considered an appropriate framework for the regulation of audiovisual media services. The paper proposed creating common provisions for both television broadcasting and on-demand audiovisual media services in order to align the two strands, in line with the intent of the revised Directive. Common provisions for code making and complaints were proposed to as appropriate measures to achieve this aim. It should be noted that the creation of common provisions for television broadcasting services and on-demand audiovisual media services does not necessarily mean that the Media Commission must take precisely the same approach to services in both categories. The Media Commission may, for example, choose to create codes and rules which differentiate between television broadcasting services and on-demand audiovisual media services and impose different levels of regulatory obligations on services in each category, taking into account the nature of the service, size of audience and other relevant factors.

The paper examined options for the regulation of on-demand audiovisual media services (ODAVMS), with a system of registration for ODAVMS emerging as the preferred option. The paper considered the complexities around the implementation of an appropriate regulatory framework for ODAVMS including examination of an appropriate approach for non-compliance with the registration requirement and breaches of regulatory codes. The paper also considered issues around the treatment of ODAVMS operating on video sharing platform services (VSPS).

Furthermore, the paper explored approaches in relation to the transposition of European Works requirements for ODAVMS, in particular around the requirement for ODAVMS to reserve at least 30% of their catalogue for European Works. The paper noted that the definition of European Works includes works originating in European third states party to the European Convention on Transfrontier Television of the Council of Europe, this will include the UK post Brexit.

The revised Directive also permits Member States to introduce rules around prominence for two types of audiovisual content.. The first relates to the prominence of European Works and provides that ODAVMS Services shall ensure that European Works are easily discoverable on their services. The paper proposes that the regulator would have the power to set rules in

relation to the visibility of European Works. For example the regulator could require services to provide a dedicated section for European Works that is accessible from the service homepage or to allow users to search for European Works by means of a search tool made available as part of the service.

The second relates to the prominence and discoverability of “content of general interest” i.e. content of a public service nature. The paper considered the potential to ensure greater discoverability of public service content by requiring platform operators providing audiovisual media services through set top boxes to ensure that the content of public service broadcasters is given appropriate prominence on platform home screens. The paper recommended that the regulator be empowered to draft the detailed rules around how such a requirement would work in practice.

In relation to television broadcasting services, the paper considered options for the implementation of additional flexibility in relation to advertising minutage (i.e. number of advertising minutes in a certain period) that is permitted by the revised Directive. The paper recommended that the current provisions should be amended to give the Media Commission scope to allow broadcasters to choose more freely when to advertise throughout the day.

The revised Directive allows the State the option to levy audiovisual media services located in another Member State, but which are targeting audiences within the State. Accordingly, the paper considered the key issues, including the potential benefits and drawbacks of the introduction of such a levy. The paper set out options regarding how such a levy could be implemented in legislation. The proposed levy is viewed by certain stakeholders as a potentially lucrative source of funding for Irish content. However, as this is a new measure introduced by the Directive, there is minimal precedent for how such a system would work in practice. Furthermore, there is a lack of reliable data around how much such a levy would raise in practice as no detailed research has been carried out on this matter to date. The paper considered the types of content that should be funded through such a scheme and what conditions should be included in the provision. For example, under the current Sound and Vision scheme any media service provider in the EU can apply for funding provided that it’s broadcast free to air in Ireland. A similar requirement may be appropriate for any new scheme that is created, with appropriate modification to provide that any content must also be made available on a free to view ODAVMS. The paper proposed a funding scheme that is broadly based on the provisions of the Broadcasting Funding Scheme set out in section 154 of the Broadcasting Act 2009 and that additional consideration of the parameters of the funding scheme should be undertaken prior to enactment to establish if any divergence from the parameters of the Broadcasting Funding Scheme is required.

## Recommendations

The paper recommended the following in respect of the regulation of audiovisual media services:

1. In order to mirror the revised Directive, it was recommended that, insofar as possible, the television broadcasting service and on-demand audiovisual media service strands of regulation are aligned the legislation. In particular, this includes the introduction of common provisions in relation to codes and complaints processes.
2. In respect of the regulation of on-demand audiovisual media services, it was recommended that a system of registration for on-demand audiovisual media services (ODAVMS) is implemented. It is recommended that refusal to register when directed to do so by the Commission shall be an offence and that the Commission may bring prosecutions in this regard at its discretion. This will enable the Commission to take a proportionate and risk based approach, with greatest focus on larger services or those with higher risk profiles. It was recommended that the Commission should be given the compliance and enforcement powers set out in the paper in order to effectively discharge its duties.
3. For European Works, it was recommended that on-demand services shall be subject to the minimum 30% European Works requirement as stipulated in the revised Directive and that the regulator shall be responsible for determining the specific criteria for exemption from European Works requirements, taking account of the European Commission's guidelines in this respect. . Furthermore it was recommended that the regulator shall be responsible for formulating prominence rules for on-demand audiovisual media services in relation to European works
4. Regarding the potential introduction of prominence requirements for public service content, content, it was recommended that further research should be undertaken by the Media Commission in advance of any introduction of such a measure.
5. Regarding news and current affairs requirements for media service providers, it was recommended that media service providers falling under any of the three categories below shall ensure that any news and current affairs content provided on any on-demand audiovisual media service operated by that media service provider adhere to the same standards required of linear broadcasting services. The three categories are as follows:
  - a) a broadcasting corporation (i.e. RTÉ and TG4); or

- b) hold a broadcasting contract under Part 6 of the current Act (e.g. Virgin Media, local radio stations); or
  - c) a media business for the purposes of the Part 3A of the Competition Act 2002 (as amended) (e.g. online news outlets such as the Irish Times or thejournal.ie)
6. For advertising minutage, it was recommended that the additional flexibility provided for in the revised Directive is implemented for commercial broadcasters. The paper recommended that the current provisions should be amended to give the Media Commission scope to allow broadcasters to choose more freely when to advertise throughout the day.
7. In respect of potential to introduce a content production levy, it was recommended that if a content production levy is to be included in the legislation, it should be commenced at a later date once research has been carried out showing that the introduction of such a levy is appropriate.

## 6. Compliance and enforcement

The compliance and enforcement mechanisms that are appropriate and necessary to ensure that the objectives of the proposed Bill are met were primarily explored in the series of policy papers, summaries of which are provided in the previous section. A number of these papers contained recommendations regarding compliance and enforcement that are carried through to the general scheme of the proposed Bill.

Broadly speaking, compliance and enforcement mechanisms were examined in the following areas:

- Regulatory structures and powers,
- The regulatory framework for online safety, and
- The framework for the regulation of audiovisual media services.

The relevant policy papers for these areas can be found in the annex accompanying this regulatory impact analysis.

### Regulatory structures, functions and powers

The Media Commission will comprise a number of Commissioners, led by an executive chairperson who will have overall responsibility for the general management and control of the organisation. The Commission will make decisions as a collective in respect of reserved functions and powers, with other functions and powers delegated to individual Commissioners or member of staff in line with Head 10 of the general scheme of the proposed Bill. For example, it is intended that the functions relating to the regulatory framework for online safety will be assigned to a dedicated commissioner for online safety. Head 10 further provides that decisions in relation to the imposition of sanctions on regulated entities are reserved for the Commission as a whole.

Further to this, head 10 of the Bill sets out relevant functions that enable the Media Commission to take compliance and enforcement measures:

- Promote and protect the interests of the public in relation to audio-visual, audio and online content;
- Carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any suspected breach of the relevant statutory provisions;

- The Commission shall have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently;
- To enforce the relevant statutory provisions;
- To encourage compliance with the relevant statutory provisions, including the publication of notices containing practical guidance as to how those provisions may be complied with.

In addition to these functions, heads 11-18 of the general scheme of the proposed Bill provide for the core compliance and enforcement powers available to the Media Commission. Heads 11-13 provide for certain core powers, including compliance and warning notices and the making of codes of practice. The use of these powers is governed by dedicated heads, for example head 50A regarding the making of online safety codes under the regulatory framework for online safety. Heads 14A-14D provide for investigations into the affairs of broadcasting contractors. Heads 15A-15E provide for investigations by authorised officers. Heads 16A-16D provide for the procedure for the imposition of an administrative financial sanction. Head 17 provides for the prosecution of summary offences under the proposed Bill by the Media Commission and head 18 provides for the categorisation of such offences.

## Regulatory framework for online safety

The regulatory framework for online safety, as provided by heads 49A to 56 of the general scheme of the proposed Bill, contains a number of compliance and enforcement provisions.

As a starting point, designated online services are obliged to abide by the online safety codes that the Online Safety Commissioner deems it relevant from them to abide by, depending on the nature of the online service and the risk profile of the online service. The Online Safety Commissioner can review the compliance of online services with the relevant online safety codes through reporting requirements, both regular and ad-hoc, information received from interested parties and members of the public, information received from nominated bodies through the systemic complaints scheme, and investigations, including by authorised officers.

If the Online Safety Commissioner considers that an online service was or is not compliant with the online safety codes that apply to it then the Commissioner can issue a compliance notice to the online service. If the steps specified by a compliance notice are not followed and no satisfactory explanation is supplied to the Online Safety Commissioner by the online service, then the Commissioner may issue a warning notice. A warning notice will indicate what actions, including formal sanction action, the Online Safety Commissioner may take if the online service does not take the steps outlined in the warning notice. The Online Safety

Commissioner will specify the timelines attached to both compliance and warning notices, allowing the Commissioner to swiftly require the resolution of urgent issues and the implementation of more time-consuming or complex solutions.

If a designated online service does not follow the directions contained in a warning notice, the Online Safety Commissioner may ask the Media Commission as a whole to decide to impose a sanction on the non-compliant online service, including:

- An administrative financial sanction,
- Compelling the non-compliant designated online service to take certain specified actions, or,
- Blocking access to the non-compliant designated online service in Ireland.

All of these sanction powers are subject to court confirmation.

## Regulation of audiovisual media services

The regulator's powers in relation to compliance and enforcement for linear broadcasters will be broadly consistent with the Broadcasting Act 2009. In respect of on-demand audiovisual media services, it is proposed to vest the regulator with a range of powers in order to encourage and enforce compliance with the rules:

- Power to issue notices, warnings, etc;
- Power to devise, implement, monitor and review codes of practice;
- Power to conduct investigations/inquiries;
- Power to appoint authorised officers with significant investigatory powers to conduct investigations;
- Power to impose administrative financial sanctions and to enter into settlements;
- Power to prosecute summary offences;
- Registration powers;

In line with the approach to the regulation of designated online services, it is proposed that the Media Commission may seek to apply a range of sanctions to an on-demand audiovisual

media service where it is of the view that the service has failed to comply with a warning notice issued by the Commission and the procedure for the application of such sanctions.

These sanctions include:

- Imposition of an administrative financial sanction;
- Compelling compliance;
- Removal of the service from the register of regulated services;
- Blocking access to on-demand service.

The application of each of these sanctions requires court approval whereupon the media service provider in question will have the opportunity to dispute its application

## 7. Review

The general scheme of the proposed Bill contains a number of provisions mandating or providing for periodic review of the operation of the regulatory systems it proposes to establish.

This includes a dedicated head (no. 33) providing for consultation between the Media Commission and the relevant Minister on proposals for legislation relating to online safety and media services. In this regard, head 33 provides that the Media Commission shall keep the relevant statutory provisions under review, shall submit to the relevant Minister any proposals relating to the relevant statutory provisions that it considers appropriate from time to time, and to conduct reviews of or participate in the drafting of relevant statutory provisions as the relevant Minister may direct.

### Regulatory framework for online safety

The regulatory framework for online safety, as provided by heads 49A to 56 of the general scheme of the proposed Bill, contains a number of review related provisions.

Firstly, the category of harmful online content that concerns “*material which it is a criminal offence to disseminate*” means that the creation of any future criminal offences relating to the dissemination of material will automatically be incorporated into the regulatory framework. Furthermore, the Online Safety Commissioner is provided with the power to recommend the addition or removal of categories of harmful online content. Ultimately, given the legal and social sensitivities regarding such issues, any such proposals require the approval of the Oireachtas through positive resolution.

The Online Safety Commissioner is also required, from time to time, to revise the online safety codes it prepares. In making online safety codes the Online Safety Commissioner is also required to have regard to a number of matters that may change over time, for example the nature and prevalence of harmful online content. This is also the case regarding the making of online safety guidance materials, the designation of online services and the application of online safety codes to designated online services by the Commissioner.

Overall, the regulatory framework for online safety is designed to be adaptable and able to change focus in the face of the changing nature of the risk posed by harmful online content and technological developments.

## Regulation of audiovisual media services

Under Heads 62 and 71, the regulator will be empowered to make codes and rules in respect of the regulation of audiovisual media services. The aforementioned Heads contain provisions allowing the regulator to make revisions to the codes and rules from time to time.

In relation to Heads 76 and 77, it is not intended to commence these provisions in line with the rest of the OSMR Bill. Instead, it is intended that the Minister will direct the Media Commission to carry out a review in line with Head 33 to ascertain if the introduction of a content production levy is appropriate.

# Appendix 1

## The revised Audiovisual Media Services Directive

The general scheme of the Online Safety and Media Regulation Bill incorporates the transposition of the revised Audiovisual Media Services Directive, Directive (EU) 2018/1808, into Irish law.

The current version of the Audiovisual Media Services Directive was agreed in 2008 and contains rules and requirements that form the minimum standards that television broadcasting services and on-demand audiovisual media services, e.g. RTÉ Player, must follow in the European Union.

In May 2016 the European Commission published a proposed revision of the Directive. The proposal was written to update the rules and requirements in the Directive to reflect the rapid changes that the video media market was and is experiencing. The proposal was examined and amended by both the European Parliament and the Council of the European Union and an agreement on a final text of the revised Directive was reached in June 2018. The final text of the revised Directive was officially published in November 2018. Ireland has 21 months, the deadline being 19 September 2020, to implement the revised Directive into Irish law.

One of the key aspects of the revised Directive is the inclusion, for the first time, of specific rules and requirements for video sharing platform services, e.g. YouTube. The revised Directive does not extend the rules and requirements for Television broadcasting services and on-demand audiovisual media services to video sharing platform services. Instead the revised Directive takes a principles based approach and requires Member States to ensure that video sharing platform services take appropriate measures to protect minors from harmful content and all users from hate speech and certain criminal content. The approach set out in the Directive is therefore systemic in nature and the role of national regulators is to ensure that the measures taken by video sharing platforms are adequate in practice to address these requirements.

The regulation of video sharing platform services is encompassed by the regulatory framework for online safety proposed in the general scheme of the Online Safety and Media Regulation Bill.

## Appendix 2

### The Action Plan for Online Safety

The Action Plan for Online Safety was launched by the Taoiseach in July 2018. The Action Plan was drawn up following engagement with a wide range of stakeholders and is being implemented by a Sponsor's Group made up of 6 key government departments and chaired by the Department of Education & Skills.

The Action Plan sets out 5 goals and 25 targeted actions to be implemented over an 18 month period. The Action Plan seeks to balance the opportunities and benefits provided by the internet with the need to ensure that people are informed and supported to deal with online risks.

Two key actions assigned to the Department of Communications, Climate Action and Environment by the Action Plan relate to developing a Government response to the issues raised by the Digital Safety Commissioner Bill 2017 (Deputy Donnchadh Ó Laoghaire), i.e. the regulation of harmful online content (Action 18), and the transposition of the Audiovisual Media Services Directive (Action 17).

The development of the proposed regulatory framework for online safety as part of the general scheme of the Online Safety and Media Regulation Bill encompasses these actions.

## Appendix 3

### Technical notifications to the European Commission

The proposed Online Safety and Media Regulation Bill will be subject to conformity assessments by the European Commission. As the proposed Bill intends to regulate online services, these assessments will go beyond the typical implementation assessment that will be carried out by the European Commission in relation to the transposition of the revised Audiovisual Media Services Directive. These assessments will be based on a number of technical or “TRIS” notifications about the online safety and on-demand audiovisual media service aspects of the Bill that Ireland will be required to make to the European Commission.

These notifications are required by the internal market framework for “*information society services*” established by the eCommerce Directive and resulting regulations. The European Commission will assess the proposed Bill to see if it is in conformity with EU law. If they deem it not to conform then they can block the passage of the proposed Bill.

Furthermore, the Commission publishes these notifications and other Member States and interested bodies are invited to comment on them over the course of a number of months. Ireland will be prohibited from adopting the Bill while these notifications are active.

Further to this, when the Media Commission makes media codes, media rules, or online safety codes, these will also need to be notified to the European Commission under the “TRIS” procedure as they will constitute technical regulations on information society services. Media codes or media rules that solely relate to broadcasting services, whether radio or television, will not need to be notified as they are not considered information society services.