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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** The proposed regulator is an important and evolutionary step forward that would provide important focus and coordination of the how Ireland manages illegal and harmful use of the Internet. Starting in 1998 with the first report on the Illegal and Harmful Use of the Internet, Ireland has been very progressive in positive initiatives to promote online safety among minors and adults alike and to combat illegal content and activity on the Internet. However, internet services are having a greater effect on everyday life of Irish citizens and there is a need for great focus on the impact on social networking services, the future of artificial intelligence, the growth in the internet-of-things, the planned growth in global satellite internet services and the increasing adoption of autonomous vehicles in the air and on the ground. A regulator focused on the dark side of the internet and providing trusted auditing of internet services will provide a necessary increase in trust for parents and children alike. The proposed regulator need a broad understanding of the complex issues facing the internet and needs to balance the rights of children and persons to free speech while simultaneously ensuring greater safety and trust for all. There are particular challenges that Ireland needs to aggressively address including online bullying and harmful behaviours leading to extremely serious harm. In addition, it is not clear which new services will be successful or what risks they include for internet users. There is an important role for the proposed regulator to ensure that the Internet service providers adhere to the highest standards of online behaviours and transparency and works with other countries to coordinate efforts to improve online services for all. A) There are several important issues to be addressed in order to implement an effective Notice and Take Down system (NTD) regime. 1. Identifying suspicious content that needs action. Often the suspect internet content needs to be re-actively identified by members of the public who detect material during their regular internet use and then reported to the service provider and then the regulator. It is important that the range of content that can be addressed by the regulator is clearly elucidated and enumerated. In my opinion, the regulator should commence with a narrow remit that can be expanded as skills evolve and experience is gained. There might be situations where content can be pro-actively identified through pro-active internet searches but the volume of suspect content can be high, might not relate to the Irish or European market. In all cases content might be behind a pay-wall or accessible in a password protected area 2. Technical specification of suspicious content that requires action. Suspect content can be

presented in different media technologies including audio, video, text or graphics and can be published using a complex variety of technical formats and can be further hidden using obfuscating technologies. Some of the primary platforms such as Google, YouTube, Facebook et al. offer internal reporting systems which automatically identify the specific details of the suspect material for review by trained moderators. Often members of the public can face difficulties in determining and recording the exact location of the suspicious content OR the content is dynamically presented in a manner that changes location regularly. An easy system of identifying content might require direct engagement/ cooperation / regulation of/with the content providers.

3. Which criteria and legal 'rules' to follow (Irish, EU, US, etc or Common Decency style rules, Company Terms and Conditions (T&C's)?) Once suspicious content has been reported and referred for assessment, the receiving authority needs to have direct access to trained and skilled personnel to access the reported content and grade the content along agreed, transparent and clear criteria whilst respecting the views of the reporting person(s) and the intentions and target audience of the content author / publisher. This needs clear respect for human rights law and deep understanding of Irish, European and International law and understanding the impact of harmful content on vulnerable internet users. The reviewers can also be strongly impacted by constant viewing of wide-ranging harmful and deliberately provocative content and would need a positive supportive environment for long term effectiveness and personal mental health. Once the reported content has been assessed as harmful or in conflict with a provider's T&C's (or possibly illegal) the location of the content would need to be determined in order to decide which internet provider is most likely responsibility for taking action. Sometimes this might be obvious from the received report but sometimes this can be more complicated than first anticipated when content.

4. Liability in the decision making. A key concern by all parties is the issues of (a) false-positives (when content is identified as harmful / illegal when in fact it is not) and (b) false-negatives (when suspect content is identified as non-harmful/non-illegal when in fact it is) and who might be impacted by such failures and whether their might be legal recourse to such decisions. It could include charges of slander in the case of (a) and reduction in trust and confidence in the regulator in the case of (b). Since suspect content that is to be considered by the proposed regulator is intended to focus mainly on alleged harmful content, it is more difficult to make consistent reliable assessment of such content based on the emotional or psychological impact of such content on a complex selection of audiences. It would be very important that decisions reached by the regulator are clear and considered authoritative and protected against unreasonable and (for minor reasons) legal action.

5. Possible actions include content removal, content warning, disable publishing, prevent re-distribution, age-restriction controls, etc) Once suspect content is identified and located and once a decision has been made that the identified content is likely to be harmful it is then necessary to decide what actions can be taken in relation to such content. Actions might include asking the author to edit the content in order to stop the harm (noting that it can sometimes be technically and legally difficult to identify the authors), to ask the publisher to take down the content, to ask intermediaries to block content (noting that blocking internet content mechanisms are often quite trivial to circumvent), to request legal investigation or instigate legal investigation as to the purpose and motivations for the suspect content to be published in the first place or to request age-verification or geo-blocking "walled gardens" to be put in place to restrict access to content to

selected ages (assuming an age verification system (AVS) has been successfully designed and implemented. It is also important to determine whether such actions will be/ should be restricted to certain geographical regions or to specific groups in society – such as age restrictions or special needs persons. Ensuring long term implementation of the decision is also challenging since content might be re-published or re-distributed on different platforms in different media formats with minor or significant changes affecting ease of technical identification. B) Adopting and adapting a model of regulated self-regulation or co-regulation where industry organisations work closely with the regulator There is a significant role in close oversight by the regulator of the activities of the various internet service providers especially in identifying unforeseen emerging illegal and harmful activities. The regulator might require certain activities to be implemented by social networking services including reporting buttons, clear terms of reference, codes of conduct, content disclosure, client disclosure, effective terms and conditions of service, transparency reports, trend reporting, etc. These agreed responsibilities will need to be auditable, verifiable and reviewable by the regulator and will require the implementation to be self-regulated on a day-to-day basis with unannounced audits implemented by the regulator.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

The regulator could receive reports from Irish/European citizens or from any internet user or perhaps restricted to the industry hotline/moderator. If the regulator is implemented to receive reports from internet users in Europe or globally, this would introduce the possibility of the regulator being the target of spurious and an overwhelming volume of requests and it will be difficult to prioritise reports received - with the purpose of prioritising the reports of immediate threat to safety or life in relation to less critical reports requiring action over a less urgent period of time. Any referral to the regulator should first be reported to the specific internet service and / or the industry funded moderator/hotline to review the report and assess the suspect content. The exact nature of the reported suspect content or activity (hate speech, etc) needs to be clearly specified and the report should include the nature of the report. If open reports are permitted to be lodged with the regulator then it will require extra resources for the regulator to identify the likely illegal or harmful nature of the suspect content and to locate the suspected content among a range of other content. If a satisfactory decision is not reached then the content might then be referred to the regulator. A statutory test might include a prerequisite that the report has already been reported to the service provider and/or the industry hotline. Depending on the nature of the reported content it might require that the suspect content has immediate harm to a wider range of persons rather than an individual. Any referral to the regulator should include the resulting decision and explanation received by the service provider or industry hotline. Any investigation needs to be coordinated against possible ongoing investigations by law enforcement to ensure that no ongoing investigations are disrupted.

6 Question 3:

- Which online platforms, either individual services or categories of services should

be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

There is a wide range of telecommunications businesses active in the internet marketplace providing from basic internet access providers through the latest evolution of online services which continually expand based on creative ideas and market opportunities. Although there are different positive responsibilities which each organisation in the internet hierarchy can contribute, the internet organisations currently in the spotlight primarily relate to social networking services, video-on-demand services and online gaming services. Since internet related technologies continues to evolve in unpredictable ways it would be a mistake to narrowly define the specific services which need to be addressed. Instead any attempted definition should focus on the broad services offered such as offering services to a wide range of citizens including minors and special needs individuals. It should be possible to start with a narrow remit and as skills and effectiveness improve or as requirements, demands and risks of the market change the remit could be expanded on request of the regulator or by the relevant Minister.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Two issues are often erroneously conflated – 1) illegal online activity and content and 2) harmful content and activity online and are very different issues with significantly different responses. A new category is now being debated in society called “severe harm”. 1) Illegal content needs close collaboration with An Garda Síochána to ensure successful investigations and prosecutions. Much work has been achieved in the current self-regulatory regime where many major global internet companies offer law enforcement portals, training, tools and sometimes joint-investigation-teams (JIT). Of course these activities should be supported and encouraged as technology improves. 2) The difficult challenge is that harmful content is demanding to define and identify independently of the effect caused by suspect content which further requires understanding the impact of the suspected harmful content on the receiver or reader of the suspicious content with specific care for minors or persons with special-needs. It must be assumed that the content

is different from illegal content and activity which is already clearly defined by law – subject to updates and improvements over time. As regards harmful content the two major areas identified as Serious Cyber Bullying and material which promotes self-harm or suicide are pressing issues which should be part of the early mandate of a regulator. In section 4, the consultation paper refers to the legislative framework established by the European Union law under the eCommerce directive. A key element of this directive has been the issue referred in the paragraph about the role of mere conduit and liability for hosting illegal content. The consultation states that “if they are made aware of the illegal content they are required to act expeditiously to ensure its removal from their service”. Previous interpretations internationally have referred to a higher standard of awareness called “actual knowledge” which is used in section 13 of the directive in relation to caching. A huge challenge in this area is to determine that content IS illegal (usually a role for law enforcement and the courts) and to be able to accurately and concisely specify the specific content that is suspect. These two issues can be very difficult for the internet citizen to determine in order to make a service provider “aware” of, or have actual knowledge of, illegal content. The regulator can offer a clear role in ensuring best practice and effective initiatives in this area. There are legal and justifiable reasons why harmful content might be discussed or propagated online since suspicious content depends on a complex range of factors and prior research and knowledge. There is also the problem of identifying suspect content in a world of complex emoji, song lyrics and hidden/obfuscated modern language dialects related to online activities.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

The focus of Video Sharing Platform services should only be concerned with internet service providers where a very significant element of the online service IS directly about online streaming of video content including activities such as YouTube, Vimeo, RTE Player, Virgin Media Player, iTunes, etc. However, internet services which provide incidental or supplemental online video services such as WhatsApp, Facebook, Linked-in, Skype, Snapchat, etc will provide a greater challenge since these services are also sometimes abused for illegal and harmful activities. These latter services would need to be under the remit of the proposed regulator as they relate to possible illegal or harmful use.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The regulator would need to have a working relationship with the VSPS established in Ireland with the ability to review and report on current practices and to require certain capabilities to be put in place at the VSPS. It is not clear which services are within the capabilities of the VSPS to implement without changes in Society. For example, an age verification system would need the ability to legally determine and profile the age of users using real-world data bases such as passports, birth certificates, etc and would have a major challenge in the balance between the rights of a child and the rights of their guardians. E.g. where would the balance rest between the rights of a minor to information about sexuality or drugs against the rights of society to restrict access to sexual or drug related explicit content.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

There should be a scale of sanctions: a) Ability to request disclosure and demonstrate current policies, practices b) Review and require improved staff training when required c) Transparency Reports for public dissemination d) Ability to audit current activities e) Public naming sanction f) Issues notices that require compliance g) Issue fines for inappropriate or inadequate responses h) Revoke permission to offer/operate a service in extreme situations i) Revoke licence to operate in extreme situations

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No comment.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No comment.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the

right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The European Court of Human Rights has often reiterated that freedom of speech is not only for content which is positive and good but also speech which is provocative, challenging and possibly unpleasant (note 1) . It is important that any intervention in the marketplace does not unreasonably impact on freedom of speech in democratic societies. In order to understand the complexities of this issues, I would refer the reader to work completed by the Mandola (Monitoring and Detecting Online Hate Speech) project funded by the European Commission which I participated in on the definitions of hate speech across Europe and specifically the work done on the Final report: Definition of illegal hatred and implication where a comparative analysis covering ten E.U. member States identified a wide heterogeneity and complexity of legislations targeting hate speech, which has consequences on the determination of an acceptable definition of illegal online hate speech (the notion of “definition of illegal hate speech” being understood as referring to the identification of hate speech that is currently illegal). This analysis leads to propose both a detailed and shorter definition of illegal hate speech covering the ten E.U. member States that have been studied, which - together with a short overview of penalties and problems. Note 1 Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. https://en.wikipedia.org/wiki/Handyside_v_United_Kingdom

14Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

As President of the European Internet Service Provider Association (EuroISPA) in 2001 I represented over 800 ISP's across Europe during the debates with the European Commission and Parliament on the eCommerce Directive. The issue of limited liability was always an important issue which has supported the development of internet services over the last two decades. The limited liability protects internet service providers who offer intermediary internet communications services to end-users when these same end-users behave in an illegal manner without the actual knowledge of the internet service provider. However, this liability is limited and will not always protect the intermediary. In most democratic jurisdictions, Internet Service Providers are not permitted to intercept or monitor internet communications unless requested and authorised by law. The issue of actual knowledge also states that the Internet Service Provider must take action when they gain actual knowledge of illegal content or activity using their internet

services. A key element in this responsibility and liability is based on the legal understanding and interpretation of what constitutes actual knowledge. Early self-regulatory regimes performed an exclusively reactive function where suspect content/activity is reported as suspect and is then reviewed by independent organisations with extensive expertise on illegal and harmful content to determine where the content is located on the internet and whether the content is likely to be illegal under the appropriate national law. The decision is then communicated to the relevant internet service for action. Once such notice has been issued, it is expected that actual knowledge of illegal activity has been given to the hosting provider – removing the protections received under the eCommerce directive. Delays in removing or blocking content can then be a legal problem for the internet service provider. Recent debates in society relate to the possible role of third party organisations or the internet service provider to perform enhanced reactive evaluations through prudent, minimal, reasonable, mostly automated proactive assessment or moderation or profiling of online activities to identify potentially illegal or harmful content or activity. These activities needs careful balance in democratic societies to protect free speech and rights to communicate without interception or monitoring with the rights of individuals to be free of harassment and victimization and access internet services without fear or unreasonable risk. The significant challenge therefore is to balance competing rights as outlined in the range of historical judgements issued by the European Court of Human rights. There is no simple solution to this balance except to understand that expertise, tools and knowledge continues to grow and it is important that all stakeholders work together to ensure a safer internet.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

There is no significant preference for either strategy as long as the internet focused regulation has its own focus, clear budget and responsibilities especially in the embryonic phase of activity. There is an advantage in sharing complimentary skills between traditional broadcasting regulatory skills and experiences and newer evolving cyber skills.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Funding is a challenging issue. The role of the regulator is to benefit society at large and as such should benefit from significant government funding – especially in the early years. However, it is clear that some internet businesses are currently generating significant income and profits from their services and should contribute to a safer internet. It might be possible to consider a cost sharing model which requires some supporting funds to be collected from Internet Service providers in the Irish market. However, it should be acknowledged that the impact of regulation could be a major barrier to entry for new internet business services as a result of both contributing to the running costs of a regulator and also by the significant burden to manage the regulatory requirements in terms of equipment and personnel. Such direct and indirect costs and potential negative impact against novel internet business models could have a substantial chilling effect on foreign direct investment in the Irish market and will certainly become a comparative issue across the European area. It will have a particular chilling effect on newer business models and will be a barrier to entry for those businesses. This might be addressed by offering lower contributions and regulatory requirements at low customer and profit levels which increases as income and customer volumes increase. In addition, the skills and equipment required to operate in the cyber safety and security space are scarce and expensive and are in high demand across the world. This will bias towards higher setup and running costs associated with the regulator

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

There should be a scale of powers and sanctions: a) Ability to request disclosure and demonstrate current policies, practices b) Review and require improved staff training when required c) Transparency Reports for public dissemination d) Ability to audit (announced and unannounced audits) current activities e) Public naming sanction f) Issues notices that require compliance g) Issue fines for inappropriate or inadequate responses h) Revoke permission to offer/operate a service in extreme situations i) Revoke licence to operate in extreme situations

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator,

and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

First 3 the Q14 The final sanction should require law enforcement investigations, prosecution and courts to reach a decision on criminal liability especially as they relate to legal persons and persons in leadership responsible roles in legal entities. This might be something that could be added later.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Offering a mediation service for users across the EU will require language support. It would be best if such complaints are first reported to a national regulator who would then refer the matter for mediation to the Irish regulator. This would permit early detection of minor or resolvable issues and higher quality referrals to the Irish based regulator.

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3 -Email

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
None. You should stay out of the internet. No government body should have any power to decide what should or should not stay online.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

No tests or appeals should be needed as the regulator (or any other part of government) should have any power to control content online.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

You cannot define harmful content as it is too subjective to the offended party. You will further erode people's freedom of speech. This is not acceptable. You are now balancing on the edge of a cliff which is a dystopian future. 1984 was a warning not a guidebook.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

You should not have the power to define these things.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

None. You should have no regulation on anything online. You shouldn't be the arbiters of what people are allowed to see/watch/listen to.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

None. You should have no powers to regulate these things.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

There should be no regulations.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund

currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

You should scrap all funds for you regulation of content. It would save some valuable taxpayers money.

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13Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Do not regulate the internet. People can always change the website or block abusers. Your proposals which you say will protect people from harm will ultimately be used as a backdoor to stifle people's freedoms and that is not acceptable. You are not the arbiters of what is acceptable.

14Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

We should stop being controlled by the EU. The EU are not to be trusted and will eventually be the downfall of our and every other member nation. They consistently try to remove more and more freedoms through regulations and laws and this must stop.

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15Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should

be considered?

[Section 5 of the explanatory note]

No regulatory structure.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

No regulatory structure.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

No powers should be given. You have no right to regulate the internet as it is not yours. People have a right to freedom which includes speech and expression and these new regulations will curtail these freedoms. This is just another step towards authoritarian control.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

No sanctions. As previously stated you should have no powers.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an

issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

This is extremely scary and I will be making sure to support all EU skeptics in Ireland, Europe and the world. You are in lockstep with a fascist organisation and are happy to do your overlords bidding. No Internet censorship.

Page 2

1 -Name

Aidan O'Neill

2 -Organisation if applicable

None

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** The first port of call should be the media platform itself. These should be compelled to: 1) develop algorithms and processes to recognise harmful content (however that is defined) and ensure that it is not posted; and, 2) respond to complaints from the public in relation to posted content and removed such content within a specified very short period - e.g. 24 hours. Additionally, the online platforms should be made legally responsible for the content that they publish, making it possible for civil actions to be taken against them if the platform publishes / distributes harmful content. The next step should be a regulator with, inter alia, the power to make binding decisions on whether a piece of content should be removed. Ideally, this would be an appeal based service, used when a platform has declined a request to remove a piece of content. If the regulator were to be the first point of contact in relation to harmful content, there is a high risk that it would simply be overrun with requests: it is therefore more efficient to leave the initial onus on the online platform itself. In order to be effective, there would need to be a short turnaround of such appeals, otherwise the risk of the harmful content being copied and spread onto other media / platforms is increased.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Devising a watertight statutory test would, in practice, not be possible. Instead, the regulator should be given broad powers to implement a set of defined principles: e.g. no bullying content; no threatening content; no defamatory content, no false information masquerading as true, no promotion of criminal acts; no content giving medically inadvisable or disproven information (promoting extreme dieting, for instance, or anti-vaccine propaganda, or chiropractic or homeopathy); no hate speech, etc. As technology and its use develops over time, the type of content is likely to change in ways that cannot be anticipated now, so a statement of principles would allow a regulator some flexibility in implementing their authority.

6 Question 3:

- Which online platforms, either individual services or categories of services should

be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

1) Social media platforms such as Facebook; Twitter; Snapchat; Instagram, etc; 2) User generated video platforms such as YouTube; Vimeo, Dailymotion, etc; 3) Online streaming platforms such as Twitch, Ustream, Periscope, etc. 4) Online news outlets such as Huffington Post, The Journal, The Irish Independent, etc.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

I think the "serious" modifier should be removed when referring to cyber bullying, threatening, intimidating, harassing, humiliating, etc., as this gives a defence, and an argument about whether something is just, e.g. threatening, rather than seriously threatening. Other categories would include, as suggested, material encouraging nutritional deprivation . . . etc; material potentially harmful to public health (anti-vaxx, homeopathy, chiropractic, unproven alternative therapies, "miracle cures", etc); material promoting an anti-science viewpoint (presenting scientifically disproven theories as truth: flat earth, anti-evolution, anti-climate change, etc),

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

VSPSs should include all such services that customarily make user generated videos available to the general public, either by live streaming or recorded videos.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from

video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The VSPSs should be informed by the regulator of the principles they are required to adhere to and put appropriate measures in place to ensure that they are followed. The regulator would deal with appeals in the event that the VSPS does not remove (harmful /illegal / etc) content when requested. The regulator's view should be final (unless challenged in court). The regulator should have the power to impose meaningful fines for non-compliance. The VSPSs should be treated as publishers, and thus responsible for the content on their services. (Follow on from previous question about type of material that should be subject to regulation: Copyright material (music, film, literature, etc) should be specifically excluded from these sites.)

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

There should be both active and reactive monitoring. For the active monitoring, the regulator should have ongoing checks on the VSPSs to monitor the content for items that fall foul of the principles. On the reactive side, the regulator should make it easy for the public to lodge complaints about the VSPSs or specific hosted material. The responsibility for establishing filters, content vetting, etc. should remain with the VSPSs.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No opinion on this

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No - the fund should remain as is. No - levies should not be applied.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

I think a distinction can be drawn between freedom of expression and freedom to amplify expression. Content that can be shown to be harmful: hate speech; bullying; exploitation; threats to personal or public health, etc should not be amplified. In cases such as these, the regulator would have the unilateral authority to prevent amplification (dissemination via VSPs). The onus should be on the person making the the speech to demonstrate that it is not harmful.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

no opinion on this

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

The second option - two regulatory bodies - is more appropriate as the aims of the two are quite different and the type of content distributed is different.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Funded directly by central government, with fines against non-compliant operators used to build a sinking fund for future funding

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

All of the above, with a focus on take-down notices, fines and criminal charges. In addition, the content providers should be classified as publishers in order to make them directly responsible for the content that they disseminate.



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12 April 2019

Alcohol Action Ireland Submission to Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive

To whom it may concern

Please find attached a submission from Alcohol Action Ireland in relation to this consultation.

Alcohol Action Ireland is a non-governmental organisation which provides an expert independent voice for policy change on alcohol related issues. We have confined our comments to those areas of the consultation where we have specific expertise.

We would be happy to meet to discuss these proposals in more depth.

Yours sincerely

Dr Sheila Gilheany, Chief Executive Officer

Alcohol Action Board Members

Carol Fawsitt (Chair), Solicitor. Professor Joe Barry MSc, MD, FRCPI, FFPHM, Public Health Specialist. Dr Declan Bedford, Specialist in Public Health Medicine and former Acting Director of Public Health, HSE. Catherine Brogan, Mental Health Ireland. Pat Cahill, former President ASTI. Prof. Frank Murray. Consultant in Hepatology & Gastroenterology. M.B., B.Ch. B.A.O., M.D., F.R.C.P.I., F.R.C.P. (Ed). Dr Bobby Smyth, Consultant Child & Adolescent Psychiatrist. Tadhg Young, Senior Vice President, Chief Operations Officer, State Street Global Services.

Alcohol Action Ireland Submission to Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive

Harmful Content

A first step in introducing any regulations in this area is to define **Harmful Content**. Alcohol Action Ireland considers that any alcohol marketing to children, should be included in the definition of Harmful Content.

Harm from alcohol is a serious public health issue both in Ireland and Europe. The harmful use of alcohol is a causal factor in more than 200 disease and injury conditions, according to the World Health Organisation, (WHO) such as liver cirrhosis, heart disease and cancer.

The implications in Ireland around alcohol misuse are stark.¹

- Over 1000 deaths per year are attributable to its use
- Every day 1500 beds are occupied by people with alcohol-related problems
- €1.5 billion is spent on alcohol related hospital discharges
- It is a factor in half of all suicides
- 900 people in Ireland are diagnosed with alcohol-related cancers annually
- It is a factor in the vast majority of public order offences
- It is a significant factor in many cases of child neglect
- Drink-driving is a factor in two fifths of all deaths on Irish roads
- 67,000 children in Ireland start drinking each year²

This harm is not unique to Ireland. The WHO European Region has the highest proportion in the world of total ill health and premature death due to the alcohol with the European Union being the heaviest-drinking region in the world.³

Given that Ireland will implement and regulate audiovisual services on an EU wide basis for entities based here such as YouTube and Facebook there is now a unique opportunity to address alcohol harm across the EU.

Alcohol Marketing

Alcohol marketing including advertising, sponsorship and other forms of promotion, increases the likelihood that adolescents will start to use alcohol, and to drink more if they are already using alcohol.⁴

The World Health Organisation's European Action Plan to reduce the harmful use of alcohol 2012-2020 protects children and adolescents and requires systems to be in place to prevent inappropriate and irresponsible alcohol advertising and marketing.⁵

The recent Public Health (Alcohol) Act 2018 has introduced welcome legislation which seeks to reduce the level of exposure of children to some aspects of alcohol advertising for example on outdoor billboards, public transport and mainstream broadcasting. However, this legislation does not apply to internet marketing.

Children and young people are constantly absorbing information and are the primary users of social and digital media including social networking sites with young people spending more time on the internet than they do watching television.⁶ An EU funded assessment of young people's exposure to alcohol marketing in audiovisual and online media found that the alcohol brands they reviewed all had a considerable online media presence featuring both marketer-generated and user-generated content.⁷ Internet marketing differs considerably from the passive type of adverts on TV and in print media. It actively encourages engagement with the ad and peer-to-peer sharing which leads to an emotional connection with the product.

A study of alcohol marketing on social media in Sweden and Finland found that 25% of alcohol marketing social media posts in Finland, and 15% in Sweden were identified as appealing to young people in some way (mainly through humour and linking with sporting activities)⁸. Another large-scale study⁹ of over 9000 adolescents in Germany, Italy, the Netherlands and Poland reported in 2016 that they had frequent exposure to online alcohol marketing and that there was a strong association between this exposure and the likelihood of starting to drink and/or binge drinking.

A 2019 report¹⁰ from the WHO notes that children are regularly exposed to digital marketing of many unhealthy products including alcohol while the response from governments to this threat to children's well-being is lagging far behind. The same report also notes that currently it is almost impossible to ensure that an advertisement for an unhealthy product will not be sent to a child.

Revised Audiovisual Media Services Directive (AVMSD)

The new rules within the revised AVMSD require that minors should be protected from potentially harmful content.

There are strengthened provisions to protect children from inappropriate audiovisual commercial communications of foods high in fat, salt and sodium, and sugars, by encouraging codes of conduct at EU level, where necessary and tobacco advertising is forbidden in all types of media.

For alcohol advertising, the co-legislators agreed to encourage further development of self- or co-regulation, if necessary also at EU level, to attempt to reduce the exposure of minors to such advertisements. However, this does not prevent Member States from applying stricter rules such as, for example, banning alcohol advertisements or adopting other measures.

Self-regulation is no regulation

There have been many studies demonstrating that industry regulation of alcohol advertising does not work¹¹. Recent reviews have indicated that self-regulated alcohol marketing codes are violated routinely, alcohol advertisements regularly contain content appealing to vulnerable populations, and youth populations are exposed to disproportionately large amounts of alcohol advertising.^{12,13} The question that is being asked in relation to alcohol industry self-regulation: who is it really protecting?¹⁴

Statutory regulation

A number of European countries have introduced regulations around internet alcohol advertising.¹⁵

For example in 2008 France extended its alcohol marketing legislation to cover interstitial or intrusive advertising (e.g. pop-ups) and content that might appeal to young people (e.g. videos and

animations). Despite these changes, however, research still suggests that over half of young people in France reported seeing alcohol marketing on the internet in the previous month.⁹

In 2015 Finland banned some forms of marketing of alcohol products on social media including encouraging individuals to engage with, or share, marketing on social media, online competitions, viral marketing and 'advergaming' (i.e. games that promote a particular brand, product or message by integrating it into play). This legislation covers marketing on the internet, games consoles, tablets and mobile phones. This law aimed to restrict marketing towards children and young people and to stop exploitation of consumers as the producers and distributors of marketing messages. However, a recent study⁸ appears to show that neither of these aims has been successful with a significant lack of age-control restrictions on many alcohol brand SM pages and sites. Additionally the study demonstrates the ability of the alcohol industry to continue to create engaging social media marketing despite the amendment.

It is clear, then, that any legislative proposals statutorily regulating alcohol marketing online needs to be stringent and applied internationally. With multiple technology companies having their European headquarters in Ireland, there is a unique opportunity for Ireland to address this problem comprehensively.

A comparison with tobacco

It is instructive to compare the situation with tobacco. Over the past three decades, Ireland, in common with countries right across the globe, has successfully introduced advertising bans and other restrictions on tobacco. This has led to a significant fall in its use with the 2018 Healthy Ireland survey¹⁵ noting that current smokers now only comprise 20% of the population. The same survey, however, indicates that 75% of the population consume alcohol. Globally alcohol use leads to a highly significant burden on public health. Among the population aged 15–49 years, alcohol use was the leading risk factor globally in 2016, with 3.8% of female deaths and 12.2% of male deaths attributable to alcohol use.¹⁶

Under the revised Audiovisual Media Services Directive (AVMSD) tobacco advertising is banned completely in all media.

Conclusion

AAI strongly advocates that statutory regulation should be introduced whereby alcohol products cannot be advertised on an information society service unless all reasonable steps are taken to ensure that the advertising cannot be viewed by children. This is the same test used by the Department of Health in relation to the offence of selling tobacco products to under 16s.¹⁷

'Reasonable steps' would effectively require the following:

- Age gates (at least user-entered date of birth or similar)
- Use of any demographic targeting tools provided by advertising networks to limit viewing to users over 18
- Registration of websites with internet filtering software providers
- A restriction on 'retweet', 'send by email' and similar tools where these would have the effect of exposing an advertisement to a new audience which might include children

We also call for the introduction of an effective monitoring system to track any such content with stringent penalties for infringement.

References

1. [Mongan D and Long J \(2016\). Overview of alcohol consumption, alcohol-related harm and alcohol policy in Ireland. HRB Overview.](#)
2. European School Survey Project on Alcohol and Other Dugs 2015
3. <http://www.euro.who.int/en/health-topics/disease-prevention/alcohol-use/data-and-statistics>
4. Scientific Opinion of the Science Group of the European Alcohol and Health Forum (2009) Does marketing communication impact on the volume and patterns of consumption of alcoholic beverages, especially by young people? – a review of the longitudinal studies Anderson, P. et al (2009) Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies. Alcohol and Alcoholism, pp.1-15, 2009
5. WHO (2012) European action plan to reduce the harmful use of alcohol 2012-2020_ <http://www.euro.who.int/en/health-topics/disease-prevention/alcohol-use/publications/2012/european-action-plan-to-reduce-the-harmful-use-of-alcohol-20122021>
6. <https://www.ofcom.org.uk/research-and-data/media-literacy-research/childrens/children-and-parents-media-use-and-attitudes-report-2018>
7. RAND Europe (2012) Assessment of Young People’s Exposure to Alcohol Marketing in Audiovisual and Online Media
8. Emmi Kaupilla, Mikaela Lindeman, Johan Svensson, Matilda Hellman and Anu Katainen (2019): Alcohol Marketing on Social Media Sites in Finland and Sweden; A comparative audit study of brands’ presence and content, and the impact of a legislative change. REPORT University of Helsinki Centre for Research on Addiction, Control and Governance (CEACG) Helsinki 2019
9. Exposure to Online Alcohol Marketing and Adolescents’ Drinking: A Cross-sectional Study in Four European Countries. Avalon de Bruijn Rutger Engels Peter Anderson Michal Bujalski Jordy Gosselt Dirk Schreckenberg Jördis Wohtge Rebecca de Leeuw Alcohol and Alcoholism, Volume 51, Issue 5, September 2016, Pages 615–621
10. WHO (2019) Monitoring and restricting digital marketing of unhealthy products to children and adolescents http://www.euro.who.int/_data/assets/pdf_file/0008/396764/Online-version_Digital-Mktg_March2019.pdf
11. Noel, J. K., Babor, T. F. (2017a). Does industry self-regulation protect young persons from exposure to alcohol marketing? A review of compliance and complaint studies. Addiction, 112(Suppl 1), 51–56
12. Noel, J. K., Babor, T. F., Robaina, K. Industry self-regulation of alcohol marketing content and exposure: a systematic review. Addiction 2017; 112(Suppl. 1): 28– 50
13. Hastings, G. Failure of self regulation of UK alcohol advertising. *BMJ* 2010; 340: b5650.
14. Noel, J. Lazzarini, Z. Robaina, K. Vendrame, A. Alcohol industry self-regulation: who is it really protecting? Addiction 2017; 112, Issue S1 57-63

15. Healthy Ireland Survey 2018. <https://health.gov.ie/wp-content/uploads/2018/10/Healthy-Ireland-Survey-2018.pdf>
16. Alcohol use and burden for 195 countries and territories, 1990–2016: a systematic analysis for the Global Burden of Disease Study 2016. [Lancet](#). 2018 Sep 22;392(10152):1015-1035. doi: 10.1016/S0140-6736(18)31310-2.
17. Section 3(3) of the Tobacco (Health Promotion and Protection) Act 1988 as amended by section 2 of the Health (Miscellaneous Provisions) Act 2001.

Page 2

1 -Name

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3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Just put a warning label on it. Removing content based on subjective analysis puts us on a dangerous path to censorship.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

The only content that should be removed is a clear call to violence. Nothing more.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)

- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

The definitions as is is good enough

Page 4

9 Question 6:

- The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

It's a private business. You really don't have a right to interfere.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No regulation

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No. Definitely not.

Page 7

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Not through taxpayers. Nobody asked for this.

Page 2

1 -Name

Aoife Miller

2 -Organisation if applicable

Blackrock College

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** any subject matter that shows harmful or degrading material should be taken down if so requested by the potential injured party

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

statutory test might contain limits on material deemed harmful or encouraging harmful (to self or others) behaviour including demeaning or degrading behaviour

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

this is ever changing so a wide media platform

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

should include all of the examples given above

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

any platform which enables videos AND photographs - snapchat, whats app, instagram

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

the Regulator should ensure that the Service Providers act with haste

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

there should be clear publication of contact numbers for the regulator so it is easy for the 'victim' to contact the regulator. if the service provider has not acted the onus should be on the regulator to act immediately. when signing up for a service, the regulator's contact should be available and highlighted to end user.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

same content rules should apply

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

should be uniformly higher standards applied across eu

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

look to existing broadcasting laws and limit accordingly

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

as these stands morph eventually into one, there should be one Media Commission with overall responsibility

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

a defined percentage should come from these service providers - You tube, Facebook, google etc and should be considered by those firms as a cost of doing business since their revenues are from advertising sources which rely on same.

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

all of the above examples

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

similar thresholds to current broadcasting laws except NO watershed i.e. never allow harmful images inciting violence to be shown

Apple Distribution International (ADI) submission to public consultation on the implementation of the Revised Audiovisual Media Services Directive

We welcome the opportunity to provide comments to the Department of Communications Climate Action and Environment's public consultation on online platforms and the implementation of the Revised Audiovisual Media Services Directive ("AVMS Directive").

This submission is intended to explain Apple's video services ("Apple Video Services") and present some general views and recommendations on regulating over-the-top (OTT) video on demand services (VOD) within the Irish and European legal framework on audiovisual media services.

It is important to note that Apple Video Services are distinct from video-sharing platforms as they do not give individual users the opportunity to upload content for distribution to the general public. Appropriate content is offered by Apple to customers on a curated basis. As such, undesirable content may not be disseminated by users. Therefore for the purposes of this submission we are not providing comments on video sharing platforms (VSPs) and issues around harmful content.

About Apple Video Services

- Apple Video Services are delivered in Europe by Apple Distribution international ("ADI"), an indirect subsidiary of Apple Inc. established in Cork. For the sale or rental of movies and TV content via the iTunes Store, ADI acts as a distributor, obtaining the rights in digital content from third party content owners. We therefore consider Ireland to be Apple's country of origin within the understanding of the AVMS Directive.
- The iTunes Movie Store is Apple's platform for consumers to buy or rent over 100,000 comedies, romances, classics, indies, and thrillers. The goal is to create a seamless experience for consumers to enjoy the richest possible content, made by creatives all over the world, in the highest audio-visual quality, via a simple and accessible service across all their Apple devices.
- The new Apple TV app (available in May) brings together all the different ways to discover and watch shows, movies, sports, news and more in one app across iPhone, iPad, Apple TV, Mac, smart TVs and streaming devices. Users can subscribe to and watch new Apple TV channels including Apple TV+, Apple's original video subscription service — paying for only services they want — enjoy sports news and network TV from cable and satellite providers as well as purchase or rent iTunes movies and TV shows all within the new app. Beginning in May customers can subscribe to Apple TV channels *à la carte* and watch them in the Apple TV app.
- Customers access Apple Video Services via the internet, and content is delivered via an internet connection. It also provides the ability to download content and consume it offline. The content is delivered specifically to subscribers who choose to access and connect to the services via Apple websites or apps, rather than being "broadcast" to the general public at large; spectrum or related local telecommunications resources is not used for the delivery and consumption by end users.

Comments on selected questions

What type of regulatory relationship should exist between an on-demand service established in Ireland and the Regulator?

We understand that the implementation of the AVMS Directive may entail a greater level of regulatory oversight for on-demand services than has previously existed. However, we would caution against using some traditional broadcasting regulatory models as a reference framework as they do not fit well with on-demand services. A broadcast licence, for instance, has been

appropriate in the context of broadcasters who use scarce resources (e.g., spectrum, network infrastructure or EPG placement). This is not the case for on-demand services which operate in a different environment, over the Internet.

The current notification procedure, in which the service provider issues identification and contact details and a brief description of the type of services it is offering locally and in the EU, has proven to work well and should be maintained. The notification should be built upon with an ongoing conversation as it is in the interests of everyone, including consumers, that the regulatory authority knows about, and understands, developments in the technology and the audio-visual market. Some elements which would be conducive to such a conversation would be:

- Clear jurisdiction, especially for services using Ireland as a base to offer cross-border services in the EU;
- A mechanism that allows for trust and confidentiality for any information exchange;
- Avoidance of unnecessary regulatory or operational burdens that bring little added value;
- An established appeal mechanism in case of disagreements.

Should the same content rules apply to both linear and on-demand services?

Already today linear and non-linear services are largely subject to similar baseline content standards, in particular in regard to issues such as content ratings, protection of minors, advertising, content that incites hatred discrimination, etc. These rules are set in EU and national legislation and applied through a mix of self-regulatory codes and more formalised initiatives such as the BAI code of programme standards. We would argue that this approach has worked well and there is little evidence to suggest any fundamental reform is required. The current rules have provided enough flexibility to allow non-linear service providers to implement solutions that fit the nature of the service whilst meeting important public policy goals on areas such as protection of minors, accessibility, data protection, etc.

Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to include non-linear services as well as applying levies to services which are regulated in another EU Member State but target Ireland?

Whilst we fully understand the need to support the production of local or important cultural value content, we do not believe that a levy system or subsidised system is the most efficient way of achieving this goal. These types of subsidised models do not necessarily lead to better quality outputs and connection with the audience, but instead can lead to market distortion and reduced innovation in the sector. We would instead encourage a framework that incentivises market driven solutions and private investment into local content.

Page 2

1 -Name

Arron Keegan

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Nothing. Free Speech allows for terrible ideas to be discussed openly and dismissed. If you were to censor my opinions, I'd assume they were right as I'm not being challenged

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

No, anything goes.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

It should not be defined. The issue with 'hate' is that it is personal. Eventually you will get to a stage where everything is considered hateful to someone and going by what you're proposing, nobody will be allowed to speak

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

If you can upload a video, it's a video sharing platform service.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Freedom of speech, freedom of expression.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

No basis whatsoever

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

I don't watch TV, my news is researched myself as many news shows can't be trusted. The same goes for a lot of people, so it doesn't apply to us. However, you should not favour one side on national TV in any case. Both sides must be represented

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Say what you like so long as it's not a call to violence. Simple

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

The EU shouldn't have a say in what I can publish online, within reason

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

No regulatory bodies, no state funded television networks. If someone wants to make it big on TV, they pay for it

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the

various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Don't fund bias broadcasts

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

None

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Nothing

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

EU shouldn't have a say

Page 2

1 -Name

Orla Twomey

2 -Organisation if applicable

ASAI

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
Not applicable

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

Not applicable

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

Not applicable

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Not applicable

Page 4

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The ASAI is an experienced regulator in the areas of marketing communications and has extensive experience in regulating commercial marketing communications. The Directive provides that a number of articles that member states should encourage the use of co-regulation and foster self –regulation through codes of conduct adopted at national level. The ASAI system that ad self-regulation is widely accepted by government, civil society, advertising industry and consumers. We are strongly of the view that a new legislative proposal should provide a role for effective advertising self-regulation in the areas covered by the directive including the protection of minors, advertising of specific product categories should as foods defined as HFSS and video sharing platforms. ASAI through its own work and that as part of global and European advertising self-regulatory orgs is experienced not only in the provision of pre-publication copy advice and complaints handling services but also in monitoring compliance with advertising rules against a number of Codes. While it is unclear what the regulatory structure will be, we would be encourage that recognition of and a role for be given in the legislation for a self-regulatory approach, as envisaged by the Directive.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Any system with processes should be open to review and it would be reasonable that there should be consultation on what those processes should be. in addition, The ASAI is an experienced regulator in the areas of marketing communications and has extensive experience in regulating commercial marketing communications. The Directive provides that a number of articles that member states should encourage the use of co-regulation and foster self –regulation through codes of conduct adopted at national level. The ASAI system that ad self-regulation is widely accepted by government, civil society, advertising industry and consumers. We are strongly of the view that a new legislative proposal should provide a role for effective advertising self-regulation in the areas covered by the

directive including the protection of minors, advertising of specific product categories should as foods defined as HFSS and video sharing platforms. ASAI through its own work and that as part of global and European advertising self-regulatory orgs is experienced not only in the provision of pre-publication copy advice and complaints handling services but also in monitoring compliance with advertising rules against a number of Codes. While it is unclear what the regulatory structure will be, we would be encourage that recognition of and a role for be given in the legislation for a self-regulatory approach, as envisaged by the Directive.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

ASAI has been part of the ODAS process, the to date there hasn't been a significant development to commercial communications for solely on demand. Not all on demand services based in Ireland are at the same scale as the broadcasters (while of course some are). Regulation should be proportionate and recognised the extent to which internal resources impact on such providers. The ASAI is an experienced regulator in the areas of marketing communications and has extensive experience in regulating commercial marketing communications. The Directive provides that a number of articles that member states should encourage the use of co-regulation and foster self –regulation through codes of conduct adopted at national level. The ASAI system that ad self-regulation is widely accepted by government, civil society, advertising industry and consumers. We are strongly of the view that a new legislative proposal should provide a role for effective advertising self-regulation in the areas covered by the directive including the protection of minors, advertising of specific product categories should as foods defined as HFSS and video sharing platforms. ASAI through its own work and that as part of global and European advertising self-regulatory orgs is experienced not only in the provision of pre-publication copy advice and complaints handling services but also in monitoring compliance with advertising rules against a number of Codes. While it is unclear what the regulatory structure will be, we would be encourage that recognition of and a role for be given in the legislation for a self-regulatory approach, as envisaged by the Directive.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

not applicable

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Not applicable

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Not applicable

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

The ASAI is an experienced regulator in the areas of marketing communications and has extensive experience in regulating commercial marketing communications. The Directive provides that a number of articles that member states should encourage the use of co-regulation and foster self-regulation through codes of conduct adopted at national level. The ASAI system that ad self-regulation is widely accepted by government, civil society, advertising industry and consumers. We are strongly of the view that a new legislative proposal should provide a role for effective advertising self-regulation in the areas covered by the directive including the protection of minors, advertising of specific product categories should as foods defined as HFSS and video sharing platforms. ASAI through its own work and that as part of global and European advertising self-regulatory orgs is experienced not only in the provision of pre-publication copy advice and complaints handling services but also in monitoring compliance with advertising rules against a number of Codes. Should the final regulatory approach, in line with the directive provisions to encourage and foster co and self

regulation, utilise and provide space for the involvement of the effective advertising self-regulatory system (as practised by the ASAI, there should be a requirement on providers to fund all parts of the regulatory value chain.

Page 8

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Re thresholds, the challenge as ASAI would see it is that it is important that consumers have access to a system to voice their concerns, but for a mediator to deal with their concerns, however triaged, from all of EU would appear to present serious challenges. It may be that a system such as utilising national advertising self-regulatory bodies, in a coordinated manner could provide an initial step for consumers to raise their concerns, after they have been addressed to the VSPs. The ASAI is an experienced regulator in the areas of marketing communications and has extensive experience in regulating commercial marketing communications. The Directive provides that a number of articles that member states should encourage the use of co-regulation and foster self-regulation through codes of conduct adopted at national level. The ASAI system that ad self-regulation is widely accepted by government, civil society, advertising industry and consumers. We are strongly of the view that a new legislative proposal should provide a role for effective advertising self-regulation in the areas covered by the directive including the protection of minors, advertising of specific product categories should as foods defined as HFSS and video sharing platforms. ASAI through its own work and that as part of global and European advertising self-regulatory orgs is experienced not only in the provision of pre-publication copy advice and complaints handling services but also in monitoring compliance with advertising rules against a number of Codes. While it is unclear what the regulatory structure will be, we would be encourage that recognition of and a role for be given in the legislation for a self-regulatory approach, as envisaged by the Directive.

Page 2

1 -Name

[REDACTED]

3 -Email

[REDACTED]

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Removal of what anyone might deem harmful content should be the sole responsibility and at the discretion of the social media platform

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

Since state regulators should not be involved, n/a

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

None

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Use the reasonable man standard as defined by the US Supreme Court

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

No services should be within this definition as the state should not curtail free speech other than yelling fire in a crowded theater

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

None because the state should not curtail free speech other than the yelling of fire in a crowded theater

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

No basis because the state should not curtail free speech other than the yelling of fire in a crowded theater

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

None because the state should not curtail free speech other than the yelling of fire in a crowded theater

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services

which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

By not enacting this Orwellian regulation

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

By not enacting this Orwellian regulation

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Neither since this Orwellian regulation should not be enacted

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

No need to fund since the Orwellian regulation should not be enacted

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

None since this Orwellian regulation should not be enacted

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

None since this Orwellian regulation should not be enacted

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

None since this Orwellian regulation should not be enacted

**Regulation of Harmful Content on Online Platforms and the
Implementation of the Revised Audiovisual Media Services
Directive**

Submission on behalf of

Bodywhys: The Eating Disorders Association of Ireland

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Introduction

Bodywhys - The Eating Disorders Association of Ireland - is the national voluntary organisation supporting people affected by eating disorders. Our core work includes the provision of a range of support services and information resources about eating disorders, to the promotion of positive body image and media awareness in schools, as well as supporting family members and friends. Bodywhys welcomes the opportunity to address the issue of harmful online content. As with any submission that forms part of this consultation, we are writing from a particular perspective and will focus on the issues which are relevant to our work.

Current submission

Research indicates that the internet is a key source of information and help amongst Irish young people in relation to mental health.^{1,2} Given the nature of the internet, it is possible that users may encounter information which is helpful, but also that which is problematic. People with low levels of happiness are more likely to access harm-advocating material online.³ Victims of online harassment may experience low self-image and are more likely to access harmful content, including material related to eating disorders.⁴ Bodywhys has for some time expressed concern in relation to harmful websites and content which centre on risky behaviours associated with eating disorders.

This submission addresses:

- Eating disorders
- An evidence based discussion of pro-anorexia websites, social media posts and associated harmful content
- Responses to the questions posed by the Department of Communications, Climate Action and Environment

About Eating Disorders

According to the Health Service Executive's (HSE) Model of Care for Eating Disorders, up to 188,895 people in Ireland may be affected by eating disorders, with 1,757 new cases emerging each year in the 10-49 year age group.⁵ According to the Health Research Board, in 2017, 14% of all admissions of individuals under 18 to Irish psychiatric units and hospitals had a primary diagnosis of eating disorders.⁶ For

anorexia nervosa, the peak incidence of onset is 14-18 years of age and for bulimia nervosa, it is 14-22 years.⁷

Eating disorders are recognised as serious and complex mental health illnesses.⁸ They feature severe disturbances in a person's thought processes and their relationship with food, their body and weight. This may lead to significant complications for a person's quality of life, and in their physical and mental health. For example, osteoporosis, heart problems, fertility problems, difficulties concentrating, damage to a person's teeth and chest pain. Individuals may have to take time out from school, college or work during treatment. Social isolation is a common consequence of eating disorders. Parents, carers, siblings and family members also experience significant emotional distress, fear, guilt and uncertainty when someone they care about is unwell. Full recovery is possible, but it is a complex process and an individual's support needs vary from person-to-person.

Associated Risks

People affected by eating disorders may be at risk in terms of their own safety.⁹ This may include medically, psychologically, psychosocially and their capacity for insight and motivation.¹⁰ Eating disorders also lead to risk in terms of mortality and suicidality.^{11, 12} People affected by eating disorders may be extremely vulnerable, at risk or in crisis. In severe cases, immediate and ongoing medical intervention and supervision may be required.

People affected by eating disorders may also present with:

- Anxiety^{13, 14, 15},
- Depression^{16, 17, 18},
- Self-harm^{19, 20, 21, 22, 23, 24},
- Suicide ideation and behaviour^{25, 26}

What is Pro-anorexia?

For over a decade, the mainstream media^{27, 28} along with researchers and health professionals, have reported on the existence and activities of pro-anorexia websites.^{29, 30, 31, 32} Pro-ana websites and online content can be defined as those which tend to focus on the maintenance, promotion and encouragement of

disordered eating behaviours and eating disorders. Typically, the websites operate without professional monitoring, supervision or formal guidance structures or support resources and channels. Terms used in this area include:

- Pro-anorexia (pro-ana)
- Pro-bulimia (pro-mia)
- Pro-eating disorder (pro-ED)

The websites are not unique to English-speaking countries and may be accessible to a global audience at any time.^{33, 34, 35, 36} The growth in availability of the internet and portable devices means that this type of material is no longer limited to websites and message boards – it has been documented on social media platforms such as Reddit,³⁷ Youtube,³⁸ Flickr,³⁹ Tumblr,^{40, 41} Instagram⁴² and Twitter.⁴³ Individuals who access pro-anorexia sites intensively do so for approximately 16 hours per week.⁴⁴

Some websites have been closed down, but have opted to relocate under an alternative identity or have used methods to conceal their new location.^{45, 46, 47, 48} Others are no longer updated or feature a notice about being shut down.⁴⁹

Quantifying an accurate number of pro-anorexia websites is challenging and has been described as guesswork.⁵⁰ Pro-anorexia websites are heterogeneous and diverse, and they may serve a range of conflicting purposes.⁵¹ There is no unifying philosophy that underpins the online pro-anorexia/pro-bulimia community.^{52, 53, 54, 55} Some sites are moderate whilst others are uncompromising in their tone, outlook and messages.^{56, 57, 58} The sites and the nature of pro-anorexia in itself have also been described as ambiguous⁵⁹ and contradictory.⁶⁰

For children and young people, exposure to internet content such as self-harm, suicide and eating disorders may increase with age.⁶¹ Young people have reported encountering pro-anorexia websites and online accounts promoting anorexia.⁶² Young girls are more likely to access the sites compared to male peers.⁶³ Parents of children affected by eating disorders may have some awareness of pro-anorexia websites, but little knowledge of their child's usage of such sites.⁶⁴ Parents may also have limited knowledge of pro-recovery websites.⁶⁵ The availability of pro-anorexia websites is a significant cause for concern for families and people affected by eating disorders.⁶⁶

What's the appeal?

Reasons for accessing the websites:

- To pursue anorexia as a choice of 'lifestyle' through extreme thinness⁶⁷
- To manage issues that users feel are not adequately addressed in relationships outside of the internet⁶⁸
- To seek support from others with similar beliefs and experiences^{69, 70}
- To seek reinforcement and a sense of community⁷¹
- To seek support due to a lack of understanding and feeling marginalised from traditional support structures^{72, 73}
- To exchange messages as a form of emotional support⁷⁴
- To cope with stigma and write online postings as a form of self-expression⁷⁵
- To maintain a concealed identity, including from family and friends^{76, 77}

What are the concerns?

Behaviours discussed may include:

- How to maintain or initiate eating disorder behaviours and how to resist treatment or recovery^{78, 79}
- How to obtain and use weight loss medications⁸⁰
- How to conceal anorexia from family members⁸¹
- How to behave in social situations involving food, particularly when interacting with people who do not have an eating disorder⁸²
- Information on weight loss strategies, commonly known as tips and tricks^{83, 84}
- Diet challenges and competitions^{85, 86, 87}
- Praise for the denial of nourishment⁸⁸
- Disguising evidence of and how to induce vomiting, the sharing of personal photographs of emaciation in order to seek approval and validation from peers.^{89, 90, 91}

Based on the available research evidence, four primary areas of concern have emerged from the availability of and exposure to pro-eating disorder websites:

1. Weight and Eating Behaviours

- The use of techniques to aid with food reduction and the subsequent impact on an individual's calorie intake⁹²
- An impact on the drive for thinness and perfectionism in young girls⁹³
- An impact on the drive for muscularity in men⁹⁴
- Reported higher levels of disordered eating amongst pro-eating disorder website users⁹⁵
- Reported preoccupation with weight, diet and food behaviours^{96, 97}
- That extreme content, including thinspiration posts, may have the potential to trigger eating disorder behaviours in vulnerable users⁹⁸

2. Thoughts and Feelings

- A negative impact on an individual's self-esteem, emotional state, perceived weight, self-efficacy and comparison with the images of women that were posted^{99, 100, 101}
- Feelings of worthlessness, weakness and self-loathing towards the body and inner self¹⁰²
- The risk of eating disorder behaviours and thought patterns becoming increasingly entrenched¹⁰³
- Low scores on cognitive dimensions and insight measures amongst blog users^{104, 105}
- Where an individual has a low sense of social belonging, exposure to pro-eating disorder websites may be negatively associated with their view of their subjective well-being (SWB) – psychological health, overall happiness and appreciation for life¹⁰⁶

3. Pressure and Stigma

- A fear of disclosure and discovery, feeling under pressure and the encouragement of eating disorder behaviours¹⁰⁷

- The intensification of stigma and the reframing of eating disorder behaviours as positive¹⁰⁸
- The continuation of the behaviours associated with and expected of the ideals of pro-anorexia¹⁰⁹

4. Lack of Support

- Ultimately, the quality of support available has been shown to be short-term relief, elusive, or a 'social mirage'¹¹⁰
- Users may report fewer social connections with the outside world¹¹¹
- Whilst there may be a social component to the interaction on the websites, this is not without limitations and challenges.¹¹²

'Thinspiration' Material and Usage of Social Media

Some websites and social media posts feature content centred on the concept of thinspiration. That is, images, messages, mantras, exercise routines, commentary and suggestions based around thin body ideals and aesthetics. Typically, this is to inspire fellow users and viewers to be thin and to admire the body depicted, with certain poses and a particular look. In most instances, the imagery depicts women. The nature of thinspiration content may be associated with the encouragement of, and motivation to support, endorse and sustain eating disorder behaviours.¹¹³

Imagery may focus on someone with a low weight, often in underwear and with an emphasis of the torso or waist and legs. Online content may also focus on pain and suffering which requires dedication and is not for everyone.¹¹⁴ Thinspiration based emotional messaging may feature praise for thinness, along with body and weight related guilt, objectifying messages and stigma about weight and fat.¹¹⁵ Additional problematic details posted on the sites include how to achieve minimal food intake, along with strategies for circumventing medical assistance or supervision.¹¹⁶

Statements such as 'sore or sorry, you pick', have been noted on some thinspiration blogs.¹¹⁷

Research indicates that internet searches related to thinspiration yield results with higher harm scores compared to searches without this term.¹¹⁸ That is, higher harm scores indicated more harm due large amounts of graphic content, imagery and active encouragement of eating disorder behaviours. It has been suggested that the

focal point of thinspiration imagery is to reduce the women depicted to particular body parts, often from below the neck, to create the impression that a woman's worth is contingent on her bodily appearance, and thus discourage eating.¹¹⁹

Pro-eating disorder posts on social media may indicate a high level of vulnerability, risk to personal safety and attitudes that reinforce eating disorder behaviours and self-harm.¹²⁰ A study which examined pro-anorexia Instagram posts found that the content posted by some users exhibited a trend of increasing mental illness severity (MIS) over time.¹²¹ The most severe elements of MIS was evident in tags such as: "anxiety", "depression", "abuse", "ana", "anorexia", "fat", "bulimia", "skinny", "starve", "binge", "purge", "anemia", "dointeat", "ugly", "size00", "fasting", "bones", "anatisps", "cutting", "suicidal", "hate", "crying", "body", "weightloss", "perfect", "flatstomach", "perfectbody", "scared", "dying", "tiny", "paranoia", selfhate", "mental", "schizo", "gross", "alone" and "worthless".

Using a dataset of 7,560 images from Instagram, researchers found that 74% of the images focused on pro-anorexia content.¹²² Through analysis, the following categories were identified:

- Thinspiration images
- Gamified images – that is those which imply that a user will engage in fasting or excessive exercise for 'likes'
- Interactive images - posts that request the audience to name a food that a user will agree not to eat for a set period of time
- Text-based quotes including, poetry, lyrics and memes that discourage eating
- Pro-anorexia images linked with depression, including feelings of sadness, isolation and worthlessness
- Pro-anorexia images linked with self-harm and suicide
- Tips on maintaining and concealing an eating disorder
- Pro-recovery messages, including encouraging seeking professional help and hope for the future
- Selfies

Instagram provides users with filter and editing options.¹²³ In the context of thinspiration, this can accentuate stylised and aesthetic features and bone protrusion.¹²⁴

As of April 2019, Tumblr has 462 million blogs, 21.1 million daily posts and is available in 18 languages.¹²⁵ Pro-anorexia content on Tumblr has been associated with the following research findings:¹²⁶

- Pro-anorexia posts are more pervasive than those from a pro-recovery perspective
- Pro-anorexia posts describe, endorse and disseminate the progression and maintenance of anorexia nervosa
- Content relating to self-harm and suicide, including graphic descriptions, is three times more common in pro-anorexia posts compared to those of the pro-recovery community
- Pro-anorexia Tumblr users may be less likely to use words related to social and personal concerns, indicating that they are less socially embedded with friends and family. This may be as a consequence of rejection, social isolation or a lack of support
- Users may post fewer cognition and perception words compared to the pro-recovery community, indicating possible cognitive impairment

Using a dataset of approximately 877,000 pro-eating disorder Tumblr posts, researchers referred to violations of community guidelines and rules as deviant content.¹²⁷ Currently, pro-anorexia content is rarely reported to moderators.¹²⁸ This study also noted that those looking for support in the pro-anorexia community may be unlikely to recognise that dangerous content is in breach of community guidelines.

A content analysis study that compared social media users' communication about eating disorders on Twitter and Tumblr found that pro-anorexia content was problematic.¹²⁹

- Eating disorders were portrayed as a lifestyle choice – something anti-pro-anorexia users disagreed with, citing concerns of potential glorification
- Physical signs of hunger were viewed positive

- Self-control over hunger was viewed as an achievement
- Fasting and eating low amounts of food were indicators of success

In 2012, Instagram banned some tags in an effort to moderate the content associated with pro-eating disorders posts.¹³⁰ The ban merely made certain posts unsearchable, it did not remove the original posts that contained the prohibited tags. In response to the ban, some users circumvented the restrictions through alternate spelling or variations such as “thynspo”, “thinspoo”, “th1nspo” and “thingspogram”.^{131, 132} A study which focused on the before and after effects of the ban found that the lexical variations used by the pro-eating disorder community were:¹³³

- Used extensively to continue to share pro-eating disorder content
- Used to share more triggering and self-harm content

This, along with participation in communities that used unmoderated tags, tended to reinforce pro-eating disorder beliefs, and over time, contributed to the expression of heightened toxic and vulnerable behaviour.

Response to Strand 1 – National Legislative Proposals

Q. 1. – What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider.

Bodywhys Response – Online platforms, internet service providers and social networking companies must implement strategies, policies and mechanisms to promptly remove content intended to promote, maintain and encourage eating disorders and related behaviours, and self-harm and suicide. This includes methods and potential ‘how to’ content suggesting risky behaviours. Reporting breaches of terms and conditions should be transparent and straightforward to use. Where content is removed appropriate support and information resources should be sent to the user.

Q.2 – If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

Bodywhys Response

An applicable statutory instrument such as Code of Practice or Standards that should be referenced in relation to the management of appropriate content, providing a summary of the minimum requirements, should be developed and providers informed of their obligations. The legal obligations in relation to statutory testing should be used as a guide when monitoring content.

Q.3 – Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

Bodywhys Response – Online platforms and services where users can create an account or profile and interact, connect with or respond to each other are typically sources where harmful material can emerge and grow.

Q. 4 – How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example,

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

Bodywhys Response – Bodywhys agrees with the list provided. Posts, comments or hashtags such as ‘stop eating’ are clearly instructional and risky. ‘Nutritional deprivation’ is not the sole point of concern in relation to pro-anorexia content, or that which is problematic in an eating context. In addition to material based on restriction, information and messaging centred on purging and that which suggests a dependence on physical activity, or excessive exercise, that which has an emphasis on punishment, or promotes a mindset to engage in behaviours that appear to exclude other aspects of a person’s life, is also problematic.

In 2016, the term ‘pro-muscular’ was identified in the research literature.¹³⁴ In particular, this type of content may emphasise and reflect an extreme pursuit of muscularity:

- Rigid exercise and dietary routines and practices
- Admiration and encouragement of the drive for size
- Promotion the benefits of muscularity
- Derogatory labelling of the non-ideal body
- Marginalisation of social activities in order to pursue muscle building
- The use of muscle enhancing substances

Response to Strand 2 – Video Sharing Platform Services

Q. 6 – The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

Q. 7 – On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

Additional comments from Bodywhys - Potential challenges

It must be acknowledged that, in an online context, distinguishing between personal admissions and disclosures of an eating disorder, as opposed to content which is considered promotion of behaviours, is not straightforward and is a challenge for content reviewers and moderators who enforce policies relating to harmful content.

- Some people with eating disorders may use both pro-recovery and pro-anorexia websites simultaneously or at different stages of the illness. This reflects the complexity of eating disorders as there is often fear and ambivalence about change, seeking help and recovery.
- Past attempts to regulate pro-anorexia content have had limited success and can send aspects of harmful communities further underground. In some instances, bans lead to the sharing of more risky content. Bans have also been circumvented through alternative spelling.
- Some people with eating disorders use social media to discuss their illness, including recovery. If a person posts photos depicting their illness, e.g. an emaciated image, along with text information about their story, another user may inadvertently report this believing that that it's promoting eating disorders when that was not the original intent.

Signposting to safer options

Bodywhys recommends that pro-anorexia/pro-bulimia websites and online content be recognised as having a serious negative impact on users and be monitored accordingly and acted upon, where required. Mechanisms must be developed to address the potentially damaging implications such usage may incur. Safety developments in this instance could include a facility to offer a safe alternative e.g. a 'click through' facility to BodywhysConnect (age 19+) and Bodywhys YouthConnect (age 13-18) which are safe and supervised online support groups for people affected by eating disorders.

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- ¹ Dooley, B.A. & Fitzgerald, A. (2012) *My World Survey: National Study of Youth Mental Health in Ireland*. Headstrong – The National Centre for Youth Mental Health and UCD School of Psychology, Dublin
- ² Karwig, G., Chambers, D. & Murphy, F. (2015) *Reaching Out in College: Help-Seeking at Third Level in Ireland*, ReachOut Ireland.
- ³ Oksanen, A., Näsi, M., Minkkinen, J., et al. (2016). Young people who access harm-advocating online content: A four-country survey. *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, 10(2), article 6. <http://dx.doi.org/10.5817/CP2016-2-6>
- ⁴ Näsi, M., Räsänen, P. & Oksanen, A. et al. (2014) Association between online harassment and exposure to harmful online content: A cross-national comparison between the United States and Finland. *Computers in Human Behavior*, 41, 137-145.
- ⁵ Health Service Executive (2018) *Eating Disorder Services, HSE Model of Care for Ireland*.
- ⁶ Health Research Board (2018) HRB Statistics Series 38. Activities of Irish Psychiatric Units and Hospitals 2017 Main Findings.
- ⁷ Lock, J, La Via, M.C. and the American Academy of Child and Adolescent Psychiatry (AACAP) Committee on Quality Issues (CQI) (2015). Practice parameter for the assessment and treatment of children and adolescents with eating disorders. *Journal of the American Academy of Child and Adolescent Psychiatry*, 54(5), 412-25.
- ⁸ American Psychiatric Association Publishing (2013) Desk Reference for the Diagnostic Criteria from DSM-5TM. Arlington, VA: American Psychiatric Association Publishing.
- ⁹ Treasure, J. (2009) *A Guide to the Medical Risk Assessment for Eating Disorders*.
- ¹⁰ Treasure, J. (2009) *Ibid*
- ¹¹ Chesney, E., Goodwin, G.M. & Fazel, S. (2014) Risks of all-cause and suicide mortality in mental disorders: A meta-review. *World Psychiatry*, 13(2), 153-160.
- ¹² Arcelus, J., Mitchell, A.J., Wales, J. et al. (2011) Mortality rates in patients with anorexia nervosa and other eating disorders: A meta-analysis of 36 studies. *Archives of General Psychiatry*, 68(7), 724-731.
- ¹³ Swinbourne, J., Hunt, C., Abbott, M. et al. (2012) The comorbidity between eating disorders and anxiety disorders: Prevalence in an eating disorder sample and anxiety disorder sample. *Australian and New Zealand Journal of Psychiatry*, 46(2), 118-131.
- ¹⁴ Kaye, W.H., Bulik, C.M., Thornton, L. et al. (2004) Comorbidity of anxiety disorders with anorexia and bulimia nervosa. *The American Journal of Psychiatry*, 161(12), 2215-2221.
- ¹⁵ Pallister, E. & Waller, G. (2008) Anxiety in the eating disorders: Understanding the overlap. *Clinical Psychology Review*, 28(3), 366-386.
- ¹⁶ Hughes, E., Goldschmidt, A.B., Labuschagne, Z. (2013) Eating disorders with and without comorbid depression and anxiety: Similarities and differences in a clinical sample of children and adolescents. *European Eating Disorders Review*, 21(5), 386-94.

-
- ¹⁷ Araujo, D.M., Santos, G.F., Nardi, A.E. (2010) Binge eating disorder and depression: A systematic review. *World Journal of Biological Psychiatry*, 11(2 Pt 2), 199-207.
- ¹⁸ Presnell, K., Stice, E., Seidel, A. et al. (2009) Depression and eating pathology: prospective reciprocal relations in adolescents. *Clinical Psychology & Psychotherapy*, 16(4), 357-65.
- ¹⁹ Verschueren, S., Berends, T., Kool-Goudzwaard, N. et al. (2015) Patients with anorexia nervosa who self-injure: A phenomenological study. *Perspectives in Psychiatric Care*, 51(1), 63-70.
- ²⁰ Claes, L., Norré, J., Van Assche, L. et al. (2014) Non-suicidal self-injury (functions) in eating disorders: Associations with reactive and regulative temperament. *Personality and Individual Differences*, 57, 65-69.
- ²¹ Claes, L., Fernández-Aranda, F., Jimenez-Murcia, S. et al. (2013) Co-occurrence of non-suicidal self-injury and impulsivity in extreme weight conditions. *Personality and Individual Differences*, 54(1), 137-140.
- ²² Claes, L., Soenens, B., Vansteenkiste, M. et al. (2012) The scars of the inner critic: perfectionism and nonsuicidal self-injury in eating disorders. *European Eating Disorders Review*, 20(3), 196-202.
- ²³ Claes, L., Jimenez-Murcia, S., Agüera, Z. et al. (2012) Male eating disorder patients with and without non-suicidal self-injury: a comparison of psychopathological and personality features. *European Eating Disorders Review*, 20(4), 335-338.
- ²⁴ Peebles, R., Wilson, J.L. & Lock, J.D. (2011) Self-Injury in adolescents with eating disorders: Correlates and provider bias. *Journal of Adolescent Health*, 48(3), 310-313.
- ²⁵ Crow, S.J., Swanson, S.A., le Grange, D. et al. (2014) Suicidal behaviour in adolescents and adults with bulimia nervosa. *Comprehensive Psychiatry*, 55(7), 1534-9.
- ²⁶ Suokas, J.T., Suvisaari, J.M., Grainger, M. (2014) Suicide attempts and mortality in eating disorders: a follow-up study of eating disorder patients. *General Hospital Psychiatry*, 36(3), 355-357.
- ²⁷ Reaves, J. (2001) Anorexia goes high tech. *Time*. Accessed 3 April 2019. Available from: <http://content.time.com/time/health/article/0,8599,169660,00.html>
- ²⁸ Troy, C. (2001) How eating disorders are being promoted on the net. *Irish Independent*. Accessed 3 April 2019. Available from: <http://www.independent.ie/unsorted/features/how-eating-disorders-are-being-promoted-on-the-net-26076688.html>
- ²⁹ Chesley, E.B., Alberts, J.D., Klein, J.D. & Kreipe, R.E. (2003) Pro or con? Anorexia nervosa and the internet. *Journal of Adolescent Health*, 32(2), 123-124.
- ³⁰ Academy for Eating Disorders (2006) *Academy calls for warning labels on pro-anorexia web sites*. Academy for Eating Disorders. Accessed 10 June 2014. Available from: <https://www.newswise.com/articles/academy-calls-for-warning-labels-on-pro-anorexia-web-sites>
- ³¹ Royal College of Psychiatrists (2009) *Psychiatrists urge action to tackle 'pro-ana' websites danger*. London: Royal College of Psychiatrists. Accessed 3 April 2019. Available from:

<https://www.rcpsych.ac.uk/mediacentre/pressreleasesearchives/2009/proanawebsites.aspx>

³² Borzekowski, D.L.G., Schenk, S., Wilson, J.L., and Peebles, R. (2010) E-ana and e-mia: A content analysis of pro-eating disorder web sites. *American Journal of Public Health*, 100(8), 1526-1534.

³³ Castro, T.S. & Osório, A.J. (2013) "I love my bones!" – self-harm and dangerous eating youth behaviours in Portuguese written blogs. *Young Consumers: Insight and Ideas for Responsible Marketers*, 14(4), 321-330.

³⁴ Teufel, M., Hofer, E., Junne, F. et al. (2013) A comparative analysis of anorexia nervosa groups on Facebook. *Eating and Weight Disorders*, 18(4), 413-420.

³⁵ Wolf, M., Theis, F. & Kordy, H. (2013) Language use in eating disorder blogs: psychological implications of social online activity. *Journal of Language and Social Psychology*, 32(2), 212-226.

³⁶ Ramos, de Souza, J., Pereira Neto, de Faria, A. and Bagrichevsky, M. (2011) Pro-anorexia cultural Identity: characteristics of a lifestyle in a virtual community. *Interface (Botucatu)*, 15(37), 447-460. Accessed 3 April 2019. Available from: http://www.scielo.br/scielo.php?pid=S1414-32832011000200010&script=sci_abstract

³⁷ Sowles, S.J., McLeary, M., Optican, A. et al. (2018) A content analysis of an online pro-eating disorder community on Reddit. *Body Image*, 24, 137-144.

³⁸ Syed-Abdul et al. (2013) Misleading health-related information promoted through video-based social media: Anorexia on YouTube. *Journal of Medical Internet Research*, 15(2), e30.

³⁹ Yom-Tov, E., Fernandez-Luque, L., Weber, I. & Crain, S.P. (2012) Pro-anorexia and pro-recovery photo sharing: a tale of two warring tribes. *Journal of Medical Internet Research*, 14(6), :e151.

⁴⁰ National Eating Disorders Association (2012). *National Eating Disorders Association partners with Tumblr*. Accessed on May 6, 2014. Available from: <http://www.nationaleatingdisorders.org/press-room/press-releases/2012-press-releases/national-eating-disorders-association-partners-tumblr>

⁴¹ De Choudhury, M. (2015) Anorexia on Tumblr: A characterization study. Proceedings of the 5th International Conference on Digital Health 2015.

⁴² Chancellor, S., Jerry Lin, Z. & Goodman, E.L. et al. (2016) Quantifying and predicting mental illness severity in online pro-eating disorder communities. Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing.

⁴³ Arseniev-Koehler, A., Lee, H. & McCormick, T. (2016) op.cit.

⁴⁴ Peebles et al. (2012) op.cit.

⁴⁵ Brotsky, S.R. and Giles, D. (2007) Inside the "pro-ana" community: A covert online participant observation. *Eating Disorders: The Journal of Treatment & Prevention*, 15(2), 93-109.

⁴⁶ Borzekowski, et al. (2010) op.cit.

⁴⁷ Boero, N. & Pascoe, C.J. (2012) Pro-anorexia communities and online interaction: Bringing the pro-ana body online. *Body & Society*, 18(2), 27-57.

⁴⁸ Castro, T.S. & Osório, A.J. (2012) Online violence: Not beautiful enough... not thin enough. Anorectic testimonials in the web. *PsychNology Journal*, 10(3), 169-186. Accessed 3 April 2019.

Available from:

[http://www.psychology.org/File/PNJ10\(3\)/PSYCHOLOGY_JOURNAL_10_3_CASTRO.pdf](http://www.psychology.org/File/PNJ10(3)/PSYCHOLOGY_JOURNAL_10_3_CASTRO.pdf)

- ⁴⁹ Cobb, G. (2017) "This is not pro-ana": Denial and disguise in pro-anorexia online spaces. *Fat Studies*, 6(2), 189-205.
- ⁵⁰ Crowe, N. & Watts, M. (2016) 'We're just like Gok, but in reverse': Ana Girls – empowerment and resistance in digital communities. *International Journal of Adolescence and Youth*, 21(3), 379-390.
- ⁵¹ Giles, D. (2006) Constructing identities in cyberspace: The case of eating disorders. *British Journal of Social Psychology*, 45(3), 463-477.
- ⁵² Brotsky and Giles (2007) op.cit.
- ⁵³ Jett, S., LaPorte, D.J. & Wanchisn, J. (2010) Impact of exposure to pro-eating disorder websites on eating behaviour in college women. *European Eating Disorders Review*, 18(5), 410-16.
- ⁵⁴ Williams, C. & Riley, S. (2013) Finding support and negotiating identity: an analysis of the structure and content of newbie posts and their elicited replies on five pro-eating disorder websites. *Social Science Research on the Internet*, 1(2), 49-72. Accessed 3 April 2019. Available from: <http://www.journal-reset.org/index.php/RESET/article/view/14/18>
- ⁵⁵ Strife, S.R. & Rickard, K. (2011) The conceptualization of anorexia: The pro-ana perspective. *Affilia*, 26(2), 213-217.
- ⁵⁶ Tierney, S. (2006) The dangers and draw of online communication: Pro-anorexia websites and their implications for users, practitioners, and researchers. *Eating Disorders: The Journal of Treatment & Prevention*, 14(3), 181-190.
- ⁵⁷ Hammersley, M. & Treseder, P. (2007) Identity as an analytic problem: who's who in 'pro-ana' websites? *Qualitative Research*, 7(3), 283-300.
- ⁵⁸ Bond (2012) op.cit.
- ⁵⁹ Giles, D. (2016) Does ana = anorexia? Online interaction and the construction of new discursive objects. In M. O'Reilly & J. Lester (Eds). *The Palgrave Handbook of Adult Mental Health: Discourse and Conversation Studies* (pp. 308-328). Basingstoke: Palgrave.
- ⁶⁰ Cobb, G. (2017) "This is not pro-ana": Denial and disguise in pro-anorexia online spaces. *Fat Studies*, 6(2), 189-205.
- ⁶¹ Livingstone, S. & Haddon, L. (2013) *EU Kids Online: Final Report*. Accessed 9 June 2014. London: London School of Economics. Available from: <http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20I%20%20%282006-9%29/EU%20Kids%20Online%20I%20%20Reports/EUKidsOnlineFinalReport.pdf>
- ⁶² Barbovschi, M. et al. (2014) In Smahel, D. & Wright, M.F. (eds) *The meaning of online problematic situations for children*. Accessed 5 November 2014. Available from: http://eprints.lse.ac.uk/56972/1/EU_Kids_Online_Report_Online_Problematic_Situations_for_Children_June2014.pdf
- ⁶³ Custers, K. & Van den Bulck, J. (2009) Viewership of pro-anorexia websites in seventh, ninth and eleventh graders. *European Eating Disorders Review*, 17(3), 214-219.

-
- ⁶⁴ Wilson, J.L., Peebles, R., Hardy, K.K. & Litt, I.F. (2006) Surfing for thinness: A pilot study of pro-eating disorder web site usage in adolescents with eating disorders. *Pediatrics*, 118(6), 1635-1643.
- ⁶⁵ Wilson, J.L., Peebles, R., Hardy, K.K. & Litt, I.F. (2006) Surfing for thinness: A pilot study of pro-eating disorder web site usage in adolescents with eating disorders. *Pediatrics*, 118(6), 1635-1643.
- ⁶⁶ Smith, A. T. and McGowan, K. A. (2011) Quality of eating disorders websites: What adolescents and their families need to know. *Journal of Child and Adolescent Psychiatric Nursing*, 24(1), 33-37.
- ⁶⁷ Fox, N., Ward, K. & O' Rourke, A. (2005) Pro-anorexia, weight-loss drugs and the internet: An 'anti-recovery' explanatory model of anorexia. *Sociology of Health & Illness*, 27(7), 944-971.
- ⁶⁸ Ransom, D.C. et al. (2010) Interpersonal interactions on online forums addressing eating concerns. *International Journal of Eating Disorders*, 43(2), 161-70.
- ⁶⁹ Williams, S. & Reid, M. (2007) A grounded theory approach to the phenomenon of pro-anorexia. *Addiction Research and Theory*, 15(2), 141-152.
- ⁷⁰ Williams, S. and Reid, M. (2010) Understanding the experience of ambivalence in anorexia nervosa: The maintainer's perspective. *Psychology and Health*, 25(5), 551-567.
- ⁷¹ Arseniev-Koehler, A., Lee, H. & McCormick, T. (2016) #Proana: Pro-eating disorder socialization on Twitter. *Journal of Adolescent Health*, 58(6), 659-664.
- ⁷² Haas, S. M., Irr, M. E., Jennings, N. A. & Wagner, L. M. (2011) Communicating thin: A grounded model of online negative support groups in the pro-anorexia movement. *New Media and Society*, 13(1), 40-57.
- ⁷³ Yeshua-Katz, D., and Matins, N. (2013) Communicating stigma: The pro-ana paradox. *Health Communication*, 28(5), 499-508.
- ⁷⁴ Tom Tong, S.T. et al. (2013) The use of pro-ana blogs for online social support. *Eating Disorders: The Journal of Treatment & Prevention*, 21(5), 408-422.
- ⁷⁵ Yeshua-Katz & Martins (2013) op.cit.
- ⁷⁶ Gavin, Rodham & Poyer (2008) op.cit.
- ⁷⁷ Ramos, Pereira Neto and Bagrichevsky (2011) op.cit.
- ⁷⁸ Norris, M.L., Boydell, K.M., Pinhas, L., & Katzman, D.K. (2006) Ana and the Internet: a review of pro-anorexia websites. *International Journal of Eating Disorders*, 39(6), 443-447.
- ⁷⁹ Harshbarger, J.L., Ahlers-Schmidt, C.R., Mayans, L., Mayans, D., & Hawkins, J.H. (2008) Pro-anorexia websites: What a clinician should know. *International Journal of Eating Disorders*, 42(4), 367-370.
- ⁸⁰ Fox, Ward & O' Rourke (2005) op.cit.
- ⁸¹ Giles (2006) op.cit.
- ⁸² Haas et al. (2011) op.cit
- ⁸³ *Ibid*
- ⁸⁴ Boero, N. & Pascoe, C.J. (2009) *Anas Mias and wannas: Authenticity and embodiment in pro-anorexia discussion groups*. American Sociological Association Annual Meeting, San Francisco, CA. Accessed 10 May 2014. Available from:

- ⁸⁵ Rich (2006) op.cit.
- ⁸⁶ Borzekowski et al. (2010) op.cit.
- ⁸⁷ Bond (2012) op.cit.
- ⁸⁸ Csipke and Horne (2007) op.cit.
- ⁸⁹ Tierney (2006) op.cit.
- ⁹⁰ Castro & Osório (2013)
- ⁹¹ Tom Tong et al. (2013) op.cit.
- ⁹² Jett, LaPorte, & Wanchisn (2010) op.cit.
- ⁹³ Custers & Van den Bulck (2009) op.cit.
- ⁹⁴ Juarez, L., Soto, E., Pritchard, M.E., (2012) *Eating Disorders: Journal of Treatment & Prevention*, 20(2), 99-112.
- ⁹⁵ Peebles et al. (2012) op.cit.
- ⁹⁶ Yeshua-Katz and Martins (2013) op.cit.
- ⁹⁷ Wolf, Theis & Kordy (2013) op.cit.
- ⁹⁸ Branley, D.B. & Covey, J. (2017) Pro-ana versus pro-recovery: A content analytic comparison of social media users' communication about eating disorders on Twitter and Tumblr. *Frontiers in Psychology*,
- ⁹⁹ Cornelius, T. & Blanton, H. (2015) The limits to pride: A test of the pro-anorexia hypothesis. *Eating Disorders: The Journal of Treatment & Prevention*, 1-10. [Epub ahead of print]
- ¹⁰⁰ Bardone-Cone, A.M. & Cass, K.M. (2007) What does viewing a pro-anorexia website do? An experimental examination of website exposure and moderating effects. *International Journal of Eating Disorders*, 40(6), 537-548.
- ¹⁰¹ Higbed, L. and Fox, J. R. E. (2010) Illness perceptions in anorexia nervosa: A qualitative investigation. *British Journal of Clinical Psychology*, 49(3), pp 307-325.
- ¹⁰² Haas et al 2011
- ¹⁰³ Bardone-Cone, A.M. & Cass, K.M. (2006) Investigating the impact of pro-anorexia websites: A pilot study. *European Eating Disorders Review*, 14(4), 256-262.
- ¹⁰⁴ Wolf, Theis & Kordy (2013) op.cit.
- ¹⁰⁵ Lyons, E., Mehl, M., & Pennebaker, J. W. (2006). Pro-anorexics and recovering anorexics differ in their linguistic internet self-presentation. *Journal of Psychosomatic Research*, 60(3), 253-256.
- ¹⁰⁶ Turja, T., Oksanen, A & Kaakinen, M. et al. (2016) Proeating disorder websites and subjective well-being: A four-country study on young people. *International Journal of Eating Disorders*,
- ¹⁰⁷ Yeshua-Katz and Martins (2013) op.cit.
- ¹⁰⁸ Chang, P.F. & Bazarova, & N.N. (2015) Managing stigma: Disclosure-response communication patterns in pro-anorexic websites. *Health Communication*, 31(2), 217-29.
- ¹⁰⁹ Chang, P.F. & Bazarova, & N.N. (2015) op.cit

-
- ¹¹⁰ Brotsky and Giles (2007), op.cit. p. 107
- ¹¹¹ Wolf, Theis & Kordy (2013) op.cit.
- ¹¹² Sheldon, P. (2008) The relationship between unwillingness-to-communicate and students' Facebook use. *Journal of Media Psychology: Theories, Methods, and Applications*, 20(2), 67-75.
- ¹¹³ Lapinski (2006) op.cit.
- ¹¹⁴ Crowe, N. & Watts, M. (2016) 'We're just like Gok, but in reverse': Ana Girls – empowerment and resistance in digital communities. *International Journal of Adolescence and Youth*, 21(3), 379-390.
- ¹¹⁵ Boepple, L. & Thompson, J.K. (2016) A content analytic comparison of fitspiration and thinspiration websites. *International Journal Eating Disorders*, 49(1), 98-101.
- ¹¹⁶ Talbot, S (2010) The effects of viewing pro-eating disorder websites: A systematic review. *West Indian Medical Journal*, 59(6), 686-697.
- ¹¹⁷ Cobb, G. (2017) "This is not pro-ana": Denial and disguise in pro-anorexia online spaces. *Fat Studies*, 6(2), 189-205.
- ¹¹⁸ Lewis & Arbuthnott (2012) op.cit.
- ¹¹⁹ Talay (2013) op. cit.
- ¹²⁰ Chancellor, S., Jerry Lin, Z. & De Choudhury, M. (2016) "This post will just get taken down": Characterizing removed pro-eating disorder social media content. Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems.
- ¹²¹ Chancellor, S., Jerry Lin, Z. & Goodman, E.L. et al. (2016) Quantifying and predicting mental illness severity in online pro-eating disorder communities. Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing.
- ¹²² Ging, D. & Garvey, S. (2017) 'Written in these scars are the stories I can't explain': A content analysis of pro-ana and thinspiration image sharing on Instagram. *New Media & Society*, 1-20
- ¹²³ Ging, D. & Garvey, S. (2017) 'Written in these scars are the stories I can't explain': A content analysis of pro-ana and thinspiration image sharing on Instagram. *New Media & Society*, 1-20
- ¹²⁴ Ging, D. & Garvey, S. (2017) 'Written in these scars are the stories I can't explain': A content analysis of pro-ana and thinspiration image sharing on Instagram. *New Media & Society*, 1-20
- ¹²⁵ Press Information. Accessed 03 April 2019. Available from: <https://www.tumblr.com/press>
- ¹²⁶ De Choudhury, M. (2015) op.cit.
- ¹²⁷ Chancellor, S. Kalantidis, Y., Pater, J.A. (2017) Multimodal classification of moderated online pro-eating disorder content. In Proceedings of the 34th Annual ACM Conference on Human Factors in Computing Systems (Denver, CO, May 6-11, 2017), to appear. CHI 2017.
- ¹²⁸ Chancellor, S. Kalantidis, Y., Pater, J.A. (2017) Multimodal classification of moderated online pro-eating disorder content. In Proceedings of the 34th Annual ACM Conference on Human Factors in Computing Systems (Denver, CO, May 6-11, 2017), to appear. CHI 2017.
- ¹²⁹ Branley, D.B. & Covey, J. (2017) Pro-ana versus pro-recovery: A content analytic comparison of social media users' communication about eating disorders on Twitter and Tumblr. *Frontiers in Psychology*,

¹³⁰ Instagram (2012) *Instagram's New Guidelines Against Self-Harm Images & Accounts*. Accessed 22 November 2016. Available from: <http://blog.instagram.com/post/21454597658/instagrams-new-guidelines-against-self-harm>

¹³¹ Duca, L. (2013) *Can Thinspiration Really Be #Banned From Instagram?* Accessed 22 November 2016. Retrieved from: http://www.huffingtonpost.com/lauren-duca/thinspiration-banned-from-instagram_b_3829155.html

¹³² Kenny, M. (2013) *How Instagram Became the New Hub for Pro-Anorexia and Thinspiration Culture*. Accessed 22 November 2016. Retrieved from: <http://www.pedestrian.tv/features/arts-and-culture/how-instagram-has-become-the-new-hub-for-pro-anore/986b7550-fd4c-4d7b-a096-c478223d611a.htm>

¹³³ Chancellor, S., Pater, J. & Clear, T. (2016) #thyhgapp: Instagram Content Moderation and Lexical Variation in Pro-Eating Disorder Communities. Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work & Social Computing.

¹³⁴ Murray, S.B., Griffiths, S. & Hazery, L. et al (2016) Go big or go home: A thematic content analysis of pro-muscular websites. *Body Image*, 16, 17-20.

Page 2

1 -Name

Brian Cusack

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening,

seriously intimidating, seriously harassing or seriously humiliating)

- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case.

For example, the Non-Fatal Offences Against the Person Act 1997.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

I do not believe this area should be regulated by a government regulator and

should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

I do not believe this area should be regulated by a government regulator and should be based upon the Terms of Service and the legislation of the jurisdiction in which the online platform operator is headquartered as is currently the case. For example, the Non-Fatal Offences Against the Person Act 1997.

Page 2

1 -Name

Brian Sweeney

2 -Organisation if applicable

Citizen

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
No government involvement should be considered in the regulation of a free and uncensored internet. If content is considered to be harmful, then it is up to the users of that platform to notify the platform hosting the material, and they will deem if it contravenes their terms and conditions.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

No government regulation of the internet should exist.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

No government regulation of the internet should exist.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have

the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

The non fatal offences against the person act of 2010 already legislates for these types of offences. If an online platform is being used to bully or harass then the normal process for reporting a crime should be followed.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

A platform where video, audio or still images are shared by the users who generate them should be bound by the terms and conditions of that platform. Platforms should be encouraged to have easy to use and transparent mechanisms to report and flag content that a user may find offensive, or may be illegal under the current laws of the EU and Ireland, e.g making threats to a person, or inciting terrorist activity. Any platform where users can upload content which can be viewed by the general public freely, i.e. without an invitation code or password from the individual who uploaded the content should be considered an online sharing platform. Private messaging platforms such as whatsapp, discord, iMessage, Signal, Telegram, skype, snapchat, or private messages shared between individuals on sharing services such as instagram or twitter should not be considered as a sharing platform in which content sent is available to the general public.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Any regulation would need to be a solely audit based role, to ensure that a platform provider is in fact carrying out its obligations as required by law. There should be no power by the regulator to instruct or demand removal of content.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

A regulator should be able to review a platform providers policies and procedures, regardless of commercial sensitivity of these policies, and should review them on a quarterly basis. A regulator may give suggestions for improvements, however there should be no obligation for a platform provider to make these changes

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

traditional broadcast media should not be regulated in the same way as an on demand service. For example, the requirement for a traditional broadcaster to not show adult themed programmes before 9pm cannot apply to an on demand service. A regulator should not be involved in the reviewing of what platforms such as netflix, amazon, itunes etc is hosting. Platforms which host user created content should be treated as a different type of content platform to netflix etc and content should be reported and policed by users.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

All broadcast media, both traditional and on demand should be accessed on a subscription model. If there is content that a platform, either traditional broadcast or on demand, wants to offer free of charge based on an advertising model then this should not be supported by any form of subscription or fee (including a license fee) RTE should move to a subscription model, in the same way all other content providers are, eg. sky tv, netflix, amazon.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

No regulation of content should exist, unless it is illegal, then there are already mechanisms for requesting removal from a platform. the internet should be free and unregulated for all who make a decision to access it.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

No government organisation should be regulating a free and open internet as it was intended to be

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

there should be no need for funding as there should be no regulation



Broadcasting Authority of Ireland

Submission to the Department of Communications,
Climate Action & Environment Public Consultation on
the Regulation of Harmful Content on Online
Platforms and the Implementation of the Revised
Audiovisual Media Service Directive

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Foreword

The Broadcasting Authority of Ireland welcomes the opportunity to contribute to the Public Consultation on the Regulation of Harmful Content and the Implementation of the Revised Audiovisual Media Services Directive (AVMSD). The media landscape has evolved rapidly over the last decade with the convergence of television and internet and the emergence of new types of services and user experiences. The regulatory framework has not kept pace. The coincidence of the need to transpose the new AVMSD with the international consensus on the urgent necessity to address the issue of harmful content makes this consultative process timely and doubly welcome.

By virtue of the media platforms based here, Ireland is in a unique position to lead the debate and chart a way forward in relation to online safety and regulation. Online media regulation requires leadership which the Authority is endeavouring to show through this submission. We set out below a vision for the regulation of online media, an approach to its implementation and a rationale to support it. In facing the challenges of this brave new world, the BAI believes we should be bold and practical. Given the complexity of the issues involved, we should also be prudent so as to avoid unintended consequences. Some issues will require careful consideration and teasing out.

In advocating a single comprehensive regulatory scheme, the interests and rights of Irish, European and global citizens have been at the forefront of the Authority's consideration. We have sought to balance the vision and principles on the entirety of the media landscape with the practicality of making it work. These underlying principles include diversity, plurality and ensuring culturally-relevant content, protection from harmful content, vindicating freedom of expression, facilitating linguistic and cultural diversity and sustaining and enhancing democratic discourse.

Professor Pauric Travers

**Chairperson
Broadcasting Authority of Ireland**

Executive Summary

Executive Summary

Executive Summary

Ireland, like other countries at a European and global level, has witnessed considerable growth in the consumption of online content across a range of networks, online services and connected devices. The increased capacity for the internet to be used as a tool to shape and influence opinion and the increased use of the internet by people of all ages to communicate means that regulation to ensure protections for audiences and children is necessary, proportionate and reasonable.

EU Member States have agreed significant new rules for online videos to strike a stronger balance between broadcasting regulation and the regulation of videos on the internet. For the first time, popular online platforms that allow users to upload videos will be required to introduce effective age verification and parental control mechanisms for users and will be obliged to take a more active role in moderating content on their platforms.

In parallel, the Minister is proposing to introduce additional rules to improve online safety for Irish residents on certain online platforms – not just those that provide videos – and to encourage platforms to take a stronger role in tackling issues such as cyberbullying.

Governments, advocacy groups and social media companies alike have expressed a desire to establish a regulatory framework for additional regulation on the internet. The Minister for Communications, Climate Action and Environment's consultation on the regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive is therefore both timely and welcome.

BAI Vision for Media Regulation in Ireland

The Broadcasting Authority of Ireland ("BAI") is the independent regulator for radio and television broadcasters in Ireland. Its functions include the regulation of public, commercial and community radio and television services, the making of broadcasting codes and rules, and the provision of funding for programmes and archiving relating to Irish culture, heritage and experience.

The implementation of the new Directive and the proposals for a national framework for online safety outlined in the Minister's consultation provides an opportunity to develop a vision for the future regulation of online media. In its submission, the BAI sets out its vision and outlines the manner in which it may be practically realised. Having given significant consideration to the matter, and drawing on its own regulatory experience, the BAI is of the view that the introduction of new regulation for online videos and new online safety regulation for Irish residents can be most effectively accomplished through the introduction of a single, comprehensive regulatory scheme and regulator.

In the view of the BAI, introducing new rules through a single comprehensive regulatory scheme and regulator offers an opportunity to develop a vision for the future regulation of media content across all platforms and services which, at its heart, seeks to serve and protect audiences and users in the new media environment. The regulator should have regard to the wider objectives of content and services that serve citizens - ensuring Diversity and Plurality, the promotion of Freedom of Expression, sustaining and enhancing democratic discourse, and facilitating linguistic and cultural diversity.

Executive Summary

This approach offers the best opportunities and solutions for protecting and supporting audiences and users, and will ensure:

- Consistency in the implementation of the provisions of the Directive and national legislation;
- Clarity for audiences and users;
- Efficiency for the Irish Government, the European Institutions and other European regulators in liaising with a single regulator;
- Operational efficiencies;
- An increased capability to respond to the evolving nature of the services to be regulated, changes in consumption patterns on those services and in the regulation of new services, and
- Facilitation of sector-wide initiatives to promote responsibility and awareness of online safety and other regulatory issues among the general population and industry.

Given its extensive regulatory experience in the area of audiovisual regulation and in the application of content principles across the sector, the BAI would support the consultation proposal which envisages the BAI forming the nucleus of the new regulatory authority. This is further discussed in the submission document.

Governance Structure

While the BAI is supportive of the regulatory framework as outlined above, it is of the view that the proposed multi-person Commission approach requires further consideration. The BAI considers and evaluates the different types of governance structures which may be appropriate for the new regulatory body in its consultation response. It believes that this matter requires further, more detailed, discussion and would welcome the opportunity to do so with the Minister during the transposition phase.

The Regulatory Approach

In this submission, the BAI sets out a proposed regulatory approach in respect of each of the four key strands outlined in the consultation document. One of the key factors which informed the BAI's deliberations was the issue of scale, both in terms of the number of services which may fall to be regulated and in terms of the number of service users. These considerations are reflected in each of the proposals as set out below:

Strand 1: New online safety laws to apply to Irish residents

The BAI welcomes the Minister's intention to introduce regulation which will contribute to the protection of Irish residents from harmful online content.

As outlined in the BAI's consultation response, the BAI submits that combining the regulation of audiovisual content under the Directive with the regulation of online safety has significant advantages from the perspective of audiences and platform users, who may not necessarily distinguish between forms of content in an online context. The regulatory approach adopted should ensure that online safety regulation and audiovisual content regulation are implemented in a separate but complementary manner with aligned strategic objectives, emphasising synergies where possible but recognising differences where appropriate.

The BAI believes that the regulator should have the power to rectify online harms by issuing harmful online content removal notices on behalf of Irish residents that have been directly affected by harmful

online content. In the longer term, the BAI envisions the development and enforcement of an online safety code applicable to key Irish online service providers in order to minimise online harms more generally. The BAI also proposes a role for the regulator in promoting awareness of online safety issues among the public and industry to prevent online harms in the long term.

Strand 2: Regulation of Video-sharing Platforms (e.g. YouTube)

The revised Audiovisual Media Services Directive reflects the growing reach and influence of new types of services that make audiovisual content available online. For the first time, EU Member States are required to regulate video-sharing platform services on the internet like YouTube. The areas of focus include the protection of minors, combatting certain criminal offences, the introduction of advertising rules and preventing incitement to violence and hatred. The revised Directive is intended to rectify “collective” harms to groups of persons rather than direct harms to individuals like online safety.

The BAI believes that video-sharing platforms should be directly regulated by a statutory regulator. The Directive’s rules should be implemented through legislation and statutory codes. Fundamental protections for freedom of speech on video-sharing platform services should be enshrined in these codes while addressing significant protection issues that arise on such services in respect of videos.

Ireland is responsible for regulating the video-sharing platform services based in Ireland for the entirety of Europe. Most of Europe’s largest providers of video-sharing platform services – such as Facebook, Google and Twitter – are based in Ireland. Ireland’s responsibility under the Directive in respect of video-sharing platform services is therefore greater than any other EU Member State.

The level of user engagement with video-sharing platform services is significant – Facebook has over 278 million daily users in Europe while over a billion hours of video is watched on YouTube every day – and matters of scale need to be reflected in any proposed regulatory approach. To manage this issue, the BAI sees the role of the media regulator as being responsible for the development of high-level rules and regulation and then assessing the measures put in place by video-sharing platforms to implement those rules. The BAI also envisages a robust and transparent complaints system and independent appeals mechanism as part of that regulatory framework.

Strand 3: Regulation of On-demand Services (e.g. RTÉ Player, Virgin Media player, iTunes)

The revised Directive envisions a more level playing field in regulation between television broadcasting services and on-demand services like the RTÉ player or YouTube Channels. EU Member States will be required to take a more active role in the regulation of on-demand services through the creation of higher standards of protection and responsibility in areas such as advertising, the protection of minors, accessibility, hate speech and incitement to violence.

The BAI welcomes the greater degree of regulatory consistency between on-demand and linear broadcasting services which is reflective of changing consumption patterns amongst audiences. The use of on-demand services in Ireland continues to increase, with over 50% of Irish adults now regularly accessing audiovisual material through these platforms.

The BAI is of the view that the most appropriate means of introducing the revised Directive’s new rules for on-demand services is through statutory regulation and codes, and to assign the role of overseeing on-demand services to the statutory regulator. This approach would need to consider the most effective

Executive Summary

mechanism for the regulation of the significant number of additional on-demand services covered by the Directive, estimated to run into many thousands in Ireland.

The BAI proposes that the regulatory framework for on-demand services should allow the regulator to adopt a 'risk-based' approach to regulation to manage scale issues and to allow it to strategically allocate regulatory resources to ensuring the greatest protection of audience interests.

Strand 4: Minor Changes to Regulation of Linear Television Broadcasting

Viewers and listeners in Ireland are served by a wide range of linear broadcasters, all of whom play a valuable role in providing choice and diversity for Irish audiences. The BAI has sought to foster the delivery of creative, innovative and culturally-relevant content for Irish audiences across all broadcasting platforms.

The BAI notes the essential role played by broadcasters in the delivery of news and current affairs, their strong ties to the Irish state and its culture and the key role they play in the creation of Irish content. The continued importance of broadcasting to the Irish state and its culture justifies the approach to regulation currently in place in respect of linear broadcasters in Ireland, which encompasses many matters that are outside the scope of the Directive, such as media plurality requirements and ensuring impartiality in news and current affairs coverage.

The revised Directive requires Member States to ensure a more level playing field in the audiovisual marketplace by increasing standards of protection rather than weakening them. As such, linear broadcasting should continue to be regulated as heretofore, except to the extent that changes may be made pursuant to the revised Directive. These include rules governing advertising and product placement.

Introduction

Introduction

The Broadcasting Authority of Ireland (BAI) was established on 1st October 2009 as an independent regulator for radio and television broadcasting in Ireland. The BAI has a range of objectives and functions including:

- stimulating the provision of high quality, diverse, and innovative programming;
- facilitating public service broadcasters in the fulfilment of their public service objects;
- promoting plurality of control in the commercial and community sectors;
- providing a regulatory environment that:
 - o sustains independent and impartial journalism;
 - o sustains compliance with employment law;
 - o protects the interests of children;
 - o facilitates a broadcasting sector which is responsive to audience needs and accessible to people with disabilities;
 - o promotes and stimulates the development of Irish language programming and broadcasting services.

The BAI is funded through a levy on all broadcasters licensed in the State.

The BAI, and its predecessors, has been responsible for the regulation of the broadcasting sector in Ireland for 30 years. In that time, its regulatory focus and activities has evolved to respond to the changing media environment brought about by technological developments, increased competition, advertising challenges and, most notably, the changing patterns of media consumption.

Ireland, like other countries at a European and global level, has witnessed considerable growth in the consumption of online videos across a range of networks and connected devices, and this trend is only expected to increase. The substitutability of these services for linear broadcasters means the potential for these services to shape and inform views and opinions has increased.

To reflect the evolving audiovisual landscape, EU Member States have agreed to a revised Audiovisual Media Services Directive (“the revised Directive”) which seeks to balance the responsibilities of linear television broadcasters with key providers of online videos, namely on-demand audiovisual media services and video-sharing platform services.

As outlined in the consultation document, implementing the revised Directive requires significant changes to the way in which Ireland regulates audiovisual content.

The BAI welcomes the opportunity to participate in this public consultation on *Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive*. Since the revised Directive was published in December 2018, the BAI has been considering its potential impact on the media environment and the most appropriate regulatory framework to give effect to its various provisions.

In parallel, the BAI has been considering matters arising in respect of the element of the consultation concerning the Regulation of Harmful Content on Online Platforms. As outlined in this submission, the BAI notes the potential for a complementary but separate approach to the regulation of both harmful online content and audiovisual media services under the Directive that is in the public interest.

Introduction

The BAI submission responds to all matters outlined in the consultation document, noting the most appropriate regulatory approach under each of the four Strands. It also sets out how these services should fall to be regulated, addressing matters such as scale, the promotion of freedom of expression and ensuring diversity and plurality.

The BAI would like to thank the Minister for Communications, Climate Action and Environment for the opportunity to respond to the consultation. If required, the BAI would be happy to provide further clarification or elaboration on any of the responses outlined in the document.

Section 1: Regulatory Structures (Strands 1 to 4)

Section 1: Regulatory Structures (Strands 1 to 4)

Q12	Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include: <ul style="list-style-type: none">• Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands.• Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video-sharing Platform Services. Is one of these options most appropriate, or is there another option which should be considered?
Q. 13	How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated? [Section 5 of the explanatory note]

1.1 Introduction

To respond to questions 12 and 13 posed by the Department, this section of the BAI’s consultation response begins by discussing the essential characteristics and qualities that will be required of a regulator operating in a regulatory framework intended to give meaningful effect to the objectives and provisions of the revised Audiovisual Media Services Directive and to address urgent Online Safety issues, especially those affecting minors. In explaining the reasons for its preferred regulatory model, the Authority firstly considers the concept of combining online safety and audiovisual regulation. It goes on to propose the leadership role that it considers the BAI should play in the regulatory structure and debates the different approaches that might be taken to the governance structure of the new regulator. The rationale and key features of the regulatory scheme which the BAI considers are essential to meet the objectives set out in the Minister’s proposals are summarised. The BAI separately addresses the proposal to extend the provisions of the AVMS Directive to all online platforms. Finally, the BAI sets out its proposal for the funding of the regulatory regime.

1.2 Characteristics and Qualities of the Regulator

The structure of the regulator and the powers it has at its disposal will need to support the aims of both the Directive and the National Legislative Proposal on online safety.

As such, it will be essential for the regulator to be able to keep pace with the rapid and evolving nature of the online environment, as well as changes in the behaviours of users and the way in which they engage with that content. In addition, the regulator will need to be aware of the demands of the marketplace and the need to support innovation in both content and services for audiences and users.

The essential characteristics and qualities of the new regulator that are needed to effectively tackle the challenges of the regulatory environment in which it will operate, can broadly be described under five key headings:

Section 1: Regulatory Structures (Strands 1 to 4)

- **Strategic:** an ability to set the strategic direction and shape a vision for the new organisation at an early stage and to develop comprehensive policies to give effect to the objectives of the Directive and the National Legislative Proposal.
- **Knowledge and Expertise:** an in-depth knowledge and developed understanding of the European audiovisual legal, policy and regulatory environment and the wider context within which it operates (i.e. the European Digital Single Market), as well as an in-depth knowledge and developed understanding of online safety and the potential for harm that can arise, will be essential. Knowledge and expertise will also underpin the regulator's ability to develop comprehensive policies at an early stage in the establishment of the new organisation and to anticipate and respond to developments in the audiovisual and online safety regulatory environment.
- **Decision-making:** robust decision-making structures and processes will be central to facilitate authoritative decision-making that engenders public trust and is capable of withstanding legal and regulatory scrutiny.
- **Communications:** communication, co-operation and negotiation with National and European institutions and regulatory agencies, as well as key sectoral players, and an ability to respond with an appropriate degree of authority and urgency to controversial public interest issues as they arise – not only at a national level but also at the pan-European level – are required.
- **Resources:** the regulator should have access to the necessary range of resources to deliver on the objectives of the legislation, including the policy, human, financial, legal and technical resources, to authoritatively set policy, regulate and, where necessary, take appropriate compliance and enforcement actions. Technical resources will be particularly significant in implementing digital solutions to resolve matters arising under the Directive and the National Legislative Proposal, including, for example, the implementation of registration systems and electronic information-gathering systems. The appropriate resources to implement a self-financing model to support its regulatory activities and potentially to develop a content levy system to support the production of European content will also be required at an early stage in the organisation's development.

1.3 The Optimal Regulatory Structure

The National Legislative Proposal presented by the Minister proposes to introduce for the first time in Ireland a regulatory scheme for the regulation of harmful online content. The transposition of the AVMSD extends the provisions of the 2010 Directive in respect of on-demand services and introduces some very new elements to the field of audiovisual regulation with VSP services being brought within the scope of regulation for the first time. Noting the Minister's proposal to combine audiovisual and harmful online content regulation in a single media regulatory agency which has few international precedents, the BAI explored firstly the concept of combining these two areas in one regulatory structure before responding to the question of the most appropriate structure and the potential role for the BAI in such an organisation.

1.4 Concept of a Single Media Regulator

Historically, the rationale for regulating broadcasting content stemmed from the fact that it was considered a powerful and influential medium of public communication. This, in turn, justified audiences being able to avail of, and having entitlements in respect of, a range of protections such as statutory complaints systems. In addition to ensuring protections for audiences, a primary focus of broadcasting regulation is also to ensure culturally-rich and linguistically-diverse content for national and European audiences and supporting democratic discourse by ensuring plurality in the ownership and control of media services and in the provision of impartial news, information and current affairs content for the users of services.

Changes in audience behaviours in the ten years since the previous iteration of the AVMSD have been central to the rationale to extend and strengthen the protections for audiences to on-demand audiovisual media services (“on-demand services”) like Netflix and YouTube Channels.

The Directive ensures a degree of alignment throughout the EU in rules applicable to television broadcasting services and on-demand services, and, in so doing, ensures a more level playing field and fairer marketplace for audiovisual content, reflecting changes in behaviour and consumption patterns of audiences.

Similarly, the inclusion of video-sharing platform services within the scope of the new Directive for the first time is a further, very significant, legislative acknowledgement of changes in the audiovisual content ecosystem in recent years and is driven by a desire to strengthen the protections for audiences and to further reflect evolving content consumption habits.

In parallel with developments in the audiovisual content environment, the evolution of social media services - many of which *are*, or provide *access to*, video-sharing platform services - have now become ubiquitous features of daily life for people of all ages. Arising from such developments, there is a growing imperative for many governments around the world to respond to online safety concerns. The urgency for a robust public policy response is understandable and the BAI acknowledges the opportunity presented, as well as the synergy that might be achieved, in combining the transposition of the revised Directive with the regulation of online safety – and placing it on a secure statutory footing – despite the perceived differences in focus of each area of regulation.

While audiovisual regulation fulfils some different purposes to online safety regulation, it is important to recognise that a user is unlikely to distinguish between the different forms that content make take on a platform i.e. whether it is in audiovisual, still image or text form. In this context, the rationale for a single regulatory entity to cover harms arising from audiovisual content and other forms of harmful content is persuasive, and the Minister’s proposals reflect the reality that online content of a harmful nature will frequently be delivered through the same devices and platforms as audiovisual content that falls within the scope of the revised Directive.

Transposing the new Directive and introducing a regulatory regime for harmful online content will require fundamental changes to Ireland’s current media regulatory landscape. The rationale for a single media regulator that emphasises the synergies between, but respects the differences in, both audiovisual

Section 1: Regulatory Structures (Strands 1 to 4)

regulation and online safety regulation in a coherent manner is compelling. There are further reasons to support such an approach:

- It ensures consistency in the application of regulatory principles, policies and rules across all areas of regulation, where appropriate;
- It offers efficiency for the Irish Government, the European Institutions and other European regulators in liaising with a single regulator;
- It offers efficiency for regulated entities in dealing with a single regulator;
- It builds on the institutional knowledge and experience of the BAI in audiovisual regulation over many years (including its work in audience protection), its specific work in implementing previous Directives and more recent work in contributing to the planning and development of the new Directive – at both national and European levels – and
- There are operational efficiencies in having a single organisation – a key policy objective of Government in the past.

It is in this context that the Authority sets out its proposals for a single regulator.

1.5 *BAI's Preferred Regulatory Model*

The Department has proposed two options for a regulatory model in its consultation documents.

Option 1 would see a restructuring of the Broadcasting Authority of Ireland as a media commission with responsibility for regulating all services and content falling within the scope of the Department's Consultation i.e. linear broadcasters (audiovisual and sound), on-demand services, video-sharing platform services and services/content subject to online safety obligations.

Option 2 envisages two regulators; the first, a restructured BAI, would be assigned responsibility for editorial services and the second, a newly created regulator, with responsibility for non-editorial online services.

In considering the questions raised in the Department's consultation, the BAI also considered a **third option**, which would maintain a separation between audiovisual content (across linear, on-demand and video-sharing platform services) and harmful content on all online platforms, i.e. an audiovisual regulator (for current regulatory purposes and for the additional purposes set out in the revised Directive) and a second regulator for online safety.

The preferred option of the BAI is Option 1 – that of a single regulator with statutory responsibility for regulating audiovisual content and harmful online content. In the view of the BAI, a single media regulator offers a unique opportunity to develop a meaningful and holistic vision for the future regulation of the media content landscape, irrespective of how content is delivered, that serves and protects audiences and users and is capable of doing so having regard to the wider objectives of content and services that serve citizens – ensuring Diversity and Plurality, promoting Freedom of Expression and sustaining and enhancing democratic discourse.

The BAI emphasises the value and importance of not only ensuring the **consistent implementation** of the provisions of the Directive and the National Legislative Proposal, but also in having a **coherent and harmonious approach** to the interests of audiences and users and the protections to be afforded to

them. The desirability for **fair and balanced treatment** of the various players in the audiovisual and online sectors is also an important consideration.

For these reasons, the BAI considers that the effectiveness of Option 2 has significant limitations and does not fully utilise the potential for regulatory synergies available. Also, the BAI considers that there is a significant possibility that having different regulators (one for on-demand content and one for non-editorial online content) could lead to significant inconsistencies in the implementation of the provisions of the Directive and result in different approaches and outcomes on the same points of law.

1.6 **Role of the BAI**

The BAI believes that it has a central role to play in the new regulatory regime as envisaged by the Minister, and the Authority, which has had responsibilities in this area since 1988, is best placed to form the nucleus of the organisation that will be the new regulator.

The BAI has appropriate and extensive experience and knowledge in regulatory practice in all aspects of linear broadcasting gained over many years. Moreover, specific knowledge and regulatory experience gained in applying **content principles** more specifically are readily transferable to related areas of content regulation.

As the regulator for television broadcasting services pursuant to three previous iterations of the Directive, the BAI has played a significant role in supporting work at the European and national levels in preparing for the significant amendments to the last Directive and more particularly in the debates and negotiations on the new provisions. The Authority has been an active participant in the establishment and development of ERGA – the EC’s Audiovisual Regulators’ Advisory Group – and in the work undertaken by this group since 2016, consistent with the provisions of the Directive that envisages a central role for existing audiovisual regulators in the new regulatory framework.

The BAI has considered the role it should play in the revised regulatory framework following transposition. In so doing, it has had regard to the characteristics and qualities of the regulator which it considers are most desirable for effective implementation of the Directive and the National Legislative Proposal and considers that it is uniquely placed to deliver on the objectives of the proposed legislation. While acknowledging that further work is required to develop a more in-depth knowledge and expertise on online safety and the potential for harm that can arise, the Authority considers that the BAI has a strong track record in the regulation of harmful content which can be applied to newer aspects of such work. We view the regulation of online safety as a natural extension of our regulatory work and practice in protecting audiences to date. A single media regulator offers the opportunity to address, in a meaningful way, current public concerns regarding harmful online content, to continue to afford audiences the protections they have enjoyed heretofore, and, at the same time, provide assurance to citizens that the enduring objectives of audiovisual regulation – Freedom of Expression, Plurality and Diversity – continue to be a high priority.

The BAI’s work in recent years in implementing its media literacy functions and its pivotal role in the establishment of a national media literacy network (*Media Literacy Ireland*) also provides a strong basis for delivering on the wider objectives of online safety regulation. The Authority played a leadership role in this area in developing and publishing its Media Literacy policy aimed at empowering Irish citizens to make informed choices about the media they consume, create and disseminate across all platforms.

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As well as engaging with a wide range of stakeholder interests, the BAI understands the importance of true cross-sector collaboration and participates in delivering media literacy initiatives with a nationwide reach, for example, the recent “Be Media Smart” campaign. Its role and experience thus far form a solid foundation to expand further its regulatory expertise into the online space.

1.7 Governance Structure of the Regulator

The BAI has considered the Minister’s proposal for a multi-person commission structure for the new regulator having regard to its own existing structures, and, more broadly, the types of structures under which Irish regulatory bodies operate. The Authority recognises that the governance and key decision-making structures of the BAI is highly complex – an Authority, Compliance Committee and Contract Awards Committee were established for a body which is first and foremost a linear audiovisual regulator.

In an Irish regulatory context, broadly, one of two approaches are typically adopted:

- Authorities/agencies with a part-time board – often comprised of seven or more persons – and supported by a full-time, permanent executive. The composition of such boards can vary – sometimes including the CEO (or not) and sometimes having members who are representative of certain sectoral interests. Occasionally, such boards are led by a full-time Executive Chairperson.
- The second most common structure is that of a full-time Commissioner or Commission, comprised of 1-5 commissioners and led by an executive chairperson – ComReg and the CCPC being current examples of this approach.

The BAI is not aware of any formal public policy guidance in Ireland regarding the circumstances in which the different options are exercised. Drawing from the experience of the Authority currently, the BAI makes the following observations:

- Boards with part-time members appear to reflect a traditional corporate approach in which the role of the board is primarily one of governance/oversight and policy formulation.
- Single commissioner and multi-person commissions may derive from the approach envisaged under European legislation, or where there is a perceived need for “experts”.

Each approach has its strengths. Single commissioner and multi-person commissions can use specialist knowledge and experience to ensure speed and agility in decision-making and to be more responsive to sectoral developments, particularly in fast-evolving environments where innovation is the norm. A further advantage of a commissioner-led structure may be one of greater public visibility and public perception of a “champion” in the matters under regulation.

Part-time boards bring a breadth of experience and a wider range of perspectives that are often vital in making determinations on issues that are frequently complex, and in situations where the rights and protections to be afforded to citizens need to be finely balanced with public policy objectives (e.g. on issues concerning freedom of expression). To leverage such value in a Commissioner-led governance model, there may be benefit, at a minimum, in availing of structured support through the inclusion of a statutory advisory board in the design of the legislative scheme.

However, regardless of the governance structure that is ultimately adopted, the BAI views it as essential that there is **coherence** in the overall functioning of the regulator; the governance structure should lend itself to the sharing of knowledge and experience and to delivering consistency across its functional areas – particularly in developing and implementing its organisational strategies, in setting its policies and in making key decisions. The BAI believes that this matter would benefit from further consideration and discussion and the Authority would welcome further engagement with the Minister in this regard.

1.8 Brief Description of Proposed Regulatory Regime

In this section, the BAI proposes its approach to the regulatory regime for the achievement of the legislative objectives, briefly discussing the rationale, principles, objectives, challenges and other factors underpinning its approach, before going on to describe the key features of the regulatory framework envisaged.

1.8.1 Rationale

Central to the BAI's approach to the new regulatory regime is a statutory regulator and a framework that combines a range of regulatory approaches, appropriate to the type of service to be regulated, the nature of the regulatory objectives to be achieved, and the scale of the task on hand. It is envisaged that common regulatory and content principles are established by a statutory regulator and given meaningful and tailored effect through appropriate codes and guidance. Furthermore, the BAI's proposed framework clearly establishes the responsibilities of the regulator as well as those of the various regulated entities within the framework. More specifically:

- The BAI considers that statutory regulation is a “well-trodden path” from a constitutional and legal perspective in Ireland. An approach based on statutory regulation provides a strong degree of legal certainty for all stakeholders – the State, the regulated entities and for audiences and users.
- A statutory regulator is more likely to engender public trust and to have the legal authority that follows from being a single, strong and well-resourced regulator.
- It is the regulatory option that will place audiences and users and the public interest at the centre of its work.

1.8.2 Principles, Objectives, Challenges and other Factors underpinning the BAI's approach to the Regulatory Regime

The BAI's proposed approach to the establishment of a new regulatory framework is underpinned by several principles, objectives, challenges and other factors. These include:

- Ensuring a high standard of protection for audiences and providing effective and meaningful redress options for all services within scope of the National Legislative Proposal and the Directive.
- Ensuring that the Directive and the National Legislative Proposal are implemented lawfully and in spirit and that all its obligations are satisfied.
- Facilitating concrete solutions to dealing with the scale of audiovisual content that will fall to be regulated and the number of on-demand services in scope.

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- Ensuring that efficiencies are maximised and that no undue regulatory burdens are placed on industry players.
- Promoting a culture of regulatory responsibility and compliance in the online space through the adoption of a service-provider first approach to incident resolution.

1.8.3 Key Features of the Regulatory Framework proposed by the BAI

The framework is designed to ensure that the focus of the regulator's work is on:

- Setting the strategic direction for delivery of the statutory objectives
- Determining key policy decisions to deliver on those objectives and
- Taking high-level "macro" decisions in the public interest in a consistent manner across the services in scope.

The framework also envisages that the regulator plays a central role in the necessary interactions with external interests, particularly with audiovisual and online regulators in other Member States of the European Union, for example in matters of jurisdiction.

While aiming to guarantee a high standard of protection for audiences and users, the statutory framework is complemented by creating a dispute resolution system that facilitates large-scale resolution of micro disputes.

Regarding the regulation of the four streams of content posed in the consultation documents, the BAI highlights the following:

- In respect of the fields co-ordinated by the Directive, linear broadcasting should continue to be regulated as heretofore, except to the extent that changes may be made pursuant to the revised Directive.
- The rationale for bringing on-demand content closer in regulatory terms to that of linear content is also appropriate for the reasons set out by the European Union having regard to audience trends and behaviours in the intervening years since the 2010 Directive came into force.
- It is appropriate that audiovisual content on video-sharing platform services (VSPS) is also brought within the scope of regulation, in the light of changes in audience consumption patterns and users' behaviours together with the significant and growing body of evidence of concerns regarding content on VSPS and principally to ensure that the same protections afforded to users of linear and on-demand content are extended as far as possible to users of content on VSPS.
- Combining the regulation of online safety with audiovisual content has significant advantages for audiences and platform users, who do not always distinguish different forms of content, the platform on which they have viewed such content, or the source of harmful content in an online context.
- The concept of a single regulatory structure facilitates the transfer of significant knowledge and experience in respect of content-related harm to online platforms and delivers the best opportunity and solutions for protecting and supporting audiences and users.

More specifically, the framework proposed by the BAI envisages:

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- A direct regulatory relationship between the statutory regulator and (a) linear broadcasters; (b) on-demand audiovisual media service providers falling within the Irish jurisdiction; (c) video-sharing platform services that also fall to be regulated here in Ireland in respect of audiovisual and harmful content.
- For the time being at least, regulation introduced pursuant to the Directive in respect of on-demand services that fall to be regulated in the Irish jurisdiction should be limited in scope to the fields coordinated by the Directive.

(a) Linear Broadcasters (Audiovisual and Sound Broadcasters):

Except to the extent that changes may be made pursuant to the Directive, the BAI envisages broadly a continuation of the current arrangements in respect of linear broadcasters.

Linear broadcasters, both audiovisual and sound, would be subject to a broadly similar regulatory regime. While maintaining substantive regulatory obligations on linear broadcasters, regard should be had in the proposed approach to transposition to reducing administrative burdens on these services.

In this regard, the BAI would be happy to submit to the Minister further proposals in respect of amendments to the existing legislative provisions in respect of linear broadcasters as set out in the Broadcasting Act 2009 that would increase administrative efficiencies and further reduce regulatory burdens on broadcasters.

(b) On-demand Services:

Arising from the provisions of the Directive, three categories of on-demand services fall to be considered:

- Irish on-demand services
- Other EU on-demand services carried on Irish VSPS
- Non-EU on-demand services carried on Irish VSPS

The BAI's approach envisages a direct regulatory relationship between the regulator and Irish on-demand services (including Irish on-demand services that are carried on Irish VSPS). Other EU on-demand services, carried on Irish VSPS, will fall to be regulated in the relevant EU Member States. Non-EU on-demand services on Irish VSPS will fall to be indirectly regulated in the Irish state via the measures to be adopted by VSPS in accordance with the provisions of Article 28b of the Directive. It may be noted that other EU on-demand services on Irish VSPS will also be subject indirectly to a level of regulation arising from the measures to be adopted by Irish VSPS pursuant to the provisions of Article 28b. The relationship between the regulator and the Irish VSPS will facilitate an ability to extend the protections to be afforded by the Directive to non-EU on-demand content on VSPS via the terms of service of VSPS. These terms of service will also help to strengthen the application of the minimum provisions of the Directive in respect of on-demand services insofar as they hold the VSPS to account via the measures to be adopted. The relationship between the regulator and the VSPS will also be helpful in dealing with content, the origin of which may be difficult to determine – even in an EU context.

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(c) Audiovisual Content on VSPS:

VSP providers are obliged to follow a principles-based common code (the “VSP Code”). This code establishes rules for audiovisual content on the VSP provider’s ecosystem, which in turn affects on-demand content on the VSP, User-Generated Videos and Audiovisual Commercial Communications falling within the scope of the Directive. A detailed accountability regime is proposed by the BAI: we set out proposals for the Article 28b assessment and reporting process for evaluating the VSP provider’s compliance with the VSP Code.

(d) Online Safety:

The BAI discusses how an Online Safety regulatory regime might work in practice in an Irish context within a wider media regulatory framework. In this regard, online safety focuses specifically on harms to be specified in the legislation that can be caused by one individual to another in the online environment and is not limited to video-sharing platform services, as is the case with the AVMSD. In the view of the BAI, online safety fulfils a different purpose to audiovisual regulation, although there is significant alignment in the strategic objectives of both.

(e) Other Features of the BAI’s proposed Regulatory Framework:

Compliance framework: the BAI proposes a broad compliance and enforcement framework for implementation of the audiovisual and online safety regulatory regime that is underpinned by best regulatory practice and the BAI’s specific experience to date in regulating audiovisual content. The BAI believes it is capable of being adapted to different types of content and circumstances appropriate to the National Legislative Proposal and the regulation of audiovisual content as envisaged by the Directive.

Reflecting the requirements of the European legislation, the BAI elaborates specific proposals in respect of a number of new features of the Directive, including:

- **Out-of-court dispute resolution mechanism:** a multi-stage approach to dispute resolution, involving roles for the VSPs, the regulator and an independent adjudicator;
- Framework for **adjudicating complaints** in respect of audiovisual content on VSPS;
- **Article 28b5** assessment process;
- **Sanctions regime**, which has regard, *inter alia*, to the specific constitutional arrangements in respect of the imposition of fines in the Irish state and which also has regard to current regulatory schemes in Ireland for such financial penalties.

General powers required in line with good regulatory practice are suggested e.g. a requirement for all regulated entities to supply data and information in a form to be specified by the regulator is envisaged as necessary. A research role for the regulator to support an evidenced-based approach to regulation is deemed desirable; liaison powers and possibly formal co-operation arrangements (such as MOUs) with other statutory bodies may be desirable and appropriate.

1.9 Applying the AVMSD Provisions to all forms of online content

The BAI notes the proposal in the *Explanatory Note* to the Department's Consultation to extend the Directive's rules for video-sharing platforms services to all kinds of user-generated content (UGC) for Irish residents on online platforms¹.

In the view of the BAI, this proposal merits further detailed consideration. Some of the questions to be discussed include:

- **What online platforms** are in scope – video-sharing platforms or all online platforms? Only platforms within the Irish jurisdiction or in other jurisdictions but available to Irish residents? On what basis would jurisdiction be established?
- **What content** is in scope?
- **What specific provisions of the AVMS Directive** would be applied to other content? (Not all provisions may be capable of being applied to UGC).
- What will be the nature of the **regulatory relationship** between the regulator and the Online Platform in this context?
- What is the **wider impact and policy implications** of such a proposal?
- What **redress mechanisms** would be appropriate and how would these function in practice?
- Is it envisaged that the same **compliance and enforcement regime** as applies to audiovisual content would underpin the regulatory regime for UGC?
- How would **issues of scale** be addressed, given that the scale of content in scope would likely far exceed the scale of content within the scope of the AVMSD provisions?
- The **resource implications** of all the above merit consideration.

In the view of the BAI, there are issues of very significant complexity and scale in applying the provisions as proposed. Bearing in mind that the AVMSD provisions were developed for audiovisual content and may not necessarily or readily be applied to other forms of content, such as still images, text etc, a detailed consideration on a provision-by-provision basis would be desirable to ascertain whether and how the Directive provisions could or should be applied.

The BAI suggests that further detailed consideration be given to the above issues, to evaluate the practicalities of extending the provisions *at this time*. Such an approach would have the added advantage of allowing time for the new regulator to become successfully established, before its competences were enlarged. Experience gained in dealing with video-sharing platforms could then, if necessary, be applied effectively to other areas of content regulation on online platforms.

1.10 Funding of the Regulatory Scheme

In line with common practice in Ireland, it is the view of the BAI that the regulatory scheme should be funded by the sector(s) to be regulated and the BAI is positioned to apply its extensive prior experience in developing a fair and transparent scheme. The broad principles underpinning such a scheme would include:

- **Transparency** as to the purposes to which levy raised will be used and in contributions made by individual entities.

¹ Page 5 of the DCCAE Explanatory Note

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- **Fairness and Proportionality:** the amounts of the levy should, in principle, be set at a rate that is commensurate with the burdens incurred by the regulator in the administration of the regulatory scheme. It should be sufficient to raise the funds necessary to facilitate the efficient running of the regulator's operations, including its operational, capital expenditure and cashflow requirements, without recourse to borrowings.
- **Certainty:** in amounts to be paid by the regulated entities on an annual basis to facilitate adequate financial planning.
- **Accountability:** the regulator should be fully accountable on the use to which monies raised are put.
- **Flexibility:** while adhering to a general principle of proportionality, having regard to the disparity in scale between the various regulated entities to be regulated under the proposed legislation and a certain unknown quantity in the level of regulatory activity involved, it may also be desirable to build in a degree of flexibility in the design of the scheme. Such flexibility might also take account of a regulated entity's ability to pay.

1.11 What is required in the legislative design of such a scheme?

The legislative provisions should set down the broad principles and parameters for the design and operation of such a scheme and a requirement for the regulator (or the BAI prior to the enactment of the legislation) to prepare such a scheme for submission to the Minister for approval. As with the BAI's current industry levy scheme, the BAI suggests that proposals for a scheme would be subject to consultation with the industry to ensure that the overarching principles and objectives for the scheme are met.

Section 2: Video-sharing Platform Services (Strand 2)

2.1 Proposed Approach to Transposition for Video-sharing Platform Services

The revised Audiovisual Media Services Directive requires EU Member States to introduce new rules for video-sharing platform services into Irish law by September 2020. The BAI's view is that these rules should be introduced in a separate but complementary manner to the rules the Minister is proposing to introduce in respect of Online Safety.

Video-sharing platform services are services that allow users to access large amounts of videos uploaded by other users. They can be provided on their own (e.g. YouTube) or as parts of social media services (e.g. the Facebook News Feed).

The principal focus of the Directive's rules for video-sharing platform services is to require them to moderate content on their services more effectively. The areas covered include the protection of minors, preventing incitement to violence and hatred, doing more to combat certain criminal offences and the introduction of advertising rules. To achieve these goals, video-sharing platform providers must provide genuinely effective age verification mechanisms, genuinely effective parental control mechanisms, introduce transparent and robust complaints procedures and ensure their terms and conditions prohibit certain kinds of videos (among other things). A regulator must monitor and oversee the implementation of these measures introduced by video-sharing platform services.

In this consultation response, the BAI proposes that video-sharing platform services should be directly regulated by a statutory regulator. The primary means by which the Directive's new rules for video-sharing platform services should be implemented in Ireland is through legislation and statutory codes.

Ireland is responsible for regulating the video-sharing platform services that are based in Ireland, and these services will only have to comply with Irish rules for all their European activities in the areas covered by the Directive. Most of Europe's largest providers of video-sharing platform services – such as Facebook, Google and Twitter – are based in Ireland. Ireland's responsibility under the Directive in respect of video-sharing platform services, therefore, is greater than any other EU Member State and Ireland must ensure that effective protections are put in place for hundreds of millions of European users of such services. The scale of audiovisual content that Ireland is responsible for regulating and the number of users of such services presents significant challenges for traditional regulatory methods.

To resolve matters of scale and numbers of users on Irish video-sharing platform services, the BAI proposes that the regulator should principally work at a "macro" level. This means that the role of the regulator would be to make very important regulatory decisions that affect large numbers of users simultaneously e.g. by drafting codes, and then by assessing on a regular and ongoing basis the measures put in place by video-sharing platform services to the code provisions. Electronic information-gathering mechanisms between the regulator and video-sharing platform services should be established to ensure that video-sharing platform services are complying with their obligations. The regulator should have extensive powers to compel video-sharing platform services to conduct independent audits, to supply data and other information as considered appropriate by the regulator

Section 2: Video-sharing Platform Services (Strand 2)

(including information in respect of processes and procedures) and to provide truthful accounts of features or aspects of the services they are providing.

Providers of video-sharing platform services should be obliged to comply with codes drafted and enforced by the regulator. These codes should be drafted in consultation with relevant stakeholders, should clearly establish the responsibilities of the video-sharing platform providers to their users and should create common standards of protection that all video-sharing platform services are obliged to follow. In developing such codes, consideration should be given to the scale of audiovisual content that must be regulated and the resources available to providers of video-sharing platform services. Fundamental protections for freedom of speech on video-sharing platform services should be enshrined in these codes while balancing that right with the need for significant protections on such services in respect of video content.

Video-sharing platform services should have robust and transparent complaints systems and users of video-sharing platform services should have the option of having their complaints resolved impartially if they are unsatisfied with the initial determination of their complaint. The BAI is proposing that video-sharing platform providers should be obliged to retain independent decision-makers, whose independence would be enshrined in statute and who can make protected disclosures to the regulator.

The regulator for video-sharing platform services should have significant compliance and enforcement powers including powers of audit, investigation and sanction. Further detail in this regard is outlined in our response to Questions 14 & 15 in Section 5.2 of this consultation response.

In the view of the BAI, online safety regulation fulfils a different purpose to the audiovisual regulation intended to fulfil the obligations contained in the Directive. Nevertheless, the strategic objectives of online safety and audiovisual regulation can be viewed as aligned in many respects. Further discussion on this issue is outlined in our response to Questions 12 & 13 in Section 1.4 of this consultation response.

Section 2: Video-sharing Platform Services (Strand 2)

Q.5	The revised Directive introduces a definition of Video-sharing Platform Services. Where should the limits of this definition be i.e. what services should and shouldn't be considered Video-sharing Platform Services? Please include your rationale and give examples. [Section 3 of the explanatory note]
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2.2 The Definition of a Video-sharing Platform Service

The definition of a video-sharing platform service in the revised Directive is novel and contains multiple legal elements that must be considered and assessed:

“video-sharing platform service” means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing”.

This definition is complex but not unclear. **Annex 1** to this submission highlights and discusses the key points of complexity in the definition in further detail, with a view to establishing a framework in which the various criteria in the definition can be applied. This can be used to identify video-sharing platform services and to explore the limits of the legal definition.

Developing a clear understanding of what constitutes a video-sharing platform service and an established methodology to reach such a determination is important because this will clarify the extent to which services that meet these descriptions are subject to the Directive's new rules. Future guidance from the European Commission on the essential functionality criterion, as envisioned by the Directive, will be vitally important to ensuring a harmonised and consistent interpretation of the definition across the EU (particularly regarding “edge cases”), as will work carried out through the now formalised European Regulators Group for Audiovisual Media Services (ERGA).

While the limits of what constitutes a video-sharing platform service will have to be determined on a case-by-case basis through detailed examination of the functionality of a particular service, for the reasons explored in Annex 1, the BAI is confident to offer its preliminary view that the services or aspects of the services in the following table are video-sharing platform services:

“Principal Purpose VSP Services”	“Essential Functionality VSP Services”
YouTube	Facebook
TikTok	Twitter
Daily Motion	Instagram
Vimeo	Snapchat
Twitch	LinkedIn
	Reddit

Section 2: Video-sharing Platform Services (Strand 2)

The BAI's views on these services are offered without prejudice to the future detailed guidance of the European Commission on the essential functionality criterion. These views are also subject to the requirement to conduct research on jurisdiction which will be necessary to ascertain where these services will fall to be regulated (although the BAI would say definitively that services provided by Facebook, Google and Twitter will fall to be regulated in Ireland).

Section 2: Video-sharing Platform Services (Strand 2)

Q6	<p>The revised Directive takes a principles-based approach to harmful online content and requires Video-sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designates a regulator to oversee the ongoing implementation of these measures.</p> <p>Given this, what kind of regulatory relationship should there be between a Video-sharing Platform Service established in Ireland and the Regulator?</p>
Q7	<p>On what basis should the Irish regulator monitor and review the measures that a Video-sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?</p>
Q16	<p>Given that the revised Directive envisages that a Video-sharing Platform Service will be regulated in the country where it is established for the entirety of the EU, it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video-sharing Platform Services. Given that such a system would be in place on an EU-wide basis, should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?</p>

2.3 How the Obligations Relating to VSP Providers in the Directive Function

The BAI considers that the most appropriate means of providing its response to these questions is to answer them together, as the questions posed raise many interrelated issues.

The BAI's response to these questions is therefore structured in six parts:

- 2.3.1** The BAI's understanding of how the obligations on VSP Services in the Directive function
- 2.3.2** Jurisdictional rules and assumptions underpinning the BAI's approach
- 2.3.3** Viewing the obligations in the Directive from "macro" and "micro" perspectives
- 2.3.4** The proposal for a VSP Code
- 2.3.5** Complaints and the Impartial Dispute Resolution Mechanism
- 2.3.6** Assessments of VSP Providers' Compliance with the Directive's rules

2.3.1 Article 28b Obligations

The revised Directive requires Ireland to ensure that video-sharing platform providers like Google, Facebook and Twitter, that are based in Ireland, comply with certain obligations and moderate videos on their services more effectively. Protections must be put in place by Ireland for all European users of these services. The areas covered by the Directive's rules include the protection of minors, preventing incitement to violence and hatred, doing more to combat certain criminal offences and prohibiting certain kinds of advertising.

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The business models of VSP Providers rely on users of the service uploading content without the direct intervention or oversight of the VSP Provider. This has fundamental implications for how VSP Services can be regulated. EU rules specify that online platforms can only be made responsible for illegal content uploaded by users where they have been made aware of its existence (e.g. by being informed by a regulatory authority or by another user of the service) and where they do not act expeditiously to remove or disable access to it after being notified.² Additionally, EU Member States are prohibited from introducing laws that create comprehensive general monitoring obligations on VSP Services.

The obligations placed on VSP Providers in the Directive are carefully worded to differentiate between circumstances where a VSP Provider itself is responsible for an activity being regulated and where the Directive requires the VSP Provider to take a more active role or to devote additional resources to moderating users' activity on the service. Where a Directive obligation requires VSP Providers to take measures to better moderate users' activities on the service, the wording of the relevant obligation in the Directive will require the VSP Provider to adopt "appropriate measures" in respect of that activity.

The ten key obligations relating to VSP Providers in the Directive are paraphrased in the table below. The obligations are phrased in a "general" way to allow EU Member States to regulate video-sharing platform services in a manner that is consistent with their own national legal framework and traditions. Member States are obliged to:³

Article	Obligations	Appropriate Measures?
Art. 28b.1(a)	Ensure video-sharing platform providers take appropriate measures to protect minors from audiovisual content ⁴ which may impair their physical, mental or moral development;	Yes
Art. 28b.1(b)	Ensure video-sharing platform providers take appropriate measures to protect the public from audiovisual content containing incitement to violence or hatred.	Yes
Art. 28b.1(c)	Ensure video-sharing platform providers take appropriate measures to protect the public from audiovisual content the dissemination of which constitutes an activity which is a criminal offence under Union law (e.g. terrorist offences, child sexual exploitation).	Yes
Art. 28b.2 Sub-Para 1	Ensure video-sharing platform providers comply with the Directive's advertising rules in Article 9(1) with respect to audiovisual commercial communications that are under their control.	No
Art. 28b.2 Sub-Para 2	Ensure video-sharing platform providers take appropriate measures to comply with the Directive's advertising rules in Article 9(1) with respect	Yes

² There are some caveats to this general rule.

³ This list is not intended to be exhaustive but highlights the main responsibilities that Member States and VSP Providers will have in respect of VSP Services.

⁴ Audiovisual content in this instance means programmes, user-generated videos and audiovisual commercial communications.

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Article	Obligations	Appropriate Measures?
	to audiovisual commercial communications that are not under their control (i.e. those which are not marketed, sold or arranged by them)	
Art. 28b.2 Sub-Para 3	Ensure video-sharing platform providers clearly inform users where videos contain audiovisual commercial communications, where they have been declared as such by users, or the provider has knowledge of the fact.	No
Art. 28b.2 Sub-Para 4	Encourage co-regulation and self-regulation to effectively reduce the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, particularly fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended.	No
Art. 28b.7	Ensure there is an out-of-court redress mechanism available for the settlement of disputes between users and video-sharing platform providers in relation to measures taken pursuant to the Directive in respect of such services.	No
Art. 28b.8	Ensure users can assert their rights in respect of the protection of minors, incitement to violence or hatred and EU criminal offences before a court.	No
Art. 28a.6	Establish and maintain an up-to-date list of video-sharing platform providers.	No

As discussed above, obligations which require VSP Providers to adopt “appropriate measures” require video-sharing platform providers to moderate videos on their service more effectively. To achieve this, video-sharing platform providers must⁵:

- Establish and operate genuinely effective age verification mechanisms on the service to prevent minors from viewing videos which may impair their physical, mental or moral development.
- Establish and operate genuinely effective parental control systems on the service.
- Align the platform’s terms and conditions and actively enforce the platform’s terms and conditions to deal more effectively with issues concerning the protection of minors, incitement to violence or hatred and EU criminal offences.
- Align the platform’s terms and conditions and actively enforce the platform’s terms and conditions in a manner consistent with the Directive’s rules for video advertisements (prohibiting certain kinds of advertising on the service e.g. tobacco);

⁵ The contents of this list are paraphrased from the contents of the list of measures contained in Article 28b.3 of the Directive.

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- Establish and operate transparent, easy-to-use and genuinely effective procedures for handling and resolving users' complaints about videos.
- Introduce technical measures to ensure that where users on the service upload videos any advertisements in those videos are declared.
- Introduce transparent and user-friendly mechanisms that allow users of the service to report or flag videos where they may be harmful to minors, constitute an incitement to violence or hatred and constitute an EU criminal offence. The provider must explain to users of the platform what effect has been given to reports and flagging by users.
- Introduce mechanisms to allow users to "rate" content i.e. to indicate what age it might be appropriate for.
- Promote media literacy on the service and introduce tools to raise users' awareness of media literacy.

The Directive creates a rebuttable presumption that the measures listed above must be adopted. The manner and form in which an appropriate measure is adopted, as well as whether it is appropriate for the measure to be adopted at all, is determined through reference to the assessment framework established in the first two sub-paragraphs of Article 28b.3.

Article 28b.3 requires an assessment of: the nature of the content; the harm it may cause; the characteristics of the category of persons to be protected; rights and legitimate interests at stake, including those of the video-sharing platform providers and users that have created or uploaded the content; the practicality of the measures (taking into account the size of the video-sharing platform service and the nature of the service that is provided); the proportionality of the measures (taking into account the size of the video-sharing platform service and the nature of the service that is provided) and the general public interest.

2.3.2 Article 28b Obligations

The obligations contained in the Directive for VSP Services relate to activity which is solely under the control of VSP Providers and activity which relates to how VSP Providers moderate videos uploaded by users of their service.

For example, Article 28b.2 (1) requires Member States to ensure that VSP Providers do not market, sell or arrange audiovisual advertisements for tobacco products in a manner contrary to Article 9.1(d). Where a VSP Provider markets, sells or arranges for an audiovisual advertisement for a tobacco product on the service, in most cases determining whether this has occurred can be determined solely through reference to actions undertaken by the VSP Provider (much in the same way responsibility would fall solely to a broadcaster if they broke a similar rule). The activities of the users of the service are not relevant in this case.

By way of contrast, Article 28b.2 (2) requires Member States to ensure that VSP Providers take *appropriate measures* in respect of audiovisual advertisements for tobacco products that appear on the

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service, but which are not under the control of the VSP Provider i.e. they are uploaded by users of the service. Determining whether a VSP Provider is satisfying this obligation will require an assessment of the VSP Provider's conduct having regard to the scale and nature of user activity on the service, the resources available to the VSP Provider and any other relevant factors as appropriate (e.g. are automated decision-making procedures present, and, if so, to what extent?).

Some obligations relating to VSP Providers in the Directive have significantly more complex implications than others. For example, Article 28b.1(a) requires VSP Providers to take appropriate measures to protect minors from audiovisual content that may impair their physical, mental or moral development. While many issues on the protection of minors will be relatively straightforward, many others will contain more complex elements that require a decision to be made based on context, the age of the minor in question and any vulnerabilities a minor might have. Arriving at a determination in these cases will typically be a more complex exercise than determining if an advertisement is featuring a tobacco product, for example.

Implementing the obligations in the Directive will require, therefore, a variety of different regulatory approaches and techniques. Clear, detailed guidance will be appropriate in some cases while requiring VSP Providers to adopt a principles-based approach to protection will likely ensure better protection for users in other circumstances. Whether a breach of the Directive's obligations has occurred can sometimes be determined in a straightforward manner, while on other more complex issues a determination of the appropriateness of measures adopted by VSP Providers will have to have regard to a range of factors. The approach to transposition adopted should reflect this complexity and provide the regulator with an appropriate range of regulatory powers to assess the measures put in place by VSP Providers.

2.4 Key Legal and Jurisdictional Assumptions Underpinning the BAI's Approach

Each EU Member State is responsible for regulating the VSP Services provided by VSP Providers from its jurisdiction on a pan-European basis (insofar as a matter falls within the scope of the fields coordinated by the Directive). As a corollary to this, the new rules in the Directive mean that other Member States may have had their ability to impose regulatory rules and sanctions on VSP Providers established outside of their Member State weakened. This has given rise to legitimate concerns among other Member States about the extent to which they can now impose regulatory measures on prominent video-sharing platform services being provided from Ireland to protect residents in their Member States.

Understanding the scope and limits of the Directive's obligations is important, as this will clarify the scope of the authority of the regulator appointed in respect of VSP Providers and the Directive's compatibility with other EU Member States' laws. The issue of the Directive's compatibility with other areas of law will be a paramount consideration in a wider European context.

In that regard, the BAI notes the following points concerning jurisdiction and compatibility:

1. While not underestimating the significance of the revised Directive's provisions, the BAI does not consider that the Directive turns Ireland into a "super regulator" for all the activities of video-sharing platform providers. The proposed approach to the transposition of the Directive must be compatible with a range of European and national rules and regulations in other Member States such as data protection and privacy, online safety, consumer protection, criminal

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enforcement and political advertising that are not coordinated by the Directive. Insofar as it is possible, the Directive must be interpreted and applied in a manner that is compatible with these other rules and compatible with the work of many regulatory authorities across the EU spanning a range of substantive areas that occur *on* VSP Services, but which do not relate to the regulation of VSP Services in the manner envisioned by the Directive *as such*. This will include the work of many online safety regulators that are likely to be established in other EU Member States over the next decade, for example. Where a conflict does exist, however, the rules of the Directive will prevail.

2. The Directive's rules on VSP Services are intended to vindicate audiences' rights in respect of audiovisual content only. In order to vindicate the rights of users in respect of audiovisual content, it is likely that content other than audiovisual content present on a service may be incidentally affected by measures intended to implement the Directive, for example where the purpose of a function on a VSP Service has a dual- or multi-purpose and affects access to, or the use of, other kinds of content on the service e.g. a login screen or a parental control mechanism. The fact that content other than audiovisual content might be affected by measures intended to implement the Directive does not act as an impediment to the application of its rules, as otherwise – given the complexity inherent in modern social media services – it would be impossible to apply the Directive. The responsibility for achieving the standards set by the Directive and for reflecting these in changes in a proportionate manner is the responsibility of VSP Providers.
3. The provisions in the Directive relating to VSP Services only create obligations on VSP Providers and only in respect of the VSP Services they provide. They do not create obligations on the users of those services unless they are audiovisual media services. To the extent that a law in another Member State creates obligations on *users* of VSP Services (other than audiovisual media services) and is enforced from that perspective, it will likely be fully compatible with the regulatory regime created by the Directive.

2.5 The Directive's VSP Provisions in Terms of Macro and Micro Elements

In developing its position on the transposition of the Directive's provisions relating to video-sharing platform services, the BAI carried out a detailed analysis of many of its provisions from the perspective of elucidating the large scale ("macro") and small scale ("micro") implications of its obligations, having particular regard to the scale of audiovisual content that will fall to be regulated on Irish video-sharing platform services.

For example, Article 28b.1(a) of the Directive requires Member States to ensure that video-sharing platform providers take appropriate measures to protect minors from audiovisual content that may impair their mental, moral or physical development. The "macro" implication of this obligation is that high level rules and principles must be drawn up determining the kinds of content that is harmful to minors and ensuring that the VSP providers' policies and procedures are aligned with these macro rules. The "micro" implications of this obligation are the millions of decisions that must be made by video-sharing platform services in relation to the rules intended to protect minors.

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Viewing the Directive's provisions in respect of VSP providers in terms of their macro and micro obligations, the BAI concluded that the most effective means of transposing the Directive is to have the state and a statutory regulator make the "macro" decisions in the legislative and regulatory framework for VSP providers and to have the VSP providers resolve "micro" disputes stemming from those "macro" rules on the platform. The role of the regulator in this context is to ensure, at the macro level, that the VSP provider acts in a manner that is aligned with these "macro" rules and to assess and monitor their compliance from this perspective. This is the overall approach to transposition favoured by the BAI in respect of VSP services for the following key reasons:

- The key strengths of statutory regulation – the public trust and the public interest – can be applied to the issues that have the largest implications for the largest amount of people.
- The cost and other resources required in having a statutory regulator in the administration of individual complaints and "micro" issues on video-sharing platform services on a pan-European basis would be inordinate and impractical.
- By having access to technical solutions to resolve issues and a direct, administrative technical link to the video-sharing platform service itself, the video-sharing platform provider is the body best equipped to resolve "micro" issues on the service at an early stage. A robust, impartial secondary stage of decision-making within a VSP provider is envisioned by the BAI in its proposed approach to enhance VSP Providers' decision-making processes.
- "Micro" harms, which are harms that have a direct impact on an individual, need to be resolved as quickly as possible to prevent harms occurring to those individuals. Given the scale of audiovisual content to be regulated, the regulator is best placed to resolve "macro"/collective harms which affect a large number of individuals or groups of persons together.
- The video-sharing platform service's compliance on micro issues can be taken, reviewed and given transparency through targeted audits of the service and selective reviews of certain key cases and issues.

2.6 A VSP Code or Codes

In the view of the BAI, the most appropriate means of transposing the Directive's obligations for VSP Services into Ireland's national legal framework is through statute and statutory codes. Statute should be utilised to create the regulatory "framework" that VSP providers are obliged to comply with and statutory codes – prepared by the regulator – should be the primary means by which regulatory standards and objectives are communicated by the regulator.

In regulating VSP Providers, the BAI does not see any need to "reinvent the wheel". While the regulatory framework should contain several mechanisms that are designed to resolve issues of scale (particularly complaints) and to allow the regulator to make informed decisions about VSP providers' activities, ultimately, statutory codes are tried and tested mechanisms that produce effective regulatory results.

Statutory codes strike an effective balance between ensuring compliance by regulated entities and allowing enough flexibility to develop and improve regulatory rules. By having a basis in statute, a breach of a statutory code is equivalent to a breach of the law, thus allowing a regulator to take enforcement actions in the event of non-compliance against an entity that has committed a breach of the code. Unlike statute, a code can be amended directly by a regulator to adapt quickly to changing

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circumstances, to respond to matters of public importance or to reflect changes in attitudes or expectations about standards of protection.

Statutory codes set common standards among all regulated services, ensuring a level playing field between the regulated entities and communicating the standards required of entities in a concise, clear manner. VSP providers should be responsible for aligning their policies, terms of service and procedures with the codes set by the regulator and ensuring that the objectives set by the codes are achieved.

The BAI cautions against a regulatory regime based solely in statute as such a rigid approach to transposition may become quickly dated and statutory rules cannot be adapted to respond quickly to urgent issues.

The standards set by the regulator should be able to take account of the resources available to different providers of video-sharing platform services and the extent to which protections might be more desirable/necessary on one service than another.

2.7 *Complaints and the Impartial Out-Of-Court Redress Mechanism*

Audience complaints serve a vital function in any regulatory system for media. Having an effective outlet in which complaints can be heard, considered and adjudicated upon fairly promotes compliance among regulated entities and empowers audiences to hold regulated entities to account. From the perspective of the regulator, audience complaints serve as important indicators about the control environment of a service and on the potential non-compliance of regulated entities with statutory codes and rules. They can also highlight trends and draw attention to key issues that audiences consider to be important.

However, in the context of the transposition of the revised Directive, it is necessary to have regard to the scale of audiovisual content being regulated on video-sharing platform services and the challenges that this poses for traditional regulatory methods. In effect, the Directive's rules mean that effective protection systems will have to be put in place for hundreds of millions of Europeans.

The BAI is of the view that even with a statutory test and a threshold that must be met before complaints would be accepted by the regulator, a "traditional" regulatory approach to complaints resolution whereupon a regulator or external body has a statutory obligation to directly resolve complaints on video-sharing platform services is unlikely to ever be achievable in practice. Where a regulator can provide the most value within the regulatory regime is by focusing on "macro" issues (discussed in Section 2.5) which affect large numbers of users simultaneously.

The BAI concurs with the Minister's view that the Directive does not require such a traditional complaints system to be established in respect of video-sharing platform services. However, insofar as it is possible, the BAI believes strongly that the approach adopted to complaints resolution in the proposed approach to transposition for VSP providers should empower individuals to be able to effect meaningful change in how video-sharing platform services conduct themselves and to encourage VSP Providers to act in a more accountable manner.

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While significant work will be required on many of the more detailed aspects of the approach, the BAI is advocating that the approach adopted to complaints resolution on video-sharing platform services should comprise the following four key features:

- (1) Video-sharing platform services should be obliged to have robust, transparent internal complaints mechanisms and procedures in respect of audiovisual content. The implementation of these systems and procedures should be overseen and assessed by the regulator.
- (2) VSP providers should be obliged to retain independent decision-makers that function as a second stage of decision-making in situations where a complainant or an individual subject to a complaint is dissatisfied with how a complaint has been determined. The independence of these decision-makers should be guaranteed in statute and monitored by the regulator.
- (3) At the macro level, the regulator should have regard to complaints received by the VSP provider in “aggregate” when it makes its assessments of a VSP provider’s compliance.
- (4) Certain bodies across the EU should be designated as “priority complainants”. VSP Providers should be obliged to designate additional resources to the resolution of complaints from these bodies and provide comprehensive reasons why decisions have been made in complaints received by them. The manner in which such complaints are resolved should be closely monitored by the regulator.

2.7.1 VSP Providers’ Internal Complaints Procedure for Audiovisual Content

The regulatory framework should require VSP providers to have a robust, transparent internal complaints procedure for audiovisual content.

Where audiovisual content is present on a video-sharing platform service, the option to complain directly about that content to the VSP provider should be available to the users of the service. VSP providers should be obliged to provide easily-usable “tools” to report content such as buttons or flagging mechanisms.

VSP providers’ internal policies and procedures for complaints resolution and their terms of service should be aligned with the requirements of the VSP Code. Users should be able to complain about other users of the video-sharing platform service or the VSP provider’s conduct, processes and/or procedures.

VSP providers should be afforded a suitable degree of flexibility in how they resolve complaints in order to facilitate technological solutions in resolving issues and to ensure that decisions can be made having regard to contextual factors. For example, rather than taking down a single piece of content, a more effective means of responding to a complaint might be to use technological measures to prohibit multiple instances of that piece of content appearing across the service.

Where a complainant is not satisfied with a decision (or decisions) made by a VSP provider, or a user’s audiovisual content has been affected by a complaint lodged by another user, the option to avail of an impartial resolution mechanism should be available.

2.7.2 Impartial Decision-Makers

Article 28b.7 of the Directive requires EU Member States to ensure that an impartial out-of-court redress mechanism is available for the settlement of disputes between users of video-sharing platform services and video-sharing platform providers about audiovisual content.

In the view of the BAI, the scale of audiovisual content to be regulated and the number of users of Irish video-sharing platform services (e.g. those provided by Facebook, Twitter and Google) should be a key consideration in the transposition of this provision.

As stated previously, due to the scale of activity on Irish video-sharing platforms services and because of particular features of Irish law, a traditional approach to complaints resolution is likely to be extremely difficult to implement in practice for the following key reasons:

- It would require the employment of thousands of staff solely dedicated to the resolution of complaints by the State.
- The organisation would be required to resolve complaints in most languages utilised within the European Union.
- Sophisticated, technological solutions to facilitate “remote” decision-making on video-sharing platform services would have to be established involving the transfer and processing of the personal data of millions of Europeans. This would include personal data of the complainant, personal data of individuals whose content has been complained about and any other personal data relevant for the making of a determination.
- Decisions made by the organisation would be subject to natural justice obligations, constitutional constraints on public sector bodies and judicial review of decisions made. This has fundamental resource and cost implications which would prohibitively impact the effectiveness of the organisation in resolving large amounts of “micro” decisions and the ability to do so quickly.
- The establishment of such a system would likely come at a significant cost to the State.

The BAI’s favoured approach to the implementation of the impartial out-of-court redress mechanism would be to create a statutory regime that requires video-sharing platform providers to retain decision-makers that have a statutory duty to act impartially. This approach would focus on “re-purposing” aspects of the complaints resolution infrastructure already in place within video-sharing platform services and utilising VSP providers’ resources directly to serve the public interest. This approach has a broad precedent in, and is analogous to, the requirement to appoint independent Data Protection Officers pursuant to the General Data Protection Regulation (GDPR).

In this approach, impartial decision-makers (“IDMs”) could be retained by VSP Providers and incorporated as a “second stage” in complaints resolution processes. Legislation and provisions in the VSP Code could guarantee that IDMs make decisions independently and impartially, introducing rules on matters such as:

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- How IDMs can be hired. For example, it might be the case that two-thirds of an interview panel appointing an IDM are comprised of representatives of independent external organisations.
- Who IDMs are required to report to and who they can receive instructions from within an organisation, and on what issues.
- How IDMs can be dismissed, providing, specifically, that they cannot be dismissed or penalised for decisions they reach while carrying out IDM functions (unless they have acted egregiously or negligently).
- Ensuring that IDMs do not have conflicts of interests.
- Establishing whistle-blower protections for IDMs and an ongoing and direct, confidential line of communication between an IDM and the regulator.
- Ensuring that effective training, support and communication networks are in place for IDMs and that they are treated on a non-discriminatory basis within the organisation (while preserving their impartiality).

The regulator would expectedly require significant powers, including investigatory powers, to ensure that IDMs act in an impartial manner. The integration of IDMs into the decision-making processes of the VSP providers would require evaluation and audit by the regulator on a regular basis. The responsibilities of VSP providers in respect of their IDMs would have to be made clear in statute and in a code or codes applicable to VSP providers, and interference with, or contraventions of, these responsibilities would have to warrant the imposition of significant sanctions against VSP providers to preserve the integrity of decision-making processes if the “impartiality” required by the Directive is to be achieved.

An IDM-based model carries significant advantages compared to the “traditional” approach to complaints resolution:

- The burden of financing and administering the system rests with video-sharing platform providers and their extensive human resource capabilities and finances can be utilised.
- There is no need for the State to develop or replicate complex technological solutions to resolve decision-making or to transfer large amounts of personal data to facilitate the resolution of disputes.
- IDMs would be able to make decisions with appropriate rapidity, reflective of the fast-paced online environment.
- Language problems associated with a traditional approach to complaints resolution can be avoided.
- The approach can be implemented with significantly less cost to the State.

The role of the IDM would be to make decisions on the application of the platform’s terms of service in an impartial manner, which, in the approach proposed by the BAI, would have to be aligned with the requirements of the VSP Code. While IDMs would not be able to “disapply” the terms of service of the platform, the system could allow IDMs to make “declarations of incompatibility” where they felt that a platform’s terms of service prohibited them from making an appropriate decision or where their experience in practice demonstrated an incompatibility between the VSP’s terms of service and the VSP Code. Declarations of incompatibility would be notified and considered by the regulator where it assesses the compliance of VSP providers at the “macro” level.

If this approach to the implementation of an impartial dispute resolution mechanism was adopted, significant consideration would have to be given to the statutory mechanisms to be introduced within the regulatory scheme to ensure that it is both genuinely impartial and *perceived to be* impartial by the public and other stakeholders. A fundamental, key issue would likely be the extent to which an IDM receives remuneration directly from the VSP provider. While the effectiveness of an IDM-based approach is contingent upon IDMs being retained by the VSP provider, it could be appropriate, for example, for IDMs to be remunerated directly from the levy that would be applicable to all VSP providers.

An IDM-based approach to the impartial dispute resolution mechanism also carries the significant benefit of encouraging a genuine culture of regulatory compliance within a VSP provider. Establishing an external state body for the resolution of complaints could be used as a mechanism by VSP providers to “outsource” their regulatory responsibilities to that body, rather than encouraging them to reflect upon, improve and invest in their existing decision-making infrastructures.

2.7.3 Macro Review of Decisions Made

Article 28b.5 of the Directive requires Member States to have a national regulatory authority assess the regulatory measures put in place by VSP providers. While it is difficult to envision an approach to transposition where the regulator adjudicates upon individual complaints on video-sharing platform services, information generated from complaints processing by VSP providers viewed “in aggregate” would provide significant value to the regulator in determining how well VSP providers’ complaints systems are functioning and whether effective redress is being provided.

For example, it would be a matter of interest to the regulator if a large number of complaints are received about an aspect of the VSP Code in order to determine if action is required at the macro level. It would also be an important feedback mechanism for the regulator if it were necessary to issue a formal regulatory recommendation – see Section 2.8, below.

Helpful indicators in this regard would include:

- The number of complaints received on a particular issue(s).
- The extent to which complainants are satisfied that their complaints have been resolved and the speed with which they have been resolved.
- The number of impartial appeals sought and on what issues.
- The level of “declarations of incompatibility” from impartial decision-makers.
- Year-on-year trends.

If a complaint is of sufficient public interest to warrant the direct intervention and involvement of the regulator, the regulator should have the capacity to issue a binding recommendation(s) to the VSP provider to address the matter. It might also be appropriate for the regulator to issue cross-sectoral “thematic reports” on certain issues to communicate regulatory expectations in a broader sense. Further information on how the BAI considers the conduct of VSP providers should be assessed is outlined below in Section 2.8.

2.7.4 Designated Priority Complainants

While other EU Member States can no longer impose sanctions or introduce rules for Irish video-sharing platform services in respect of matters that fall within the fields coordinated by the Directive, the BAI is of the view that other EU Member States' concerns about loss of jurisdiction in matters coordinated by the Directive could possibly be addressed – in part – by a “priority complainant” scheme within the regulatory framework for video-sharing platform services.

While respecting the country of origin principle, a priority complainant scheme could require VSP providers to dedicate additional resources to, and to resolve complaints more quickly from, certain bodies being designated as “priority complainants”. In such an arrangement, a priority complainant would lodge a complaint on behalf of affected parties in their Member State and a VSP provider would have a duty to contact and engage constructively with the body making the complaint with a view to resolving the matter. A VSP provider would not be obliged to comply with the request from the priority complainant (respecting the country of origin principle), but the extent to which it has engaged constructively with the complainant in resolving the issue could be a relevant consideration in terms of assessing the VSP provider's compliance.

In order to implement any such system, significant consideration would have to be given to its purpose and the safeguards necessary to prevent abuse of the system, both in terms of the number of priority complaints that might be lodged and the rationale for complaints made. Various tests would have to be developed to ensure that a matter is, for example, of significant public interest or impact to warrant a priority complaint. A careful balance would need to be achieved to ensure the country of origin principle under the Directive is respected and that the complaints system remains practicable and workable relative to the resources available to a VSP provider.

A possible approach to a priority complainant scheme could be to designate an independent statutory body, such as an audiovisual regulator in each Member State, as a priority complainant.

2.8 Regulatory Assessment Framework for VSP Providers

Article 28b.5 of the revised Directive requires EU Member States to ensure that a national regulatory authority assesses the appropriateness of regulatory measures put in place by VSP providers to moderate content on their services. In the BAI's view, this will require the establishment of a comprehensive regulatory assessment framework for VSP providers with oversight by a statutory regulator.

The BAI considers that the statutory scheme for the regulation of VSP providers will require the regulator to be given significant compliance and enforcement powers, including powers of audit, inspection, investigation and sanction to ensure compliance (discussed in the BAI's response to questions 14 and 15 in Section 5.2). However, the overarching goal of the regulatory scheme should be to reach a point where compliance by VSP providers is such that the use of such powers is an infrequent occurrence or is not necessary. An approach to regulation that is based solely on sanctions and enforcement is unlikely to be conducive towards encouraging compliance, whereas open dialogue between the

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regulator and regulated entities also offers an opportunity to allow compliance matters to be explored and resolutions and future compliance to be achieved.

While significant detailed work will be required to develop the details of a regulatory assessment regime for VSP providers, the BAI is of the view that it should comprise the following five main elements:

1. The requirement for a VSP provider to set out annually (or biennially) a **statement** outlining their key compliance objectives and commitments, together with key performance indicators,
2. The requirement for VSP providers to provide a comprehensive **report** relating to the compliance period, assessing their performance against their objectives. (“VSP Reports”). In turn, the regulator would review this assessment and make its own assessment of the VSP’s performance.
3. The requirement for a VSP provider to provide a full and fair account of its service(s) in the manner specified by the regulator, and to establish mechanisms for the sharing of information about the service(s) to the regulator.
4. The requirement for the regulator to issue a report of its findings and to make formal recommendations and/or give directions to the VSP provider, which it is obliged to follow.
5. The ability of the regulator to produce “thematic” reports applicable to all VSP Providers.

The assessment process envisioned by the BAI would not be a certification process as such. Rather, the BAI views it as a means of providing transparency on compliance by a VSP provider with its fundamental obligations to comply with the VSP Code and its other statutory obligations, in the period under review. It would also function as a means of directing the attention of a VSP provider to matters where the regulator perceives changes or improvements (including process improvements) should be made to better ensure compliance with the VSP provider’s statutory obligations and duties. While it could function as an early warning system if the VSP provider is to avoid sanctions in the future, it would not preclude the regulator from implementing its statutory enforcement powers where a situation merited such actions.

2.8.1 VSP Statement of Compliance Commitments

Each VSP provider should be required to prepare annually (or biennially) a statement of its compliance commitments, setting out their key performance objectives and commitments, together with key performance indicators in order to ensure that they comply with the VSP Code prepared by the regulator. The format for such a statement should be determined by the regulator in consultation with the VSP provider but, **at a minimum**, it should include the appropriate measures to be implemented by a VSP provider pursuant to Article 28b.

The VSP provider is responsible for devising and introducing technical and other measures to ensure the achievement of its objectives.

2.8.2 VSP Report

Each VSP provider should be obliged to conduct an assessment of its performance against its compliance commitments (as set out in its statement) and to compile and submit a detailed report to the regulator on an annual or biennial basis. This report should contain a comprehensive account of

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the extent to which the VSP provider has achieved its compliance objectives and commitments in the period under review and should be in a format specified by the regulator. The regulator should be required to interrogate the report, offer its views on the contents of the report, and draw its own conclusions on the overall performance of the VSP provider. The regulator should have the necessary powers to conduct, or request the VSP provider to arrange to conduct, an independent audit of the matters under review if necessary.

Unless specific information contained in the report is of a highly commercially sensitive nature to the VSP provider, it is expected that VSP Reports would be made published by the regulator in full to ensure the transparency and accountability of the process.

The frequency at which the regulator might require a VSP provider to prepare a statement of compliance commitments and to issue a report could vary depending on the VSP provider in question, having regard to the number of users to be protected on a service and the risk and severity of harm occurring or that may occur. A “tiering” system that allows the regulator to prioritise and allocate resources to assessing the compliance activities of certain VSP providers would likely be appropriate.

The regulator’s assessment of the performance of a VSP provider would be supported by information from a variety of sources, for example:

- The VSP provider’s statement of compliance commitments and the report arising.
- Specific information requests by the regulator to the VSP provider during the assessment process.
- Information gathered from complaints resolution processes acting as a feedback mechanism (discussed in Section 2.7, above).
- Information gathered from other sources, including:
 - Communications with other Member States, including audiovisual regulators.
 - Information provided by the VSP provider to the regulator on request, (including through electronic information-gathering mechanisms) and in a format to be specified by the regulator.
 - Information available in the public sphere.
 - Reports / confidential communications received from IDMs or whistle-blowers.
- Information gathered from independent and impartial audits conducted by a VSP provider at the request of the regulator.

On concluding its review of a VSP provider’s achievement of its compliance performance, the regulator would then prepare its own report and recommendations arising from the Article 28b assessment process.

2.8.3 Statutory Recommendations

The regulator for VSP providers should have the ability to issue a statutory recommendation or recommendations to a VSP provider arising from the Article 28b5 assessment process. The acknowledgement of recommendations and a duty to engage constructively with the regulator on implementing any recommendation arising should be in the nature of statutory obligations on VSP providers and in the VSP Code.

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A recommendation could be a means adopted by the regulator to direct a VSP provider in a targeted manner to resolve or address specific matters of public interest falling within the scope of the VSP Code, and could come in two forms:

- A **Category 1** recommendation could be issued where the regulator forms the opinion that action is required by a VSP provider to take steps to address a regulatory matter or to further investigate and clarify a matter. By way of example, a Category 1 recommendation might require a VSP provider:
 - To consult with representatives of [Affected Class of Persons] with a view to addressing their concerns about [Incident] and reflect on how any policies or procedures might be amended to reflect [Affected Class of Persons]' concerns.
 - To take note of [Incident] and ensure that the policies and procedures are amended as appropriate to ensure that like-incidents are less likely to happen again, or that they are resolved more effectively on subsequent occasions.
 - To provide a public explanation about how the decision in [Incident] was made.
 - To ensure that a platform's advertising policy is cognisant of [Issue], and suitably reflect best-practice in this area.
- A **Category 2** recommendation could be issued where the regulator has a reasonable apprehension that the standard of protection required by a provision of the VSP Code is not being met by the VSP provider and that steps must be taken to address a matter. By way of example, a Category 2 recommendation might require a VSP provider:
 - To adopt genuinely effective measures on the platform within a specified period to ensure that minors are significantly less likely to be exposed to [category of content x]. An independently-audited and comprehensive report should be adduced demonstrating a reduced exposure of minors to such content in a specified time period.
 - To amend the platform's policies within a specified period to ensure that audiovisual commercial communications containing [type of advertising] are prohibited by the VSP Service's policies.

2.8.4 Provision of Information to the Regulator and Information-gathering Mechanisms

A VSP provider should be obliged to provide to the regulator an honest and accurate account of how its services function, and to provide such accounts in a manner specified by the regulator. This should include information about the technical capabilities of the service in question and information relating to incidents that have arisen on the service.

A VSP provider should also be obliged to put in place, as appropriate, information-gathering arrangements and mechanisms to facilitate the regulator's work. This should include summary information generated from the provider's complaints operations and information relating to certain categories of content on the service, for example regarding advertising or on-demand services present on the VSP service. The approach taken should be cognisant of minimising the extent to which personal data is transferred to the regulator and should also avoid any undue administrative burden.

Section 3: Online Safety (Strand 1)

Section 3: Online Safety (Strand 1)

Q1	What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system, where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. [Sections 2, 4, & 8 of the explanatory note]
Q2	If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate. [Sections 2, 4 & 8 of the explanatory note]
Q3	Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme? [Sections 2, 5 & 6 of the explanatory note]
Q4	How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered? For example, <ul style="list-style-type: none">- Serious Cyberbullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)- Material which promotes self-harm or suicide- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

3.1 Summary

The potential for real-world harm to occur to individuals through their use of the internet has increased significantly as more aspects of their “real lives” have moved to social media platforms. The BAI concurs with the Minister that additional regulation in the area of online safety is important to protect Irish residents.

The BAI believes that the responsibilities given to the Online Safety Regulator should reflect the need to tackle online safety holistically, in the short-, medium- and long-term. To accomplish this, the BAI considers that the Online Safety Commissioner should have three primary responsibilities:

1. **Rectifying** online harms by issuing harmful online content (“HOC”) removal notices to services on behalf of Irish residents that have been directly affected by harmful online content.

Section 3: Online Safety (Strand 1)

2. **Minimising** online harms by developing and enforcing an online safety code applicable to key, Irish resident online service providers.
3. **Preventing** online harms by promoting awareness of online safety issues among the public and industry.

The experience of the Australian, New Zealand and German jurisdictions in establishing similar regulatory bodies may assist Ireland in designing a regulatory scheme for harmful online content.

Online Safety – covering all kinds of content – should form a core, separate, but complementary function to the audiovisual and sound regulatory functions of a new media regulator.

3.2 Strand 1 – National Legislative Proposal

Like the BAI's response to issues relating to video-sharing platform services under strand 2 of this consultation response, the BAI feels that the most appropriate means of providing its response to these questions is to answer them together. The questions posed raise many interrelated issues that can be viewed from a holistic and complementary perspective in the approach adopted.

The BAI's response to these questions is structured in three parts:

1. Purpose and Objectives of the Online Safety Commissioner
2. Challenges and Practical Considerations regarding Online Safety Regulation
3. Potential Functions of an Online Safety Commissioner
 - a. Take-down Mechanism
 - b. Harmful Online Content Codes
 - c. Promoting Awareness

3.3 Purpose and Objectives of the Online Safety Commissioner

In establishing an Online Safety Regulator, the BAI is of the view that regard should be had in the first instance to ascertaining its fundamental purpose and focus.

The concept of "online safety" as it is commonly understood comprises a broad range of areas relating to the harms that can be caused to and by individuals via online technology, including cyberbullying and self-harm among other issues. While having no clear or agreed definition, the area of online safety has a strong focus on the rectification of "wrongdoing" caused to an individual by another individual or individuals, which in some cases may be of a criminal nature.

In the BAI's view, this significant element of *personal* "wrongdoing" is what fundamentally distinguishes online safety regulation from the regulation contained in the revised Directive. The revised Directive requires the introduction of sector-wide rules applicable to audiovisual media services and video-sharing platforms services which are intended to prevent or rectify "harms" of a collective nature to large groups of individuals (e.g. a race of persons) rather than to individuals as such. This is in addition to the Directive's stated aim to promote plurality, cultural and linguistic diversity, consumer protection and fair competition (among other things).

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Despite the differences in focus of online safety and media regulation more generally, the BAI considers that the purpose and strategic objectives of online safety regulation can be viewed as being aligned with media regulation – by viewing online safety in an expansive and holistic manner rather than with a strict focus on the rectification of harms to individuals and by drawing upon some of the key principles and goals of media regulation. Such an approach to online safety strongly emphasises the synergy and benefits of including an online safety regulator under the wider umbrella of a media regulator and facilitates an approach to online safety that tackles issues in a comprehensive manner in the short-, medium- and long-term.

The BAI considers that the following four strategic objectives and responsibilities are relevant for an online safety regulator operating within the new media regulatory structure:

- Rectifying serious harms occurring to Irish residents through their use of online services.
- Ensuring that individuals and members of groups that are frequently subject to harmful online content can fully benefit from digital technology and social media.
- Reducing online harms by introducing online safety rules for online platforms.
- Promoting responsibility and awareness of online safety issues among the general population and industry.

To fulfil these objectives and responsibilities, the BAI considers that the Online Safety Regulator could have the following three functions:

1. Operating a statutory mechanism to remove harmful online content that directly affects Irish residents (**Rectification of Harm**)
2. Developing and enforcing an online safety code for Irish-resident online platforms (**Minimisation of the potential for Harm**)
3. Promoting awareness of online safety issues among the public and industry (**Preventing Harm**). Ensuring that online services play a more effective role in tackling online safety issues can provide wide, “collective” benefits to large numbers of individuals simultaneously.

In any scenario involving harmful online content, the BAI notes that there are generally three key categories of persons involved:

- (1) The individual affected by harmful online content.
- (2) The individual that has created the harmful online content.
- (3) The platform that the harmful online content is hosted on.

In the view of the BAI, the **principal** focus of the Online Safety Regulator should be on the individual affected by harmful online content (1) and on ensuring that online platforms moderate harmful online content more effectively (3).

3.4 *Challenges and Practical Considerations regarding Online Safety Regulation*

Before discussing the functions that an Online Safety Regulator might have, the BAI would like to take the opportunity to highlight some of the key challenges and practical considerations that it considers should influence the overall approach to putting an online safety regulator on a statutory footing.

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Firstly, having regard to considerations on freedom of expression, it is essential that the harmful content within scope of the legislation is clearly defined. In addition, adequate checks and balances should be introduced to ensure that any limitation on freedom of expression is duly justified.

Resolving many of the issues relating to online safety will require long-term, societal change. While platforms can and should take a more active role in regulating harmful online content, the overall approach adopted to online safety must recognise that harmful online content originates in how individuals use online platforms. Promotion and raising awareness of online safety with a view to preventing harms occurring in the first place should be a fundamental function of the online safety regulator.

The scale of potentially harmful activity that an online safety regulator might be expected to regulate is immense. Significant consideration should be given to ensuring that the resources of the Online Safety Regulator can be directed towards resolving the most serious issues and which ensure the greatest possible good to the greatest number of persons. The functions and resources available to the regulator should reflect such an approach.

The regulatory approach taken should function consistently with the approach taken to the implementation of the revised Directive in respect of video-sharing platform services. In the BAI's view, the most effective means of accomplishing this is through implementing the revised Directive and online safety rules in a separate but complementary manner with broadly aligned strategic objectives, recognising synergies where appropriate but also respecting differences in the goals to be achieved by both kinds of regulation.

The Online Safety Regulator should operate in a manner that is separate and complementary to other Irish regulators and enforcement bodies that have other responsibilities in respect of online platforms.

3.5 *Potential Functions of an Online Safety Regulator ("OSR")*

In considering the foregoing, the BAI is of the view that the role of an Irish Online Safety Regulator could comprise three key functions reflecting short-, medium- and long-term approaches to online safety intended to rectify, minimise and prevent online harms to Irish Residents.

3.5.1 Function 1: Harmful Online Content ("HOC") Removal Notices

The BAI supports the proposal that the OSR should be empowered by statute to issue notices to providers of online services to remove harmful online content on those services.

The BAI considers that those notices (hereinafter referred to as "Harmful online content notices", or "HOC notices") should be issued by "investigators", who are employees of the OSR.

The OSR should be able to issue HOC Notices to both "open" online services (e.g. social media platforms) and "encrypted" online services (e.g. private messaging services). The approach taken to determining what services are in scope should focus on where the protections of an OSR can provide the most benefit, and the legal definition of services covered by the HOC notice mechanism should be drafted accordingly.

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While including encrypted private communications networks within the scope of harmful online content notices is desirable to “future proof” them and to effectively tackle certain online harms, significant detailed consideration will have to be given to how this will work in practice and how such inclusion intersects on issues such as data protection, for example.

In the interests of clarity, harmful online content for the purposes of the National Legislative Proposal should be defined in legislation independently of the provisions and requirements of the Directive in respect of harmful content.

The OSR should issue takedown notices on receipt of requests from Irish residents or someone legitimately acting on an Irish resident’s behalf e.g. a parent, guardian or a representative from a protection group that is in contact with the Irish resident.

The key legal test that should be triggered for an investigator to take up a request is that the request gives rise to a reasonable apprehension in the mind of the investigator that the Irish resident initiating the request is or is likely to be directly affected by content that satisfies the statutory definition of “harmful online content”. Content should only be considered “harmful online content” where it is actually and presently hosted on a service at the time a request is made to the OSR.

For an Irish resident to be “directly” affected by harmful online content, the harmful online content should:

- Relate specifically to the requester (i.e. the information contained in the harmful online content relates specifically to the individual making the request), **or**
- Be directly targeted at the requester in a harmful manner (i.e. the information contained in the harmful online content may be of a general nature but is targeted directly at the requester in a manner intended to, or likely to, cause harm).

Takedown notices for harmful online content should comprise two substantive elements:

- Requiring the online service to remove content relating to the specific instance of harm, and
- Requiring the online service to adopt reasonable steps to prevent the same specific harm re-occurring (e.g. by banning or suspending the individual(s) that have uploaded the harmful online content).

The BAI agrees with the Minister’s proposal that requests should first go to service providers before the OSR takes them up. Foreseeably, exceptions to this rule will be appropriate in certain circumstances, and the approach to online safety that is taken should ensure that effective mechanisms for managing complaints concerning harmful online content exist on certain key platforms most used by Irish residents.

To ensure the OSR can act in an “agile” manner and can provide redress quickly, HOC notices should be issued without prejudice to any assessment as to the lawfulness of the harmful online content itself or the activity that has led to the creation of the harmful online content. In issuing HOC notices, OSR investigators should not enter into investigations or fact-finding exercises regarding the liability of

Section 3: Online Safety (Strand 1)

individuals or organisations that have uploaded harmful online content. The key focus of HOC notices should be on preventing further harm occurring to the individual directly affected by the harmful online content by having it removed in a timely manner and requiring the platform provider to take reasonable steps to ensure the same or similar instances of harm does not reoccur.

To minimise conflict with other areas of law (national and European), the legislation establishing the takedown mechanism should not create any “ongoing” liabilities for internet services or the users of those services in respect of harmful online content. The only liability arising in the HOC scheme should be where a platform has failed to take measures to comply with a HOC notice issued by the OSR.

As envisioned by the Minister’s Explanatory Note, the statutory definition of harmful online content should be broader than just audiovisual content and should include all *kinds* of online content (e.g. words, images, sound). It should include specific identifiable harms which can always clearly be regarded as “harmful”.

The BAI agrees that the harms set out in the Explanatory Note to the consultation i.e. serious cyber-bullying of a child, material which promotes self-harm or suicide and material designed to encourage prolonged nutritional deprivation (that would have the effect of exposing a person to risk of death or endangering health) are clearly among the most serious harms that could be envisaged to an individual and for this reason, merit their inclusion in the categories of harmful content to be included in the legislation. Other additional specific identifiable harms within the definition of “harmful online content” might also be included. Any such additional harms to be specified in the legislation should be evidence-based, whether that evidence has been established in Ireland or is based on evidence gathered in other jurisdictions.

The BAI envisages that the statutory scheme for HOC notices would need to ensure that the OSR takes requests from complainants and issues notices at its sole discretion i.e. it cannot be compelled through legal action to issue HOC notices. Legislative steps to ensure that HOC notices are “privileged” would be necessary to minimise actions taken against the OSR. However, effective appeal mechanisms to the online safety regulator should exist for users of internet services whose content is subject to a takedown notice. Where appropriate, the reasons for making a decision to issue a takedown notice should be clear to facilitate such an appeal.

A decision-making framework for investigators should be established by the regulator, providing principles-based guidance and balancing matters such as freedom of expression with the need for the rectification of harm/protection from further harm.

Service providers should be obliged to comply with HOC notices within a specified time period.

3.5.2 Function 2: Harmful Online Content Code

To approach online safety from a more proactive perspective, the BAI considers that there is scope for certain Irish online services with large numbers of Irish resident users to comply with a Harmful Online Content Code (the “HOC” Code).

Section 3: Online Safety (Strand 1)

The aim of the HOC code would be to reduce the potential for, or actual, harm occurring to Irish residents on certain key Irish online services by ensuring:

- That appropriate complaints mechanisms exist on such services in respect of harmful online content;
- That the terms of service and policies of the online platform are aligned to ensure that harms as defined in statute are prohibited;
- That the policies of online platforms in respect of moderation of harmful online content are transparent;
- That platforms take a consistent approach to implementing appropriate measures to combat harmful online content;
- The promotion, in a transparent manner, of the policies and practices of online platforms.

The HOC Code would be drafted by the OSR in consultation with relevant stakeholders. An appropriate mechanism should be established by the regulator for compliance and reporting purposes. The expectation of the full co-operation of the platforms should be laid down in the legislation, together with the requirement to supply any, or all, necessary data and information to support this function.

Appropriate and dissuasive sanctions should exist in statute where a regulator determines that an online platform has repeatedly or seriously breached the HOC Code. Suitable investigatory powers should be granted to the regulator to support this function. Further discussion on the powers and sanctions available to the regulator in this regard are discussed in the BAI's response to Questions 14 and 15 in Section 5.2 of this submission.

3.5.3 Function 3: Promoting Awareness

The OSR should have a statutory responsibility to engage publicly, and in a targeted way, in a variety of awareness-raising activities relating to online safety. There will likely be significant synergies that could be achieved with the regulator's wider media literacy activities in the audiovisual sector. Examples of such activities might include:

- Running nationwide online safety awareness campaigns.
- Undertaking research in respect of online safety.
- Supporting other statutory bodies and institutions with an online safety agenda.
- Providing statutory reports to the Minister to be laid before the Houses of the Oireachtas

Section 4: Audiovisual Media Services (Strands 3 &4)

Q8	The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services? [Section 4 of the explanatory note]
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4.1 Summary of Proposed Approach to Transposition

The revised Audiovisual Media Services Directive requires EU Member States to take a more active role in the regulation of on-demand services provided from their jurisdiction. On-demand services come in a variety of different forms and range from large services such as the RTÉ Player, iTunes and Netflix to pages or “channels” of an editorial nature on video-sharing platform services such as YouTube and Facebook.

The 2010 Directive required EU Member States to introduce a basic level of protection for audiences in respect of “television-like” on-demand services. The approach taken to regulation in Ireland was to create ODAS, a self-regulatory body and reflected the nascency of Irish on-demand services at that time.

The revised Directive requires a fundamental change in approach to the regulation of on-demand services in an Irish context. The BAI agrees with the Minister that more active regulatory oversight is required in Ireland to ensure that these kinds of services comply with rules on the protection of minors, advertising rules and the many other matters dealt with in the revised Directive.

A key goal of the revised Directive is to ensure a more level playing field between on-demand services and television broadcasting services. To achieve this, the BAI’s view is that the most appropriate means of introducing the revised Directive’s new rules for on-demand services is through statutory regulation and codes, and to assign the role of regulating on-demand services to a statutory regulator in order to achieve stronger regulatory alignment on issues specifically dealt with in the revised Directive only (e.g. advertising, protection of minors, accessibility).

With regard to television broadcasters, it is the view of the BAI that these services should continue to be regulated as heretofore, except to the extent that changes may be made pursuant to the revised Directive. In this regard, the BAI welcomes the greater flexibility afforded to television broadcasters in the areas of product placement and television advertising spots. The BAI also proposes that potential amendments to the Broadcasting Act 2009 to reduce administrative burden on linear services – both television and radio – should be actively considered.

4.2 Regulation of Audiovisual Media Services

The BAI considers that it is appropriate to respond to this question in four parts:

- 1: Key changes to the regulation of on-demand services
- 2: The appropriateness of equivalent obligations for linear broadcasting and on-demand services
- 3: The regulatory relationship between Irish on-demand services and the Irish regulator
- 4: The regulatory environment for linear broadcasting services

4.2.1 Key changes to the regulation of on-demand services

The Directive's provisions in respect of on-demand services originally only applied to "television-like" services such as the RTÉ Player or TG4 Player, which are currently regulated in Ireland through the ODAS system. This "television-like" requirement has been removed in the revised Directive, and, as a result, a much broader range of services including many Irish YouTube Channels, Facebook Pages and Twitter pages that provide audiovisual content in an editorial manner must now comply with the Directive's rules.⁶ To achieve greater regulatory parity between television broadcasting services and on-demand services envisioned in the revised version of the Directive, the Irish regulator for on-demand services will, among other things, be obliged to take an active role in ensuring that they:

- Make their ownership information publicly available in a register
- Take measures in respect of incitement to violence and hatred and public provocations to commit terrorist offences
- Take measures to better protect minors from content that may impair their development
- Make their services more accessible to persons with disabilities
- Comply with the Directive's rules on audiovisual advertisements
- Comply with sponsorship rules
- Comply with product placement rules
- Comply with a 30% European Works quota and ensure the prominence of those works (where applicable)

4.2.2 The appropriateness of equivalent obligations for linear broadcasting and on-demand services

As a general regulatory principle, the BAI takes the view that it is desirable for "like" services to be obliged to follow "like" rules. Given the significant convergence of the market for audiovisual media over the past decade, the BAI endorses the more level playing field envisioned by the Directive between television broadcasting services and on-demand services. It also welcomes the fact that the general approach taken at EU level was to ensure this through an increased level of protection in respect of on-demand services rather than to lower existing levels of protection applicable to television broadcasting services.

In introducing a new regulatory scheme for on-demand services on foot of the requirements of the revised Directive, as a starting point, the BAI believes it is useful to consider the differences and

⁶ The term "programme" – which is a component of the definition of an on-demand services – has been significantly altered in the revised version of the Directive: *'programme' means a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider including feature-length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama;*"

Section 4: Audiovisual Media Services (Strands 3 &4)

similarities in how such services are provided and consumed when compared to television broadcasting services, as it helps in determining the extent to which similar obligations should apply to on-demand services and television broadcasting services.

Firstly, regard must be had to the essential role that broadcasters play in the delivery of news and current affairs content, their strong ties to the Irish state and its culture, the key role they play in the creation of Irish content and their role as providers of employment within Ireland. While many on-demand services have strong “cultural” and “Irish” elements, the emphasis is much greater for linear broadcasters whose output and influence plays an important role for the State and its citizens.

As a result, it is the view of the BAI that the current regulatory arrangements in respect of television broadcasting services is appropriate and justified going forward. To the extent that an area of regulation is harmonised by the Directive, however, the BAI feels that it is entirely appropriate that television broadcasting services and on-demand services should be obliged to follow similar rules ensuring similar standards of protection for audiences. Taking measures to ensure greater equivalency in these areas is both a legal obligation and desirable from an audience perspective.

While ensuring similar standards of protection in respect of television broadcasting services and on-demand services, the overall regulatory approach adopted to on-demand services in the transposition process should, however, have regard to the significant variety of on-demand services that fall within the scope of the Directive, the realities of how on-demand content is provided and the relative influence of such services *vis-à-vis* television broadcasting services. Where television broadcasting services and on-demand services are competing more “directly” for audiences, as a general rule, the BAI believes that similar regulatory methods should be utilised where practicable. Where broadcasters are competing against smaller on-demand services on video-sharing platforms “collectively”, the Directive’s rules for video-sharing platform services can be viewed as ensuring a more level playing field in those circumstances.

4.2.3 The regulatory relationship between Irish on-demand services and the Irish regulator

The BAI considers that the creation of a direct regulatory relationship between on-demand services and the regulator should be underpinned in the transposition of the provisions of the revised Directive into Irish law. Our views on the “structural” implications of this approach and our rationale for advocating it are explored in the BAI’s response to question 12 in Section 1.

All on-demand services, irrespective of their size, and irrespective of the manner in which they are provided, should be obliged to comply with a statutory code or codes aligned with the requirements of the revised Directive for which their compliance is assessed and enforced by the regulator.

Per the requirements of the Directive, on-demand services should be obliged to register with the regulator, to make their ownership information publicly available and to provide contact information so that they can be contacted about regulatory matters by both the regulator and members of the public.

In considering the scale of on-demand content that will fall to be regulated under the rules of the revised Directive and the large number of “smaller” on-demand services now in scope, significant consideration

should be given to ensuring that the regulator has the flexibility to apply its resources to regulate those services that have the greatest influence or where non-compliance has the most significant adverse consequences for audiences. A “risk-based” approach to regulation can ensure that regulatory resources are applied where they provide the most value to the public.

The statutory powers available to the regulator to regulate on-demand services should reflect the variety of on-demand services present in an Irish context. For example, larger and more “television-like” on-demand services will require a regulatory approach more akin to large linear broadcasters, whereas smaller on-demand services present on video-sharing platform services will likely require a more nuanced, risk-based approach to ensuring compliance.

Members of the public should be able to avail of a statutory complaints system for on-demand services. However, consideration should be given to the extent to which such a process may provide value to the public in respect of smaller on-demand services with little influence, and whether regulatory solutions exist that might achieve the same outcome as the vindication of a complaint but in a more flexible manner.

4.2.4 The Regulatory Environment for Television Broadcasting Services

The focus of the regulatory changes in the revised Directive are on on-demand services and video-sharing platform services, and the BAI welcomes the proposal for a greater degree of regulatory consistency and a more level playing field between these services and television broadcasting services, given the significant convergence of the market for audiovisual media over the past decade.

Television broadcasting services are significant sources of high-quality, culturally-relevant and linguistically-diverse Irish content and, in an increasingly globalised and competitive media environment, play an essential role in ensuring that such content continues to be delivered to Irish audiences. They are also considered sources of trusted news and current affairs content which plays a vital role in informing citizens about issues of importance to the democratic process. Despite commentary heralding the decline of linear broadcasting, it could be argued that television broadcasters play a more important role than ever in the overall media landscape.

As discussed above, the continued importance of broadcasting justifies the more comprehensive approach to regulation currently in place in respect of television broadcasting services in Ireland. Such matters include rules relating to media ownership and control and ensuring fairness, objectivity and impartiality in the provision of news and current affairs, which are outside the scope of the Directive.

While maintaining substantive regulatory obligations on television broadcasters, regard should be had to the challenges faced by the sector in the new media environment, where on-demand services and video-sharing platform services operate and compete for similar audiences.

In this regard, and in keeping with the BAI’s strategic objective of developing sustainable funding models for the Irish audiovisual sector, the BAI supports the regulatory changes arising from the provisions of the new Directive for television broadcasting services. In particular, the BAI welcomes broadened rules in respect of product placement and television advertising spots which allows greater flexibility for broadcasters.

Section 4: Audiovisual Media Services (Strands 3 &4)

As part of the legislative process for the transposition of the Directive, the BAI seeks the opportunity to reduce the administrative burdens on linear services – both television and radio. The BAI would be happy to submit to the Minister further proposals in respect of amendments to existing legislation in respect of linear broadcasters as set out in the Broadcasting Act 2009 that would increase administrative efficiencies and further reduce regulatory burden on broadcasters.

4.3 Content Funding

Q9	Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund? [Section 4 of the explanatory note]
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4.3.1 Sound and Vision

The BAI is currently responsible for the administration of Sound & Vision 3, a broadcasting funding scheme for television and radio that provides funding in support of high-quality programmes on Irish culture, heritage and experience, and programmes to improve adult and media literacy. The Broadcasting Fund also supports an Archiving Scheme and both Schemes are funded through 7% of the television licence fee. Sound & Vision 3, has been in operation since 2015, providing over €56m to 293 television and 907 radio projects.

The consultation asks whether Ireland should update its current content production fund to allow non-linear services to access this fund. As structured, Sound & Vision 3 may only fund the production of programmes that are to be broadcast by an eligible television or radio broadcaster as defined in the Broadcasting Act 2009. Any change to the eligibility criteria would require legislative amendment.

The BAI is currently undertaking a statutory review of Sound & Vision 3, further to Section 158 of the Broadcasting Act 2009. The review will explore the potential impact of the on-going significant shifts in the media market, including production, delivery and consumption, and consider how the scheme may need to change and evolve in the coming years to ensure that it is appropriate for, and responsive to, the evolving media landscape and the manner in which audiences are consuming audiovisual content. The BAI will also be gathering the views of key stakeholders as to whether a broader remit for the scheme is considered desirable.

The review is scheduled to be completed in July 2019 and the BAI would be pleased to discuss emerging findings with the Minister at that point.

Question 9 also asks whether Ireland should seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund. This is considered further below.

4.3.2 On-Demand: Article 13 Content Levies

Article 13, Paragraph 2, of the revised Directive allows Member States to require media service providers under their jurisdiction to contribute financially to the production of European Works, including via direct investment in content and contribution to national funds. They may also require media service providers targeting audiences in their territories, but established in other Member States, to make such financial contributions, which shall be proportionate and non-discriminatory. In such cases, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes such a financial contribution, it shall take into account

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any financial contributions imposed by targeted Member States. Any financial contribution shall comply with European Union law, and, particularly with State aid rules.

The levy cannot be applied to television broadcasting services and on-demand services with a low turnover or low audience threshold. The European Commission is expected to provide guidance on these issues during the transposition period.

The BAI supports the introduction of a content levy in principle.

The BAI is of the view that while the legislation should provide a basis for the introduction of such a scheme, considerable work is required before such a scheme can be determined in legislation. It is recommended that the regulator be charged with drawing up such a scheme to be submitted for Ministerial approval before being implemented. This would allow ample time and opportunity for the following:

- Development of a system to determine what services fall within the scope of such a levy.
- Determining the system for charging. For example, the levy might be interpreted as including revenue generated from product placement. It is especially unclear as to how the levy applies to services that are accessible for “free”.
- Consideration of the cross-jurisdictional issues that are likely to arise. The participation of the new regulator in ERGA could assist in identifying issues to be resolved and in determining the means for resolving such issues.
- There are no concrete mechanisms in the Directive obliging service providers who will be subject to the levy to provide financial information to regulatory bodies administering the levy. Provision needs to be made in law to facilitate the regulator in acquiring the information necessary to implement such a scheme. A significant level of cross-jurisdictional co-operation will also be required as will the sharing of relevant information with regulators in other Member States.
- While technically the issue of the levy is a matter to be resolved between a Member State and on-demand services, there will have to be a significant degree of co-operation between Member States to avoid duplication in the charging arrangements and to ensure that broadly harmonised approaches are adopted to levy and revenue calculation.
- In Ireland, such a content levy scheme might also be considered in the context of the already-established Broadcasting Funding Scheme.
- Consultation with relevant stakeholders on the operation of such a scheme would be highly desirable.

4.3.3 On-demand Audiovisual Media Services: Article 13: European Works and Prominence

The BAI would like to take this opportunity, in the context of discussing the regulation of audiovisual media services, to comment on the transposition of Article 13 of the Directive concerning European Works and Prominence as well as on the provisions of Article 7a of the Directive concerning prominence and Public Service Media.

Pursuant to Article 13 of the revised Directive, on-demand services are required to secure a 30% quota of European Works (“EW”) and to ensure prominence of those works. The obligation does not apply

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where an on-demand service has a low turnover or a low audience. In addition, Member States can waive the quota where it is impracticable or unjustified by reason of the nature or theme of the audiovisual media service in question.

Quotas for European Works are a long-established concept in a linear broadcasting context. A 50% European Works quota for television broadcasting services was included in the original Directive and has been maintained in its revised version. In respect of the services currently under its remit, the BAI reports regularly on the compliance of Irish broadcasters with the European Works provisions of the Directive.

However, while it is recognised that the approach to the calculation of European Works is relatively straight-forward in the case of linear services (as a percentage of the total linear schedule), the methods for calculating compliance with the 30% quota will not be as easily implemented in the case of on-demand services.

Pursuant to the last iteration of the AVMS Directive, regulators in other jurisdictions took a range of approaches to promoting the level and prominence of European works on on-demand services. (Ireland, having taken a different approach to other European jurisdictions, did not assign such functions to the BAI.) The types of methods employed included:

- Calculating the total minutes of EW in an on-demand catalogue.
- Adopting regulatory measures to ensure the prominence of EW in user-interfaces for on-demand catalogues.
- Applying the quotas only to on-demand services with wide reach and audience impact.
- Introducing requirements relating to investment in EW.

Although many jurisdictions made progress in this regard, a wide range of challenges arose including:

- Interpreting and applying the definition of “European Works” contained in the original Directive (which is unchanged in its revised iteration) in a practical manner at the national level.
- Establishing the cut-off point for inclusion/exclusion of on-demand services in implementing quotas.
- Determining what levels of prominence are sufficient for satisfying quotas.

Regarding the provisions of the revised Directive, the European Commission is expected to issue guidelines regarding the calculation of the share of European Works and on the definition of low audience and low turnover.

The regulator might consider, for example, the different business models utilised by Irish on-demand services and whether, and how, the quota might apply to such services. Examples of business models utilised by Irish on-demand services include:

- Paying for content on an item-by-item basis (e.g. iTunes)
- “Free” content funded by advertising (e.g. Irish YouTube Channels)

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- “Free” Content paid for via the licence fee and commercial revenue (e.g. The RTÉ Player, TG4 Player)
- “Free” Content paid for via commercial revenue only (e.g. Virgin Media player)
- Paying via a recurring subscription fee to access a “catalogue” of content (e.g. Sky “Boxsets”)

The regulator may have regard also to the work of ERGA (EC’s Audiovisual Regulators’ Group) in this area. A report prepared by ERGA showed that with regard to quotas:

- There were various levels of experience in implementing European works quota or quota-like obligations.
- Where quota levels were applied, the levels of European works required within the different Member States varied significantly and some Member States did not have a minimum quota.
- The preferred method for calculating the share of the catalogue was either on the basis of the number of hours of European works or on the basis of the number of titles of European works. Where a title represented a series, the option of a calculation based on the number of episodes was applied in two jurisdictions.
- Other options included impact-oriented calculation methods, such as share of viewing time or combining the quota with prominence-type measures (e.g. European works featuring on the homepage).
- Some genres of content were excluded from the quota (e.g. news and sport, commercial communications).

In anticipating the implementation of the revised provisions of the Directive in respect of European works, a number of further considerations have been discussed:

- Where an AVMS provider operates linear and non-linear services, can the quota be fulfilled having regard to all its services?
- Where an on-demand service operates more than one catalogue, is it reasonable to consider the level of European works as a percentage across all catalogues?

On the issue of prominence, the following was noted:

- A definition of what constituted prominence did not exist.
- A limited number of regulators only have been active in this regard, pursuant to the last Directive. This was linked to the lack of an evidence base on what prominence actions were most effective.

One further point of note is the need to give flexibility to regulators to be responsive to changes in the audiovisual sphere. Technology is changing rapidly and there is evidence that this is impacting prominence in respect of certain forms of content. If the objective of the Directive is to be achieved, it seems reasonable to give the regulator in Ireland some flexibility to respond to such developments.

Having regard to all the above, the BAI believes that the proposed legislation should specify the principles and/or other matters to be considered by the regulator in implementing these provisions but that some flexibility should be afforded to the regulator concerning the categories and size of on-

demand services that the quota should be applied to here in Ireland and how best to determine that the quota is satisfied given the nature of the service in question. Given the lack of regulatory intervention in this jurisdiction heretofore, such an approach would allow for an evidence-based approach to the rules to be developed and applied. This could also take account of the evaluation of experience in other European jurisdictions and, particularly, the specific arrangements that are deemed to be effective.

4.3.4 Prominence and Public Service Media: Article 7a

A second but discrete area of prominence concerns the prominence of public service media content. Article 7a of the revised Directive provides that Member States *may* take measures to ensure the appropriate prominence of audiovisual media services of general interest (e.g. public interest content). This is an optional provision in the Directive that Member States can utilise at their discretion.

To date, measures to ensure the prominence of public interest audiovisual content in Europe have been justified on the basis that producing public interest content tends to be less profitable than commercial content, it is publicly funded, and tends to better promote “public goods” such as essential news and current affairs and democratic debate more so than occurs in purely commercial content.

As a matter of public policy, Ireland has, in the past, secured through legislative provisions, a degree of prominence for public service channels/services of a general interest nature (RTÉ, TG4 and Virgin Media services). Currently, the BAI has a number of functions in this regard, although these functions are by no means common amongst all European regulators. In Ireland and the UK, the functions are aimed at ensuring that audiovisual content of public service origin and services of a general/public interest character are suitably “prominent” on services that facilitate access to audiovisual content (e.g. they appear higher in the channel listings on an EPG, or there is prominence within the catalogues of on-demand services).

In Ireland and in the UK, prominence in EPGs for public service channels is deemed to be particularly important because of their licensing obligations to provide relevant news and current affairs and other culturally-relevant content for national audiences. The regulatory focus has been primarily on the prominence of public service channels in the programme listings of EPGs (electronic programme guides). The BAI’s functions are limited when compared with e.g. Ofcom in the UK. Notwithstanding this somewhat limited set of statutory functions, the BAI has been occasionally drawn into issues of prominence over the years, typically at the behest of broadcasters who are often seeking some form of regulatory intervention.

More recently, the issues being raised are going beyond the determination of where a service should be placed on the channel listings of an EPG and are linked to technological developments. A typical issue currently is the home screen on smart TVs on which the channel listings are not always prominent and where other content offerings compete for viewers. An issue recently noted, for example, is the way in which access to television listings can “disappear” from the smart TV home screen, depending on a viewer’s previous selections. There is clearly an expectation that there is some opportunity for regulatory guidance and/or intervention in such situations which would need to be facilitated in any legislation arising from the transposition of the Directive. The BAI considers it appropriate for the regulator to have such an increased role. In this regard, the overarching regulatory objectives of

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plurality and diversity in the range of services and content available to Irish audiences provide a useful rationale for such an approach.

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Q10	The United Nations Special Rapporteur on the promotion and protection of the right to freedom of expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?
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5.1 European and International Context

In response to the concerns expressed by the Special Rapporteur, the BAI suggests ways in which his concerns can be addressed through the legislative provisions and the statutory scheme for Online Safety, achieving a proportionate response to balancing the right to freedom of expression with the protection of residents from harmful online content.

The BAI has considered the concerns expressed by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression arising from the Digital Safety Commissioner Bill 2017 and notes the commitments of the Irish Government in response to these concerns, including its commitment to discharging its obligations under Article 19 of the International Covenant on Civil and Public Rights (ICCPR).

The BAI also notes more generally the means by which Ireland gives meaningful effect to the right to freedom of opinion and expression e.g. through the rights afforded to Irish citizens pursuant to the Irish Constitution, the European Convention on Human Rights and the EU Charter of Fundamental Rights.

The BAI also notes the manner in which this right is reflected in current broadcasting legislation. In line with its statutory objective of endeavouring “to ensure that the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld”, the BAI seeks to promote freedom of expression and achieve this overarching objective through all its policies and practices.

Given the concerns of the Special Rapporteur, the BAI suggests that there is a persuasive case for grounding online safety regulation in a regulatory body, such as the BAI, experienced in promoting freedom of expression as a fundamental principle underpinning all its regulatory activities. This experience has necessarily required the BAI to balance the democratic values enshrined in the Constitution and in other legislation with the right of citizens to be afforded certain protections in the media sphere.

The BAI has had regard to the 2018 Annual Report of the UN Special Rapporteur in which he addressed concerns regarding the regulation of content on online platforms and made several recommendations in this regard. Having regard to those recommendations the BAI would suggest the following in respect of the National Legislative Proposal:

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- The legislation should clearly define “Harmful Content”, specifying as appropriate the specific categories of harmful content within the scope of the legislation. The 2016 Report of the Law Reform Commission provides helpful guidance in this regard.
- A “Smart Regulation” approach: the guiding principles underpinning the Special Rapporteur’s recommendations can be reflected in the regulatory principles to be applied in the legislative scheme. In general, an incremental and evidence-based approach to the introduction of restrictions and rules is recommended.
- The Online Safety regulatory scheme proposed by the BAI (see section 3 above) positions the “take-down” proposals in a wider regulatory context that is not simply about the removal of content but one which promotes the reduction of harm and the promotion of public awareness and education of the harms that can be caused through digital technologies. This approach is in line with the Smart Regulation approach advocated by the Special Rapporteur (and indeed the Law Reform Commission) and could be further supported by a continuation and expansion of the BAI’s current approach to implementation of its Media Literacy Policy and Activities.
- The BAI endorses the principle of proportionality in respect of sanctions as recommended by the Special Rapporteur – see BAI proposals in this regard set out in this Section 5 below.
- The Special Rapporteur’s recommendation #68 advises that “States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression”. He recommends that they should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users.

The regulatory structures in the legislative scheme proposed might be described as quasi-judicial structures. The BAI assumes that actions and decisions of the regulator, as a statutory body, would be required to be taken in accordance with principles of natural justice and would be subject to the scrutiny of the Irish courts by way of judicial review proceedings.

- The Special Rapporteur’s recommendation #69 advises that “States should publish detailed transparency reports on all content-related requests issued to intermediaries and involve genuine public input in all regulatory considerations.”

The BAI proposes the publication of such transparency reports in its Online Safety Scheme (see Section 3 above). Furthermore, the BAI also envisages that any codes or guidance arising from the new statutory provisions are drawn up in meaningful consultation with relevant stakeholders.

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Q11	How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? [Section 2, 4, 5, 6, 7 & 8 of the explanatory note]
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5.2 E-Commerce Directive

One of the core goals of the European Union has been to promote the “free movement” of services by introducing common rules among Member States about how services should be regulated in cross-border scenarios. A number of key general rules were agreed by EU Member States at the beginning of the 21st century about how online services should be regulated within the EU:⁷

- Online services can only be made liable for illegal content they host when they have actual knowledge of it and have failed to act expeditiously to remove it. Services that “host” content uploaded by users without the oversight of the service provider can generally only be made liable for that content on a “reactive” basis” i.e. after they have been notified of its existence.
- EU Member States cannot introduce “general” obligations that require online service providers to monitor the content on their services or to actively seek facts or circumstances indicating illegal activity. Online service providers cannot generally be required to take “proactive” measures to moderate their services where content is uploaded by users without their oversight.
- EU Member States are prohibited from restricting access to online services being provided from other EU Member States to their jurisdiction.
- Online services are regulated in the Member State in which they are established and provided from rather than from where they are consumed.

As a result of these measures (among other things), many popular online services made available on the modern internet are now provided on a continental and global basis.

At the time these rules were drafted the most popular services on the internet today either did not exist or were only nascent. Since that time, a significant growth and consolidation of market players has taken place and most of the “main” services made available on the internet in Europe today are provided by a small number of service providers. These service providers primarily function as “platforms” whose business models depend on providing their users with access to services, goods or non-economic activities provided by smaller entities or by enabling communication between users (e.g. Amazon, Google, Facebook, iTunes, Netflix).

The revised Directive requires providers of video-sharing platform services to take proportionate, proactive measures to moderate the content that they provide access to more effectively and to utilise

⁷ See Directive 2000/31/EC. Exceptions and variations to these general rules have naturally evolved over time as appropriate.

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the substantial resources and technical capabilities they have accrued in providing their services to further the public interest, in particular to protect minors, to combat incitement to violence and hatred, to combat certain criminal offences and to improve advertising standards. The BAI wholly welcomes this development, as well as the Minister's intention to introduce rules for Online Safety – which speak very much to the same kinds of issues.

At the principles level, while preserving the EU's online liability framework, the BAI would note that the revised Directive is a recognition by the European Institutions that purely "reactive" frameworks of liability for large, popular online platforms and services without corresponding "proactive" obligations to introduce measures and tools to protect users are causing significant, pan-European issues.

In summary, in considering the questions raised by the Department in its consultation, the BAI has been cautious to ensure that its proposals respect the EU's online liability framework and feels that the standard of protection required by the revised Directive and an effective regulatory system for Online Safety for Irish residents can be achieved within this framework.

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Q14	What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (Section 8 of Explanatory Note). In addition, should these functions and powers differ between regulation for VSPS under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. (Sections 2,4,5, 7 and 8 of Explanatory Note)
Q15	What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include: <ul style="list-style-type: none">- The power to publish the fact that a service is not in compliance,- The power to issue administrative fines,- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,- The power to apply criminal sanctions in the most serious cases. Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction. [Sections 2, 4, 6, 7 & 8 of the explanatory note]

5.3 Sanctions/Powers

In response to the matters raised in the above questions, in this Section the BAI describes broadly the functions and powers that should be assigned to the relevant regulator to facilitate its compliance and enforcement role. More specifically, the BAI then addresses the powers of sanction that should be available to the regulator. The approach of the BAI has been informed by its own compliance and enforcement activities over many years, which incorporates principles of better regulation and reflects general good practice in compliance aspects of regulation.

5.3.1 Compliance and Enforcement: General Considerations

Any regulation requires that the appropriate regulator be empowered to ensure compliance by regulated entities with the statutory provisions under which the entities operate. To deliver on the objectives of the National Legislative Proposal and the Directive, it is essential that the regulator has at its disposal a robust and wide range of compliance and enforcement powers prescribed in law if its work is to be conducted effectively and credibly. This includes powers up to and including the imposition of fines and sanctions on entities who are deemed to be in breach of the statute.

Member States are obliged to ensure that video-sharing platform services under their jurisdiction comply with a range of measures set out in the Directive. In this context, it is helpful to consider the changed nature of the relationship between the regulated entities and the regulator. Heretofore, the majority of linear broadcasters have had a statute-based contractual relationship with the regulator, and the statutory provisions, together with the contractual provisions with which the broadcasters must comply,

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have placed the regulator in a strong position for the most part, as the ability of the regulator to suspend or terminate a contract acts as a significant deterrent in ensuring compliance.

In the case of online platforms, including VSPS, the nature of the regulatory relationship will be quite different. In addition, the challenges may be significant given that many such platforms are coming into the realm of statutory content regulation for the first time. In the absence of a contractual relationship, therefore, the means at the disposal of the regulator to ensure effective compliance and enforcement need to be robust and fit-for-purpose.

In an Irish context, the BAI is mindful of the fact that the imposition of financial sanctions must also have regard to the specific constitutional arrangements in respect of the role of the Irish courts in such matters.

5.3.2 Compliance and Enforcement Principles and Powers

The overall aim of the regulator should be to ensure a consistent and transparent approach to its compliance activities, holding platforms to account in respect of their statutory obligations in a manner that encourages and promotes a culture of compliance.

A number of general principles should underpin the approach to determining the regulator's compliance and enforcement powers to enable the regulator to monitor compliance effectively and to take the necessary enforcement actions in a timely manner:

- **Effective:** The regulator's statutory powers should facilitate an effective regulatory response and act as a deterrent to future breaches of statute
- **Proportionate:** The regulator should be required to act **proportionately**, particularly having regard to the wider objectives of the regulator in promoting freedom of expression
- **Flexibility:** The regulator's powers should facilitate an appropriate **range of responses**, tailored to the specific circumstances of a breach, as well as the nature of the content and platform upon which the content is carried. This includes an ability to escalate concerns as appropriate and an ability to respond at a level appropriate to the seriousness, scale or impact of a specific event. Where rectification does not occur, the means to enforce the decision of the regulator should be available.
- **Risk-based approach:** The statutory provisions should facilitate a risk-based approach to the regulator's compliance and enforcement activities, allowing regulatory actions to be targeted at content likely to have greatest impact or cause most harm.
- **Evidence-based:** The overall approach of the regulator should be guided by the statutory provisions, its strategic objectives and priorities, and underpinned by a credible evidence base.
- **Co-operation:** The statute should set an expectation of co-operation and regular engagement between the regulator and online platforms, in addressing issues in a timely manner and taking actions to ensure that the same types of breaches do not re-occur.

5.3.2.1 Strand 1: Compliance Powers

The powers available to the regulator, necessary for monitoring compliance by online platforms with the statutory provisions in respect of harmful content, must correspond with the breadth of functions as

ultimately determined by the legislation. The key function envisaged in the consultation documentation is the take-down or removal of harmful content and the process for the issuing of such notices is addressed separately by the BAI in Section 3 of this document, *Online Safety*, (see above). In this context, the power to issue directions, including interim and final notices to services in relation to failure to comply and the additional power to seek injunctive relief to enforce notices are all appropriate. Powers of inspection, investigation and audit are also useful general powers in a compliance context. Consideration might also be given to placing voluntary disclosures of non-compliance by platforms on a statutory footing.

5.3.2.2 Strand 2: Compliance Powers

The BAI has set out specific proposals for redress, as well as proposals in respect of the Article 28b assessment process – see Section 2 above. Some further powers are suggested below:

- A wide range of monitoring and compliance powers are envisaged consistent with the functions of the regulator as set out in the legislation.
- Power to request the supply of data and information in a format specified by the regulator
- Ability to issue directions, interim and final notices to services in relation to failures of compliance is appropriate
- Power to direct the VSPS to supply a compliance plan of action for the approval of the regulator
- Power to seek injunctive relief to enforce the notices of the regulator are also appropriate
- Power to issue recommendations and directions to a VSP to adapt its systems, processes and procedures in order to ensure compliance with the legislative provisions
- Powers of inspection, investigation and audit
- Power to receive and consider voluntary disclosures of non-compliance

5.3.3 Enforcement and Sanctions

The same principles as apply to the regulator's compliance functions also apply to the enforcement powers and powers of sanction that should be available to the regulator (see paragraph 5.3.2 above).

The current sanctioning powers of the BAI are set out in Part 5 of the Broadcasting Act 2009 – these include powers of investigation, suspension and termination of contracts and the issuing of fines. The BAI's experience in implementing those powers, has proven to be effective. However, it must be noted that the Authority's experiences in the application of the provisions have been limited to a number of instances only given that the provisions are procedurally- and resource-heavy and the level of resources available to the Authority can have a practical limiting effect on the level of activity that can be undertaken.

In the case of online platforms, including video-sharing platforms, the nature of the relationship with the regulator will be a markedly different one (i.e. non-contractual in nature) and such powers will not exist in the case of any of the online platforms that will fall to be regulated pursuant to the revised Directive or the National Legislative Proposal. This requires, therefore, appropriate provisions in respect of sanctions and fines that are capable of being fully implemented as speedily and effectively as possible.

5.3.3.1 Enforcement: Regulator's general powers common to Strands 1 and 2

The following enforcement powers of a general nature are considered appropriate in respect of the regulator's role:

- Requirement for platforms to adopt technological solutions as may be directed by the regulator to ensure compliance with the legislation
- Power for the regulator to issue notices or directions to ensure compliance with the legislation. Examples of such directions might include the requirement to adapt a platform's systems, processes and procedures, (e.g. complaints procedures), submit a compliance action plan etc.
- Ability of the regulator to issue compliance performance reports supporting transparency in the overall compliance process
- Power to issue notifications, warning notices and final warning notices to services in relation to failures of compliance and the power to seek injunctive relief to enforce the notices of the regulator
- Ability to negotiate settlements should also be considered, having regard to the experience of other Irish regulatory bodies in this regard.

On 8 April last, the UK Government issued a White Paper on Online Harms. Within the scope of consultation is the consideration of compliance and enforcement powers that would enable the regulator to disrupt the business activities of a non-compliant company, as well as to introduce measures to impose liability on individual members of senior management (compatible with the E-Commerce Directive) and measures to block non-compliant websites or apps. Such measures might merit further consideration in an Irish context. In addition, the experience to date in Australia and New Zealand in the regulation of online harms and the effectiveness of the compliance and enforcement powers assigned to regulators in those jurisdictions might also merit consideration. The BAI would be happy to assist the Department and Minister further in this regard.

5.3.4 Sanctions and Fines

The BAI considers the following sanctions as appropriate:

- The power to issue findings and recommendations arising from the regulator's compliance activities and from an inspection, investigation or audit.
- The power to publish such findings, including a finding that a service is not in compliance. This reflects a growing recognition of the significance of ancillary measures in arriving at a proportionate sanction such as the effect of widespread publication of any negative determination, and the content of any public notice of sanction.
- The power to issue administrative fines.
- The power to apply criminal sanctions in the most serious cases, while appropriate, will not fall solely to the regulator. Further consideration is required as to the respective roles of the regulator and the relevant law enforcement agencies of the State in such cases. There are several regulatory bodies in Ireland (for example, the CCPC) whose experience in such matters could be drawn on, in finalising the regulatory arrangements in respect of the criminal aspects of the proposed legislation.

5.3.4.1 Principles applying to sanctions and determining the level of fines:

In determining the level of a fine, the legislation should set out guidance for the regulatory body concerning the range of considerations to be applied in determining a sanction and reducing it to a quantitative amount.

Broadly, the principles that should apply to the issuing of sanctions and fines should reflect the general practice of the Irish courts i.e. have regard to the specifics of a particular offence, where it sits on a range of seriousness and then applying mitigating factors, having the effect of reducing the penalty.

In the view of the BAI, the following considerations should apply to sanctions and fines:

- They should be appropriate and proportionate to the breach/offence
- They should act as an incentive/deterrent to ensure future compliance and reflect public disapproval
- Account should be taken of the gravity of the breach; culpability, offender behaviour/conduct in the commission of a breach and the impact and/or degree of harm caused.
- Regard should be had to the context of pursuing a legitimate public interest agenda, if the offender is exercising important freedom of expression rights, was genuinely adhering to public interest values, or has merely erred. The public interest in avoiding any “chilling effect” on reporting should be considered.
- Amount: the amount of a fine might have regard to: (1) turnover in the previous financial year; (2) ability to pay; (3) quantifiable consumer detriment/level of financial gain/unjust enrichment on the part of the regulated entity.
- Mitigating factors: co-operation with the regulator; explanations for breach or failure to co-operate e.g. accidental breach or oversight? Previous good conduct/isolated incident? Timeliness in responding to/taking action on foot of a notification.
- Compliance history of the offender – e.g. First breach? Repeated breach? Continuing breach?
- Actions taken to remedy the consequences of the breach
- Consideration should also be given to the granting of express provisions for the regulator to negotiate settlement agreements, in line with the practices of other Irish regulatory organisations, with a view to reaching speedy and certain outcomes and to avoid the need for referral to the courts.

5.3.4.2 Administrative Fines

The current powers of the BAI in respect of the issuing of financial sanctions are set out in Chapter 2 of Part 5 of the Broadcasting Act 2009. The BAI’s powers are not dissimilar to those currently available to, and used frequently by, the Central Bank of Ireland. In the case of the BAI, the financial sanction provisions of the 2009 Act have been used on one occasion only. The experiences of a number of Irish regulatory bodies in implementing their enforcement functions, highlighting the constraints in issuing administrative fines and making the case for reform, were raised in a joint submission to the Law Reform Commission’s Fourth Programme of Law Reform in December 2017. The contents of this submission may be worth considering in the context of the drafting of the new statutory provisions.

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5.4 Conclusion

In the view of the BAI, the above compliance and enforcement principles and powers are applicable across the range of content to be regulated by the new media regulator. However, the manner in which these principles are given effect will need to be developed further and need to be capable of being adapted to the particular circumstances of online content and services. Given its regulatory experience in the media area, this is work which the BAI would be happy to undertake in advance of the drafting of the legislative provisions and would be willing to examine and evaluate practices (albeit still relatively limited) in other jurisdictions.

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

The purpose of this Annex to the BAI's consultation response is to discuss the complex elements in the definition of a video-sharing platform service in more detail, to create a clear framework in which the legal elements in this definition can be applied and to establish a methodology for identifying video-sharing platform services.

It is structured in six parts:

1. A breakdown of the various elements of the legal definition of a video-sharing platform service.
2. A detailed discussion on the concept of dissociability, and how this creates the framework in which the legal criterion in the definition of a video-sharing platform service should be applied.
3. Core VSP Service Functions and Ancillary VSP Service Functions
4. A detailed discussion on the Principal Purpose Test and the Essential Functionality criterion.
5. Statutory mechanisms to assist a regulator in arriving at determinations.
6. A proposal for a methodology to determine whether a video-sharing platform service is being provided.

A1.1 Legal Definition of a Video-sharing Platform Service

The legal definition of a video-sharing platform service contained in the Directive contains several components. When these components are compartmentalised and described in their plain meaning (insofar as this is possible), they are as follows:

- The service is a service for the purposes of the Treaty on the Functioning of the European Union, meaning it is a service that is ordinarily provided for remuneration. In essence, this means that it is a service that generates revenue for the service provider or for other service providers providing *like* services (and can be a service with no direct monetary cost to a consumer).
- A principal purpose of the service or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the public in order to inform, entertain or educate. The service may be a service in its entirety (e.g. an entire website or application), or, where appropriate, a part of a service that is "dissociable" from the rest of the service.
- The provider of the service does not have editorial responsibility over the programmes and user-generated videos that are uploaded to the service (as the term "editorial responsibility" is defined in the Directive). This means that the act of uploading videos to the service is not generally carried out by the provider of the service, or at their request, or in coordination with others.
- The service is provided through electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. This includes both fixed and mobile internet.
- The organisation of the programmes and user-generated videos on the service is determined by the video-sharing platform provider, including by automatic means or algorithms particularly by displaying, tagging and sequencing. This means the service provider creates and maintains

effective control of the framework in which videos can be uploaded and accessed by users of the service.

- If the service is a non-economic activity (which includes services centered on the provision of audiovisual content on private websites and non-commercial communities of interest), it is excluded from the scope of the Directive.

A1.2 Dissociability: A framework for applying the legal criteria in the VSP Definition

The legal purpose of the definition of a video-sharing platform service in the revised Directive is to function as a “trigger” for the protections contained in Article 28b when a service meeting the qualities contained in that definition is being provided. In the view of the BAI, the starting point in creating a framework and methodology in which the criteria in the definition of a video-sharing platform service can be applied consistently is the concept of “dissociability”.

The concept of dissociability arose from Case C-347/14 of the European Court of Justice.⁸ It has been formalised and incorporated into the text of the Directive in its revised version. The case in question explored *how* the criterion in the definition of a service covered by the Directive should be applied, and ruled that the correct approach to doing so in a complex scenario is to examine the extent to which any functionality present on a service aligns with the definition, in itself and irrespective of the framework in which it is offered. ([...] *“preference must be given to a substantive approach which, according to the wording of Article 1(1)(a)(i), consists of examining whether the principal purpose of the service at issue, in itself and regardless of the framework in which it is offered, is the provision of programmes to inform, entertain or educate the general public”*.) Services that fall within the scope of the revised version of the Directive in such a way are considered “dissociable”.

The key purpose of the concept of dissociability (as explored in Case C-347/14) is to ensure that the protections granted by the Directive in respect of the services it covers cannot be circumvented where the complexity of the framework in which they are offered stretches or strains the limits of a relevant legal definition.

In a practical sense, the essence of Case C-347/14 is that in attempting to determine if a service covered by the Directive is being provided, pre-conceived notions about whether the service under examination falls within scope should be disregarded and specific functionalities that align with the criterion in the legal definition should be searched for i.e. rather than taking a “top-down” approach that starts from the a pre-conceived notion that a VSP service is being provided and attempting to “fit” the definition around that pre-conceived notion, the approach taken should be to analyse a service from the “ground up” through reference to specific functionalities which are present to find the parts of the service that align with the definition.

Dissociable parts of social media services that are video-sharing platform services will include the Facebook News Feed or the Twitter feed accessible to users on their Twitter home page. These are examples of services that are provided *through* a service with a broader range of functionality which align very clearly with definitions of services covered by the Directive.

⁸ Case C-347/14

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

The concept of dissociability also serves to limit the Directive's scope. The Directive states that “[w]here a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive 2010/13/EU, only that section should be covered by that Directive, and only as regards programmes and user-generated videos”⁹, and that social media services should be covered by the Directive “to the extent that they meet the definition of a video-sharing platform service”.¹⁰

Thus, once it has been established that a video-sharing platform service is *being provided*, it will be important to establish the limits of this definition in order to determine which aspects of a service are in scope of the Directive and which are not. This is a key consideration as a video-sharing platform provider is only obliged to introduce protections in respect of the video-sharing platform services they provide rather than all the services they provide.

A1.3 Core VSP Service Functions and Ancillary VSP Service Functions

The concept of dissociability has two key implications for any regulator's analysis of a service:

1. Any aspect of a service with a broad range of functionality (e.g. a social media website), insofar as it independently satisfies the legal criterion in the definition of a video-sharing platform service, can be regarded as a video-sharing platform service.
2. The Directive only applies to the parts of a service under examination that constitute part of a video-sharing platform service.

In the BAI's view, the logical starting point in determining whether a video-sharing platform service is being provided is, therefore, to examine services from a “blank slate”, to identify all of the user-interface elements of the service in question that might independently satisfy the definition of a video-sharing platform service and then to apply the legal criterion in the definition to those elements. This approach is consistent with the two key interpretative implications of the dissociability criterion described above, as it will lead to a fully comprehensive examination of the service in question, provide grounds for why those parts are included within the scope of the Directive and will naturally exclude parts of the service that do not form part of a video-sharing platform service.

A common technical feature that must be present in all video-sharing platform services irrespective of any other matter is that there is a publicly-available interface element included on a service that allows users to view audiovisual content uploaded by other users. In the BAI's view, these kinds of interface elements should be used as “grounding” mechanisms when analysing services to see if a video-sharing platform service is being provided, as they act as easily identifiable focal points to apply the “legal” and “technical” elements of the definition consistently and methodically across different services. By “deconstructing” services in such a way, “like” interface elements common to different services can be more easily identified (e.g. the News Feed, Twitter Feed and Instagram feed) and similar regulatory methods in respect of these “like” functions across different services can be developed.

Therefore, in examining a complex, multi-functional service like Facebook to determine if a video-sharing platform service is being provided, “Facebook” as the term is commonly used and understood

⁹ Recital 6

¹⁰ Recital 4

would not be the focus of regulation *per se* but, more particularly, the user-interface elements of Facebook that most closely align with the definition of a video-sharing platform service in the Directive (one example of which is the News Feed). In complex services these interface elements will form a “network” or “heat map” of interrelated video-sharing platform service “nodes” that can be identified and regulated on a collective or individual basis as appropriate. This approach to regulation is consistent with the proportionality required by the Article 28b.3 test, as the “focus” of regulatory measures will be the elements of the service that align with the definition of a video-sharing platform service. This approach is also consistent with Recitals 4 and 6.¹¹

While these terms are not used in the Directive, the BAI considers that the definition of a video-sharing platform service used in the Directive encapsulates platforms’ **Core VSP Service Functions** and **Ancillary VSP Service Functions**.

- A **core VSP service function** is the relevant element of a user-interface on a service that independently satisfies all the relevant legal criteria in the definition of a video-sharing platform service. It is the irreducible core element of the VSP service provided that triggers the application of the Directive’s rules, and will allow, in some shape or form, users of the service to access audiovisual content uploaded by other users. On social media services, a core VSP service function will often take the form of a content feed (a key example is the Facebook News Feed). In practice, on complex social media services, it is likely that multiple aspects of the service will constitute core VSP functions.
- An **ancillary VSP service function** is an element of a service that interacts with and affects a user’s access to, or use of, the core VSP service function being provided, as well as the kind of content that appears on it, but which cannot in and of itself be regarded independently as a video-sharing platform service on a legal analysis. Ancillary VSP service functions do not have to appear on the same website/interface “page” as the core VSP service, and include the terms and conditions of the service, its login page (which provides access to the VSP service), notifications systems or any number of interface elements that directly interact with or affect the VSP service.

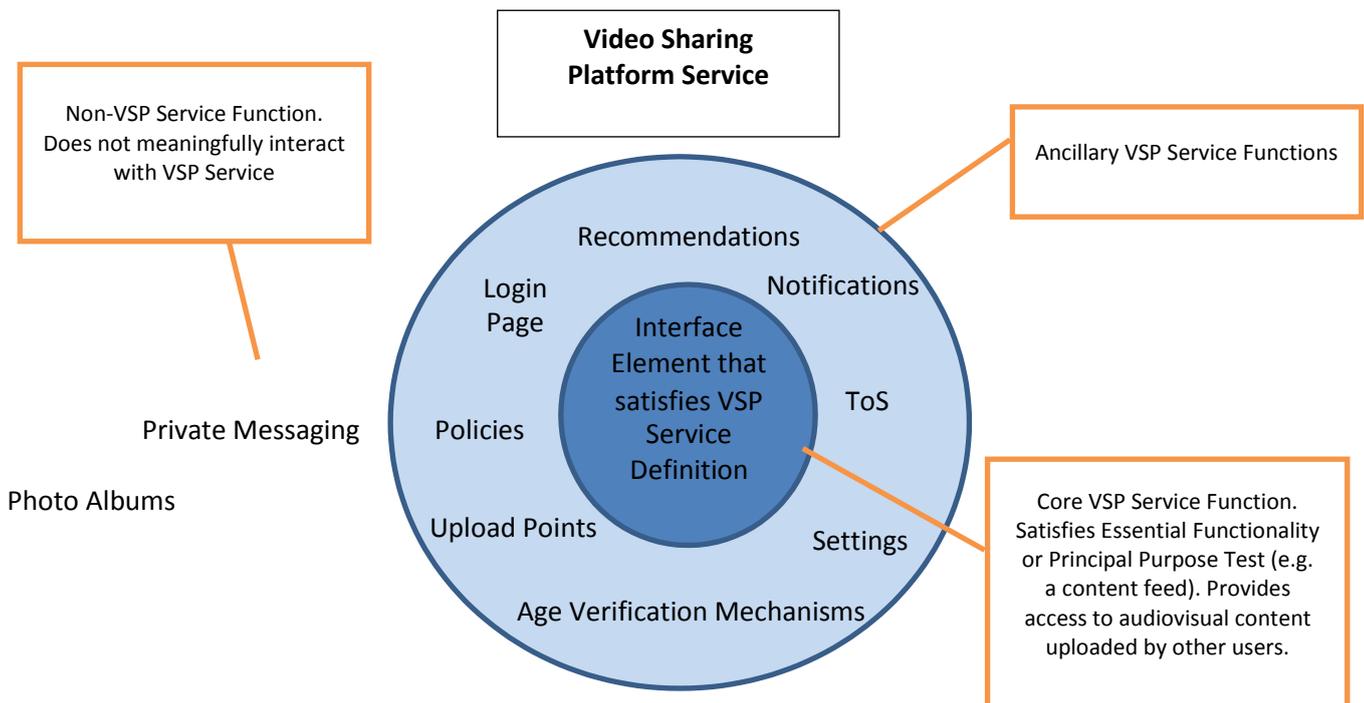
The inclusion of ancillary VSP service functions within the scope of the definition of a video-sharing platform service can be justified through reference to the features of a video-sharing platform described

¹¹ Further discussion regarding the formal application of the concept of dissociability to the essential functionality criterion would be helpful, although the approach advocated by the BAI to identifying and regulating video-sharing platform services would remain largely unchanged by this matter. The BAI’s view is that translating the Directive’s rules for video-sharing platform services into a practical regulatory regime will require the identification of video-sharing platform services through reference to specific functionalities present on platforms that satisfy the criterion in the legal definition of a video-sharing platform service (irrespective of whether the principal purpose or essential functionality test is used). Many such interface elements may exist on any given platform and the regulatory model used must be able to account for different levels of protection that may be justified under the Article 28b.3 test. The BAI’s model for identifying and regulating video-sharing platform services (i) accounts for the complexity inherent in applying the Article 28b.3 test, (ii) ensures regulatory rules can be applied consistently across different services by identifying core “like” elements across those services in combination with easily applicable common constructive indicators to identify VSPs, and (iii) creates an iron-clad basis for the regulatory relationship between the regulator and regulated entities by ensuring that the removal or amendment of any one interface element on the platform does not undermine the basis for regulation in respect of other elements, leading to a stronger overall basis for the application of regulation (i.e. a distributed basis for regulation rather than a single basis).

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

in Article 28b.3, which include: a platform's terms of service, ACC declaration mechanisms, reporting and flagging mechanisms, age verification systems, content rating systems, parental control systems, complaints handling procedures and media literacy tools. None of these features independently satisfy the definition of a video-sharing platform service when analysed in isolation, but rather are provided as an ancillary function to a video-sharing platform service being provided.

The following diagram illustrates how this view of video-sharing platform services might apply to a complex social media service providing a single, dissociable VSP service.



Once it has been determined that a video-sharing platform service **is being provided** (i.e. there is, at a minimum, a core VSP service function), per recital 4 and 6, a dissociability test must then be applied to determine which parts of the service are ancillary VSP service functions and which parts of the service are not part of the video-sharing platform service provided and hence to which the Directive is not applicable.

Determining dissociability in this context is a question of the extent to which the functionality of the service under examination meaningfully interacts with and affects a user's use of the core VSP service that has been identified, having regard to the protections that were intended to be afforded to audiences by the Directive.

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

Ancillary VSP Service functions will have to be determined on a case-by-case basis, depending on the service being provided. Examples of ancillary VSP service functions on a complex social media service might include:

Recommendation Systems	Content Flagging Systems	Login Systems
Notifications Systems	Terms of Service	Upload Mechanisms
Settings	Age Verification Mechanisms	Content Policies
Audiovisual Advertisements	Parental Control Measures	Content Algorithms
Complaints Processes	Search Mechanisms	“Blocking” Mechanisms

All of these different features are likely to form part of a video-sharing platform service being provided insofar as they affect access to, or use of, a core VSP service function or are features of a service that a regulator might require a VSP provider to change or introduce further to Article 28b of the Directive to bring a VSP service into compliance with rules stemming from the Directive.

Where it has been identified that a VSP service is being provided through a social media service, the complexity inherent in modern social media services will often mean that an aspect of the platform that constitutes part of a VSP service will affect functionality on the platform unrelated to the provision of that VSP service or other VSP services present on the same service. For example, Facebook’s login page (an ancillary VSP service function) grants access to both its news feed (a core VSP service function) as well as its photo albums (which possibly does not constitute part of a video-sharing platform service). The Facebook login page is also an ancillary VSP service function relative to Facebook Watch (another core VSP service function). The interrelated nature of the various functionalities present on the platform do not act as an impediment to the application of the Directive’s rules. The Directive must be read and applied in a compatible and complementary manner to ensure that the standard of protection required in respect of all VSP services is met.

A1.4 Principal-purpose VSP Services and Essential Functionality VSP Services

The legal definition of a video-sharing platform service in the Directive envisions two main “kinds” of video-sharing platform services.

The first kind of video-sharing platform service is a “**principal-purpose VSP service**”. This is a service (including a dissociable section of a wider service) that satisfies the common qualities in the definition of a video-sharing platform service and its principal purpose is devoted to providing programmes, user-generated videos, or both, to the public, in order to inform, entertain or educate.

The second kind of video-sharing platform service is an “**essential functionality VSP service**”. This is a service (including a dissociable section of a wider service)¹² that satisfies the common qualities in the definition of a video-sharing platform service and an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the public, in order to inform, entertain or educate.

¹² See footnote 9 above.

A1.4.1 Principal-purpose VSP Services

The scope and limits of the principal purpose test – that a service’s principal purpose is devoted to providing audiovisual content to the public in order to inform, entertain or educate – are well understood.

In applying the principal purpose test to services under examination to see whether they are video-sharing platform services, the revised Directive does not appear to envision a significant degree of meaningful change to how the test functions in practice. In essence, the test requires an intuitive assessment as to the extent to which the provision of access to audiovisual content intended to inform, entertain and educate on the service can be regarded as the main/primary purpose for which a service is being provided.

While the exercise of applying the principal-purpose test to services under examination to see whether they are video-sharing sharing platforms will be novel, the BAI does not consider that any significant points of confusion or complexity are likely to arise in doing so. At its most clear, a service such as YouTube in its various forms (e.g. mobile applications) will fall to be regulated as a principal-purpose video-sharing platform service in almost its entirety.

As discussed previously, dissociable sections of social media services may also fall to be regulated as video-sharing platform services through the principal-purpose test. For example, it might be the case that a social media service with a range of different functionalities has a content feed that only supplies videos or that a service has a videos “section” which is distinct from the rest of the functionality it provides.

A1.4.2 Essential-functionality VSP Services

The “essential functionality” criterion is a new concept that appears in the latest iteration of the Directive for the first time. It is a component in the definition of a video-sharing platform service that provides that where an essential functionality of a service under examination the provision of programmes, user-generated videos, or both, to the general public in order to inform, entertain or educate, that the Directive will apply to such a service insofar as all of the other elements in the definition of a video-sharing platform service are met.

How the essential functionality criterion will apply has been the subject of much discussion in the drafting process for the Directive. Helpfully, further to Recital 5 of the revised Directive, the European Commission will provide detailed guidance on how this criterion is intended to be applied.

Without prejudice to any future guidance offered by the European Commission on this issue, the BAI would like to take the opportunity of the Department’s Consultation to offer its views on some of the relevant factors that might be considered in its application.

A1.4.3 Purpose of the Essential Functionality criterion

In introducing and approving the inclusion of the essential functionality criterion in the definition of a video-sharing platform service in the Directive, the European Institutions recognised that by itself the principal-purpose test was not sufficient to grant an appropriate level of protection to audiences in respect of audiovisual content provided on the modern internet. Popular social media services such as

Facebook and Twitter, for which the provision of audiovisual content may not constitute their principal purpose, but which nonetheless provide access to vast amounts of audiovisual content every day to hundreds of millions of Europeans, would have fallen outside the scope of the Directive but for the inclusion of the “essential functionality” criterion in the definition of a video-sharing platform service. The inclusion of services such as these within the scope of the Directive was the fundamental purpose for which the essential functionality test was introduced.

A1.4.4 Practical Application of the Essential Functionality Criterion

In considering the foregoing, it is the view of the BAI that the concept of essential functionality should not be interpreted narrowly, but through a broad lens that captures a variety of different circumstances in which the application of the protections contained in the Directive might be justified. A broad interpretation of the essentially functionality criterion allows the purpose for which the concept was introduced to be fully realised.

If it was intended that essential functionality be interpreted in a limited or narrow manner, the concept could have been limited by the European Institutions in the text of the Directive. Instead, the concept of essential functionality was left broadly “open” so that the Directive could be applied to its full effect and flexibly to a range of different services that do not satisfy the principal purpose test but which nevertheless provide access to large amounts of audiovisual content in a manner warranting protection.

In the view of the BAI, essential functionality must therefore be interpreted as encompassing **actual essential functionality** and **constructive essential functionality**.

Actual essential functionality is determined with reference to the manner in which a particular service is being provided in practice and the relative importance of the provision of audiovisual content to the provision of that service. In determining actual essential functionality, one would look at the extent to which the provision of programmes and user-generated videos in order to inform, entertain and educate is essential to the provision of a particular service.

Constructive essential functionality views essential functionality from an abstract perspective that examines whether the Directive should apply to a given *kind* of service. In essence, this approach asks whether there is a functionality present on a service under examination devoted to providing programmes or videos in order to inform, entertain or educate, and to *which it is essential that the Directive’s protections apply*. If such a functionality is present, it is an “essential functionality”. This approach determines essential functionality with reference to objective, abstract criteria that can be applied across *like* services, having regard to the nature of protections envisioned in the Directive and the purpose for which they were introduced by the European institutions. This would include assessments of factors such as the total number of users on a service being exposed to audiovisual content in a manner envisioned by the Directive, the length of time they are exposed, the influence of a service and the likelihood of harms envisioned by the Directive occurring on a service.

If a service under examination satisfies indicators from one or both types of approaches to essential functionality the Directive should apply to the service.

A1.4.5 Practical Example: Actual and Constructive Essential Functionality

Audiovisual content consumption rates of users on different services present a useful example to illustrate how essential functionality incorporates both actual and constructive elements. For example, compare the following two hypothetical content feeds:

Content Feed A	Content Feed B
<ul style="list-style-type: none">- 1 Million European Users- 40% of users' viewing time dedicated to viewing audiovisual content	<ul style="list-style-type: none">- 300 Million European Users- 10% of users' viewing time dedicated to viewing audiovisual content

In this scenario, Content Feed A could be regarded as a video-sharing platform service that satisfies the essential functionality test on actual grounds. The provision of audiovisual content constitutes a significant enough share of audiovisual content provided on a daily basis that factually it could be regarded as essential to the provision of the service, despite the relatively low number of users in a Pan-European context. The service could also possibly satisfy the principal purpose test as well, depending on the extent to which the provision of audiovisual content on the service is a merely indissociable complement to the main activity of the service.

Content Feed B satisfies the essential functionality test on a constructive basis due to the total audiovisual content consumed on the service. By way of illustration, if the average user on a service spent 1 hour per day consuming content on both platforms, over a year, Content Feed A would account for approximately 17,000 years of audiovisual content consumed and Content Feed B would account for approximately 1,250,000 years of audiovisual content consumed. In this example, 74 times as much total audiovisual content is consumed on Content Feed B in a year, despite the fact the average user on Content Feed B spends 18 minutes less a day consuming audiovisual content.

Having regard to the purpose for which the essential functionality criterion was introduced, and the protections intended by the Directive, it would be absurd and fundamentally contrary to that purpose if the protections to be afforded to audiences by the Directive did not apply to services such as Content Feed B. This is the case because of the clear and unambiguous intention of the European Institutions to include services such as those within the scope of the Directive in the drafting process, the tremendous influence of such services by virtue of the scale of audiovisual content they provide, and the risk of harms envisioned by the Directive occurring to users of the service. Recital 4 of the Directive is particularly important in this context.¹³

Ultimately, while the manner in which audiovisual content is delivered to users of both services will vary, the functionality provided on both services for which the Directive's intentions were intended to apply to is the same – the act of consuming audiovisual content. If a narrow “actual” approach to essential

¹³ Recital 4: “Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism, those services should be covered by Directive 2010/13/EU to the extent they meet the definition of a video-sharing platform service”.

functionality was the only approach adopted, the fact that less audiovisual content is being consumed in a “relative” sense on the Content Feed B could act as an impediment to the application of the Directive’s rules, despite the fact that in an “absolute” sense it provides access to vastly greater amounts of audiovisual content than Content Feed A.

A1.4.6 Technical Criteria and Indicators vs Intuition

An interpretation of essential functionality that includes both actual and constructive components gives voice to reasonable, clear and intuitive determinations about what services should and should not be covered by the Directive as video-sharing platform services.

The example described above has used the indicator of audiovisual content consumption to illustrate why services like Content Feed B should be covered by the Directive. In practice, the approach taken in this example is likely more complex than is necessary, as it is difficult to envision how a service with an excess of 50 million users that provides audiovisual functionality in a manner envisioned by the Directive could not be covered by its protections, unless such consumption is statistically negligible and insignificant or for a purpose that was not to inform, entertain or educate. It is for this reason that the BAI has concluded on an intuitive basis that the services listed in Section 2 of this consultation response are “essential-functionality” video-sharing platform services.

While metrics and the assessment of technical criteria may be useful tools to assist a regulator in determining what services are covered by the Directive, it should be borne in mind that any determination of essential functionality will ultimately be an intuitive exercise assessing the extent to which a service meets a “legal” test rather than a technical one. The avoidance of an overly technical approach to determining essential functionality will be paramount as technical aspects of services can change rapidly, potentially leading to the circumvention of protections, whereas the indicators in an approach focused on the risk of harm occurring to users and the need for the Directive’s protections to be applied can remain consistent across different services irrespective of changes to the interface in which they are provided.

To that extent, the key question in determining whether essential functionality applies from a constructive perspective is not to ask *if* the Directive applies, but rather *should* the Directive apply to such services having regard to the need for protections to be put in place for audiences and the European Institutions’ intentions.

On that basis, and subject to further detailed work developing thresholds and exceptions, the BAI feels that the following factors could be developed as easily-applicable, key, constructive indicators that determine whether a service satisfies the essential functionality test:

- The number of users on a service being exposed to audiovisual content uploaded by other users of the service.
- The number of minors being exposed to audiovisual content uploaded by other users.
- Total audiovisual content consumed on the service in a given period.
- The extent to which the audiovisual content of users is monetised on the interface element e.g. revenue generated from paid audiovisual commercial communications.

“Edge cases” will always potentially stretch or strain any indicators. In such circumstances, determinations will have to be made on a case-by-case basis.

A1.5 Preliminary Information-gathering Tool

In order to determine if a video-sharing platform service is being provided, as a preliminary step, a regulator will need a statutory tool that obliges providers of services that *may be* video-sharing platform services to provide certain kinds of information to the regulator about their service. This information would then have to be assessed by the regulator to determine if a video-sharing platform service is being provided.

Given that video-sharing platform services can essentially be provided through any electronic communications network, the range of services that this tool will have to apply to should be quite broad, and detailed consideration should be given as to how it will function in practice. The tool should also cover information necessary to ascertain a service’s jurisdiction under the Directive rules as well.

A1.6 Determining whether a Video-sharing Platform Service is being provided

In summary, the BAI feels that video-sharing platform services can be identified through the following four-step methodology:

1. Identify a user-interface element of a service that allows users to be exposed to audiovisual content uploaded by other users.
2. Use a preliminary information-gathering tool to collect information from the provider of the service that is relevant to determining whether the service is a video-sharing platform service.
3. Assess whether the user-interface element in question satisfies the legal definition of a video-sharing platform service, determining in the process whether it is a principal-purpose video-sharing platform service or an essential-functionality, video-sharing platform service. This identifies **core VSP service functions**.
4. Apply a dissociability test to determine what aspects of the service constitute **ancillary VSP service functions** and the aspects of the service to which the Directive does not apply.

**RESPONSE TO IRISH GOVERNMENT CONSULTATION ON THE REGULATION OF HARMFUL
CONTENT ON ONLINE PLATFORMS AND THE IMPLEMENTATION OF THE REVISED
AUDIOVISUAL MEDIA SERVICES DIRECTIVE
April 2019**

Introduction

1. Since early 2018, Professor Lorna Woods and William Perrin have been working, under the aegis of Carnegie UK Trust, on a detailed regulatory proposal for internet harm reduction. As the Irish government considers the development of an Online Safety Act, we hope that this submission on our work provides some useful material for consideration.
2. Carnegie UK Trust was established in 1913 by Scottish-American industrialist and philanthropist Andrew Carnegie to seek:
“Improvement of the well-being of the masses of the people of Great Britain and Ireland by such means as are embraced within the meaning of the word “charitable” and which the Trustees may from time to time select as best fitted from age to age for securing these purposes, remembering that new needs are constantly arising as the masses advance.”
3. Carnegie UK Trust works across the UK and Ireland to influence policy and deliver innovative practice. Our proposal has been developed with reference primarily to the UK regulatory and legislative system so we do not comment in detail in this submission on, for example, the consultation questions relating to the introduction of the Audio-Visual Media Services Directive (AVMSD) within Ireland but we noted within the British context that the statutory duty of care could be used as a mechanism to implement the video-sharing platform provisions of the AVMSD.
4. We have included references to our more detailed work throughout this submission and would be happy to provide further information or discuss with Irish officials, if helpful.

Background

5. Lorna Woods (Professor of Internet Law, Essex University) and William Perrin (Trustee of Carnegie UK Trust) have been working with Carnegie UK Trust (CUKT) to design a regulatory system to reduce harm on social media. The proposals have been published via a series of blog posts¹ and a new paper has recently been published which consolidates

¹ <https://www.carnegieuktrust.org.uk/project/harm-reduction-in-social-media/>

our thinking, and updates some of the work in the light of feedback and discussions with diverse stakeholders over the past 18 months.²

6. We have vast experience in regulation, privacy and free speech issues. William has worked on technology policy since the 1990s, was a driving force behind the creation of OFCOM and worked on regulatory regimes in many economic and social sectors while working in the UK government's Cabinet Office. He ran a tech start up and is now a trustee of several charities. Lorna is Professor of Internet Law at University of Essex, an EU national expert on regulation in the TMT sector, and was a solicitor in private practice specialising in telecoms, media and technology law.
7. Our Carnegie work was catalysed by the harms set out in the UK government's Green Paper³ and much reporting of harms by interest groups. We published our initial work just before the government's May 2018 announcement that they would bring forward a White Paper to:

‘set out plans for upcoming legislation that will cover the full range of online harms, including both harmful and illegal content. Potential areas where the Government will legislate include the social media code of practice, transparency reporting and online advertising.’⁴

8. Our proposals put forward a new regulatory regime to reduce harm to people from social media services. We draw on the experience of regulating in the public interest for externalities and harms to the public in sectors as diverse as financial services and health and safety. Our approach – looking at the design of the service – is systemic rather than content-based, preventative rather than palliative.
9. At the heart of the new regime would be a ‘duty of care’ set out by Parliament in statute. This statutory duty of care would require most companies that provide social media or online messaging services used in the UK to protect people in the UK from reasonably foreseeable harms that might arise from use of those services. This approach is risk-based and outcomes-focused. A regulator would have sufficient powers to ensure that companies delivered on their statutory duty of care. Our proposals have been adopted as the basis of recommendations to Government by many campaigning organisations and Parliamentary committees in recent months.⁵

² https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf

³ <https://www.gov.uk/government/consultations/internet-safety-strategy-green-paper>

⁴

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/708873/Government_Response_to_the_Internet_Safety_Strategy_Green_Paper_-_Final.pdf

⁵ A duty of care has been recommended by the following organisations to date in 2019: NSPCC (Taming the Wild West Web, February 2019: <https://www.nspcc.org.uk/globalassets/documents/news/taming-the-wild-west-web-regulate-social-networks.pdf>); Children's Commissioner: <https://www.childrenscommissioner.gov.uk/2019/02/06/childrens-commissioner-publishes-a-statutory-duty-of-care-for-online-service-providers/>; UK Chief Medical Officers: <https://www.gov.uk/government/publications/uk-cmo-commentary-on-screen-time-and-social-media>

10. The long-delayed Online Harms White Paper was published by the UK Government on 8th April 2019 and proposes the introduction of a statutory duty of care, enforced by an independent regulator, which draws on our thinking. We are currently reviewing the detail of their proposals and will respond formally as part of the three-month consultation.⁶
11. We note that the Irish government has committed to bringing forward legislation with similar objectives to those set out by the UK government:

‘The situation at present where online and social media companies are not subject to any oversight or regulation by the state for the content which is shared on their platforms is no longer sustainable. I believe that the era of self-regulation in this area is over and a new Online Safety Act is necessary’.⁷

12. Our proposals for a statutory duty of care are therefore as relevant to the consideration of the scope and objectives of online legislation in Ireland as they are in the UK. Indeed, we briefed Donnchadh Ó Laoghaire TD on our approach last autumn. We also note that, last autumn, Senator Catherine Noone called for a “statutory duty of care” for social media companies to address online harassment and abuse.⁸
13. The content of this submission is most relevant to the proposals and questions set out by the Department of Communications, Climate Action and Environment in Strand 1 of the consultation’s Explanatory Note (new online safety laws to apply to Irish residents). Please see our more detailed work for consideration of the intersection with the Audio Visual Media Services Directive (AVMSD) and other European legislation, which will also have relevance to the Irish regulatory context.⁹

A statutory duty of care for online harm reduction

14. We note that the consultation starts from the premise of designing an appropriate system “to require the removal of harmful content from online platforms” and ask whether this requires the “regulatory oversight of the notice and take down systems which services have in place, or the direct involvement of the regulator in a notice and take down system

[map-of-reviews](#)); House of Commons Science and Technology Committee: <https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/822/82202.html>; UK Labour Party: <https://labour.org.uk/press/tom-watson-speech-fixing-distorted-digital-market/>; Lords Communications Committee: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/>; All-Party Parliamentary Group on Social Media and Young People’s Mental Health and Wellbeing/Royal Society of Public Health: <https://www.rsph.org.uk/our-work/policy/wellbeing/new-filters.html>)

⁶ <https://www.gov.uk/government/consultations/online-harms-white-paper>

⁷ ‘Minister Bruton proposes new law to protect children online’; Press release: 5 March 2019

⁸ <https://www.irishexaminer.com/breakingnews/ireland/catherine-noone-wants-statutory-duty-of-care-for-social-media-firms-to-fight-online-abuse-870903.html>

⁹ See our recent paper:

(https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf), chapter 4.

where it would have a role in deciding whether individual pieces of content should or should not be removed?”¹⁰

15. We would argue that designing a regulatory system around take-down systems for content is too reactive; it will also be problematic in relation to the risk that the consultation rightly flags “that legitimate freedom of speech and freedom of expression online could be curtailed.”
16. Our proposal draws on the long-established precautionary principle for policymaking, coupled with a “safety by design” approach, which put the onus instead on social media platforms to prevent users from the risk of coming to reasonably foreseeable harm on their platforms. Takedown procedures are a necessary part of the activity overseen and monitored by the regulator but by starting from an outcome-focused, risk-based position, we believe that greater protection can be afforded to users, particularly vulnerable groups.

Platforms as public spaces

17. Social media and messaging service providers should each be seen as responsible for a public space they have created, much as property owners or operators are in the physical world. Everything that happens on a social media or messaging service is a result of corporate decisions: about the terms of service, the software deployed and the resources put into enforcing the terms of service. These design choices are not neutral: they may encourage or discourage certain behaviours by the users of the service.
18. In the physical world, the UK Parliament has long imposed statutory duties of care upon property owners or occupiers in respect of people using their places, as well as on employers in respect of their employees. A statutory duty of care is simple, broadly based and largely future-proof. For instance, the duties of care in the [Health and Safety at Work Act 1974](#)¹¹ work well today, enforced and with their application kept up to date by a competent regulator. A statutory duty of care focuses on the objective – harm reduction – and leaves the detail of the means to those best placed to come up with solutions in context: the companies who are subject to the duty of care. This is the fundamental difference between our approach and the starting point of the questions on notice and takedown that are posed in consultation on the Irish Online Safety Act.
19. A statutory duty of care returns the cost of harms to those responsible for them, an application of the micro-economically efficient ‘polluter pays’¹² principle. The E-

¹⁰ Department of Communications, Climate Action and Environment: “Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive: Explanatory Note” March 2019 p4-5

¹¹ <https://www.legislation.gov.uk/ukpga/1974/37>

¹² Polluter Pays – OECD 1972 see https://www.oecd-ilibrary.org/environment/the-polluter-pays-principle_9789264044845-en

Commerce Directive¹³, permits duties of care introduced by Member States; the Audiovisual Media Services Directive (as amended in 2018) requires Member States to take some form of regulatory action in relation to a sub-set of social media platforms – video-sharing platforms – and we note that the consultation is looking for detailed responses on how this might be implemented in Ireland.

The precautionary principle

20. Rapidly-propagating social media and messaging services, subject to waves of fashion amongst young people in particular, are an especial challenge for legislators and regulators. The harms are multiple, and may be context- or platform- specific, while the speed of their proliferation makes it difficult for policymakers to amass the usual standard of long-term objective evidence to support the case for regulatory interventions. The software that drives social media and messaging services is updated frequently, often more than once a day. Facebook for instance runs a ‘quasi-continuous [software] release cycle’¹⁴ to its web servers. The vast majority of changes are invisible to most users. Tweaks to the software that companies use to decide which content to present to users may not be discernible. Features visible to users change regularly. External researchers cannot access sufficient information about the user experience on a service to perform long-term research on service use and harm. Evidencing harm in this environment is challenging, traditional long-term randomised control trials to observe the effect of aspects of the service on users or others are nearly impossible without deep co-operation from a service provider.
21. Nonetheless there is substantial indicative evidence of harm both from advocacy groups and more disinterested parties. In the UK, OFCOM (the communications sector regulator) and the Information Commissioner’s Office (ICO) have demonstrated¹⁵ that a basic survey approach can give high level indications of harm as understood by users. So, how do regulation and economic activity proceed in the face of indicative harm but where scientific certainty cannot be achieved in the time frame available for decision making?
22. Being called on to act robustly on possible threats to public health before scientific certainty has been reached is not new for Governments. After the many public health and science controversies of the 1990s, the UK government’s Interdepartmental Liaison Group on Risk Assessment (ILGRA) published a fully worked-up version of the precautionary principle for UK decision makers.¹⁶

‘The precautionary principle should be applied when, on the basis of the best scientific advice available in the time-frame for decision-making: there is good

¹³ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, available: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>.

¹⁴ Rapid release at massive scale August 2017 <https://code.fb.com/web/rapid-release-at-massive-scale/>

¹⁵ https://www.ofcom.org.uk/_data/assets/pdf_file/0018/120852/Internet-harm-research-2018-report.pdf

¹⁶ <http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.htm>

reason to believe that harmful effects may occur to human, animal or plant health, or to the environment; and the level of scientific uncertainty about the consequences or likelihoods is such that risk cannot be assessed with sufficient confidence to inform decision-making.'

23. The ILGRA document advises regulators on how to act when early evidence of harm to the public is apparent, but before unequivocal scientific advice has had time to emerge, with a particular focus on novel harms. The ILGRA's work is still current and hosted by the UK Health and Safety Executive (HSE), underpinning risk-based regulation of the sort we propose.

System not content

24. In our most recent paper, we set out in detail our view that online environments reflect choices made by the people who create and manage them; those who make choices should be responsible for the reasonable foreseeable risks of those choices. Our approach – moving beyond a focus on platform accountability for every item of content on their respective sites, to their responsibility for the systems that they have designed for public use – allows the reduction of harm to be considered within a regulatory approach that scales but, by not focussing directly on types of content, is also committed to the preservation of free speech.
25. In the regime we propose, oversight would be at a system or platform level, not regulation of specific content – this is significant in terms of placing responsibility on the actions and activities that platform operators control and also in terms of practicality. Regulation at the system level focuses on the architecture of the platform. This is similar to the 'by design' approach seen in data protection and information security (for example in the EU GDPR). Ongoing review of this design is important to ensure that the system continues to function as the market and technology develops¹⁷. The statutory duty of care approach is not a one-off action but an ongoing, flexible and future-proofed responsibility that can be applied effectively to fast-moving technologies and rapidly emerging new services.
26. In broad terms, our system-level approach looks like this: the regulator would have powers to inspect and survey the networks to ensure that the platform operators had adequate, enforced policies in place. The regulator, in consultation with industry, civil society and network users would set out a model process for identifying and measuring harms in a transparent, consultative way. The regulator would then work with the largest companies to ensure that they had measured harm effectively and published harm reduction strategies. Specifying the high-level objectives to safeguard the general public allows room for service providers to act by taking account of the type of service they offer, the risks it poses (particularly to vulnerable users) and the tools and technologies available

¹⁷ On difficulties with 'baked in' assumptions see e.g. Antignac, Th, and Le Métayer D., 'Privacy by design: From technologies to architectures' in Preneel B. and Ikononou D. (eds.) *Privacy Technologies and Policy*, Springer International Publishing, 2014, pp. 1-17; Koops, B-J., and Leenes, R., 'Privacy Regulation cannot be hardcoded. A critical comment on the 'privacy by design' provision in data protection law' (2014) 28 *International Review of Law, Computers and Technology* 159.

at the time. The approach builds on the knowledge base of the sector and allows for future proofing. The steps taken are not prescribed but can change depending on their effectiveness and on developments in technologies and their uses.

Defining harms

27. The consultation on the proposals for the Online Safety Act asks two important questions on:

- the content that should be considered “harmful content” and the nature of services that should be in scope; and
- the list proposed by the Irish government for defining “harmful content”.

28. We have considered similar questions in relation to the introduction of a statutory duty of care and set out our current thinking in summary here. There is more detail on both areas in our recent paper.

29. We note that the consultation proposes the following example of the types of material that could be included in a definition of “Harmful content”: serious cyber bullying of a child, material which promotes self-harm or suicide, and material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health. We also note the important clarification that online platforms are already required to remove content which is a criminal offence under Irish and EU law.

30. Under our duty of care proposal, we set out a role for Parliament to guide the regulator with a non-exclusive list of harms for it to focus upon. These would include:

- Harmful threats – statement of an intention to cause pain, injury, damage or other hostile action such as intimidation. Psychological harassment, threats of a sexual nature, threats to kill, racial or religious threats known as hate crime. Hostility or prejudice based on a person’s race, religion, sexual orientation, disability or transgender identity. We would extend hate crime to include misogyny currently being reviewed by the UK government¹⁸.
- Economic harm – financial misconduct, intellectual property abuse, passing off and consumer scams
- Harms to national security – violent extremism, terrorism, state sponsored cyber warfare
- Emotional harm – such harm is unlikely to be covered by the law as it stands. The common law sets a very high bar for emotional harm, of a ‘recognised psychiatric

¹⁸ Review announced following campaign by Stella Creasy MP <https://www.bbc.co.uk/news/uk-politics-45423789>

injury¹⁹. This is out of kilter with the past decade of the law changing to recognise an emotional component of crime, often where women are victims – stalking, domestic abuse, harassment²⁰, controlling or coercive behaviour²¹. We suggest that emotional harm is reasonably foreseeable on some social media and that services should have systems in place to prevent emotional harm suffered by users such that it does not build up to the criminal threshold of a recognised psychiatric injury. For instance, through aggregated abuse of one person by many others in a way that would not happen in the physical world or service design that is intentionally addictive. This includes harm to vulnerable people – in respect of suicide, self-harm anorexia, mental illness etc.

- Harm to young people – bullying, aggression, hate, sexual harassment and communications, exposure to harmful or disturbing content, grooming, child abuse (See UKCCIS²² Literature Review).
- Harms to justice and democracy – prevent intimidation of people taking part in the political process beyond robust debate, protecting the criminal and trial process.

Who should be regulated?

31. Our thinking has evolved here during the course of our work, and we have broadened out our scope beyond an initial definition of social media services. We propose regulating services that:

- Have a strong two-way or multiway communications component;
- Display user-generated content publicly or to a large member/user audience or group.
- Are not subject to a detailed existing content regulatory regime, such as the traditional media.

32. As well as the large platforms such as Facebook, Twitter, YouTube, LinkedIn, TikTok, Kik etc, we would also include messaging services that have evolved and permit large group sizes and semi or wholly public groups, as well as gaming services that include a social network/messaging function. We have yet to come to a definitive view on search engines. The regime would cover reasonably foreseeable harm that occurs to people who are users of a service and reasonably foreseeable harm to people who are not users of a service.

33. If a service provider targets or is used by a vulnerable group of users (e.g. children), the risk of harm is greater and the service provider should have more safeguard mechanisms

¹⁹ See Stannard – Sticks and Stones [https://pure.qub.ac.uk/portal/en/publications/sticks-stones-and-words-emotional-harm-and-the-english-criminal-law\(677b44b4-b703-4e73-832f-466b75d58c42\)/export.html](https://pure.qub.ac.uk/portal/en/publications/sticks-stones-and-words-emotional-harm-and-the-english-criminal-law(677b44b4-b703-4e73-832f-466b75d58c42)/export.html)

²⁰ The CPS guidance provides a good overview of harassment issues <https://www.cps.gov.uk/legal-guidance/stalking-and-harassment>

²¹ Also: <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship>

²²

in place than a service which is, for example, primarily used by adults and which may have community rules agreed by the users themselves.

Regulatory approach

34. It is not appropriate for us to put forward any views on a suitable regulatory structure for the Irish regime; the audience for our proposal is the UK government and as such we recommend establishing a regulator that is independent of government and that OFCOM is the most appropriate regulatory body in the UK to take on oversight for a new statutory duty of care. We would, however, urge caution in setting up a wholly new body to oversee online safety and harm reduction. The time and resources required to achieve this will significantly delay the delivery of urgent action to reduce harms to vulnerable groups. Giving the regulatory responsibilities – at least in the first instance – to an existing authority can mitigate that risk.
35. In relation to the consultation questions on the powers that could be assigned to the regulator and the sanctions it could impose, we set out below and in the annex our thoughts in relation to a statutory duty of care. As we set out above, a risk-based regime that focuses on the outcome means that the service providers are free to choose how to discharge their responsibilities to reduce harm, and we envisage that the designated regulator would be given substantial freedom in its approach to remain relevant and flexible over time.
36. We suggest the regulator employ a harm reduction method similar to that used for reducing pollution: agree tests for harm, run the tests, the company responsible for harm invests to reduce the tested level, test again to see if investment has worked and repeat if necessary. If the level of harm does not fall or if a company does not co-operate then the regulator will have sanctions. We set out more detail on how the regulator would work in the annex.
37. In a model process, the regulator would work with civil society, users, victims and the companies to determine the tests and discuss both companies harm reduction plans and their outcomes. The regulator would have a range of powers to obtain information from regulated companies as well as having its own research function. The regulator is there to tackle systemic issues in companies and, in this proposal, individuals would not have a right to complain to the regulator or a right of action to the courts for breach of the statutory duty of care. We suggest that a form of ‘super-complaint’ mechanism, which empowers designated bodies to raise a complaint that there has been a breach of statutory duty, be introduced.
38. We have put some detailed thought into appropriate sanctions and penalties in recent months. We believe that a regulator needs effective powers to make companies change behaviour. Our proposal suggests large fines set as a proportion of turnover, along the lines of the [General Data Protection Regulation \(GDPR\)](#)²³ and [Competition Act](#)²⁴ regimes.

²³ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection

We have also made suggestions in our most recent paper of powers that bite on directors personally, such as fines.

The need to act

39. We are of the view that urgent action is needed, especially in a fast-changing sector, creating a tension with a traditional deliberative process of forming legislation and then regulation. We are heartened that the UK Government has put forward a statutory duty of care as the centrepiece of their regulatory proposals in the recent Online Harms White Paper but need to further consider the detail when drawing up our consultation response.
40. We are under no illusion that the issues involved in this area are complex: social media companies have a duty to shareholder interests; individuals do not bear the costs of their actions when they use social media leading to strong externalities; rights to freedom of speech are highly valued; the issues cut across different global approaches to regulation, making jurisdiction sometimes unclear; and few governments have seemed willing to take a strong lead. So, we therefore welcome the commitment that the Irish government has made to tackling online harms and hope that, wherever both governments end up with their final proposals, there will be an opportunity to work collaboratively on the implementation and learnings from the approaches. We would be happy to discuss our proposals in detail with Irish officials as they consider the next steps in the policymaking process.
41. In the meantime, we urge both governments to find a route to act quickly and bring forward their legislative proposals as early as is practicably possible. If we wait three or four years the harms may be out of control, which will not be good for society, nor the companies concerned.

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Regulation) [2016] OJ L 119/1, available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1552405263176&uri=CELEX:32016R0679>

²⁴ <https://www.legislation.gov.uk/ukpga/1998/41/contents>

ANNEX: The regulatory process and the role of the regulator

42. Given the huge power of most social media service companies relative to an individual we would appoint a regulator to enforce the duty of care; expecting individuals to assert rights through court processes as a mechanism to control the problems on these platforms is unlikely to work given the costs and stresses of litigation, the asymmetry in knowledge and power between the platforms and individual litigants. The regulator would ensure that companies have measurable, transparent, effective systems in place to reduce harm; to do so it would be provided with information-gathering powers. The regulator would have powers of sanction if companies did not comply with their duty of care.
43. Under our proposals, the regulator would be independent. The regulator would not get involved in individual items of speech and would be bound by the Human Rights Act. In exercising its powers, it must have regard to fundamental human rights and the need to maintain an appropriate balance between conflicting rights. The regulator must not be a censor. Regulators in the UK such as the BBFC, the ASA and OFCOM (and its predecessors) have demonstrated for decades that it is possible to combine quantitative and qualitative analysis of media, neutral of political influence, for regulatory process.
44. Central to the duty of care is the idea of risk. We are not proposing that a uniform set of rules apply across very different services and user bases but that the risks and appropriate responses to those risks are assessed in the light of these differences. Harmful behaviours and risk have to be seen in the context of the platform. In assessing whether a statutory duty of care had been met, the regulator would examine whether a social media service operator has had particular regard to its audience. For example, a mass membership, general purpose service open to children and adults should manage risk by setting a very low tolerance for harmful behaviour, in the same way that some public spaces, such as a family theme park, take into account that they should be a reasonably safe space for all.
45. The risk profile would be different for a specialist site targeted at a more limited audience. Specialist audiences/user-bases of social media services may have online behavioural norms that on a family-friendly service could cause harm but in the community where they originate are not harmful. Examples might include sports-team fan services or sexuality-based communities. This can be seen particularly well with Reddit: its user base with diverse interests self-organises into separate subreddits, each with its own behavioural culture and approach to moderation. Mastodon also has distinct communities each of which sets its own community rules (as opposed to ToS imposed by the provider) within the overarching Mastodon framework. In some sites, robust or even aggressive communications (within the law) could be allowed.
46. One possible benefit of this approach could be that there might be more differentiation between providers and consequently possibly more choice, though we note the strong network effects in this sector. Differentiation between high and low risk services is common in other regulatory regimes, such as for data in the GDPR and is central to health and safety regulation. In those regimes, high risk services would be subject to closer oversight and tighter rules, as we intend here.

Harm reduction cycle

47. We envisage an ongoing evidence-based process of harm reduction where the regulator works with the industry and civil society to create a cycle that is transparent, proportionate, measurable and risk-based. The regulator would prioritise high-risk services, and would only have minimal engagement with low-risk services. We describe a cycle here that relies on consultation and feedback loops with the regulator and civil society.
48. A harm reduction cycle begins with measurement of harms. Here we emphasise that as the companies' performance is to be managed at system level, we do not intend that the effect of social media use on each individual should be measured. Rather what is measured is the incidence of artefacts that – according to the code drawn up by the regulator – are deemed as likely to be harmful (to a particular audience) or if novel could reasonably have been foreseen to cause harm. We use 'artefact' as a catch all term for types of content, aspects of the system (e.g. the way the recommender algorithm works) and any other factors. We discuss foreseeability below.
49. The regulator would draw up a template for measuring harms, covering scope, quantity and impact. The regulator would then consult publicly on this template, specifically including the qualifying social media services. The qualifying social media services would then run a measurement of harm based on that template, making reasonable adjustments to adapt it to the circumstances of each service. The regulator would have powers in law to require the companies providing the qualifying services to comply. The companies would be required to publish the survey results in a timely manner. This would establish a first baseline of harm.
50. The companies would then be required to act to reduce these harms by setting out and implementing a harm reduction action plan. We expect those planned actions to be in two groups – things companies just do or stop doing, immediately; and actions that would take more time (for instance new code or terms and conditions changes). Companies should inform the regulator and publish their actions. Companies should seek views on their action plan from users, the victims of harms, the NGOs that speak for users and victims etc. The companies' responses to public comment (though they need not adopt every such suggestion made) would form part of any assessment by the regulator of whether an operator was taking reasonable steps and satisfying its duty of care. Companies would be required to publish their action plans, in a format set out by the regulator, such as:
 - ☐ what actions they have taken immediately;
 - ☐ actions they plan to take;
 - ☐ an estimated timescale for measurable effect; and
 - ☐ basic forecasts for the impact on the harms revealed in the baseline survey and any others they have identified.
51. The regulator would take views on the plan from the public, industry, consumers/users and civil society and makes comments on the plan to the company, including comments as to whether the plan was sufficient and/or appropriate. The companies would then continue or begin their harm reduction work.

52. Harms would be measured again after a sufficient time has passed for harm reduction measures to have taken effect, repeating the initial process. This establishes the first progress baseline. The baseline will reveal four possible outcomes – that harms:
- have risen;
 - stayed the same;
 - have fallen; or
 - new harms have occurred/been revealed.
53. If harms surveyed in the baseline have risen or stayed the same the companies concerned will be required to act and plan again, taking due account of the views of victims, NGOs and the regulator. In these instances, the regulator may take the view that the duty of care is not being satisfied and, ultimately, may take enforcement action (see below). If incidence of harms has fallen then companies will reinforce this positive downward trajectory in a new plan. Companies would prepare second harm reduction reports/plans as in the previous round but including learning from the first wave of actions, successful and unsuccessful. Companies would then implement the plans. The regulator would set an interval before the next wave of evaluation and reporting.
54. Well-run social media services would quickly settle down to a much lower level of harm and shift to less risky service designs. This cycle of harm measurement and reduction would continue to be repeated, as in any risk management process participants would have to maintain constant vigilance of their systems.
55. We anticipate that well-run services and responsible companies will want to comply with a harm reduction process. Where companies do not comply, or where the regulator has grounds to believe that they have not we propose that the regulator has information gathering powers as is normal in modern regulation (see for example the powers granted to the Information Commissioner in the UK). A net output of the harm reduction cycle would be a transparency report produced by each company to ensure an accurate picture of harm reduction was available to the regulator and civic society organisations.

Measurement

56. While the harm reduction cycle envisages that the use of the platforms by users should be subject to some sort of surveying, we do not envisage that the measurement necessitates constant monitoring of all use and neither statute nor the regulator should require this. At the scale at which many platforms operate, statistical sampling methods should be sufficiently robust combined with other measures. For instance, the platforms' own mailbox/complaints log should provide early warning of systemic problems.

Foreseeability

57. The regulator will need to consider with industry, victims and civil society how foreseeability of material risks applies in the context of social media and messaging. This is at the heart of any risk assessment – there will be risks which will be obvious – for instance material harm is known to have occurred before and those which, while not obvious are foreseeable. If a material risk is foreseeable then a company should take reasonable steps to prevent it. Health and safety law for instance has developed

substantial practice around foreseeability of risk and the regulator in this case will have to take a similar approach.

From Harms to Codes of Practice

58. An output of the harm reduction cycle would be industry generated codes of practice that could be endorsed by the regulator. In our view, the speed with which the industry moves would mitigate against traditional statutory codes of practice which require lengthy consultation cycles. The government, in setting up such a regime, should allow some leeway from standard formalised consultation and response processes. Codes of practice, as well as other forms of guidance (which could also be produced by the regulator) make compliance easier for small companies.

Proportionality

59. Some commentators have suggested that applying a duty of care to all providers might discourage innovation and reinforce the dominance of existing market players. We do not think that the application of the duty of care would give rise to a significant risk in this regard, for the following reasons.

60. Good regulators do take account of company size and regulation is applied proportionate to business size or capability. We would expect this to be a factor in determining what measures a company could reasonably have been expected to have taken in mitigating a harm. Clearly, what is reasonable for a large established company would be different for an SME. The proportionality assessment proposed does not just take into account size, but also the nature and severity of the harm, as well as the likelihood of it arising. For small start-ups, it would be reasonable for them to focus on obvious high risks, whereas more established companies with greater resources might be expected not only to do more in relation to those risks but to tackle a greater range of harms.

61. The regulator should determine, with industry and civil society, what is a reasonable way for an SME service provider to manage risk. Their deliberations might include the balance between managing foreseeable risk and fostering innovation (where we believe the former need not stymie the latter) and ensuring that new trends or emerging harms identified on one platform are taken account of by other companies in a timely fashion. The regulatory emphasis would be on what is a reasonable response to risk, taken at a general level. In this, formal risk assessments constitute part of the harm reduction cycle; the appropriateness of responses should be measured by the regulator against this.

62. We note that, in other sectors (notably HSWA, data protection and guidance on the Content Codes for broadcasting), regulators give guidance on what is required by the regulatory regime and ways to achieve that standard. This saves businesses the cost of working out how to comply. As in other sectors, regulation will create or bolster a market for training and professional development in aspects of compliance. We would expect the regulator to emphasise the need for training for start-ups and SME's on responsibility for a company's actions, respect for others, risk management etc. The work on ethics in technology could usefully influence this type of training.

63. Furthermore, regulators would not be likely to apply severe sanctions in the case of a start-up, at least initially. A small company that refused to engage with the regulatory process or demonstrated cavalier behaviour leading to harms would become subject to more severe sanctions. Sanctions are discussed below.

Techniques for harm reduction

64. We do not envisage that a system that relied purely on user notification of problematic content or behaviour and after the event responses would be taking sufficient steps to reduce harm. In line with the 'by design' approach, consideration for the effects of services and the way they are used should happen from the beginning of the design process and not be mere afterthoughts and consider the way the system as designed affects its users and their behaviour. Nor should the responsibility for safety principally fall to individuals affected (some of whom may not even use the platform) to configure complex tools and to be resilient enough to complain (and persist in that complaint in the face of corporate disinterest), especially where those people are vulnerable. We draw the following from a wide range of regulatory practice, but the list is not intended to be exhaustive. Some of these the regulator would do, others the regulator would require the companies to do if they were not implementing systems to drive down risk of harm.

65. Each qualifying social media service provider could be required to:

- develop a statement of assessed risks of harm, prominently displayed to all users when the regime is introduced and thereafter to new users; and when launching new services or features;
- provide its child protection and parental control approach, including age verification, for the regulator's approval;
- develop easy to use tools for users to control the content they see and to limit their exposure to others;
- display a rating of harm agreed with the regulator on the most prominent screen seen by users;
- an internal review system for risk assessment of new services, new tools or significant revision of services prior to their deployment (so that the risk is addressed prior to launch or very risky services do not get launched);
- develop a triage process for emergent problems (the detail of the problem may be unknown, but it is fairly certain that new problems will be arising);
- work with the regulator and civil society on model standards of care in high risk areas such as suicide, self-harm, anorexia, hate crime etc;
- provide adequate complaints handling systems with independently assessed customer satisfaction targets and also produce a twice yearly report on the breakdown of complaints (subject, satisfaction, numbers, handled by humans, handled in automated method etc.) to a standard set by the regulator; and
- assess how effective the company's enforcement of its own terms of service is and if necessary improve its performance.

66. The regulator would at a minimum use the following tools and techniques:

- publish model policies on user sanctions for harmful behaviour, sharing research from the companies and independent research;

- ☐ detailed guidance as to the meaning of harm;
- ☐ publish transparency report models for companies to follow;
- ☐ set standards for and monitoring response time to queries;
- co-ordinate with the qualifying companies on training and awareness for the companies' staff on harms;
- ☐ approve industry codes of practice, where appropriate; and
- ☐ provide guidance to companies, in particular with SMEs in mind on suggested approaches to dealing with well-known problems and watchlists of issues that might arise when operating particular types of service (or encourage trade bodies to do so);
- ☐ monitor if regulated problems move elsewhere and to spread good practice on harm reduction;
- publish a forward-look at non-qualifying social media services brought to the regulator's attention that might qualify in future;
- support research into online harms – both funding its own research and co-ordinating work of others;
- establish a reference/advisory panel to provide external advice to the regulator – the panel might comprise civil society groups, people who have been victims of harm, free speech groups.

Sanctions

67. Some of the qualifying social media services will be amongst the world's biggest companies. In our view the companies will want to take part in an effective harm reduction regime and comply with the law. The GDPR penalties and sanctions regime (including levelling fines as a proportion of revenue for data breaches, along with the impact of consequent publicity and reputational damage) have yet to be fully exercised by the ICO in the UK and may yet provide an effective preventative model. The impact of the CNIL decision against Google in France will be an early indicator of the effectiveness of the GDPR regime in modifying corporate behaviour.²⁵
68. The companies' duty is to their shareholders. There is an argument that, in order to spend significant shareholder resources on matters for the public good a company management requires regulation. The scale at which these companies operate means that a proportionate sanctions regime is required.
69. The range of mechanisms available within the Health and Safety regime allow the regulator to try improve conditions rather than just punish the operator, so we would propose a similar range of notices (and to some extent the ICO has a similar approach). For those that will not comply, the regulator should be empowered to impose fines (perhaps GDPR magnitude fines if necessary). We have noted in the context of the ICO that a range of investigative powers to support effective enforcement were introduced; we propose that similar powers be given to the regulator here - a comprehensive suite of information gathering powers such as the ICO's ability to make information notices under s. 142 of the Data Protection Act 2018 and information orders under s. 145.

²⁵ CNIL announcement, 21 January 2019: <https://www.cnil.fr/en/cnils-restricted-committeeimposes-financial-penalty-50-million-euros-against-google-llc>

70. All regulatory processes leading to the imposition of sanctions should be transparent and subject to a civil standard of proof. The regulator, like any public body, would be subject to judicial review.

71. Sanctions would include:

- ☒ Administrative fines in line with the parameters established through the Data Protection Act/GDPR regime of up to €20 million, or 4% annual global turnover – whichever is higher. Many types of fines, however, are routinely insured against.
- Enforcement notices – (as used in data protection, health and safety) – in extreme circumstances a notice to a company to stop it doing something. Breach of an enforcement service could lead to substantial fines.
- ☒ Enforceable undertakings where the companies agree to do something to reduce harm.
- Adverse publicity orders – the company is required to display a message on its screen most visible to all users detailing its offence. A study on the impact of reputational damage for financial services companies that commit offences in the UK found it to be nine times the impact of the fine.
- Forms of restorative justice – where victims sit down with company directors and tell their stories face to face.

Who should regulate?

72. When considering this, the first question is whether a regulator is needed at all if a duty of care is to be created. Our view is that a regulator can address asymmetries of power between the victim and the harm causer. It is conceivable for a home owner to sue a builder or a person for harm from a building, or a person to sue a local authority for harm at a playground. However, there is a strong power imbalance between an employee and their boss or even between a trade union and a multinational. A fully functioning regulator compensates for these asymmetries. In our opinion, there are profound asymmetries between a user of a social media service and the company that runs it, even where the user is a business, and so a regulator is required to compensate for the users' relative weakness.

What Sort of Regulator?

73. Assuming a regulator is needed, should it be a new regulator from the ground up or an existing regulator upon which the powers and resources are conferred? Need it be a traditional regulator, or would a self or co-regulator suffice? There are many instances of co-regulation in the communications sector that have run into problems. Self-regulation works best when the public interest to be served and those of the industry coincide. This is not the case here.

74. Our view is that, whichever model is adopted, the important point is that the regulator be independent. The regulator must be independent not only from government but also from industry, so that it can make decisions based on objective evidence (and not under pressure from other interests) and be viewed as a credible regulator by the public. This is particularly important given the fundamental human rights that are in issue in the context of social media. Independence means that the regulator must have sufficient resources, as

well as relevant expertise.

75. A completely new regulator created by statute would take some years before it was operational. In our view harm reduction requires more urgent action and for this reason we reject the idea, seen in some proposals, that a new sector specific regulator is required.
76. Instead, our work proposes extending the competence of an existing regulator: it spreads the regulator's overheads further, draws upon existing expertise within the regulator (both in terms of process and substantive knowledge) and allows a faster start. In a UK context, we recommend that OFCOM takes on the powers to reduce harm in social media services: it has long experience in digital issues, a strong research capability and proven independence as well as resilience in dealing with multinational services.

Page 2

1 -Name

caroline goldsmith

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** FACEBOOK do not deal with DEFAMATION at all My business was ruined by Facebook posts that were defamatory of me. DEFAMATION should be dealt with by a regulator where there will be swift action. All I ever head from complaining about the posts was an answer back from them saying 'This content does not violate our community standards' WE NEED A REGULATOR FOR DEFAMATION

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Defamation complaints should be dealt with FAST due to the potential to spread the defamation far and wide Facebook has no liability as a publisher so they do not care as they wont be penalised like any other PUBLISHER - They have played fast and loose with the idea of the PLATFORM STATUS - No Facebook is a PUBLISHER so is TWITTER and INSTAGRAM AND YOUTUBE YES PUT A TEST IN PLACE - Then the regulator has to move in fast.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

ALL SOCIAL MEDIA and the SOCIAL MEDIA PAGES OF ALL PUBLICATIONS like Newspapers....

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Defamation of any individual or business

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Youtube to be included as a platform for the regulator. However youtube uploads 500 hours of video per minute so the task is massive

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The regulator should be independent and declare all interests they have in any social media companies

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The regulator should put in place measures to stop harmful content getting to young minds

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting

services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

They should all have the same regulation its published content

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Yes regulate and penalise them all the same

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

We can have free expression on all matters that is fine. We can not however defame people or companies or publish material that is harmful to children such as sexual content or things that encourage them to self harm. YOU CANT LUMP IN THE ANTI VAXXERS HERE THOUGH They have a CONSTITUTIONAL RIGHT TO REFUSE ANY MEDICAL PROCEDURE and not be forced to give any medication to another person or their child,

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

IT is all going to come down to how you define HARMFUL ONLINE CONTENT - YOU CANT INCLUDE VACCINATION ISSUES FOR AN AGAINST as that is a healthy debate HERE - that is constitutionally protected right

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-

demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

A new option will have to be considered for ONLINE PLATFORMS those old bodies are ARCHAIC

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

They should be funded by Government from cutting TD Salaries and giving it to regulation

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The powers should be to enforce the law like any other PUBLISHING PLATFORM. If it is found that the Social media platforms published defamation and did not remove it then they should be allowed to be sued like any other publisher Then see how fast they will get themselves inline . If they publish harmful content they should be fined

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

I have written extensively on a problem in social Media with some people acting as Social Media Psychopaths... See my paper here that has remedies also of how to counteract the problem..... Some people actually get a kick out of destroying other peoples lives..... .Serial Social Media Psychopathy-Identifying a Novel Social Media Phenomena by Caroline Goldsmith This paper illustrates the authors bold yet humble informal account of a three year observation of several individuals all of whom had a visible presence on social media platforms and exhibited profound observable traits of psychopathy expressed in a distinct systematic pattern as yet undescribed in the literature.

<https://crimsonpublishers.com/tnn/fulltext/TNN.000528.php>

19Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Age appropriate and content appropriate standards must be met and the videos come with warnings like the Irish Film Censor Board

Page 2

1 -Name

Chris Prendergast

2 -Organisation if applicable

myself

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
I would imagine that a notice and take down system would be inundated with requests and so would require extensive resources. However, it would seem to be the best system. If a service provider fails to comply with a take down notice then the regulator should have the power to issue fines.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

The following would seem to form part of any statutory test for what content should be removed - Is the material personal? - Is the material directed at a particular person? - Is the material explicit? Is the material intended to cause embarrassment, distress, or harm?

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

Social Media Websites, Media Sharing Platforms, Messaging services such as snapchat, whatsapp, signal, facebook messenger, etc. Individuals should also be included within the scope of the legislative scheme and be made subject to prosecution for certain offences under the Act.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Yes all of the above should be included but the definition should also refer to the nature of the harmful material being "personal" to the individual affected. I would think this necessary in order to properly protect freedom of expression / speech / creativity. For example: a fictional television series, Youtube video, etc., in which a character is an excessive drug user, or self-harms, commits suicide etc., while this is sensitive material it should not be deemed harmful for the purposes of online safety legislation. However, material that is maliciously "aimed (or targeted) at a person in an attempt to cause them embarrassment, upset, distress, or harm" should be included in the definition. This would have the ability to make a criminal offence under the act for revenge porn where sexually explicit material which is of an adult and so does not fall under the remit of child sexual abuse offences, is uploaded and shared via social media.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Two regulatory bodies as described above would seem most appropriate

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Fines and criminal sanctions

From: [Ciarán Mc Mahon](#)
To: [Online Safety Consultation](#)
Subject: Submission - Dr Ciarán Mc Mahon
Date: 15 April 2019 11:31:58

CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear DCCAIE,

Please consider the below as a submission to the consultation on Online Safety.

Fundamentally, this process is based on a flimsy assumption. In liberal democracies we do not legislate around harmful content. We legislate around harmful individuals and proceed accordingly. Regulating content, while well-intentioned, is, in my view a mistake. It is also one which would suit the operators of the online platform much better than it would their users, ie. our citizens.

Instead, I suggest that Government's focus should not be on harmful content, but on harmful individuals or organisations and how they can be sanctioned and removed from online platforms. (e.g. recent statement by An Taoiseach regarding use of Tinder by convicted sex offenders. This would not be easy, but it could be more fruitful in the long run (<https://www.thetimes.co.uk/article/varadkar-ban-abusers-from-apps-d88q5s85b>). We should be thinking more about citizens' rights than content removal.

Of course, the State has in place laws which could be seen as already regulating 'harmful content' – e.g. child sex abuse material. Hence, Government should only talk about harmful content that it is also legislating around elsewhere. The distinction between harmful content and illegal content is not a useful one. Alternatively, the Government could consider bringing test legislation around specific areas e.g. Material designed to encourage prolonged nutritional deprivation. Can the Government legislate to force removal or censorship of such material from newspapers? Or flyers? If such material can be banned in print – without being sent to the Supreme Court – then it can be transposed to online platforms. Otherwise, that's where this Online Safety Act legislation will end up, the whole lot of it – which will be yet another extraordinary waste of time.

Futhermore, I would suggest that the Government review the research around cyberbullying. Is it actually as widespread a problem as needs to be legislated around? Would it not make more sense to simply streamline and simplify existing harrasment legislation and reporting mechanisms? What exactly happened to the Internet Content Advisory Group's recommendations here? (chiefly recommendation 16, p.9).

In terms of the basic problems here, the practical solutions I would propose are as follows. Ultimately a Digital/Online Safety Commissioner Office would be welcome, even were it to simply be a one-stop reporting shop, with wide education/awareness remit (parents in particular). I suggest that take-down mechanisms can wait til a later stage – let's see how much of this problem can be dealt with by increasing digital literacy of the population as a whole. Secondly, Government needs to commit to funding basic social science research in this area. The expertise gap has been painfully obvious in these debates.

Finally, a six week consultation period on online harms is not long enough. I can appreciate both the urgency and the complexity of this area, hence I suggest the Government do what it has previously done with such tricky subjects and put it before a Citizens' Assembly. Bring European and global experts to Dublin to discuss with citizens the relative advantages and disadvantages of various methods of 'regulating harmful content' and maintaining citizens' rights online. Such a format would also be able to be adapted to bring children's voices into this

discussion, who have been strikingly absent from much of this debate, including the Digital Age of Consent.

Apologies for brevity,

Ciarán Mc Mahon

Buy the book: bit.ly/psychologyofsocialmedia

twitter.com/cjamcmahon

linkedin.com/cjamcmahon

tinyletter.com/cjamcmahon

www.ciaranmcmahon.com

Page 2

1 -Name

Colin Gregory [REDACTED]

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
A complaint to the Gardai should suffice, and it is they who should have the power to instantly deal with the situation.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

No. A complaint to the Gardai should enable them to order the immediate removal of any such material together with the power to arrest and to confiscate any electronic devices used to publish such material.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

All available platforms.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Material which is likely to cause serious harm to any registered sex offender or other convicted criminal in the form of messages threatening harm, revealing an address of an offender, calling on people other than Gardai to take action against such an offender, taking of or publishing pictures of any such offender, reporting of any details of such an offender outside of the final outcome of a court case, publishing or sharing of any existing archive material about any such offender, and the hosting of any of the above on any server, whether by registered newspapers, media organisations or members of the general public at large.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Serious breaches of the regulations must be met with appropriate punishments.

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

The power to issue a mandatory court order preventing a person or organisation who has breached the Act from being able to use social media or any other online publishing platform for a period of five years.

Page 2

1 -Name

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2 -Organisation if applicable

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Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
The Online Safety Commissioner should have the power to investigate complaints of serious harmful communications targeting an individual, and issue takedown notices to platforms, where complaints have not been actioned in a specific time frame or to an acceptable standard. This would be greatly facilitated by the use of a Single Point of Contact process, as used in law enforcement for data retention purposes. The Online Safety Commissioner should seek to establish a SPOC relationship with all major providers (including those that do not have a presence in Ireland) so that the office can intervene as required, where such action is proportionate and justified. In terms of issuing notice to INDIVIDUALS for workload purposes, this would be best left to the Gardai, though the process should be outlined in the legislation for how this could happen and at what point the Digital Safety Commissioner would get involved as appropriate. The Digital Safety Commissioner on the other hand should be acting issuing takedown notices to platforms through a Single Point of Contact (SPOC) process.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

There should be a time limit – i.e. if the case is not resolved within 48 hours (for eg) then it can be escalated up. This gives the OSPs a clear target in terms of timings and removal. It could get more complex if content crosses platforms (i.e. if offending photo or video is shared across more than one platform). Platforms should be required (through regulation or voluntary code as appropriate) to be publish timelines and criteria for intervention, and these should be available through the website of the Office of the Digital Safety Commissioners. Adults or children who are dealing with online issues need a clear roadmap to resolve them, including clear indication of what they need to do before action will be taken by the Digital Safety Commissioner.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

In terms of the regulation, it can probably only refer to the ones with a presence in Ireland (Facebook/Google, etc) but it's really important the law does not limit the mandate to only dealing with those entities based here. The Australian E-Safety office has a relationship with non-Australian based entities like Snapchat and TikTok through their Tier 1 scheme. It may not be able to bring them to court to resolve cases but there should be the facility to build incentives in other ways (i.e. name and shame, financial penalties when they fail to adhere). Snapchat and TikTok are among the most popular platforms with the children we talk to (aged 8 – 13) and they do not have headquarters in Ireland. All platforms (including online gaming services) should come under the remit of the office, either through regulation for those with a presence in Ireland, or through a voluntary code. Regular reports on levels of compliance with the regulation and/or voluntary code should be published by the office of the Digital Safety Commissioner, so that users (including parents and children) can make more informed choices on which platforms are safer/better to use.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

The definition should also include reference to the gross breaches of privacy, setting up fake or offensive websites as well as harassment and stalking. Also takeover of accounts for the purpose of harassing someone (as opposed to fraud). For clarity it should reference that the material could be on social media or another relevant electronic service (like Sarahah or Twitter– so not covered by direct messaging) In terms of how this is assessed, you could include the wording 'a reasonable person would conclude that it was X, Y, Z' It is important that awareness of this is brought to the general public including children to ensure there is a nationwide clear understanding of what is considered as harmful (it is not just a term used within the courtroom etc). Additionally, it is important that citizens understand that producing this type of content is covered under law and can be prosecuted if involved in same. Education and awareness campaigns are key for this. - No point bringing out a new law that the 'digital citizens' of these platforms

are not aware off.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

The definition should not include TV or video on demand services where these are covered by existing regulation. It should however include content on platforms that are dedicated to video sharing (e.g. YouTube) but also video content shared on social media or gaming platforms (E.g. Facebook, Instagram, Xbox live). This is important to ensure that the legislation keeps up with the changing environment, where lines are becoming increasingly blurred between services provided by traditionally separate platforms. The need for greater transparency on the complaints process for instance that will come with this legislation applies across the board for all videos shared online, whether it is a YouTube video or a game clip shared on Xbox Live. Consideration should also be given to Live streaming services which are already very popular with young children, and what part of the legislation these can fall under.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

On the same principles as for regulation of all online content providers (non-Video based) – i.e. notice for takedown and removal of content within a certain timeframe (48 hours) once a legitimate complaint has been assessed.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

On the same principles as for regulation of all online content providers (non-Video based) – i.e. notice for takedown and removal of content within a certain timeframe (48 hours) once a legitimate complaint has been assessed.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the

right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

By having a very clear definition around what is harmful content. Freedom of expression should not include content that will cause considerable harm to another person and again, this is why it would be useful to include the proviso that 'a reasonable person' would conclude that it was sufficiently harmful to warrant removal. We believe that this new legislation also offers the opportunity to ensure that the office of the digital safety commissioner has a strong educational mandate because ultimately we need to educate the general public and children in particular around how to communicate in a reasonable and respectful manner online. The Australian office has a very clear and strong education mandate and this has a basis in the legislation itself.

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16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

The office should receive core funding from government but this should be subsidised heavily through a levy on social media and messaging platforms with a legal presence in Ireland and a specified contribution from other platforms who sign up to a code of conduct. The office could be further resourced through a penalty system for non-compliance.

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18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

We would agree with all of the following sanctions: - The power to publish the fact

that a service is not in compliance, - The power to issue administrative fines, - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and, - The power to apply criminal sanctions in the most serious cases.

Page 2

1 -Name

Diarmuid Hudner

2 -Organisation if applicable

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3 -Email

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Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
In our opinion and experience from operating a safe social network with over 80,000 users, speed is the key issue in relation to harmful content. The monitoring teams of the service provider need to be efficiently resourced and adequately trained to respond quickly to a reporting issue. At Cybersmarties.com if a user reports a message then the content is sent (in our case) to the school where a teacher will make a judgement on its validity. However the "offender" will also immediately be prevented from either directly contacting that user or posting anything at all. The purpose of this is to do 2 things (1) Remove the oxygen from the fire in preventing escalation of cyberbullying and other negative behaviour (2) bring positive behavioural practice to social media. The turnaround times of the monitoring team of the service provider and the regulator from reporting a message/post through to resolution is essential. We operate a 15 minute turnaround system). this is important from the position of a user wrongfully being reported.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

We believe there should not be a statutory test in place but rather an efficient operating system between the monitoring teams of the service provider and the regulator. If there is a statutory test, it will further delay the process not speed it up. The service providers should have a large enough monitoring teams in place. Ultimately service providers of social media make their revenue from advertising and negative posts, harmful content and cyberbullying all damage their reputation and therefore advertising revenue (You are aware of key advertisers who have pulled out of advertising on certain social media platforms recently) so it is in their interest that users use social media in an appropriate manner.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Facebook, Twitter, Snapchat, Whatsapp, Instagram, Tik Tok. It is important that the regulator keeps abreast of all upcoming social networks which people use

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Sexist material, Sexual orientation discrimination.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

On demand Services such as RTE player, Netflix etc and standard VSP's such as youtube. All advertisements should be compliant if video sharing is used

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

We believe that it should form the same basis as we recommend for standard online service providers with a monitoring team and reporting system which operates quickly. Please see answer to Question 7

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

All content on social media is traceable by location through a device's IP address so for example if a video is uploaded in Ireland then a video sharing platform will be able to identify that it originated in Ireland immediately. We believe that it should then fall into the jurisdiction of the Irish regulator to identify when a video is flagged/reported and provided with the content. Depending on the volume of incidents, a protocol could be put in place to filter this for example if a video is uploaded in Cork on a video sharing platform which contains extreme violence then this may be a Category red incident and will be reported directly to the regulator by the VSP. Lesser harmful content may be dealt with by the VSP themselves and randomly audited by the regulator to ensure that the VSP is compliant with the regulations in place. Cybersmarties.com operate this service with An Garda Síochána. It is important to note here that nearly all online service providers now possess a video sharing facility

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

We would not be knowledgeable enough in this sector to adequately answer this question

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

We would not be knowledgeable enough in this sector to adequately answer this question

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and

those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

It can be understood from any content, however positive in nature, may be found to be offensive to an individual(s). Therefore the strict adherence to the categories of harmful content is fundamental. The Irish regulatory body must be objective, unbiased and uninfluenced by any individual government or body in order not to be viewed by the general public as censoring information or to be in breach of their rights to freedom of expression. However if the regulatory body dilute or make the boundaries of categories of harmful content too narrow then their effectiveness in regulating harmful content will become quickly diminished. A broader understanding or big picture view of what the essence of social networks (including VSP's) were intended to do when developed originally i.e to promote friendships globally, exchange information, ideas and services freely and positively. If our rights to freedom of expression endanger this big picture view then we must put parameters around them

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

By following the answer recommendations outlined in Questions 1,2 and 7

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

We would not be knowledge enough in this sector to adequately answer this question

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

A license fee to be paid by the on-demand audiovisual media services and non-editorial online services

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

I agree with the enforcement examples given in Section 8 of the explanatory note. I do not believe that they should differ between regulation for VSP's under Strand 2 and Strand 1 as harmful content is harmful content irrespective of the mechanism of how it is delivered. If one differentiates between the EU and National powers of enforcement, one is permitting a loophole to appear as to the location of where the content was destined for use

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

All of the above. Also the regulator should have the power to limit the use of advertising in Ireland where the service provider is continually disregarding its obligations. All service providers generate their revenue from advertising. Service providers will comply much faster with their regulatory obligations if their revenue model is interrupted. A limited fine to a service provider which makes billions of revenue each year will be limited in its effect on that service providers compliance. However a restriction of use to a service providers revenue model through advertising will have a much more responsive result. Every other industry is regulated properly except for social media service providers. It is important for humanity as a whole (seeing the rise of extremism generated through social media, political voting meddling and a continual rise in suicide rates through social media) that strict guidelines are enforced in a manner which will get a positive result.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

We do not believe that a process of mediation without enforceable sanctions will have any effect whatsoever other than further exacerbate the complaint. The mediation system without powers has no legal effect and so does not have any purpose other than to be seen to playing a part in the process. What recourse will an individual user have in reality if not protected by their national regulator. I fear by some of these questions, especially in relation to the EU-wide directives that lukewarm regulation will be put in place with very limited powers to enforce anything which will reduce the negative behaviour on social networks and on-line VSP's.

Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive

Submission of the Data Protection Commission

Introduction

The Data Protection Commission (DPC) is the national independent authority in Ireland with responsibility for upholding the fundamental right of individuals to have their personal data protected, and enforcing the obligations of data controllers and processors in this context. The statutory powers, duties and functions of the DPC are detailed in the Data Protection Act 2018 (the 2018 Act) which gives further effect to the General Data Protection Regulation (EU) No. 2016/679 (the GDPR).

The DPC notes that the aim of this consultation is to *“seek the views of citizens and stakeholders as to an achievable, proportionate and effective approach to regulating harmful content, particularly online”* following Minister Bruton’s intention to introduce new regulation in this area, namely an Online Safety Act overseen by a new Online Safety Commissioner, which will protect Irish residents using online platforms with appropriate provisions. The DPC notes that this new act will also transpose the Revised EU Audiovisual Media Services Directive (AVMSD), which requires Ireland to implement (1) a new system of regulation for user-generated audiovisual content on video-sharing platform services, (2) a revised system of regulation for on-demand audiovisual media services, and (3) updates to the regulation of traditional television.

The DPC welcomes the opportunity to provide a submission in respect of what is a very important and timely subject matter. There is often a tendency to view any and all issues relating to online content through a data protection lens, but this is not necessarily the appropriate starting point for these issues. In fact, in their 2016 Report on Harmful Communications and Digital Safety, the Law Reform Commission acknowledged this gap in legislation, calling out the need for new criminal justice offences in areas such as “revenge porn” and “upskirting”, but also recommending the establishment of an Office of a Digital Safety Commissioner of Ireland on a statutory basis to promote digital and online safety and to oversee and regulate a system of “take down” orders for harmful digital communications. As a regulator in the digital space, the DPC fully supports the Law Reform Commission’s suggestion that a separate and distinct role is required here, which accords with the Minister’s proposal to introduce a new separate area of regulation which will be monitored and

enforced by an independent Online Safety Commissioner. The establishment of this separate role and function will necessitate closer contact between all regulators in the digital space, and the DPC wishes to highlight that collaboration and dialogue between several supervisory authorities within the State will be required.

It can be difficult to separate data protection and privacy issues from other issues and challenges that present for individuals when they are active online, such as harmful content. However, the regulation of harmful content does not form part of the DPC's statutory remit, and in order for individuals to avail of the remedies under the GDPR and the 2018 Act, the content in question must contain personal data. Individuals can only exercise their data protection rights in respect of their own personal data, and so if, for example, a video containing footage of an individual inflicting severe harm upon an animal is posted online by that individual, data protection law cannot provide any solution to objections from other individuals to the posting of such material. For these reasons, the DPC welcomes the Minister's acknowledgement that new regulation is required to ensure that harmful content can be removed from the internet, which requires a separate and distinct role for an Online Safety Commissioner.

In this context, this submission seeks to provide a brief overview of the scope of the data protection law regime in Ireland and highlight the areas where data protection law does not come into play, but where the proposed Online Safety legislation may offer a remedy. While the DPC considers that the regulation of harmful content is focused on specific goals (such as ensuring individuals are safe online by monitoring and removing harmful content) which differentiate it from the DPC's task to regulate the processing of personal data in broader terms, the DPC considers that its perspective on the regulation of the processing of personal data online may help inform the wider discussion on the prominent issues and challenges in relation to the regulation of harmful content.

Principles of Data Protection

The DPC regulates the processing¹ of personal data by organisations ("data controllers") who decide how and why personal data is processed by them and "data processors" (i.e. those who process

¹ Processing is very broadly defined by the GDPR under Article 4(2) as "...any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction"

personal data on behalf of a data controller) in both an online and offline context. The term “personal data” is broadly defined and includes any information relating to an identified or identifiable living individual, which may be anything from a name, a photo, a video, bank details, an email address, and medical information to a computer IP address. The GDPR and the 2018 Act (which gives further effect to the GDPR at a national level) are some of the legislation which constitutes the DPC’s legal framework for the regulation of data processing.

At a minimum, the GDPR provides for certain overarching regulatory obligations which must be adhered to by relevant actors, i.e. “controllers” and “processors”, which process or, in other words, use or handle, personal data in all its forms. The fundamental principles which must be adhered to when processing personal data are set out in the GDPR² as follows:

- Personal data must be processed **lawfully, fairly** and in a **transparent** manner in relation to the data subject;
- Personal data must be collected for **specified, explicit** and **legitimate** purposes and not further processed in a manner that is incompatible with those purposes;
- Personal data must be **adequate, relevant** and **limited to what is necessary** in relation to the purposes for which they are processed;
- Personal data must be **accurate** and, where necessary, **kept up to date**; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;
- Personal data must be **kept** in a form which permits identification of data subjects for **no longer than is necessary** for the purposes for which the personal data are processed; and
- Personal data must be processed in a manner that ensures **appropriate security** of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

²See Article 5(1) of the GDPR.

Data Subject Rights

Data subjects have a number of rights under the GDPR, ranging from the right to access their personal data to the right to request the erasure of their personal data, subject to certain exceptions³, and these rights apply in both an online and offline context. However, in order for these rights to apply, personal data must be at issue. Take, for example, the right to request erasure of personal data, also known as the right to be forgotten, which applies in six very specific circumstances under Article 17 of the GDPR. In a scenario where a video depicting an individual has been uploaded to an online platform and the individual is clearly identifiable from the video – subject to the meeting the criteria set out in Article 17 of the GDPR and assuming no exceptions to the right apply, that individual has a right under data protection law to obtain erasure of this video of them from the platform. However, this right would not apply where video footage of an individual has been uploaded but it is not possible to identify who the individual is because it does not show their face and there is no other identifying information (e.g. such as audible or visual characteristics). In other words, the right to erasure does not apply if the content does not contain any personal data. Likewise, the right to erasure would not apply if an individual made a complaint about a video that was posted online featuring another individual promoting or encouraging other people to engage in certain damaging behaviours. This is because data protection only gives individuals rights to enable them to control and protect the use of their own personal data.

Online Interactions between Individuals

The DPC notes that the purpose of the proposed Online Safety legislation is to ensure that harmful content can be removed quickly from the internet and the Minister proposes to include content relating to cyberbullying in the definition of the term “harmful content”, namely “*content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating*”. The DPC notes the importance of this proposal as data protection law is not intended to regulate online interactions or relationships between people on a personal, one-to-one basis, i.e. where there is no data controller/data subject relationship. Article 2(2) of the GDPR states that the GDPR does not apply

³ Data subject rights are not unlimited as evidenced by Recital 4 GDPR which states that “*the right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality*”. As such, there are a number of carve-outs under the GDPR which restrict a data subject’s data protection rights, including their right to be forgotten and there is also a range of exceptions to the exercise of data subject rights set out in the 2018 Act.

to the processing of data by an individual “*in the course of a purely personal or household activity*”, e.g. with no connection to a professional or commercial activity, and this is commonly referred to as the “household exemption”. Recital 18 further states that personal or household activities *could* include social networking and online activity undertaken within the context of such activities, clarifying however that the GDPR *does* apply to controllers or processors “*which provide the means for processing personal data for such personal or household activities.*” That being said, in recent case law, the Court of Justice of the European Union (CJEU) has made it clear that an individual may still assume the responsibilities of a data controller under the GDPR depending on what they do with the personal data of others that they have collected. For example, in the Bodil Lindqvist⁴ case, the CJEU held that the household exemption did not apply where an individual posted content online which was accessible to an “*indefinite number of people*”. However in general, data protection law does not provide the means to regulate online interactions between individuals on a personal, one-to-one basis. As such, the DPC acknowledges the objective behind the new Online Safety legislation, which aims to regulate this type of interaction where it involves harmful content.

A Data Protection Perspective on Regulating Harmful Content

As discussed above, the DPC handles and examines complaints from individuals in relation to potential infringements of data protection law by data controllers and processors. When it comes to regulating the processing of personal data, the DPC’s regulatory tasks are focused on addressing the *manner* of the processing of personal data (i.e. whether the processing of personal data complies with the rules set out in the GDPR and the 2018 Act, amongst other legislation), rather than the *nature* of the content. This differentiates the remit of the DPC considerably from the regulatory remit of the proposed Online Safety legislation which will focus on the monitoring and removal of content which it deems to be “harmful”. In other words, data protection law cannot be used as the litmus test for assessing whether content can be considered “harmful” or “inappropriate”. As noted above, the only circumstances in which data protection law may apply to content or material which is under consideration is where it contains personal data. “Harmful content” frequently will not involve personal data and therefore often falls outside of the scope of data protection law. An example of this might be a video that has been posted online and shows an unidentifiable individual attacking another

⁴ *Bodil Lindqvist* (Court of Justice of the European Union, Case Ref. C-101/01, 6 November 2003)

unidentifiable individual. While undeniably harmful in nature, the DPC does not have the statutory power to enforce the removal of such material on foot of a complaint, given that the video does not contain any personal data. As such, data protection law cannot provide remedies or redress to respond to this type of behaviour. There are clear limitations to the reach of data protection regulation and consequently it does not provide a comprehensive regime for tackling harmful digital communications. Therefore the DPC acknowledges the rationale behind the Minister's proposal for Online Safety legislation and the statutory establishment of an Online Safety Commissioner who will be able to deal with all types of harmful online content irrespective of whether or not it involves personal data.

The DPC considers it of the utmost importance that the term "harmful content" be clearly and carefully defined in the proposed Online Safety legislation. Clear criteria should define the circumstances under which this new legal framework is triggered so that there can be no confusion that harmful online content falls to be regulated under this framework and not the data protection legal framework. As mentioned above, the DPC notes that one of the criteria the Minister proposes to include under the definition of the term "harmful content" is "*Serious cyberbullying of a **child** – i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating*". Given that the national legislation is intended to apply to all Irish citizens, the DPC suggests that this criterion be extended to include all individuals, not just children, as otherwise the possible exclusion of adults from the definition could lead to a lacuna where adults, in the absence of redress or remedy under the new legislation, seek to have concerns about harmful content addressed under the remit of data protection which as discussed above, does not provide an appropriate framework for dealing with these issues. This would also lead to an inconsistency of approach for addressing issues engaging harmful content dependent on whether the affected individual is an adult or a child.

Age Verification

The DPC notes that the Revised Audiovisual Media Services Directive (AVMSD) requires Video-Sharing Platform Services (VSPS) to take appropriate measures to, inter alia, protect minors from potentially harmful content and that these measures include VSPSs providing age verification and parental control systems to users. The DPC also notes that the Minister proposes that these requirements and

measures will also apply to platforms in respect of other user-generated content which is not audiovisual in nature.

The issue of age-verification mechanisms also comes into play in the data protection sphere. Article 8 of the GDPR (commonly referred to as the “age of digital consent”) sets the limitations as to the minimum age at which online service providers can rely on a child’s own consent to process their personal data. In Ireland, the Data Protection Act 2018 gives further effect to the GDPR and states that children below the age of 16 cannot give consent to online service providers to process their personal data. If consent to process personal data is requested by the online service provider in order for the child to access the service, consent must be given by the person who holds parental responsibility for the child. However, the GDPR requires that the online service provider must make “*reasonable efforts*” to verify that consent is given by the holder of parental responsibility “*taking into consideration available technology*”. As such, there is essentially a two-step challenge at play here: (1) how to verify the age of users of online services, and (2) how to verify whether the person giving consent is actually the holder of parental responsibility for the child.

The European Data Protection Board (EDPB) has touched on this area in one of its guidance papers⁵ and suggests that in some low-risk situations, it suffices for online services to ask the date of birth of the user such that they can identify if the user is over or under the age of digital consent. However, without identity checks, clearly the possibility remains live that children will lie about their age once they discover the restrictions on the platform. Further, without a system of verifying the holder of parental responsibility, the possibility remains that children can get a “friend” to authorise their application to register for a particular app or online service.

In the experience of the DPC, many of the major internet platforms are implementing a variety of solutions mostly based on self-declaration by the user seeking to register with them. Some platforms are placing a particular focus on protecting child users by implementing standards across their services that in many ways mirror the strong privacy legislation in the US, namely COPPA – the Children’s Online Privacy Protection Act. These companies have chosen to use a variety of techniques to ensure that consent is actually being given by the relevant adult, including validation through a micro-payment on a credit card or by means of presenting an ID card or digital signature of the parent.

⁵ European Data Protection Board’s Guidelines on Consent under Regulation 2016/679, available at: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051

However, these techniques are new to the European marketplace, and some users may be concerned about the balance between providing information required to validate the parental consent and the potential privacy implications of that information. As such, solutions are not easily implemented or standard, and many different stakeholders come at the same issue from different perspectives. This challenge is one of the reasons why the DPC launched its own public consultation in December 2018 on the processing of children’s personal data and the rights of children as data subjects under the GDPR, to address issues such as:

- If an online service provider is relying on consent as their legal basis (justification) for processing children’s personal data, what methods could/should be used to verify that a child is 16 or over in order that the child is granted access to the online service without the need for parental consent?
- What methods could/should online service providers use to ensure that the person providing consent in these circumstances is *actually* the holder of parental responsibility over the child?
- What constitutes a “reasonable effort” made by organisations to verify such consent is being given by a person who is actually the holder of parental responsibility over the child? How should “reasonable efforts” be measured in this regard?

Following the consultation, which also included a dedicated stream to collect the views of children and young people in a classroom setting, the DPC intends to address the issue of age-verification mechanisms and the provision of authorisation by a guardian or parent, amongst other issues, in best practice guidance on common online scenarios. That guidance is expected to be published towards the end of the year.

Conclusion

Digital technology is an intrinsic part of everyday life for each and every one of us and provides huge opportunities, but the online world also presents new risk scenarios for children and adults alike, many of which are not subject to oversight or regulation by an appropriate body. The DPC reiterates its agreement with the government’s position that separate legislation is required to specifically regulate the area of harmful content amongst other issues, as well as the establishment of a dedicated, independent Online Safety Commissioner to enforce the law. The DPC thanks the Department of Communications, Climate Action and Environment for inviting input on these important issues and looks forward to further developments in this area.

Page 2

1 -Name

Deborah McMahon

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** should be the social media platform and should have nothing to do with government as government has proved that they are incompetent at legislation

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

There is already legislation to cover violence or sexual content after that the citizens of Ireland are adults and are quite capable of policing themselves from hate speech

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

No online platforms should be stopped as that goes against free speech and brings us closer to a totalitarian state

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

No there is no other content that should be removed that's not already covered under criminal law ... children should not be on social media under the age of consent if they are not capable of dealing with differing fees ...who will decide what is hate speech?

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

any video that depicts violence against minors or adults for self gratification

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

If there is criminal activity then it should fall under the purview of the Garda and a dedicated cypher squad and not a regulator who will be appointed by whatever Government is in power

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

When minors are in danger

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

There should be no requirements other than protecting minors .. as we have seen

during various referendums when government regulates media we only hear one side of the debate on broadcast media

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

We should get rid of the license fee and privatize all media to allow for more independent and more balanced media

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

By not regulating speech and ideas just cause government doesn't agree with it

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

We should respect free speech and the rights of people to hold differing opinions

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

There should be no regulation on free speech as who decides what ideas are good or bad

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

None should be funded by tax payer .. we are paying for a justice department that can barely cope with actual crime without policing thoughts and feelings

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

None there shouldn't be a regulator

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

If they are doing criminal activity arrest them otherwise nothing

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Maybe we should remove ourselves from the EU if they require us to regulate free speech

Page 2

1 -Name

Deepak Saxena

2 -Organisation if applicable

TCD

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
A regulator on the lines of Advertising Standards Authority

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

It should be first reported to the concerned platform where is posted. If it is not resolved as per their policies, it could be reported to the regulator.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

All social media, websites, and streaming services.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Yes. One category should include content that promotes harmful health practices such as opposition to the vaccination.

Page 4

8 Question 5:

- The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

All public platform where users can upload videos. This means streaming services like Netflix is not included.

9 Question 6:

- The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Regulator won't intervene until a complaint is made.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Not, because on demand is self selected.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No

Page 6

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Based on UNCRC Articles 19, 36, and 39

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Single agency

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Based on the TV licence and (potentially) a Digital Tax

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

Power of removal of the content, fines/sanctions in case of repeated offence.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

All the above perhaps with the exception of Criminal charges.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Yes, not sure about the number

INPUT TO DEPARTMENT OF COMMUNICATIONS CLIMATE ACTION AND ENVIRONMENT ON THE PROPOSED DIGITAL SAFETY COMMISSIONER

The Department of Justice and Equality (DJE) welcomes the public consultation by the Department of Communications, Climate Action and Environment (DCCA) on the regulation of harmful content online. This is an area of increasing concern which cannot be tackled by one Government Department alone and requires a co-ordinated approach.

DJE is responsible for tackling illegal online content. At present, Hotline.ie takes reports from the public about illegal content online. The reports that it receives are mainly about child sexual abuse content. Hotline.ie is run by the Internet Service Providers Association of Ireland (ISPAI) and its operations and procedures are agreed and approved by DJE. Hotline will take action only when the reported content is assessed by their expert Content Analysts as probably illegal under Irish law – Child Trafficking and Pornography Act 1998 [as amended by the Criminal Law (Sexual Offences) Act 2017] or Prohibition of Incitement to Hatred Act 1989.

The EU has proposed a new Regulation on Preventing the Dissemination of Terrorist Content Online. This Regulation, once it comes into force, will mean that Ireland will be required to establish a Competent Authority for the purposes of implementing the provisions of the Regulation – namely the issuing of removal/referral orders, ensuring compliance with said orders, overseeing implementation of proactive measures by industry and proactively searching for terrorist content online.

DJE is currently preparing for the implementation of this Regulation and is examining and evaluating existing notice and take down procedures and mechanisms as well potential future options. In doing so, we are conscious of the need to develop and future proof Ireland's policy on all forms of illegal content. The fight against illegal content has to date focused on Child Sexual Abuse Material (CSAM) and terrorist content. However, other forms of illegal content such as hate speech, and incitement to violence will also need to be considered.

In addition to considering the various forms of illegal content online, the Department is also reviewing the existing model and structures used to tackle such content and how these could be developed and improved. We are also assessing the steps we need to take to implement the proposed Regulation on terrorism content as well as how the eventual model to be put in place could also apply to other forms of illegal content.

While this Department's focus therefore is on effectively tackling illegal content online we are very much conscious of the fact that there is what could be described as a spectrum of harmful content – beginning perhaps with mildly offensive material at the lower end and ending with illegal content such as CSAM at the top. It is essential that the right tools are in place to allow us tackle the entirety of the spectrum where appropriate.

However, it should be noted that the proposed Digital Safety Commissioner/Regulator may well have powers in relation to sanctioning internet related companies, including social media companies, for harmful content published on their platforms. It is important therefore to ensure that the tools put in place and potential sanctions for tackling harmful content are not in excess of those that exist for tackling illegal content.

While it is extremely important to effectively tackle harmful content as well as illegal material online It may not be desirable or sustainable in a country the size and scale of Ireland to have two parallel processes in place for interfacing with industry in relation to online content or for receiving reports in relation to harmful/illegal material. Any future architecture for interface with the relevant industry representatives or with the public would need a clearly defined role that would avoid duplication of effort and different government departments engaging in parallel exercises.

DJE looks forward to working closely with DCCAE to jointly tackle harmful and illegal content online and make the internet safer for Irish citizens.

Cybercrime Unit
Crime and Security Directorate
Department of Justice and Equality



Page 2

1 -Name

Shirley Scott

2 -Organisation if applicable

Dublin Rape Crisis Centre

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** We would recommend that the regulator administer a notice and take down system. Under this system, we would suggest that the user first be required to make their complaint directly to the relevant digital service undertaking. If the content was not taken down or did not comply with a take-down timeline specified in a code of practice, then the user could make a complaint to a regulator or eSafety Commissioner. The digital service undertaking would thus be the first port of call and the eSafety Commissioner would be an appeal body only. In addition, we would advise that a system of mediation be put in place, whereby there is an option, if both parties consent, for parties to go to mediation about whether or not the content should be removed. The regulator's take-down procedure could follow a two tiered system, similar to the model in Australia. Using this approach, digital service platforms would be divided into two categories. The first category could be intended for smaller digital service platforms, that have implemented certain basic online safety requirements, which could be set out in legislation, as has been done in Australia. With the second category applying to larger digital service platforms. A tier 1 social media service may be requested by the regulator / eSafety commissioner to remove harmful content from their website, while a tier 2 social media service may be given a notice (a social media service notice) requiring the removal from the service of harmful content. In addition, it could be advisable that a regulator / eSafety Commissioner also has the power to require a person who posts harmful content to remove such content. These notices requiring the removal of content should also be enforceable by the courts. For this procedure, it would be advisable that the regulator / eSafety Commissioner develop a code of practice, similar to the one outlined by the Irish Law Reform Commission in their Report on Harmful Communications and Digital Safety, 2016.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

No, we do not believe a statutory test should be put in place. In requiring that the complainant first go to the digital online undertaking, we think that the number of

complaints will be small enough that such a test is unnecessary.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

We would advocate adopting the definition recommended by the Irish Law Reform Commission (LRC) in their Report on Harmful Communications and Digital Safety, 2016. In this report, the Commission recommended that a regulator would monitor and regulate all 'digital service undertakings'. This term is defined by the LRC as including a non-exhaustive list extending to any undertaking that is described, which in an enactment or otherwise, as an intermediary service provider, an internet service provider, an internet intermediary, an online intermediary, an online service provider, a search engine, a social media platform, a social media site, or a telecommunications undertaking.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

We would recommend an approach that focuses both on the behaviour itself and on the impact of such behaviour. Therefore, we would recommend that harmful content be defined as any content that seriously interferes with the peace and privacy of the other person or causes alarm, distress or harm to the other person. This is based on the definition of harassment contained in the Harassment, Harmful Communications and Related Offences Bill, 2017. It is also similar to the definition in the Australian Enhancing Online Safety Act, 2015, where the Office for the eSafety Commissioner defined it as 'content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating'. In the New Zealand Harmful Digital Communications Act, 2015, 'harm' is defined as 'serious emotional distress'. An important point to note is that our existing criminal legislation on this issue is entirely inadequate to address issues of harassment, stalking, voyeurism or other harmful online behaviour.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

The European Commission has explained that the definition of video sharing platforms in the Directive include services such as YouTube, as well as audio-visual content shared on social media services, such as Facebook. Therefore, we would advocate that the definition of video-sharing platforms be interpreted as broadly as possible, to encompass all large digital service undertakings which share audio-visual content on their platforms. It may lead to arbitrary distinctions, if we only regulate certain intermediaries and do not regulate others. In addition, regulating all platforms, which enable a large number of users to view audio-visual content would be consistent with the purpose of the Directive. Therein creating a level playing field for emerging audio-visual media, preserving cultural diversity, safeguarding media pluralism and protecting children and consumers.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

We would recommend that the regulator would have the same relationship with video sharing platforms as other digital service undertakings. We would also refer you to the approach outlined in questions 1, 14 and 15.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

We would also refer you to the approach outlined in questions 1, 14 and 15.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

There are two issues to address here: the first is ensuring that the definition of harmful content does not stretch too far and infringe on people's freedom of expression. We believe that the definition of harmful content, as outlined in question 4, is balanced and would not result in a restriction of freedom of expression. It only requires the removal of content when the content is having a serious impact on the victim. The second concern is that if digital service undertakings are held liable for the content on their platform, then they will become overly restrictive in what they allow to be posted on their sites and thus result in users' freedom of expression becoming unduly restricted. A current way this balance is being struck in many jurisdictions is through imposing a duty of care upon digital service undertakings, in conjunction with a regulatory notice and take-down scheme. Under a duty of care approach the procedures of intermediaries for dealing with harmful content on their platforms would be under scrutiny rather than the specific content. In the UK, Ofcom published a discussion paper in 2018 where it outlined an approach to regulation related to content, and of companies that provide access to content. But it is not regulation of content. Ofcom was advocating that protecting people from online harms requires Parliament to set clear statutory objectives regarding content, reflecting societal norms; and regulation of platforms to ensure they adopt practices or procedures designed to secure these objectives. In particular, Ofcom identifies a need to focus on the processes that platforms employ to identify, assess and address harmful content, and their handling of subsequent complaints and appeals. That such an approach of regulation would not infringe upon freedom of expression is supported by recent case law by the European Court of Human Rights (ECHR). The Court in *MTE and Index v Hungary* 2016, found that a notice and take-down procedure was a good method of balancing the rights and interests involved. The obligation that can be placed on a digital service undertaking may be even greater when the digital service undertaking has considerable control over the platform (like an online newspaper) and there is hate speech involved, as is demonstrated in the ECHR case of *Delfi v Estonia* 2015. The Court held that requiring an online newspaper to remove hate speech in their comments section, regardless of whether they were aware of its presence on their platform did not breach Article 10's protection of freedom of expression under the ECHR. These judgments appear to be slightly in conflict with the immunity provisions in the eCommerce Directive, which the Commission has previously announced it would consider revising.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

The proposals in this submission are unlikely to come into conflict with the immunity provisions in the eCommerce Directive, as they focus mainly on procedural accountability of online platforms, rather than accountability for the content on their sites. The imposition of a duty of care is specifically permitted under Article 15 of the eCommerce Directive. Furthermore, the immunity

provisions in the eCommerce Directive is actually quite narrow in scope, only applying to 'neutral' platforms, when they are not yet 'aware' of the illegal content on their site. Recital 42 gives insight into the sorts of activities protected by the immunity, describing the services as of a 'mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of, nor control over, the information which is transmitted or stored'. There is a strong argument to make that many of these digital service undertakings who 'host' content is not neutral, given that they use algorithms to keep people watching and making huge profits from selling user's data to online advertisers. A further restriction upon the scope of the immunity in Article 14 of the eCommerce Directive is that it does not apply once a site gains actual knowledge or 'awareness' of illegal activity on its website. In *L'Oreal v eBay* the Court of Justice provided a standard or test by which one can measure whether or not a website operator could be said to have acquired an 'awareness' of illegal activity in connection with its services. This test was whether 'a diligent economic operator would have identified the illegality and acted expeditiously'. This means that digital service undertakings cannot just take a hands-off approach and claim that they did not have actual knowledge of the illegal content on their platform. This is important as, if 'awareness' was interpreted in too narrow a manner, it could encourage platforms to take a less proactive role in monitoring the content on their websites, so that they could claim ignorance. Furthermore, the Article 15 restriction that Member States cannot impose a 'general obligation' to monitor content upon those service providers that fall within Articles 12-14, does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation. Furthermore, recital 48 provides that this directive does not affect the possibility for Member States of requiring services providers, who host information provided by recipients of their service, to apply duties of care which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities. Recital 40 notes that 'service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities' and that the immunity provisions 'should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology'. This duty to act is demonstrated in the case law outlined in question 10.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

We would advocate for two regulatory bodies, where the regulatory body with responsibility for non-editorial online services would be similar to that recommended by the LRC in their Report on Harmful Communications and Digital Safety, 2016. The LRC were proposing a similar approach to that set out in Australia's Enhancing Online Safety Act, 2015, whereby a digital safety commissioner would be established to monitor and regulate 'digital service undertaking.'

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

The large digital service undertakings profit hugely from the large usage of their platforms. Therefore, they should be required to contribute to the funding of the regulator. Regulation of these platforms will also be of great benefit to the general public, so the regulator's funding should also be a matter of general taxation. We would be wary of a system whereby the person making the complaint has to contribute to the cost of the complaint, as this could potentially discourage the more vulnerable in pursuing their complaint.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

We would recommend a three tiered system for defining the powers of the regulator, as was outlined in the New Zealand Law Commission's briefing paper on Harmful Digital Communications, 2013. Tier 1 would focus on education and user empowerment. For this, the eSafety Commissioner could play a lead role in promoting education and digital literacy and creating materials to facilitate this. The regulator could work closely with the Ombudsman for Children for materials relating to children. Tier 2 would involve a focus on self-regulation, so as to ensure speed and efficiency in responding to harmful content online. This could involve the eSafety commissioner working with digital service undertakings to create effective codes of conduct. An aspect that is missing in the regulation of most social media platforms is verification procedures to ensure that those who are setting up accounts are in fact 'real' people. The ability of individuals to set up fake accounts enables much more abusive behaviour to be carried out online. Therefore, it is a notable absence, that there are not greater requirements to ensure that people are in fact who they say they are. This is also an important point in trying to stop the spread of fake news etc. Tier 3 would then be legal recourse and sanction powers. Under this the regulator, could have the take-down

powers outlined above and the sanction powers stated in question 15. We do not see a reason for the powers to differ between regulation of Video Sharing Platform Services and other digital service undertakings.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

We agree with most of the powers outlined above, however, we question whether a regulator can have the power to apply criminal sanctions. Rather, we believe that the regulator should have the power to prosecute in the most serious cases.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

We believe that this should be explored further with the European Commission. However, they must ensure that any system that is developed be appropriate for both common law and civil law countries, particularly as Ireland is soon to become the only common law country in Europe.

Page 2

1 -Name

Eamonn Colfer

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
A takedown request should come from the regulator, but a court order should be required to enforce it and it should be subject to an appeal in court.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Appeals would be allowed to proceed if a judge considers the appellant to have standing e.g. if there is an arguable case that the plaintiffs rights to free expression have been unduly impinged upon, or if the takedown is damaging to their economic life or physical or mental health or constitutional or ECHR rights.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Social media including Facebook, twitter etc.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Harmful content should be regarded as including websites inciting suicide, anorexia, domestic violence, sexual assault, or promoting in defamation, genocide, war crimes, the commission of crimes. Websites used to organise rioting should be ordered to remove this content.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Websites involved in sharing copyrighted videos should be considered video sharing platforms.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The regulator should issue a code of conduct that would be advisory. It should have a board containing representatives of civil society, as well as internet technical experts, social media industry and representatives for people harmed by harmful content eg family members of suicide or anorexia promoting websites or online harrassment.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Tech companies should be fined for non compliance. There should be a points system like with driving licenses, with repeated transgressions punished perhaps with increasing fines.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator?

In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

On demand services like Netflix feature movies and series in countries within and outside the EU so harmonising regulations completely would be difficult, but less difficult if enforced by EU institutions like the Commission and ECJ. I don't think the rules of public service broadcasting should necessarily be the same as for on demand platforms, but I do think that age verification should be enforced. This could be accomplished by requiring that age verification for adult content or other legal but controversial content (eg movies about wars with violent scenes) include verification by credit cards. In Ireland a person has to be 18 to use a credit card.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Other providers should also have access to this fund, except for parts of the fund dedicated to public service broadcasting. Regarding content from other EU states, I think that should be addressed through Single Market laws.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Freedom of expression rules should apply equally to online media and traditional eg print/tv/radio media to ensure diversity of opinion. I'm concerned that the EU Copyright Directive unfairly benefits traditional media and hurts consumers because search engines might have to charge consumers to use newsfeeds to recoup the cost of paying media companies charges for article-displaying rights. The Irish law ought to recognise that some online offence caused in say political or personal arguments may be unintentional, and in such situations should merely allow site moderators to resolve this by issuing warnings. Harmful content should not be defined as including criticisms of policies of a government or political party. Certain potentially defamatory language could perhaps be blocked on forums or online videos through filters, but it's important for democracy that the right to hold dissenting political opinions eg on the Israeli/Palestinian conflict, be protected.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits

into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

I think that blocking content should be subject to a court order. That would reduce the risk of over zealous regulation, particularly of content (eg political criticisms) that are not advocating crimes but which some find offensive. In Russia there is a cautionary tale, where laws against online 'extremism' are often in practice used against Opposition figures who have popular blogs. I do support changing the ecommerce directive to fine tech companies that refuse to remove illegal content on foot of a court order.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

I think two separate regulators would be better, because some websites might combine broadcasting with non broadcasting elements, such as a comments section. Also because the BAI is appointed by the government, a single regulator for all of the media would risk pluralism of political opinion, similar to what happens in Russia with Roskomnadzor, which has sometimes blocked reputable western news websites during the Crimean crisis, and blocked Amazon and many Google websites.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Perhaps by a tax on online advertising, or by confiscated assets of cybercriminals

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a

national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

Maybe the regulator should conduct inspections to verify websites or hosting companies and social media are moderating content adequately. The regulators sanctions should range from warnings for minor infringements, to fines or prosecutions for grave ones. The creation of a European Public Prosecutor to prosecute this should be considered, given the problems posed by servers being outside Ireland. The use of European Arrest Warrants to acquire servers from foreign EU states should be considered.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Warnings to remove content, and fines for refusal to comply. However accused platforms should have the right to challenge the fines in court if it considers itself wrongly accused or the level of fines excessive.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Complaints should be subject to arbitration if 100,000 EU citizens complain. But this should be subject to verification that the complainants are not internet trolls or hostile state actors.

Response to the public consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive

Eibhear O hAnluain*



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1 Introduction

My name is Eibhear O hAnluain.

I have been working in the IT industry since 1994, initially as a software engineer, more recently as an IT systems architect, and I am currently a consultant IT systems architect employed by Dublin-based consultancy organisation¹.

I am responding to this public consultation in my personal capacity, and my views here are not necessarily those of my employer, nor those of any of my employer's clients.

¹ [Redacted], <http://www.gibiris.org/eo-blog/>
¹ [Redacted]

In this submission I am seeking to highlight 3 concerns with respect to the 11Regulation of Harmful Content on Online Platforms11.

- How such a regulation could affect small or hobbyist services
- How such a regulation could be abused by bad-faith actors
- How such a regulation could define 11Harmful Content11

I would like to outline some initial thoughts on these matters first before addressing the specific questions of the consultation.

1.1 The nature of the internet from the perspective of the technology

1.1.1 Technical protocols

Formally, 11the Internet11 is a mechanism for identifying computers on a network, and for ensuring that messages from one computer on the network get to another computer. For this purpose, each computer is assigned an address (e.g. 78.153.214.9). This system is called The Internet Protocol².

These dotted-notation addresses are associated with more easy-to-remember name-based addresses by means of a system called the 11Domain Name System11³.

There are a number of protocols⁴ for transmitting messages over the Internet, with two of the more common being 11TCP11⁵ and 11UDP11⁶.

The software required to implement these communications protocols is installed onto all forms of internet-connected devices, ranging from objects as small as (or smaller than) heart pacemakers, to as large as the largest super-computers.

This software is not aware of the size or capacity of the device it's installed on. Similarly, the protocols mentioned above have no regard to the purpose its host computer has, nor to who owns it, nor to how large it is.

The 11World Wide Web11 (the Web), from a technological perspective, is not the Internet. The Web is a set of defined protocols that make use of the Internet. Unlike the Internet and transmission protocols - which are designed to require each computer to regard all others are peers - the Web operates a little more on a client-server basis: the software package, often referred to as a web browser, on one computer is used to request specific information from the software package, often referred to as the web server, on the other computer.

However, despite the 11client-server11 nature of the Web, due to the simplicity of the software needed for a computer to be a web server, you can find web serving software operating on extremely small 11IoT11 devices.

² As defined in RFC 791: <https://tools.ietf.org/html/rfc791>

³ As defined by RFC 1034 (<https://tools.ietf.org/html/rfc1034>) and RFC 1035 (<https://tools.ietf.org/html/rfc1035>).

⁴ For the purposes of this document, a protocol is a set of instructions detailing how two or more computers should express queries and responses to each other

⁵ <https://tools.ietf.org/html/rfc1035>

⁶ https://en.wikipedia.org/wiki/User_Datagram_Protocol

1.1.2 Low barrier of entry for useful technology

The above demonstrates that someone with a computer, a connection to the internet and sufficient time and determination can set up a web service that will function just like the services we're all familiar with.

This is exemplified by the development of certain internet-related technology in recent decades:

- The Linux operating system kernel is named after its inventor, Linus Torvalds, who started work on it in 1991 as a college project - he wanted to write a computer operating system that was accessible to all, and which functioned in a specific way. The Linux operating system now forms the basis of a significant proportion of internet connected computing devices globally⁷ (including 73% of smartphones and tablet computers, through Google's Android, and somewhere between 36% and 66% of internet-facing server computers), and 100% of supercomputers.
- The Apache web server started development when a group of 8 software developers decided they wanted to add functionality to one of the original web server software packages, NCSA httpd. The Apache web server now powers 43.6% of all web sites⁸.
- The Firefox web browser was initiated by three software developers who wanted to make a light-weight browser based on the Mozilla code-base. At the height of its popularity, Firefox was used in 34% of web-page requests, despite not coming installed by default on any computer or mobile device. However, its real impact is that it was instrumental in breaking the monopoly that Microsoft's Internet Explorer held since the late '90s, resulting in far richer and more secure web.

1.2 Self-hosting

1.2.1 The nature of self-hosting

Both the Linux operating system kernel and the Firefox web browser can be considered truly disruptive technologies. In both of their domains, their arrival resulted in dramatic improvements in internet and other technologies.

This affect isn't unique to those examples. There are many alternatives to the systems that we are familiar with, all developed by individuals, or small, enthusiastic teams:

- Twitter isn't the only micro-blogging service: there's also GNU Social, Mastodon.
- One alternative to Facebook is diaspora*

⁷https://en.wikipedia.org/wiki/Usage_share_of_operating_systems

⁸ https://w3techs.com/technologies/overview/web_server/all. Incidentally, the no. 2 on that web page, with nearly 42% share of websites is nginx. It also started out as a project by an individual who wanted to solve a particular project.

- Nextcloud and Owncloud are examples of alternatives to Dropbox.

In the cases of all these alternatives, users can sign up for accounts on 11 instances¹¹ operated by third-party providers, or users can set up their own instances and operate the services themselves.

Many of these services can federate with others. Federation in this context means that there can be multiple instances of a service, communicating with each other over a defined protocol, sharing updates and posts. For users, federation means that they can interact with other users who aren't necessarily on the same node or instance. For administrators of instances, federation means that they can configure their instances according to their own preferences, rather than having to abide by the rules or technical implementation of someone else.

1.2.2 Real examples of self-hosting

I host a number of such services:

- Eibhear/Gibiris is my blog site.
- Social Gibiris is a micro-blogging service that is federated with others using the AtomPub technology. Thus, Social Gibiris is federated with many other instances of GNU Social, Mastodon and Pleroma.
- git.gibiris.org is a source-code sharing site that I use to make publicly available some of the software that I develop for myself.
- news.gibiris.org is a news-aggregation that allows me to gather all the news sources of interest to me into one location, which I can then access from wherever I am.
- cloud.gibiris.org is a file-sharing platform that I use with my family when we are collaborating on projects (e.g. school projects, home improvement projects, etc.)
- matrix.gibiris.org is an instant-messaging system which I set up for the purposes of communicating with my family and close friends.

Most of these services are hosted on a computer within my home. 3 of these services provide information to the general public, and the other three are accessible only to those who set up accounts.

2 of those services, git.gibiris.org and Social Gibiris can process or post user-uploaded information.

2.2.1 Regulation of self-hosted services

While it is attractive to create regulations to manage the large, profit-making organisations, it is imperative that such regulations don't harm the desire of those who want to create their own services.

Any regulation that applies liability on the service for someone else's words or behaviour, is a regulation that can be adhered to only by organisations with large amounts of money to hand. For example, if the regulation was to apply liability on me for posting made by someone else (and somewhere else - these are federated services) on the 2 implicated services that I run, I would have to shut them down, as I would not be able to put in place the necessary infrastructure that would mitigate my liability⁹. Given that my services are intended to provide a positive benefit to me, my family members and my friends, and that I have no desire to facilitate harmful behaviour on those services, a law forcing me to shut these services down benefits no one.

Similarly, a regulation that demands responses from services on the assumption that the service will be manned at all times, requires individuals who are self-hosting their services to be available at all times (i.e. to be able to respond regardless of whether they are asleep, or overseas on a family holiday, etc.)

This submission comes from this perspective: that small operators should not be unduly harmed by regulations; the likelihood of this harm coming to pass is greater when such small operators are not even considered during the development of the regulations. If the regulations have the (hopefully unintended) effect of harming such small operators, the result will not just be the loss of these services, but also the loss of opportunity to make the Web richer by means of the imposition of artificial barriers to entry. Such regulations will inhibit the development of ideas that pop into the heads of individuals, who will realise them with nothing more than a computer connected to the internet.

1.3 Abuse

All systems that seek to protect people from harmful or other objectionable material (e.g. copyright infringement, terrorism propaganda, etc.) have, to date, been amenable to abuse. For example, in a recent court filing, Google claimed that 99.97% of infringement notices it received in from a single party in January 2017 were bogus¹⁰:

A significant portion of the recent increases in DMCA submission volumes for Google Search stem from notices that appear to be duplicative, unnecessary, or mistaken. As we explained at the San Francisco Roundtable, a substantial number of takedown requests submitted to Google are for URLs that have never been in our search index, and therefore could never have appeared in our search results. For example, in January 2017, the most prolific submitter submitted notices that Google honored for 16,457,433 URLs. But on further inspection, 16,450,129 (99.97%) of those URLs were not in our search

⁹ This assumes that my services aren't forced to shut down by the new EU Copyright Directive anyway

¹⁰ <https://www.techdirt.com/articles/20170223/06160336772/google-report-9995-percent-dmca-takedown-notices-are-bot-generated-bullshit-buckshot.shtml>

index in the first place. Nor is this problem limited to one submitter: in total, 99.95% of all URLs processed from our Trusted Copyright Removal Program in January 2017 were not in our index.

Aside from the percentage of URLs noted that don't exist in Google's index, that a single entity would submit more than 16 million URLs for delisting in a single month is staggering, and demonstrates a compelling point: there is no downside for a bad-faith actor seeking to take advantage of a system for suppressing information¹¹.

More recently, there is the story of abuse of the GDPR's Right to be Forgotten. An individual from Europe made a claim in 2014, under the original Right to be Forgotten, to have stories related to him excluded from Google searches for him. This seemed to have been an acceptable usage under those rules. However, that this claim was made and processed seems also to be a matter of public interest, and some stories were written in the online press regarding it. Subsequently, the same individual used the Right to be Forgotten to have these stories excluded from Google searches.

This cat-and-mouse game continues to the extent that the individual is (successfully) requiring Google to remove stories about his use of the GDPR's Right to be Forgotten. Even stories that cover only his Right to be Forgotten claims, making no reference at all to the original (objected-to) story¹². This is clearly an abuse of the law: Google risks serious sanction from data protection authorities if it decides to invoke the 11... exercising the right of freedom of expression and information11 exception¹³ and it is determined that the exception didn't apply. However, the claimant suffers no sanction if it is determined that the exception does apply.

In systems that facilitate censorship¹⁴, it is important to do more than merely assert that service providers should protect fundamental rights for expression and information. In a regime where sending an e-mail costs nearly nothing, where a service risks serious penalties (up to and including having to shutdown) and where a claimant suffers nothing for abusive claims, the regime is guaranteed to be abused.

1.4 Harmful content definition

This submission will not offer any suggestions as to what should be considered 11harmful content11. However, I am of the belief that if 11harmful content11 is

¹¹ The law being used in this specific case is the US Digital Millennium Copyright Act. It contains a provision that claims of copyright ownership on the part of the claimant are to be made under penalty of perjury. However, that provision is very weak, and seems not to be a deterrent for a determined agent: <https://torrentfreak.com/warner-bros-our-false-dmca-takedowns-are-not-a-crime-131115>

¹² <https://www.techdirt.com/articles/20190320/09481541833>

¹³ GDPR, Article 17, paragraph 3(a)

¹⁴ While seeking to achieve a valuable and socially important goal, this legislation, and all others of its nature, facilitates censorship: as a society, we should not be so squeamish about admitting this.

not narrowly defined, the system will allow bad actors to abuse it, and in the context where there is no risk to making claims, and great risk in not taking down the reported postings, loose definitions will only make it easier for non-harmful content to be removed.

2 Answers to consultation questions

2.1 Strand 1 - National Legislative Proposal

2.1.1 Question 1 - Systems

- The legislation should state in an unequivocal manner that it is not the role of web services to adjudicate on whether specific user-uploaded pieces (text, videos, sound recordings, etc.) can be considered harmful under the legislation. The law should make it clear that where there is a controversy on this matter, the courts will make such rulings.
- As regard a system, this submission would support a notice-counternotice-and-appeal approach. Such an approach affords the service operator and the accused party an opportunity to address the complaint before the complained-of material is taken offline. The following should be incorporated:
 1. A notice to a service operator that a user-uploaded piece is harmful should contain the following information:
 - That the notice is being raised under this legislation (citing section, if relevant).
 - That the person raising the notice is the harmed party, or that the person raising the notice is doing so on behalf, and at the request, of the harmed party. Where the harmed party doesn't want to be identified, the notice could be raised on their behalf by someone else. However, totally anonymous notifications under this legislation should not be permitted, as it would not be possible to determine the good-faith nature of the notice.
 - The specific (narrowly tailored) definition of harmful content in the legislation that is being reported.
 2. A notice to the user who uploaded the complained-of material regarding the complaint. This will allow the user to remove the material, or to challenge the complaint. An opportunity to challenge a complaint is necessary to forestall invalid complaints that seek to have information removed that would not be considered harmful under the legislation.
 3. Adequate time periods for both the complainant and the posting user to respond.
 4. Where responses aren't forthcoming. . .

- ... if the posting user doesn't respond to the initial complaint, the posting is to be taken down
 - ... if the complaining user doesn't respond to the posting user's response, the posting is left up.
5. Within a reasonable and defined period of time, the service provider will assess the initial complaint, the counter-notice, and the complainant's response to the counter-notice, and will decide whether to take the material down or to leaving it up, citing clear reasons for the decision.
 6. Where either party is not happy with the decision, they can appeal to the regulator, and if the regulator contradicts the service operator's decision, the service operator must abide by the regulator's ruling. In its consideration of the ruling, the regulator must be required to consider the rights of both parties.
- Responsibilities and obligations of the service provider must relate to the size of the service. For example, it's not reasonable to ask the service provider to respond within an amount of time for those services that would not have someone available within that time. Self-hosters or small, single-location, operations would not be able to respond within an hour if the complaint is made at 4am!
 - This system should not apply to complaints that a posting violates the service's terms and conditions. If the complaint isn't explicitly made under this legislation, it should not fall within the regulator's remit. Under no circumstances should merely violating a service's terms and conditions (or "community standards") be considered an offence under this legislation.

2.1.2 Question 2 - Statutory tests

The service operator should be protected from liability under the rules if the service can show the following:

- That the initial complaint was responded to appropriately and within a reasonable amount of time.
- That an appeal was responded to within a reasonable amount of time.
- That the poster and complainant were each offered an opportunity to respond
- That the responses, and any appeals, were given due consideration.
- That the final decision (whether to keep the post up or pull it down) was well-reasoned, and considered the context in which the post was made.
- That, where appeals have been made to the regulator, the service responds to any order from the regulator in a reasonable manner and within a reasonable amount of time.

2.1.3 Question 3 - Which platforms to be considered in scope

This submission is concerned to ensure that assumptions not be made that all affected platforms will be large, for-profit organisations with scores, or hundreds, or thousands of staff acting as moderators of user-uploads.

The legislation should also not assume that platforms that want to deal with user uploads should be of a particular nature, or size.

To make either assumption would be to chill lawful interactions between internet-connected parties, and would further entrench the larger players on the internet.

2.1.4 Question 4 - Definitions

- Please see my introductory comments on this matter.
- Definitions of harmful content must aim to be as narrow as possible, in order to avoid the potential of the legislation being used to target political speech.
- In respect of serious cyberbullying, it should be considered harmful content under the legislation not just when it targets a child. It should be considered cyberbullying and harmful even if it is an adult, if the complaint states that s/he is being harmed or fears harm should the complained-of behaviour continue.
 - In the event that the target of the cyberbullying is a public figure, there should be an additional burden on the complainant to state that the behaviour represents real intent to cause harm, and is more than people with opposing political or social views shooting their mouths off.

2.2 Strand 2 - Video Sharing Platform Services

2.2.1 Question 5 - What are video-sharing services

This submission is not providing an answer to this question.

2.2.2 Question 6 - Relationship between Regulator and VSPS

This submission is not providing an answer to this question.

2.2.3 Question 7 - Review by Regulator

The regulator should require the following reports to be published by online services regarding complaints made under this legislation:

- Number of complaints, broken down by nature of complaint
- Number of complaints that were appealed to the service, broken down by nature of complaint and basis of appeal

- Number of appeals upheld, broken down by reason for appeal
- Number of appeals rejected, broken down by reason for rejection.
- Number of complaints/appeals that were appealed further to the regulator.

2.3 Strands 3 & 4 - Audiovisual Media Services

2.3.1 Question 8 - "Content" rules for television broadcasting and on-demand services

This submission is not providing an answer to this question.

2.3.2 Question 9 - Funding

RTE and its subsidiary services should continue to be funded by the government, either through the licence fee, general taxation or a mixture of both. RTE's editorial independence should be re-iterated in this law (and strengthened, if required, specifically to assure independence from the editorial demands of advertisers). It should be anticipated that RTE will eventually broadcast only over the internet, and that it will be both a live-streaming service (e.g. providing programming in a manner similar to its current broadcast schedule), and an on-demand service.

Funding of services other than RTE should only be considered for services operated by non-profit organisations such as trusts or charities, and such funding should also come with an assurance of editorial independence for the recipients.

2.4 Strands 1 & 2 - European & International Context

2.4.1 Question 10 - Freedoms

- Core to the consideration of the legislation is that everyone posting to services are presumed to be innocent of an offence, and their postings should also be presumed not to offend the law.
- Accusations of harm must be tested to determine if they are being made to suppress legal speech. This is particularly true where the person making the allegation is a public figure, or is representing a public figure.
- Where a service applies - or is required to apply - sanctions on users who repeatedly post harmful information, similar sanctions should also be applied to users who repeatedly make false accusations under the law.

2.4.2 Question 11 - Limited liability

Any regulatory system that makes service providers liable for what their users say on those services will result in one or a combination of the following effects:

1. Service will stop permitting users to make postings.

2. Where the value of a service is wholly, or in part, that it allows its users to post to it, the service may have to shut down.
3. Services will be sued or prosecuted for the actions of its users regardless of the effort and good faith they put in to moderating what is posted on their service - a concept that is borderline ludicrous in the off-line world. This would be analogous to a car manufacturer being liable for the consequences of car occupants not wearing their seat-belts.

There must be clarity in the regulations that a service is protected as long as it acts in a good-faith manner to deal with postings made by users that are determined to have been illegal. This reflects Ireland's obligations under various trade agreements to grant safe-harbour protections to internet services.

The regulation must also protect platforms and their users against bad-faith accusations of harm, particularly from public figures. If it is easier to use an accusation of harmful content than to claim libel, public figures will use that facility to suppress information they would like not to be known.

2.5 Strands 1-4 - Regulatory Structures

2.5.1 Question 12 - Regulatory structure

This submission is not providing an answer to this question.

2.5.2 Question 13 - Funding of regulatory structure

This submission is not providing an answer to this question.

2.6 Strands 1 & 2 - Sanctions/Powers

2.6.1 Question 14 - Functions and powers

This submission is not providing an answer to this question.

2.6.2 Question 15 - Sanctions

The following should be taken into account when considering sanctions on platforms

- The nature of the operation
 - Large, global, profit-based private organisations providing services to the general population. (examples include YouTube, Facebook, Twitter).
 - Smaller, local, profit-based private organisations providing services to the general population, focused on the region (examples might include boards.ie, everymum.ie, etc.)

- Small, non-profit forums set up by locally-based and -focused organisations such as soccer clubs, or school parents' associations¹⁵
- Individuals, hosting their own platforms.
- The good-faith efforts of the operation to respond to accusations of harm.
- The capacity of the service to respond - smaller operations can't afford 24-hour monitoring to respond to such accusations, and the law should not require it. Such services should be able to avail of bad-faith actors seeking to interfere with their operations by overwhelming them with false accusations of harm that need to be dealt with.
- Who the accuser is - public figures should be prevented from using accusations of harmful content to remove information that is merely critical of them or their behaviour.

2.6.3 Question 16 - Thresholds

This submission is not providing an answer to this question.

¹⁵ There is often the temptation to advise these organisations to use larger platforms like Facebook or Google. Some organisations may not want to avail of those services, and the reasons for this are not relevant. What's important is that deciding not to use these platforms is valid, and these decisions should be protected and encouraged, not inhibited.

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1 -Name

Eoin Corcoran

3 -Email

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
The Regulator should issue notice to have criminal content struck down, and to issue financial sanctions for those bodies which fail to do so. The Regulator should also be able to issue fines to bodies which continually misapply such restrictions, or (mis)apply them in a discriminatory manner.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Appellants must have the capacity to appeal decisions under this legislation to a statutory body, to vindicate their constitutional right to free expression. There may be practical constraints to such, but without adequate access to the vindication of such rights, citizens may find their rights infringed.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Ideally this would be restricted to "official" platforms - i.e. print and broadcast media, public bodies. If we were to apply this to companies like Facebook or Twitter, it would have serious practical constraints in ability to investigate whether issues are within our jurisdiction, whether the company can be culpable for an act committed abroad but which is seen by a citizen domestically, whether companies based abroad are required to respect the constitutional rights of citizens etc.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

The restrictions should be in place for the promoting or dissemination of child sexual offensive material - I do not believe "hate speech" or "incitement to hatred" can be countenanced with the constitutional right to freedom of expression. If someone was to blame Catholics for child molestation and cover ups, would this be qualified as hate speech/incitement to hatred or as fact? If the same measure was applied to Islam and its promotion of pedophilia, or if a religious Catholic was to call transgenderism unnatural according to their teachings - would these all qualify as hate speech/incitement to hatred, would none of them? I do not believe that it is someone else's place to impose their morality on another.

Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the revised Audiovisual Media Services Directive

Submission of Facebook Ireland Limited

Facebook Ireland welcomes the Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the revised Audiovisual Media Services Directive.

We support Minister Bruton's stated aim of achieving a proportionate and effective approach to dealing with harmful content online, and very much welcome his focus on defining "harmful" communications in such a way that does not curtail legitimate freedom of speech and freedom of expression online.

Our priority is to make Facebook a safe place for people of all ages, which is why we work closely with safety experts, including the National Anti-Bullying Centre at DCU, and have spent many years developing a range of tools to help people have a positive experience on Facebook.

In this submission, we share information on Facebook's approach to dealing with harmful content on our platform, which has been developed over the past 15 years, and our views on the questions posed by the Consultation.

We very much appreciate the opportunity to contribute to the material being considered by the Department of Communications, Climate Action and Environment as it seeks to bring forward draft legislation.

Introduction

Facebook's mission is to give people the power to build community and bring the world closer together. Every day, people from around the world come to Facebook to share their stories, see the world through the eyes of others and connect with friends and causes. We recognise how important it is for Facebook to be a place where people feel empowered to communicate, and we take our role in keeping abuse off our service seriously. For this reason, we have developed a comprehensive set of [Community Standards](#) which govern which content is and is not allowed on Facebook. Our Community Standards cover things such as bullying; hate speech; harassment; nudity; privacy and graphic violence. When applying these standards, we seek to find a balance between safety and allowing users to have a voice. In developing these standards, we work with hundreds of civil society organisations and academics from around the world.

In order to enforce these Community Standards at scale, we allow users to report content for our teams to review. Our specially trained reviewers work 24/7 and support over 50 languages. In 2018 we doubled the number of people working on our safety and security teams to 30,000. By combining background technology and user reporting we are able to enforce our Community Standards at scale. For example, in Q3 2018, we took action on 15.4 million pieces of violent and graphic content. This included removing content or putting a warning screen over it, and, where appropriate, disabling the offending account and/or escalating content to law enforcement. We also removed more than 750 million fake accounts during the same time period, and we removed 8.7 million pieces of content that violated our child nudity or sexual exploitation of children policies — 99% before anyone reported it to us. For more information on the scale and effectiveness of our enforcement efforts, please see our [Community Standards Enforcement Report](#).

In addition to user reporting and the increasing use of background technologies to ensure the content shared on our platform conforms to our Community Standards, to help our users have a safe and enjoyable experience on our platform we also provide them with tools to control their experience, like blocking and comment filters, and education and safety resources, such as our [Safety Centre](#) and [Digital Literacy Library](#).

Strand 1 – National Legislative Proposal

Question 1

What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. [Sections 2, 4, & 8 of the explanatory note]

In developing a takedown system under the National Law Proposal (“NLP”), a good basis for this can be found in the Law Reform Commission's 2016 report on harmful communications and digital safety. The report recognises that most online platforms already include mechanisms and tools to allow users to report content to them that may violate their standards or policies. It also states that “a victim of harmful communications should be able to have a readily accessible and effective take down procedure available to him or her.” Because multiple pieces of legislation require the removal of illegal content, we welcome the opportunity to create a streamlined piece of legislation that would outline (1) the process for notice and takedowns and (2) the definitions of harmful content. This will help to create a consistent approach.

We also recommend any system put in place under the NLP be consistent with the system put in place for Video-Sharing Platform Services (“VSPS”) under the revised

Audiovisual Media Services Directive (“**revised AVMSD**”) to ensure regulatory predictability and certainty. As required under Article 28b(6) of the revised AVMSD, any system should also comply with the requirements of Articles 12 to 15 of the e-Commerce Directive¹ and Article 25 of Directive 2011/93/EU.² In particular any requirement to remove unlawful content must be applied in a way which is consistent with the foundational principles that platforms:

- are not liable for unlawful content of which they are not aware;
- cannot be obliged, when providing the services covered by Articles 12 -14 of the eCommerce Directive, to monitor the information which they transmit or store, nor be put under a general obligation to actively seek facts or circumstances indicating illegal activity (see also Recital 48 of the revised AVMSD).

Development of a Code and Guidelines

In deciding on the appropriate take-down system, the Department should also be mindful of existing EU initiatives in this area and should work in harmony with them (e.g. the European Commission’s 2018 Recommendation on measures to effectively tackle illegal content online³) as this could risk regulatory divergence.

The existing regulatory regime for on-demand AVMS (“**ODAVMS**”) in Ireland provides a useful template for a regulatory system which could provide a guide for the development of the NLP. Under such a system, a code of conduct (the “**Code**”) could be developed by online service providers, including VSPPS, in co-operation with the regulator and other relevant industry and civil-society bodies. The Code could set out the minimum requirements that providers should meet in respect of the NLP.

The Code could be accompanied by non-binding and well-defined guidelines (“**Guidelines**”) which would help guide platforms to ensure they are effectively combating harmful content while respecting free speech. Like the Code itself, they should be developed by industry in co-operation with the regulator. For instance, we note that the BAI produces non-binding guidance notes for certain of its codes.⁴

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

² Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

³ COMMISSION RECOMMENDATION (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online [2018] OJ L63/50.

⁴ See here: <https://www.bai.ie/en/codes-standards/#al-block-13>, under the heading ‘Useful Documentation’.

For example, the BAI has produced a guidance note (“**Note**”) on the *Code of Fairness, Objectivity & Impartiality in News and Current Affairs* (“**Code on Fairness**”). According to the BAI, the Note is not to be regarded as a complete or authoritative statement of law but is provided to assist broadcasters and the general public to interpret and apply the *Code on Fairness*. The Note has been developed in response to feedback on the various provisions contained within the *Code on Fairness*. The BAI notes that, as it is implemented by broadcasters, understanding of the various provisions will evolve. Consequently, the Note can be amended from time to time as the need becomes apparent.

In line with the above example from the BAI, the Code and Guidelines we propose in this response could provide a useful way of ensuring the regime can react to specific harms as and when they arise, rather than trying to second-guess potential issues that simply may never arise in practice. It could also offer an opportunity for service providers to share insights and discuss their experience of trends that are arising. Such an approach would also reduce the administrative and enforcement burden on regulators.

Take-down System under the Code

As the Explanatory Note provides, the most efficient system for handling complaints about content is one where the first contact is made with the service provider. The Code we propose above should explain (and the Guidelines could provide more clarity) what type of harmful communication is subject to take-down. It could provide that service providers should offer easy-to-use reporting tools to users. It could also include a common complaints procedure that could operate where content has been reported to the service provider but has not been removed. This could then be escalated to the regulator for a further review. This can be helpful in certain situations where when a user reports content, sufficient context or information is not made available to allow an online service provider to determine whether a post is in fact harmful or indeed, unlawful. Providing users with guidance on the level of information to be provided would help mitigate this issue thereby reducing the number of complaints that are escalated. Where a complaint has been escalated to the regulator and further information comes to light, the regulator should be able to provide this additional context to the service provider so that they can make a further determination in light of the relevant circumstances.⁵

⁵ Further information on the current On Demand Audio-Visual Media Services Code (“**ODAS Code**”): For example, on-demand audiovisual media service providers who sign up to the ODAS Code are required to give “due and adequate consideration” to complaints made in writing which, in the opinion of the provider, has been made in good faith and is not of a frivolous or vexatious nature. On-demand audiovisual media service providers are required to prepare and implement procedures handling of complaints, including a point of contact, timescales for dealing with complaints (must respond within 15 working days) and an appeals mechanism within the providers organisation a senior level which will respond to appeals within ten working days of receipt. The Compliance Committee of the BAI is required to accept appeals against the resolution offered by the service provider only with regard to breaches in

In a situation where the relevant substantive and procedural requirements are met for a regulator's involvement in a content takedown request (as we describe in more detail in our response to question 2 below), the regulator should approach the service provider to engage with the service provider to determine whether the content in question is to be removed. In cases where the service provider disagrees that the content in question is harmful, the regulator may have the authority to issue a decision requiring that the content be removed. Such decision, which must be subject to appeal to the courts, should be accompanied by proper, detailed reasons (as laid down in the Guidelines). This is particularly important given the free speech implications that may be at play in cases where the regulator is seeking to demand the removal of content that is deemed harmful but may not be unlawful.

Finally, we recognise the need for a regulator to have the ability to issue sanctions, but sanctions should only be applied if the platform consistently and systematically fails to comply with valid takedown orders by a regulator (which would occur only where the relevant substantive and procedural requirements are met for a regulator's involvement in a content takedown request). In particular, given the complex legal issues in play, and the need to balance competing rights, sanctions should not be employed simply because a company, acting in good faith, came to a different view on a matter than the regulator in the first instance (see also our response to question 15).

Question 2

If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate. [Sections 2, 4 & 8 of the explanatory note]

Once a user has exhausted a platform's internal reporting process, there should be a test which sets out the procedural and substantive thresholds which must be satisfied before the regulator will become involved ("Test"). The Test should be set out in the Code referred to in our response to question 1 above, rather than in statute. One of the advantages of having the Test in the Code rather than set out in legislation is that it can be more flexible and develop in light of the experience of the application of the Code in practice. Having the Test in the Code could be particularly beneficial in explaining how, and the extent to which, a complainant should be required to demonstrate actual and/or on-going harm. The Test must ensure that regulatory intervention is focused on appropriate cases, where such intervention is necessary. The Test should be aligned with that under the revised AVMSD. There must be a mechanism in place by the regulator to ensure that appeals are made in good faith and are not of a frivolous or vexatious nature.

relation to community standards and protection of minors provided a complaint is received within ten working days from the decision of the appeal being notified to the complainant.

Question 3

Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme? [Sections 2, 5 & 6 of the explanatory note]

The Department should ensure its regulation of online service providers is consistent between the revised AVMSD and the NLP. Bearing that in mind:

(i) In relation to Strand 1, it is important that any proposed national legislation is consistent with existing regimes, namely the relevant provisions of the e-Commerce Directive. The category of services to which requests or notices to remove harmful content may apply, should be clearly and consistently defined so as to ensure certainty.

(ii) As regards Strand 2, (Section 6 of the Explanatory Note concerning VSPS), the revised AVMSD has correctly recognised the significant differences between video-sharing platform services and traditional audio visual services (television broadcast and on-demand), recognising in particular the lack of editorial control by VSPS providers in the content they host and imposing on them a different set of regulatory obligations. This is in line with the e-Commerce Directive mentioned above, which set the framework to foster the online economy in the EU, providing legal certainty by setting out important principles such as the country of origin principle and the limited liability regime for intermediary services.

Question 4

How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered? For example,

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)***
- Material which promotes self-harm or suicide***
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health***

[Sections 2, 4 & 6 of the explanatory note]

We agree with the stated aim of the consultation of achieving a proportionate and effective approach to dealing with harmful content online. We also welcome efforts to focus on, and define clearly, what is meant by harmful content.

(i) In relation to Strand 1, we agree that serious cyber bullying of a child, material which promotes self-harm or suicide and material designed to encourage prolonged nutritional deprivation are among the types of communication that, while not crossing a threshold of illegality, constitute “harmful” content. This is why our Community Standards, which set out the types of content that are not allowed on Facebook include bullying, harassment and the promotion or encouragement of suicide, self-injury or eating disorders. When this content is reported to us it is removed. We are also working on ways to remove harmful content before anyone even sees it.

The Department has rightly identified that the creation of a new class of “harmful” content would impose legal requirements to remove content that is not illegal. It has also highlighted that this will need to be carefully balanced against competing rights of both users who share and post content and online service providers. We welcome these clear acknowledgements. Supplementing the definition of harmful content with Guidelines (per Question 1 above) would assist an online service provider to determine how best it can protect children from harmful content. For example, images of a model in a clothing campaign could conceivably be captured by the definition (in Section 2 of the Explanatory Note) of encouraging an online user to prolong nutritional deprivation that would have the effect of exposing him or her to risk of death or endangering health (academic and popular literature have documented and debated this phenomena). We also know from consultations with experts in suicide prevention and mental health, that the line between admission and promotion of self-harm and suicide is complex and requires a thoughtful approach. Providing people with the space to express difficult thoughts and feelings is very important both from a therapeutic perspective and in providing friends and family the opportunity to reach out and offer support to a loved one in distress. We would respectfully recommend that in setting out the definitions and any supplementary guidelines, experts in the relevant fields are consulted.

The Law Reform Commission’s 2016 Report on Harmful Communications and Digital Safety provides a good road map for expanding the scope/understanding of harmful communication. As per the LRC's report, the definitions should be clearly defined and, to the extent possible, technology-neutral. Expanded definitions could include: non-consensual sharing of intimate images and online harassment (including an amendment of already existing criminal concepts such as harassment and stalking).

Strand 2

(ii) As regards Strand 2, “regulation of video sharing platforms”, (as discussed in “Section 6” of the Explanatory Note on this question), the revised AVMSD will enter into effect by September 2020. Under the revised AVMSD, VSPs are obliged to adhere to a separate set of obligations aimed at *inter alia* protecting minors from potentially harmful content under a set of Principles (recital 45 and article 28 of the Revised AVMSD). In the same

vein as Strand 1 above, clarity and guidance is required as to the definition of categories of “harmful content” (and/or “illegal content”).

As we note in our response to Question 1 (in relation to content takedown under the NLP), a consistent approach concerning the definition of harmful content should be adopted across online providers of user-generated content (including VSPS) to ensure regulatory predictability and certainty. This will facilitate the expedient removal of truly harmful content by both online platforms and VSPS when necessary. As regards VSPS, any measures should be practicable and proportionate taking into account the size of VSPS and the nature of the service itself.

Strand 2 – Video Sharing Platform Services

Question 5

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples. [Section 3 of the explanatory note]

This definition is intended to be interpreted consistently throughout the EU. In that regard, it is apparent from Recital 5 of the Revised AVMSD that the EU legislature recognises the difficulties that may be inherent in interpreting the scope of this definition. Accordingly, the European Commission (in consultation with the Contact Committee) should play a central role in ensuring “*clarity, effectiveness and consistency of implementation*” with respect to this definition, via the issuing of guidelines.

Furthermore, certain aspects of this definition have already been interpreted by the CJEU (see, for example, Case C-347/14⁶ and Case C-132/17⁷).

In light of the above, it would not appear necessary for the Department to seek to adopt a unilateral interpretation of this concept. The Irish legislature should faithfully transpose the definition into Irish law, and the definition may be interpreted in light of further guidance from the European Commission. We also note that the European Commission is already reaching out to service providers, including Facebook, on this issue.

Given the above, we do not believe that it is necessary to seek to interpret the scope of this definition in Irish statute law. However, if the Department is minded to adopt this

⁶ Case C-347/14, *New Media Online GmbH v Bundeskommunikationssenat and Der Bundeskanzler*

⁷ Case C-132/17, *Peugeot Deutschland GmbH v Deutsche Umwelthilfe eV*

approach, we may submit comments on how the definition should be interpreted in due course.

Question 6

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator? [Section 3, 4, 5, 6 & 8 of the explanatory note]

As discussed above in our response to Question 1, any system put in place under the NLP should be consistent with that put in place for VSPS. The revised AVMSD promotes the use of co-regulation and encourages the fostering of self-regulation through codes of conduct. Recital 49 notes: *“It is appropriate to involve video-sharing platform providers as much as possible when implementing the appropriate measures to be taken pursuant to Directive 2010/13/EU. Co-regulation should therefore be encouraged.”* Such a regime should be the result of an iterative process based on a principles-based approach as well as accountability and dialogue between services within the scope of the revised AVMSD and the regulator. As part of this accountability mechanism, a provider could demonstrate compliance with a Code of the kind discussed in our response to Question 1.

The future regulator should also implement a flexible and responsive rapport with VSPS, developing a working relationship that jointly seeks to protect internet users from harmful content while also ensuring that the ability to innovate is preserved and service providers are able to adopt the best solutions to these issues.

Question 7

On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place? [Section 3, 4, 5, 6 & 8 of the explanatory note]

Please see our response to Question 1 in relation to the Code (which, for the purpose of promoting regulatory consistency and certainty, should apply to both VSPS and any service providers falling under the NLP) and the ‘living’ guidance document which will provide a mechanism by which the regulator, in close consultation with industry, can ensure that the regime continues to be fit-for-purpose at all times.

Specifically, the regulator should be in a position to review or monitor the measures a VSPS (and service providers falling under the NLP) has in place in response to repeated instances of reported non-compliance, for example, after receiving 'X' number of end-user complaints which have met the Test's threshold (as discussed in our response to question 2). In such a situation, service providers should be engaged with and provided an opportunity to remedy any issues identified by the regulator.

Recognising that this is an area of evolving technologies and standards, where potentially multiple ways of achieving any outcome exist, the approach should be designed to be responsive and flexible.

Strands 3 & 4 – Audiovisual Media Services

Question 8

The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services? [Section 4 of the explanatory note]

As the Department notes, it must complement various existing national, EU and global legislative frameworks which are already in place on this subject. In relation to content rules, the regulation of online service providers should be consistent across the EU to further the objectives of the Digital Single Market. The Department should continue with the regulatory regime under ODAS Code. The same rules applying to TV should only apply to ODAVMS to the extent required by the revised AVMSD. Doing otherwise risks regulatory divergence between Ireland and other EU Member States and undermining the ODAVMS sector in Ireland. Finally, no change needs to be made to the existing framework for ODAVMS because linear content is curated and offered to the users in a completely different way to on demand content, and linear content allows passive viewing in a way which requires more prescriptive regulation. The active user choice involved in the selection and viewing of on demand content means that the divergent regulatory regimes are appropriate.

Question 9

Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund? [Section 4 of the explanatory note]

The Regulator is best placed to make decisions as to dispersment of the Sound and Vision fund and as to the application of levies, as it deems fit.

Strands 1 & 2 – European & International Context

Question 10

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content? [Section 2, 4, 5, 7, & 8 of the explanatory note]

We agree with the Department that achieving an appropriate balance between fundamental rights is a complex undertaking, and that there is a risk that an overly broad definition of harmful content, particularly where it is not unlawful, could unduly impact right of free expression and access to information. This is why we believe that where sanctions are envisaged under the regulatory regime, they should be proportionate i.e. based on systematic failures to remove harmful content rather than based on single instances. And where the content is not illegal, this should also be a mitigating factor to be weighed.

The Principles under the revised AVMSD (as discussed in our response to question 4), impose an obligation on VSPS to put in place practicable and proportionate measures to protect children and the general public. The Code and Guidelines discussed in our response to Question 1 should contain suggested measures and standards which online service providers and VSPS should implement. This Code and the Guidelines will weigh freedom of expression considerations against the need for online service providers and VSPS to remove harmful content. The Guidelines could provide examples or considerations that a service provider must take into account before removing any content.

Question 11

How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? [Section 2, 4, 5, 6, 7, & 8 of the explanatory note]

Please see our comments elsewhere in this submission. In particular:

- This can be ensured through the faithful transposition and enforcement of the revised AVMSD.

- Ireland must also seek to avoid implementing national rules under the NLP which cut across Ireland's obligations under the revised AVMSD and the eCommerce Directive. To achieve this, it will be important to identify the common areas across all the relevant legislation so as to avoid implementing inconsistent and potentially conflicting requirements.

Strands 1-4 – Regulatory Structures

Question 12

Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- ***Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,***
- ***Two regulatory bodies. Assigning the responsibility for editorial services, e.g. ondemand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.***

Is one of these options most appropriate, or is there another option which should be considered? [Section 5 of the explanatory note]

Regulation should be under the one roof to ensure consistency of application and regulatory predictability. Indeed, with the increasing convergence of services and technology it is essential to have the regulatory regimes for VSPS, ODAVMS and linear services managed by a single body that understands the landscape and can provide a unified view.

Question 13

How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated? [Section 5 of the explanatory note]
Strands 1 & 2 –Sanctions/Powers

The Regulator will be best placed to make determinations as to funding across the regulatory structure(s) here.

Question 14

What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. [Section 2, 4, 5, 7, & 8 of the explanatory note]

Any powers and functions the regulatory body has should be consistent with the revised AVMSD while also maintaining consistency across the NLP and VSPS to ensure regulatory predictability and to avoid regulatory divergence. The functions and powers assigned to the relevant regulator should be the same. Implementing different sanctions for regulation under each strand would likely to lead to confusion where different elements are subject to different regimes.

Question 15

What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance, The power to issue administrative fines,***
- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,***
- The power to apply criminal sanctions in the most serious cases.***

Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Sanctions should be imposed where there has been a systematic failure by the online service provider (Strand 1) or VSPS (Strand 2) to comply with its obligations or repeat instances of non-compliance. The service provider should be afforded an opportunity to remedy any non-compliance before sanctions are considered.

In keeping with the entitlement to fair procedures enshrined in Bunreacht na hÉireann, the service provider should have an entitlement to make submissions to the regulator before any decision is made. Detailed reasons for the decision arrived at should also be provided by the regulator. The decision should also be subject to appeal.

With regard to the specific sanctions to be imposed by the regulator, it is important to be mindful of the provisions of Article 34.1⁸, and Article 38.1⁹ of Bunreacht na hÉireann when considering the various options. While it is clear that, in order to effectively fulfil its role, a regulator should have the power to issue formal notices or directions to a service provider to take down content (provided that the exercise of such powers is subject to an appeal process as outlined above), the imposition of criminal sanctions directly by a regulator could potentially raise issues as to whether the regulator was involved in an exercise of judicial powers in criminal matters in a manner prohibited under Article 34 of the Constitution.

⁸ "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public"

⁹ "no person shall be tried on a criminal charge save in due course of law"

With regard to the imposition of administrative fines, it is again important that such fines are not so high as to essentially be punitive in nature, which would be indicative of the matter being a criminal matter best resolved by the courts. It is submitted that a proportionate response be implemented with the strictest sanctions being reserved for the most grievous cases of non-compliance. The regulator should also set out general criteria for assessing the facts of each case so that regulated entities can understand the basis upon which decisions are reached. It is also submitted that relevant mitigation factors ought to be fed into any sanction regime, for example, where under NLP, the content in question is harmful but not necessarily illegal and where good faith efforts have been made by the service provider to engage with the regulator to resolve the matter.

Noting the above, the Department may consider implementing a sanctions regime based on one which already exists, for example, that under the ODAS code.

Question 16

Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints.

However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate? [Sections 2, 4, 6, 7 & 8 of the explanatory note]

Yes, thresholds should apply (see previous answer to question 2).

Page 2

1 -Name

Detective Sergeant Mary T Mc Cormack

2 -Organisation if applicable

GNPSB An Garda Siochana

3 -Email

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
The companies should have very clear reporting procedures for members of their platform to report harmful content, this should be advertised across the platform. In addition the regulator can intervene if a member of the public believes a particular piece of content should be taken down and hasn't been. There must be clear guidelines on what constitutes harmful content also.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

Yes clear processes and procedures should be in place. risk matrix of sorts should be developed with obviously the most serious content reaching the higher ranks of the regulators office or their office at all. Some content should be an automatic referral where others could be notice regarding content takedowns.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

all online platforms where the public can post, be sent or can engage in chats, discussions etc should be included in this. I believe that chat groups within apps such as WhatsApp, Kik and Snapchat will be very hard to monitor and I do not think it will be as easy to regulate and that anyone offended or hurt by posts may have to look at civil/criminal law to aid their cause.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

In addition to the examples above, also included should be revenge porn, up skirting (that is taking images without consent up women's/girls skirts, or taking pictures of their buttocks in tight pants in public). Any non consensual sexual images should be included as part of harmful content. Some things are obvious such as child abuse and cyberbullying, whether that is in image/video or chat form/

Page 4

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

very similar to my answer previously - clear guidelines to be set which include a risk matrix for escalating information to the regulator.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

audits on takedowns v reports should be looked at on a quarterly basis in the beginning to see compliance and it sets down the standard early in the process introduction

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting

services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

yes - all platforms that are sending out a message should have a good working relationship with the regulator. Making it clear from the start will ensure all those providers are aware of what is expected from the beginning. It is always easy reign back in but start with a wide outlook.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

no comment

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Risk Matrix and processes which account for these rights and freedoms

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Risk Matrix and processes which account for these rights and freedoms

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audio-visual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services people will not trust the Broadcasting authority to take this on and will not see this as progress

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Not my field - no comment

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

no comment

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Publish the fact that a company is not working with the regulator and not in compliance - this will show the companies that there is serious consequences of non compliance. Fines should be considered however I think the publicity issue will be a heavier hitter. Criminal sanctions need to be considered as sometimes unfortunately companies do not take it seriously if no sanctions there.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

no comment



Richard Bruton TD
Minister for Communications, Climate Action & Environment
29-31 Adelaide Road
Dublin 2
D02 X285



Dear Minister Bruton,

Re: Public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive

Thank you for the opportunity to respond to your public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services (AVMS) Directive.

Google has engaged with policymakers in Ireland and around the world on the question of the appropriate regulatory oversight for content sharing platforms such as social media and video sharing sites. In November 2018 we presented testimony on this issue to the Oireachtas Committee on Communications, Climate Action and Environment and we were also pleased to participate in the Government's Open Policy Forum on Online Safety in March 2018. We are pleased to see the development of proposals in further consultation with all interested parties.

Smart regulation is good for the Internet and for society, and nowhere is it more important to get the balance right than in the debate over what we can and cannot see and share online. Taking into account relevant differences between services, Google's view is that regulatory oversight of content sharing platforms should be guided by four principles:

- governments should clearly set out the rules on what constitutes impermissible content;
- oversight should set out standards for transparency and best practices;
- oversight should address systemic failures to respond to identified violations, and
- governments should foster international cooperation, while recognizing people national differences.

We have expanded on these principles in our response to the questions posed in the consultation, and I am attaching a copy of our submissions. We believe that it is essential that any new legal framework in Ireland should also reflect and be consistent with the laws governing online services in the EU, in particular the E-Commerce Directive, but also relevant frameworks in other fields, such as privacy and data protection, jurisdiction and

applicable law. In particular, we would highlight the need for national legislation to reflect the ‘notice and takedown’ procedures specifically envisaged by the E-Commerce Directive and E-Commerce Regulations for information society service providers (ISSPs) in addressing notifications of allegedly unlawful information; this system strikes a careful balance between the interests of persons affected by unlawful information, ISSPs and internet users. Additional oversight for content sharing platforms should complement, rather than replace, these laws.

We welcome the progress towards implementing the updated AVMS Directive, which will have a significant impact on the European online video landscape. We are pleased that the text recognises the key differences between traditional broadcast media and video sharing platforms (VSPs) such as YouTube, and draws distinctions in the rules accordingly. We also welcome that the text is in harmony with the rules of the E-Commerce Directive, which is crucial to allowing open platforms and a vibrant web economy in Europe. The text provides a framework of legal certainty for VSPs to be measured on their compliance measures through the country of origin principle.

As Ireland looks towards transposition, we encourage you to seize the opportunity to draft rules that are balanced, foster innovation and enable VSPs to thrive. As some open questions remain on how the provisions can best be implemented, we are happy to offer our thoughts on this. In addition to the areas covered by the consultation, there are a number of other issues associated with transposition of the Directive that we would like to bring to your attention for further discussion, including:

- On **VSP safeguards**, YouTube has been working together with Facebook, Twitter and with the European Commission since 2016 to implement a [code of conduct](#) for hate speech. Since then, Instagram, Google+, Snapchat, Dailymotion, and Jeuxvideo.com have joined the Code of Conduct. We believe this should be the benchmark for national codes of conduct. It is important that national codes of conduct apply the intentions set out in the Directive, i.e. *“appropriate to achieve the objective of protecting minors from harmful content and all citizens from incitement to hatred”* without applying additional burdens.
- On **user content rating**, we recommend a sensible interpretation of the requirement for VSPs to provide user *“rating systems”*. The *“user”* should be interpreted to refer to the *“uploader”* of content, not the end user. Crowd-sourcing *“user ratings”* for content would be unreliable and unworkable. Every user will have a different view of what rating should be given a particular piece of content, or even what content should be age-gated. To meet the goals of AVMS, the focus should be on providing an uploader with the ability to *“rate”* a piece of content as being suitable for 18+ and therefore subject to age-verification measures.
- The rules for **audiovisual commercial communications** should be measured ~~appropriately~~ ^{appropriately} so that a platform cannot comply with these rules without moderating the content of advertising. The rules should therefore only apply to advertising over which the VSP actually has meaningful control.

- The transposition should allow flexibility for consumer-friendly **overlays of AVMS rules**. As one important example, these rules should not interfere with a copyright owner's ability to claim and monetise content uploaded by a third-party (who may constitute the media service provider under the AVMS rules).
- Under the current wording (and given the confusing **overlap between the definition of a "programme" and a "user-generated video"**), individual creators such as YouTubers could fall in scope of the definition an on-demand audiovisual media service provider, meaning they may need to notify the local regulator and comply with other AVMS Directive rules. While an adequate level of protection for users - particularly children - must be guaranteed, this could create excessive burdens for individual creators (and indeed a significant burden for regulators), therefore we believe that a balance should be found in this specific respect.

Open platforms such as YouTube are a benefit to a thriving audiovisual sector, and have enabled great things for creators and viewers in Europe. YouTube is an important driver for creativity, enabling people to share their talents across and outside Europe. European partners of all kinds and sizes are succeeding on YouTube, including new European talent, established creative industries, cultural institutions and other creative entrepreneurs. These partners are using the platform to communicate, entertain, educate, promote tolerance and understanding, and make a living.

We look forward to working with you to help determine the appropriate framework that will best ensure safeguards for our users.

Yours sincerely,

Ryan Meade

Senior Manager, Government Affairs and Public

Policy Ireland

Public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive

Google's responses - submitted through online questionnaire

Strand 1 – National Legislative Proposal

Question 1:

What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. [Sections 2, 4, & 8 of the explanatory note]

In responding to this question it is useful to first outline the system that Google has in place for dealing with requests to remove prohibited content that is hosted on its services. This system has been developed within the legal framework provided by the E-Commerce Directive, a topic that we address in further detail below.

Google's approach to removing prohibited

content Google makes available a range of tools for users to request the removal of content that is regarded as unlawful within a specified jurisdiction (e.g. defamatory content posted by a user). When a person uses these tools to request the removal of prohibited content, Google assesses the request. We remove specified jurisdiction as required by applicable law on the basis of a legal removal request.

- pornography or sexually explicit content
- harassment or cyber-bullying content
- content that encourages others to do things that might cause them serious injury, especially children
- content that promotes violence against individuals based on race or ethnic origin, religion, disability, gender, age, nationality, veteran status, or sexual orientation/gender identity, or whose primary purpose is inciting hatred on the basis of these core characteristics
- graphic or gratuitously violent content
- content which forms part of predatory behaviour, such as stalking or threats and

Google also makes available tools for users to request the removal of content that is regarded as unlawful within a specified jurisdiction (e.g. defamatory content posted by a user).

When a person uses these tools to request the removal of prohibited content, Google assesses the request. We remove specified jurisdiction as required by applicable law on the basis of a legal removal request.

Google's removal processes operate on a huge scale. For example, between October 2018 and December 2018 YouTube removed over 8.7 million videos that broke its rules and blocked over 261 million comments, detected through a mix of automated and human flagging. Of those videos,

YouTube removed 18,950 videos for violations of policies on hate speech and over 49,500 videos for violation of policies on violent extremism.

We believe that any proposal for the domestic regulation of harmful content should recognise, and build on, the notice and take down procedures that internet service providers such as Google already make available to internet users. The percentage of content subject to removal requests is low; however, given the huge range of user generated content that is available online, even a small percentage amounts to a large volume of removal requests in total. As such, it makes sense for a proposed regulatory body to complement rather than compete with the removal processes already operated by internet service providers. It is not likely to be an efficient use of public resources to assign a regulator responsibilities for online content that replicate the processes already pursued by online platforms, nor would this deliver significant additional benefit to users of online services.

What is the optimal role for a proposed regulatory body?

As a starting point, the regulatory body's powers will have to operate in accordance with the E-Commerce Directive's overarching legal framework. The E-Commerce Directive is the principal instrument in the EU governing the liability of internet service providers for content that is hosted or transmitted via their services.

The E-Commerce Directive provides that:

- In order to trigger a take down obligation on the part of the service provider, the user must properly notify the service provider of unlawful content and provide it with the necessary information to identify the content and to determine whether or not it is unlawful.
- The service provider will only be exempt from possible legal liability where it has promptly removed properly notified unlawful content. Service providers are otherwise not responsible for user-generated content that they host or transmit.
- Service providers cannot be placed under a general-monitoring or active searching obligation.

As a result, a service provider that does not operate such procedures would be exposed to potential legal liability for unlawful content hosted on its services. In this way, appropriate safe harbours are essential to supporting free expression, innovation, and economic growth.¹

The E-Commerce Directive also places limits on EU Member States' ability to regulate service providers' notice and take down responsibilities. Within the context of the E-Commerce Directive, national regulatory bodies may be designated a role in:

- Determining what constitutes unlawful content in cases where there is disagreement between the service provider and a user. This adjudication function is typically carried out by courts, although in some instances specialist administrative bodies play a role (e.g. the Data Protection Commission in the case of data protection issues).

¹ <http://internetassociation.org/wp-content/uploads/2017/06/NERA-Intermediary-Liability-Two-Pager.pdf>; <https://www.oxera.com/publications/how-are-internet-start-ups-affected-by-liability-for-user-content/>

- Exercising oversight of the service providers' notice and take down procedures, e.g. ~~to~~ ~~regulate~~ ~~by~~ ~~the~~ ~~company~~ ~~users~~.

Within these EU mandated limitations, Google submits that a national regulatory model ~~is~~ ~~not~~ ~~feasible~~ of why people value content sharing platforms - a critical distinction from traditional media, and why we should explore new rules to solve new

problems. New oversight also needs to recognize relevant differences between services of different scale and purpose. Platforms such as YouTube -

with over one billion users and the principal purpose of helping people to store and share content with the public or other broad audiences - have different roles from other services like file storage or email, and require different rules.

Google submits that four principles should guide proposals for additional regulatory oversight of content sharing platforms:

Defining what constitutes impermissible speech

- Governments have an obligation to lay out for companies, and their own citizens, ~~where~~ ~~they~~ draw the lines between permissible and impermissible speech. Regulators should provide clear definitions, focused on objective, ~~and~~ ~~be~~ ~~able~~ ~~to~~ ~~take~~ ~~action~~ ~~against~~ ~~violative~~ ~~content~~.

Set out standards for transparency and best practices

- Transparency provides the starting point for effective practices, and the basis for ~~an~~ ~~open~~ ~~discussion~~. Content sharing platforms should work with governments and other stakeholders to provide clear information about legal removal processes and how to submit complaints and appeals; promptly assess and act on those submissions; and report on the results.
- Because technology is not static and new forms of communication continue to ~~emerge~~ ~~and~~ ~~evolve~~, ~~regulators~~ ~~should~~ ~~take~~ ~~a~~ ~~flexible~~, collaborative approach that supports best practices, and promotes research and innovation. Overly restrictive requirements (e.g. one-size-fits-all removal times, specific technology mandates or monitoring ~~and~~ ~~penalties~~) would reduce access to legitimate information and discourage innovation. Along with considering relevant differences between services, relevant differences between types of content should also be taken into account; for example: child sexual abuse imagery is always illegal; while distinguishing hate speech from legitimate news reporting on political speech, or the lawful expression of unpopular or unfashionable opinion, is generally a matter of context.

Address systemic failures to respond to identified violations, not one-offs

- Oversight should focus on ensuring procedural accountability, addressing systemic failures rather than individual ones, and using data-driven approaches to understand whether particular errors are outliers or representative of a more significant problem.

- Where clear evidence indicates a platform is systemically failing to follow through on their stated commitments, an enforcement body could be empowered to conduct a review. Companies should be able to bring evidence before a neutral arbiter to contest findings of systemic failure and raise countervailing considerations, such as respect for international human rights.
- Penalties may be appropriate in cases where a platform is systemically failing to respond to valid notices of specific illegal content. However, a more unbounded approach – such as penalising failure to foresee that lawful speech may nevertheless turn out to be problematic – would allow a regulator to limit access to legitimate information in an opaque and arbitrary manner. While platforms should responsibly develop and enforce appropriate content policies, governments should also be transparent and articulate what is impermissible in a well-tailored way. They should use democratic processes to clearly delineate that a type of content is unlawful, and those restrictions should be necessary and proportionate.

Foster international cooperation

- Given the multinational nature of modern platforms, and people’s abilities to access information from other countries, countries should share best practices with one another and avoid conflicting approaches to oversight that impose undue compliance burdens.
- That said, individual countries should be able to set their own rules, consistent with international human rights. Content that is illegal in one country may be lawful in another. No one country should be able to impose its rules on the citizens of another country.

As the development of information technology, the internet and social media empowers individuals with more effective tools with which they can share and access information, we believe that all of the relevant stakeholders must work together to ensure that the correct balance is maintained between upholding opportunities to create and access information while simultaneously respecting countries’ differing cultural norms and laws. The arrival of new online platforms has changed how we get and share information, mostly for the better, but sometimes with unintended consequences. The Internet has in some ways challenged the traditional institutions that helped organize, curate, and share valuable information for society. We look forward to working with the government to contribute to the great task of building new systems, institutions and laws that promote trusted and useful information.

Within these EU mandated limitations, Google submits that a national regulatory model for harmful content should take account of the following:

- There needs to be a clear definition and understanding as to the legal status of harmful content. The law already dictates that many categories of what might loosely be termed “harmful content” are legally prohibited, e.g. content that incites hatred. By virtue of the Commerce Directive, service providers that host such content must expeditiously remove or disable access to it. Legal uncertainty and confusion will arise if content is to be classified as both unlawful and harmful. As such, any new statutory definition of “harmful content” should be addressed to content that is not currently illegal under Irish law.
- Individuals should in the first instance use a service provider’s notice and take down tools, before seeking the intervention of the national regulator in the case that either: (a) the service provider has not acted expeditiously to remove the allegedly harmful content; or (b)

the service provider has declined to remove the content on ~~grounds of a finding that it is illegal~~ the service provider's decision before the national regulator.

- To ensure that there are sufficient safeguards for the right to freedom of expression, service providers should not be subject to any legal liability in respect of allegedly harmful content hosted on its platform until such time as the national regulator has determined whether or not the content meets the statutory definition of harmful content. Even then, any determination by a national regulator should be subject to a right of appeal to the courts by the service provider and/or the complainant. There can often be legitimate differences of opinion over whether content is objectionable or whether it is protected expression. It would not appear to us to be desirable to make intermediaries decide what should stay online and what should not, in circumstances where the unlawfulness of the content is not obvious. If a service provider is subject to a risk of legal liability merely because an individual asserts that hosted content is prohibited, freedom of expression will be severely inhibited, requests being made, and would inevitably lead to the wholesale censorship of the internet.

Finally, Google also notes that jurisdictional issues will need to be carefully considered in ~~the~~ ~~only~~ ~~EU~~ level playing field between service providers that are established in Ireland as against those that operate outside of the jurisdiction, while also respecting the AVMS Directive's country of origin principle. Furthermore, limitations on access to the regulatory regime based on citizenship will need to respect Irish and EU law.

Question 2:

If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

As noted above, Google believes that a national regulatory model should complement rather than compete with the notice and take down procedures operated by service providers. If a user can have his/her request dealt with by the service provider, there should be no need to involve a national regulator. A national regulator would likely be faced with an unmanageable volume of requests if it were obliged to act as the representative of individuals that are seeking to have harmful content removed from all available online platforms².

A national regulator could, however, play a very useful role for internet users generally by facilitating best practices and providing information and guidance in relation to the service providers' notice and take down procedures. Google would also support industry in having a role in working with the

² The regulator would also likely be subject to a large amount of inappropriate or frivolous reports in addition to genuine and actionable flagging of harmful content. We regularly receive overly broad removal requests (see e.g. <https://support.google.com/transparencyreport/answer/7347743?hl=en>), and analyses of cease-and-desist and takedown letters have found that many seek to remove potentially legitimate or protected speech (see e.g. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628).

In addressing this question, the E-

Commerce Directive is again of direct relevance and application. Articles 12-14 of the E-Commerce Directive list three categories of information society service provider:

- **Mere conduits.** These are services that consist of the transmission of information across a network or providing access to such network, for example, a telecommunications service.
- **Caching services.** These are services that consist of the transmission of information across a network, where a service provider temporarily stores information for the purpose of making an efficient onward transmission of information. Google's search services fall within this category.
- **Hosting services.** These are online services that consist of the hosting of information and hosting of a platform to post and display user generated content fall within this category.

In Google's submission, any national regulatory or legislative scheme in respect of 'harmful content' should focus on online content sharing platforms - whose principal purpose is to disseminate information - which play an important role in public discourse, are the subject of many of the concerns about harmful content and gaps in relevant media regulation and are the appropriate focus of additional oversight. New oversight also needs to recognize relevant differences between services of different scale and purpose. Social media and video sharing services have different roles from other services like file storage or email, and require different rules. Similarly, mere conduits and caching services are intermediaries in the transmission of information and should not therefore be implicated by regulation that is directed towards the removal of harmful content from online platforms. For example, an order to de-index a website URL from a search index will not achieve the object of having harmful content removed from the website itself.

To ensure legal certainty as regards the application of proposed national regulation, Google submits that a definition of the types of content sharing platforms subject to the regulation should be included in the legislation. In addition, clear exceptions should be provided for other types of services, such as private stored content/cloud services. Specific exemptions or derogations in respect of content for journalistic purposes or for the purpose of academic, artistic or literary expression should also be considered, similar to that enshrined in the GDPR and section 43 of the Data Protection Act 2018.

Question 4:

How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- *Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)*
- *Material which promotes self-harm or suicide*
- *Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health*

[Sections 2, 4 & 6 of the explanatory note]

Because the term “harmful content” is itself inherently vague and open to different interpretations in legislation. Furthermore, the right to freedom of expression will have to be balanced within any legislative proposal. In Google’s submission, the statutory definition should have the following characteristics:

- The concept of “harmful” content should be informed by rigorous evidence-based criteria that consider the seriousness of the impact of the content on the physical and mental wellbeing of users.
- It will not be possible, or desirable, for a regulator to adjudicate upon every case of offence or insult that is brought to the attention of a regulator. A sufficient number of complaints must be made with the statutory definition should be drafted so that frivolous complaints being made.
- A proposal to classify content as “harmful content” should only be made after freedom of expression and societal implications have been fully assessed. In particular, a proposal should not inhibit the ability of internet users to have informed and robust debate online.
- Only a closed list of specified “harmful content” should be the subject of regulation.

If a precise self-contained definition is not legislated for, a number of negative consequences will likely follow:

- Users will be confused over what is acceptable behaviour when using online platforms.
- Many platforms will be forced to take a precautionary approach to the removal of content, which Google believes that such an approach is not appropriate, as it fails to attempt any meaningful balancing of the important fundamental rights at issue.
- There will be gradual chilling of online expression with internet users being fearful of expressing their opinions or participating in online debate.

A further issue to be decided is whether the legislation should grant protections to children alone or to both children and adults.

In Google’s submission, there are strong grounds for limiting the scope of the law already protects adults against unlawful content, and it is questionable whether any benefits that there are to protecting adults against “harmful content” will be outweighed by the unpredictable consequences for freedom of expression that would necessarily result from such protection.

The case for protecting children against “harmful content” is clear-cut. This is the regulatory model adopted in Australia, where the statutory regime is limited to “cyber bullying material” that, objectively viewed, is intended to have the effect of “*seriously threatening, seriously intimidating, seriously harassing or seriously humiliating*” a child (Section 5, Enhancing Online Safety for Children Act 2015). It also aligns with the objectives and structure of the revised AVMS Directive.

Strand 2 – Video Sharing Platform Services

Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

The definition of Video Sharing Platform Services adopted under the revised Directive is the result of complex negotiations among the EU Institutions, which deliberated for more than two years to carefully shape and balance that notion in order to ensure the maximum protection for childrens' and users' rights over the internet.

After considering a number of alternative definitions based on the general nature of the platform (video-sharing, social media, etc.) and on the technology used to give access to the content (uploading, downloading, etc.), the Commission and the Council agreed upon the adoption of a technology-neutral notion of Video Sharing Platform Service encompassing any service devoted, in all or in an essential functionality, to providing audio-visual content without editorial liability over it (Article 1, paragraph 1, (aa)), including social media (see Whereas 4). We note the reference to “an essential functionality”. In other words, the provision of programmes, user-generated videos or both need not be the essential functionality of the service.

Besides, Article 1, paragraph 1, (aa) of the revised Directive makes no express reference to the law of the Member States for the purpose of determining its meaning and scope. Thus, the notion of “Video Sharing Platform” under that provision shall be regarded as an “autonomous notion of EU law”.

Accordingly, Member States should implement that definition in a verbatim way to allow a uniform application of EU Law and to ensure that the revised Directive's targets of protecting children and tackling unlawful audiovisual content be ensured throughout the EU in an effective manner (see CJEU decisions in Deckmyn, Padawan, etc.).

By the same token, if each Member State were to implement its own definition of Video-Sharing Platform, that would substantially set aside the balance struck at EU level and seriously undermine the chances for the Directive to reach its goals of protecting children and the public as a whole.

Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The most effective regulatory models are shaped around a principles-based approach granting the regulators and the regulated entities a framework flexible enough to adapt to technology as it evolves. With this in mind, the regulatory relationship between Video Sharing Platform providers and regulators should be built upon shared policy values and a deep understanding of the technology involved in the platform business.

EU and national best practices support this point. In the field of harmful content, the regulatory framework designed upon the Code of Conduct on Countering Illegal Hate Speech Online has proved effective. In this example, the EU Commission, together with the major internet companies, have jointly agreed to ensure that flagged content is expeditiously acted upon by online intermediaries and social media platforms.

The Commission's understanding of the technological challenges connected to removing content in the online environment, the proportionate and effective obligations upon platforms, as well as the sharing of best practices among internet companies, platforms and social media operators has produced remarkable results.

As Commissioner Jourová commented, "today, after two and a half years, we can say that we found the right approach and established a standard throughout Europe on how to tackle this serious issue, while fully protecting freedom of speech."³

Building on the foundation of the Code of Conduct, it is critical to design an institutional framework by which the regulator and stakeholders can work hand in hand towards a shared policy result.

On one hand, the governance structure of the Regulator should reflect its new responsibilities in the online field. Hence, it would be key that the Regulator's board dealing with those new tasks consist of

members who are well aware of the social and technology challenges particular to the internet world and to the platform environment.

Further, the Regulator could encourage the establishment of a multi-stakeholder governance structure to make all Regulator's decisions more effective and up-to-date with the existing social and technological environment.

Such an institutional solution would ensure that:

³ https://ec.europa.eu/ireland/news/countering-illegal-hate-speech-online-eu-code-of-conduct-ensures-swift-response_en

- The Regulator is provided with the up-to-date competences to understand the platform sector;
- Platforms understand the Regulator and the collective needs represented by NGOs and are allowed to bring their technical know how into the discourse; and
- NGOs have a direct link with the Regulators and with platforms and can interact with them without filters, helping to shape the regulatory environment.

Question 7:

On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The monitoring activities of the Regulator should develop along the lines of the technologically-conscious and policy-effective approach described above. The many successful initiatives to tackle illegal content existing at a national EU Level, such as the above-mentioned Code of Conduct on Hate Speech, the Code of Practice on Disinformation, and the ICT coalition, demonstrate that the most effective way to protect users' rights over the internet is establishing clear principles and objectives, to allow platforms to pursue them through the most technologically-suited actions, and to put in place a continuous, resilient monitoring system to update and evolve existing schemes in case they do not meet those objectives. The most effective monitoring scheme would adhere to the principles for regulatory oversight of content sharing platforms, discussed above.

In this context, establishing an institutional body - such as the forum addressed in the previous point

- where the Regulator and platforms exchange dialogue would be key to ensuring that the most effective monitoring scheme is possible.

Strands 3 & 4 – Audiovisual Media Services

Question 8:

The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

The revised Directive in fact maintains a clear separation between the legal framework for ~~linear~~ and on-demand providers. The separation is due to the technical differences that exist between those two services, which reflect the different ways in which the public uses them. Hence, while the principles regulating broadcasters and on-demand providers might be aligned (e.g., need for protection of children), the rules governing those two services differ in some respects (e.g., a time-based obligation targeting on-demand providers would be pointless, while it is still an effective measure for broadcasters).

In order to ensure full protection of children and users in general, the approach designed under the revised Directive should be safeguarded. As in the case of Video Sharing Platform Services outlined above, the different rules for broadcasters and on-demand services adopted in the revised Directive are the result of deep analysis and extended negotiations which brought the EU institutions to agree that, when it comes to protecting children's and users' rights in the AVMS field, a tailored approach is far more preferable than an unsophisticated, ineffective one-size-fits-all solution.

Besides, while the minimum-harmonisation approach allows national lawmakers to transpose ~~parts~~ of the revised Directive in a way they deem fit to their national environment, Member States should not ignore the founding principles of the revised Directive -- which include the different approach to content rules between broadcasters and on-demand providers.

Question 9:

Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Allowing non-linear services to access the Sound & Vision fund seems consistent with the revised Directive's principle of creating a level-playing field among the major players of the audio-visual sector, i.e. broadcasters and on-demand service providers -- while safeguarding their differences.

In line with such an approach, another important innovation the revised Directive introduces is the elimination of the "TV-like" principle, which paves the way for some professional content creators, including some YouTubers, to fall within the scope of application of the Directive.

In order to create a proper level-playing field, it seems consistent that the new obligations imposed upon those creators correspond to new development opportunities, including access to funds once granted to traditional AVMS players only, such as the Sound & Vision fund.

YouTube Originals, an on-demand service with a European establishment in Ireland, has ~~benefit~~ to support creators, which has been benefitting the production content on that on-demand service in terms of quality

and pluralism.

As to the possible introduction of levies to services established in another EU Member State and targeting Ireland, Ireland should consider that Article 13, paragraph 2 of the revised Directive provides that:

(i) It is not mandatory for Member States to require levies to foreign on-demand service providers;

(ii) If a Member State does so, it shall require a proportionate and non-discriminatory amount of levies to providers established in its territory;

(iii) Instead of levies, Member States are entitled to target on-demand providers abroad and targeting their territory with investment obligations, i.e. with rules binding providers to invest a given percentage of the revenues earned in the targeted Member States in the production of EU Works.

The latter solution does not risk conflicting with States' own standards, provided they are not imposed on providers in their own catalogue and not requiring particular coordination with possible levy systems adopted in other EU Member States.

Strands 1 & 2 – European & International Context

Question 10:

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Google notes that the [UN Special Rapporteur's Report on the regulation of online content](#) contains a number of recommendations to assist states in ensuring that freedom of expression is not unduly curtailed by legislation or regulation aimed at protecting internet users from harmful online content. These include:

- Repealing and rejecting any law that criminalises expression online
- Ensuring regulation is focused on guaranteeing company transparency and remediation to enable the public to make choices about how and whether to engage in online forums, rather than heavy handed, "viewpoint-based" measures
- Only seeking to restrict content further to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy

- Refraining from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression

The protection and promotion of the right to freedom of expression is a fundamental principle of public law. It applies to all forms of expression, including those that are disseminated through digital technologies.

As noted in responses to Questions 1 and 4, any regulatory system must be conscious of the chilling effect on expression and responsible innovation that a vague, overbroad, or draconian regulatory framework can have.

Online platforms such as YouTube play an important role in facilitating individuals' freedom of expression and opinion rights online. Upon receipt of a take down request, the most risk-averse response is simply to comply with the request. A regulatory framework which is punitive to hosting platforms will compound this risk and could encourage platforms to adopt a less critical approach to take-down requests without any meaningful balancing of the rights at issue.

As set out in our response to Question 1, to ensure that there are sufficient safeguards for the right to freedom of expression, harmful content hosted on its platform until such time as the national regulator or court has determined that content is

Regulatory features such as having a clear definition of "harmful content" and ensuring that the definition is limited only to content that causes serious harm, will assist in balancing the rights of internet users to freely express themselves online and the requirement to safeguard the public interest from harmful content.

Question 11:

How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? [Section 2, 4, 5, 6, 7, & 8 of the explanatory note]

Our responses to Questions 1, 2 and 3 describe the framework established by the E-commerce Directive for the regulation of harmful content online. These principles apply equally to any national proposal for the regulation of harmful content (Strand 1) and the regulation of content made available by video sharing platform services that are subject to the AVMS Directive (Strand 2).

Strands 1-4 – Regulatory Structures

Question 12:

Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?
[Section 5 of the explanatory note]

In order to ensure consistency among the different strands, it would be sensible for Ireland to follow the examples of other Member States and appoints the Broadcasting Authority of Ireland as the entity responsible for the four strands.

As mentioned above, in restructuring the BAI it would be appropriate to ensure that its governance structures reflect its new responsibilities, and the range of technology and industry sectors it will be regulating and with which it will interact.

Within the restructuring necessary to make the BAI fit for that role, Ireland might also consider a dedicated forum including members of different stakeholders of the field (e.g., platforms, NGOs, etc.) to ensure continuous dialogue between the players of the market and the Regulator, as well as coordinated and more effective actions to tackle unlawful content on the internet.

Question 13:

How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Google submits that direct funding from the State is the best model for promoting independence and impartiality of any regulatory body that oversees video sharing platforms and other online service providers falling within the scope of harmful online content regulation. This solution is necessary to ensure that, as provided for under Article 30 of the revised Directive, national regulatory bodies are legally distinct and functionally independent of any public or private body.

Strands 1 & 2 –Sanctions/Powers

Question 14:

What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

Having regard to the stated intention to legislate for an Online Safety Commissioner with the power to order the removal of “harmful content”, our responses in Questions 1-4 outline our view on the optimal procedures for operating such a regulatory regime. The Online Safety Commissioner’s powers must operate within the confines of the E-Commerce Directive, and accordingly its adjudicative and enforcement powers will necessarily be limited in scope.

There is a real risk, however, that given the large number of users who are likely to submit

complaints to the regulator, any system which requires a regulator to adjudicate or act as a mediator in respect of individual complaints is likely to experience long delays and expend extensive resources.

Furthermore, a regulator which adjudicates on individual cases may stray into adjudicating on issues more appropriately heard before a court such as the balance between protecting the right to freedom of expression and protecting internet users from harm.

For these reasons, and in line with the approach being taken in other EU states, a more efficient and appropriate method for regulating harmful content online may be to focus on the review of structural compliance by a service provider. Under this model, the regulator’s functions are primarily concerned with ensuring that content sharing platforms have appropriate systems in place to (i) receive and review complaints; and (ii) provide appropriate responses to individuals. Any enforcement powers under such a regime would be exercisable in connection with serious or systematic violations by the service provider.

Question 15:

What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- *The power to publish the fact that a service is not in compliance,*
- *The power to issue administrative fines,*
- *To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,*
- *The power to apply criminal sanctions in the most serious cases.*

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

The power to publish the fact that a service is not in compliance should be limited to cases where that non-compliance has an appreciable impact on the public and such publication can help to reduce or prevent damage to the public. The function, in other words, should not be punitive.

In order to protect freedom of speech, it is key that sanctions or fines, as well as notices and court enforcement, be limited to the most serious, repeated, and systemic cases of structural non-compliance rather than single instances of non-compliance. Oversight should focus on procedural accountability, penalizing systemic failures rather than individual ones, and using data-driven approaches to understand whether particular errors are outliers or representative of a more significant, pervasive problem.

As outlined above, decisions by platforms not to take down content are in the most part guided by their commitment to protect freedom of expression and opinion. Without sufficient and clear protection from liability, many platforms (particularly those who are just starting up) may be forced to take the path of least resistance and delete content irrespective of whether it is obviously unlawful or not. Google believes that such an approach is not appropriate, as it fails to attempt any meaningful balancing of the important fundamental rights at issue. This would lead to a gradual chilling of expression and legitimate debate online with the censorship of meritorious communications occurring for fear of potential claims.

The principles above apply to cases involving criminal sanctions, which should only target harmful conduct by users for their conduct online and avoid side effects such as criminalising platforms for something that has been committed through their service by third parties without any intention to harm by the platform itself.

Question 16:

Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Many platforms already provide for effective mechanisms to handle takedown requests. Platforms are successfully handling millions of takedown requests directly with users, making significant efforts to protect their rights and to improve their platforms to ensure that users' rights are protected in the most effective manner.

In order to avoid a torrent of unmerited claims overwhelming any arbitrator or ADR provider, cases where users are entitled to escalate the dispute to mediators should be limited to the most serious types of harmful content within the remit of the revised Directive -- hence

excluding cases such as personal defamation not involving threats or racism, spam, etc, which are outside the remit of the revised Directive.

Also, as per Article 28b of the revised Directive, the independent mediation service to which the revised Directive makes reference should only concern disputes related to a limited number of topics, i.e. those listed under Article 28b, paragraphs 1 and 3 of the revised Directive.

As well as helping to ensure effective and appropriate use of regulator resources, the introduction of an appropriate statutory threshold test can be expected to discourage those who might seek to use the new online safety laws: to suppress legitimate criticism; to stifle those who would seek to remind readers of facts of genuine public interest that the subject in question might find uncomfortable; or, to stamp out online expressions of heartfelt opinion about the actions or policies of those in the public sphere. Even if the subject is not so discouraged, the introduction of such a threshold test, as well as effective regulatory procedures to dispose of trivial claims at an early stage, would greatly assist to halt the progress of any such claims and thus diminish their adverse effects.

Further, Ireland will need to coordinate the mediation service provided under the revised Directive with the mediation service envisaged under the forthcoming Platform to Business Regulation. In this perspective, it could be opportune to limit the access to the AVMS mediation to the disputes between platform providers and consumers, while those between platform providers and professional users would be dealt with by the mediation services provided under the Platform to Business Regulation.

Page 2

1 -Name

Ciaran Austin

2 -Organisation if applicable

HSE National Office for Suicide Prevention

3 -Email

Page 3

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

All online platforms including general publishers, forums/chat services, social media services, video sharing services and on-demand services.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Material which promotes self-harm or suicide should be considered as a clearly defined category in the context of any new national legislation. Many cases of internet-related suicide have been reported in the popular and academic press. The HSE National Office for Suicide Prevention (NOSP) asserts that these highlight the potential that the internet has, to promote suicide or other related harmful practices. Connecting for Life, Irelands National Strategy to Reduce Suicide 2015-2020 <1> places considerable emphasis on the need to “engage and work collaboratively with the media in relation to media guidelines, tools and training programmes to improve the reporting of suicidal behaviour within broadcast, print and online media” (Objective 1.4). Four specific actions (1.4.1, 1.4.2, 1.4.3 and 1.4.4) detail a range of ways in which key stakeholders (e.g., DCCAE, BAI, Press Council of Ireland, NOSP, NGO partners) can encourage safer online environments, responsible media reporting and broadcasting of suicide-related content. The HSE NOSP is of the view that a stronger legislative definition of harmful online content,

which emphasises the harmful impact of pro-suicide or self-harm material, should be developed. This would assist in collective efforts to achieve objective 1.4 of Connecting for Life and other related efforts in this area. A clearly defined list of material which promotes self-harm or suicide should be developed, to include but not limited to;

- Information on how to hurt or kill oneself, including evaluations of different methods and rationale for each, and related questions and answers
- Chatrooms, forums or other material that encourages suicide or assists with suicide planning
- Suicide “pact” sites
- Images or videos that depict acts of suicide or self-harm, or locations/materials associated with such acts
- Material which promotes other suicidal behaviours e.g., behaviours that include planning for suicide, acquiring means to suicide, attempting suicide and suicide itself
- Other potentially harmful information such as promoting means of concealment of self-harm activities.

It should be noted that while there is significant potential for harm from accessing pro-suicide material online (normalisation, triggering, competition, contagion) there is also the potential to exploit its benefits (crisis support, online help supports and information, reduction of social isolation, delivery of therapy, outreach) - any new legislation should give careful consideration to this balance.

Research that highlights how and why pro-suicide online content is harmful: Significant increases have been noted in changes in the accessibility of suicide-related information. For example, in a study <2> analysing changes between 2007 and 2017, over 54% of hits from search terms related to suicide, contained information about new high-lethality methods of suicide. Additional research from the University of Bristol <3> in 2015 found that in a population survey of 21-year-olds, of the 248 participants who had made suicide attempts (6% of the overall sample), almost three quarters reported some kind of suicide-related internet use at some point in their lives. One in five had accessed sites giving information on how to hurt or kill oneself, though most of these had also visited help-sites. In a clinical sample of over 1500 patients who presented to hospital following a suicide attempt, 8% said they had used the internet in connection with their attempt. This percentage was higher for younger patients (12% of those aged 16-24 years) and those who had self-harmed with high suicidal intent (24%). For most of those interviewed in the clinical sample, the main purpose for going online was to research methods of suicide, sometimes in great depth. While researching methods of suicide online, did not always lead to action, it made individuals vulnerable by validating their feelings, legitimising suicide as a course of action, and providing knowledge about methods of suicide. Half of those interviewed in the clinical sample planned and carried out a suicide method, based on their online research; some had purchased materials online. However, in some instances, information about methods discovered online was found to be ‘off-putting’, causing some individuals to rule out particular methods of suicide. A more recent (2017) review <4> of the evidence of the relationship between internet use, self-harm and suicidal behaviour in young people, highlights that this relationship is particularly associated with internet addiction, high levels of internet use, and websites with self-harm or suicide content.

<1> <https://www.hse.ie/eng/services/list/4/mental-health-services/connecting-for-life/publications/connecting-for-life-ireland-national-strategy-to-reduce-suicide.html> <2> Gunnell D, Derges J, Chang S-S, Biddle L. Searching for suicide methods. *Crisis*, 2015. 36(5): 325-331. <http://dx.doi.org/10.1027/0227-5910/a000326> <3> Mars B, Heron J, Biddle L, Donovan J, Holley R, Piper M, Potokar J, Wyllie C, Gunnell D. Exposure to, and searching for, information about suicide and self-harm on the Internet: Prevalence

and predictors in a population based cohort of young adults. *Journal of Affective Disorders*, 2015. 185 p 239-245. <http://dx.doi.org/10.1016/j.jad.2015.06.001> <4>
Marchant A, Hawton K, Stewart A, Montgomery P, Singaravelu V, Lloyd K, et al. (2017) A systematic review of the relationship between internet use, self-harm and suicidal behaviour in young people: The good, the bad and the unknown. *PLoS ONE* 12(8): e0181722. <https://doi.org/10.1371/journal.pone.0181722>

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Takedown process & fines similar to Germany's NetzDG legislation are advisable. However, greater transparency is required around how content is served to minors, NetzDG requires the public to make a complaint - and only 600 takedowns occurred in 2018. Relying on the commons to police the internet, is not ideal, especially given levels of personalisation. Ideally, all platforms that serve content algorithmically should be mandated to have a separate algorithm for content served to minors. Similarly, different rules around how that content can be interacted with should be created and enforced. eg. YouTube has banned comments on videos showing young children.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

A statutory test is only useful if it can be constructed to keep up with the rate of change that can be employed by the internet companies. If the statutory test can be applied at the level of the algorithms that serve/recommend content to users, as mentioned above, it should function. However, this would require platforms to be transparent about their algorithms; they have been reluctant to do this to date.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

The focus should be on social platforms and online services most often used by Irish Minors. Research may be required to determine an exact list, but at a guess; Snapchat, Instagram, WhatsApp, YouTube, Facebook, FB Messenger, Tik Tok. The focus should be on mobile interaction.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU

law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Cyberbullying, grooming, and content that promotes risky activities that would potentially damage health or endanger lives should be defined. Particular attention should be paid to male/female interaction; cyber-stalking, revenge porn (the nonconsensual sharing of sexually explicit photos or videos), etc.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

I agree with the proposal that the definition of VSP is extended to social platforms in respect of other user generated content for Irish residents. Services should be considered VSPs if they host user generated videos and serve them to users; this would extend the definition to all social platforms.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Where practical, and non-cost prohibitive, VSPs should be required to create live dashboards and historical databases of audience interactions with content, so that the regulator can investigate the levels of interaction with specific content. The regulator should have oversight of any algorithms responsible for serving or recommending content to minors. And the regulator should be able to impose proportionate and meaningful fines on the VSPs found to be in breach of any

regulations.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

See above.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Television production and UGC are not aligned and different regulation and oversight is required. There is no need to apply the same content rules to both television broadcasting services and on-demand audiovisual media services.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

If non-linear services can prove that they are creating content that fulfils any form of public service broadcasting remit, they should be able to access the Sound & Vision fund.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

This is a very difficult question. An evidence based, consensus-driven response to this, devised and regularly revised through engagement with a host of stakeholders in the political, technical and NGO/civic space is required.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits

into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

There are legislative changes outside the remit of this consultation that would assist in this area. e.g. an extension of defamation legislation to include social platforms would add an element of rigour to the hosting/serving of content which could be beneficial to ensuring strands 1 & 2 fit the relevant EU framework.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Personally, I believe the BAI to be anachronistic in its construction. However, to ensure quick and technically focused responses to the specific issues around online content, I would recommend two separate bodies, with clear delineation around how they interact in the areas where there is cross-over.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Government funding required to ensure transparency and independence. Certain funds and initiatives could be funded by the platforms and services to be regulated.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Analytical oversight (live and historical); algorithmical oversight; audience oversight (specific data related to minors required). These functions and powers

should differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1. An analytical approach is required for both, but there are cost implications for businesses in each strand to providing the analytics required.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

All the above. More than just administrative fines would be recommended.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Thresholds make sense from a triage/throttling perspective, but aren't aligned with an open forum for citizens and stakeholders to voice concerns. Some process is required to accommodate both, and give users a feeling of meaningful engagement.



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For The Department of Communications, Climate Action and Environment
Re Public consultation on regulation of online content
Date [REDACTED]

The Irish Council for Civil Liberties ([ICCL](http://iccl.ie)) would like to thank the Department of Communications, Climate Action & Environment for the opportunity to provide input towards the public consultation on the regulation of harmful content on online platforms.

In our submission, we briefly set out the issues and fundamental rights challenges facing state and corporate attempts to regulate content online and we also provide recommendations.

I. Fundamental rights implicated by harmful content regulation online

It is clear that our fundamental rights are implicated by state and corporate regulation of harmful content on online platforms, in particular our right to privacy¹ and freedom of expression.² It is therefore important to observe at the outset that our rights are not changed or reduced online,³ but rather apply to all forms of online communication.⁴ Legislation in Ireland is required to conform with Ireland's human rights obligations under the Irish Constitution, the European Convention on Human Rights, and the international human rights treaties that Ireland has ratified.

¹ Our right to privacy is protected by Article 12 of the Universal Declaration of Human Rights (UDHR), Article 17 of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the European Convention on Human Rights (ECHR), and Article 7 of the Charter of Fundamental Rights of the EU (EU Charter). In correlation, our personal data is also protected under Article 8 of the EU Charter. In the Irish Constitution, a right to privacy has also been identified as one of the unenumerated rights stemming from the wording of Article 40.3; see *Cullen v. Toibín* [1984] ILRM 577.

² Similarly, our right to freedom of expression is protected by Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the ECHR, Article 11 of the EU Charter, and Article 40(6)(1)(i) of the Irish Constitution.

³ The United Nations Human Rights Council has stated that the same rights people have offline must also be protected online. This is particularly true for freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the UDHR and the ICCPR. See UN Doc A/HRC/32/L.20.t, available at:

<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>

⁴ The right to freedom of expression for example applies to all forms of electronic and Internet-based modes of expression. See UN Human Rights Committee, General Comment No.34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, (2011), available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.



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Egregious circumstances including the safety of children, prevention of terrorism, or, more broadly, the existence of harmful content online are frequently cited reasons by states and corporations for limiting fundamental rights. Mechanisms used and suggested to limit content online have included a combination of monitoring, reporting, pausing, reducing, removing, filtering, blocking, or censoring online content. Some of these terms signify the same actions, for example filtering and censoring, though the choice of language may soften rhetorically the implication for our rights that these actions might have.

Given the potential for rights limitations these content moderating actions might entail, it is the position of the ICCL that states and corporations alike must comply with constitutional and international standards. While states may limit our enshrined rights only in exceptional circumstances, they must still conform with the principles of legality, necessity, and proportionality and the strict requirements of a three part test: The restriction must be prescribed by law, pursue a legitimate aim, and be necessary in pursuit of that aim.

II. Rights compliant online content moderation: identified difficulties

It is generally understood by rights groups in Ireland that online platforms have failed to regulate content in a manner that upholds fundamental rights in Ireland. Recently, various Private Members' motions have attempted to address this problem by introducing bills in the Dáil and the Seanad. Unfortunately however these bills, including the Digital Safety Commissioner Bill 2017, do not appear to have provided rights compliant methods or proposals for online content moderation.

For example, while the ICCL recognises the efforts of Deputy Ó Laoghaire to regulate harmful content by bringing forward the draft Digital Safety Commissioner Bill 2017, we have previously pointed out a number of difficulties with that bill. **In our Autumn 2018 joint submissions with CIVICUS to the Committee for Communications, Climate Action & Environment,⁵ we described problems regarding the bill's incompatibility with international human rights standards on freedom of expression together with practical barriers to the bill's implementation.**

⁵ Please see the ICCL's previous joint submissions with CIVICUS, available at: <https://www.iccl.ie/wp-content/uploads/2018/11/Digital-Safety-Commissioner-Bill-2017-ICCL-CIVICUS-Submissions.pdf>



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The ICCL otherwise observes several difficulties generally for rights compliant content regulation online:

Blanket monitoring is not rights compliant

Legislation or regulations permitting generalised monitoring of content based on the concern that it *might* be harmful could allow governments and corporate platforms to surveil people in Ireland in a manner that contravenes constitutional and human rights standards and the principles of legality, necessity and proportionality. Similarly, imprecisely drafted laws or regulations that do not intend but nonetheless increase the chances of blanket surveillance would also run afoul of these standards.

Standardised definitions and removal procedures have been fallible

As legislative attempts in Ireland, at the EU level,⁶ and also corporate filtering mechanisms have revealed, it can be very challenging to define terms for the purpose of regulating and removing content in a fair, consistent, or practical manner. As the explanatory note for this consultation points out, 'harmful content' as a term has been no exception. Further, in a now substantive body of evidence, we are also seeing that well resourced corporate platforms have been confronting the problem of ethical removal procedures for harmful content in a concerted and technically sophisticated way for several years. They continue to fail.⁷ There are ever increasing examples of what has been in effect platform censorship rather than harmful content removal.⁸

⁶ See the parallel and challenged attempts of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) to define and moderate terrorist content online. EDRI, 'Terrorist Content Regulation: Successful "damage control" by LIBE Committee' (EDRI, 08 April 2019), available at: <https://edri.org/terrorist-content-libe-vote/>

⁷ See many strong examples of this failure outlined by Corynne McSherry and Gennie Gebhart, 'Mark Zuckerberg Does Not Speak for the Internet' (*Electronic Frontiers Foundation*, 1 April 2019), available at <https://www.eff.org/deeplinks/2019/04/mark-zuckerberg-does-not-speak-internet>

⁸ The Electronic Frontiers Foundation categorises these examples and also provides anecdotes: 'We've seen prohibitions on hate speech used to [shut down conversations](#) among [women of color](#) about the harassment they receive online; rules against harassment employed to shut down the account of a [prominent Egyptian anti-torture activist](#); and a ban on nudity used to [censor women](#) who share childbirth images in private groups. Museums have had [works of art](#) taken down for "suggestive content." And we've seen [false copyright and trademark allegations](#) used to take down all kinds of lawful content, including time-sensitive political speech.' See Corynne McSherry and Gennie Gebhart, 'Mark Zuckerberg Does Not Speak for the Internet' (*Electronic Frontiers Foundation*, 1 April 2019), available at <https://www.eff.org/deeplinks/2019/04/mark-zuckerberg-does-not-speak-internet>; see also the University of Toronto's Citizen Lab results of their investigation into how internet filtering technology in Canada is being used in various countries to censor access to news, religious content, LGBTQ+ resources, and political campaigns. Jakub Dalek et al, 'Planet Netsweeper, Executive Summary' (*Citizen Lab*, 25 April 2018), available at: <https://citizenlab.ca/2018/04/planet-netsweeper/>



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The major barrier to rights compliant standardised term definitions or removal systems thus far have been problems in accuracy. Experts point out that, apart from settling on agreed definitions, standardised content monitoring by either humans or algorithms are also inevitably inaccurate - rights compliant material is often wrongfully removed and rights infringing material is often left up.⁹

Accuracy problems - the human element

On the human side, it is unrealistic to expect either corporate or government regulator employees to identify infringing content without a significant error rate. Facebook head Mark Zuckerberg points out that 'The vast majority of mistakes [Facebook makes] are due to errors enforcing the nuances of our policies rather than disagreements about what those policies should actually be.'¹⁰ Corporate platforms might be understandably accused of ulterior motives including profits attached to leaving content up.¹¹ However, it is also not clear how a team of human moderators at government regulatory levels could also receive adequate training to engage in rights balancing assessments historically reserved for the judiciary.

Accuracy problems - the machine element

On the machine side, algorithmic solutions to fundamental rights infringements have also been criticised by technical experts for having the unintended consequence of unduly limiting fundamental rights. Automatic filters have not worked to date particularly because they can't detect context. Facebook admits this, noting that only 52% of hate speech is identified proactively.¹² Filters are also prohibitively expensive for any but the largest online platforms. In 2016, Google issued a report stating that YouTube's ContentID cost \$60 million.¹³ This number has likely continued to increase significantly and thus also raises for the ICCL a question regarding whether there is sufficient available government resourcing to assume these methods.

⁹ See Daphne Keller, 'Problems with filters in the European Commission's platforms proposal' (*Center for Internet and Society at Stanford Law School*, 05 October 2017), available at: <http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal>. Keller notes that 'errors include both false positives—removing lawful content—and false negatives—leaving infringing content up.'

¹⁰ Mark Zuckerberg, 'A Blueprint for Content Governance and Enforcement' (*Facebook*, 15 November 2018), available at: <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/>

¹¹ BBC News, 'Facebook moderators "keep child abuse online"' (*BBC News*, 17 July 2018) available at: <https://www.bbc.com/news/technology-44859407>

¹² Mark Zuckerberg, 'A Blueprint for Content Governance and Enforcement' (*Facebook*, 15 November 2018), available at: <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/>

¹³ Google (2016). *How Google Fights Piracy*, available at: <https://drive.google.com/file/d/0BwxyRPFduTN2cl91LXJOYjIYSjA/view>



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The legacy of state surveillance and censorship

There is also a legacy relating to the historical use of surveillance technologies deployed by states in a manner that disproportionately interferes with fundamental rights. These rights impacts cannot be disregarded particularly when they involve historically marginalized and discriminated communities. Surveillance tactics for example have been used by state policing institutions on social media platforms as tools of political and ideological persecution. The state goal has been to silence dissent, disrupt organised protest, crack down on social movements, and discredit protest leaders and social demands.¹⁴ There are important questions raised by this historical legacy regarding how the Irish government might best respond to online content concerns without resorting to online surveillance.

Systems design and value-based solutions

Whether algorithmic design or predictive data can at some point effectively respond to the issue of content moderation is still being explored. There may be scope in the future for filters that are self-appointed and directed (as opposed to operated by an external authority including state regulators or corporate platform).¹⁵ Self-appointed filtering would permit end users decide what content we might see online. Such mechanisms might include what one design expert has called 'repository invitations', a method whereby an internet user can't add another to a project without that user's consent.¹⁶

These designs are nascent and still exploratory but redirect the conversation to the importance of users deciding for ourselves what we want our internet and online platforms to look like. An question that is absent from the consultation is one of values: Will we support online spaces that are heavily monitored and tightly regulated by mediators who, to date, have often applied rights balancing analysis incorrectly? Or will we support online spaces that are free, secure, and self-actualising via the user's own discretion to control what content we have exposure to?

Transparency

One solution to the moderation problem proposed by the United Nations Special Rapporteur on Freedom of Expression includes what the Special Rapporteur calls 'radical transparency' for corporate platforms and states.¹⁷ The Special Rapporteur's brand of transparency has also been

¹⁴ The ICCL, as a member of the International Network of Civil Liberties Organisations ([INCLLO](#)), has also written about this surveillance problem in our March 2019 submissions to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association to inform his thematic report - The rights to freedom of peaceful assembly and of association in the digital age. INCLLO will be publishing our report in June 2019.

¹⁵ Mike Masnick, 'Platforms, Speech And Truth: Policy, Policing And Impossible Choices' (*techdirt*, 9 August 2019), available at: <https://www.techdirt.com/articles/20180808/17090940397/platforms-speech-truth-policy-policing-impossible-choices.shtml>

¹⁶ Bits of Freedom, 'ENDitorial: Can design save us from content moderation?' (*ENDitorial*, 16 May 2018), available at: <https://edri.org/enditorial-can-design-save-us-from-content-moderation/>

¹⁷ UN Doc A/HRC/38/35 (18 June–6 July 2018).



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promoted by civil rights advocates.¹⁸ It requires at a minimum full disclosure of the moderating entity of the rules used to moderate content and how those rules are applied, together with appeals processes and accountability for wrongful takedown.

Transparency to this level of disclosure would assist state, treaty body mechanisms and human rights advocates in better understanding the strengths and weakness of content moderation programs towards designing more effective and rights compliant programs. See for example the repeated requests by Amnesty International for Twitter to publish data on the abuse perpetrated on their platform, and see also the company's failure to do so thus far. Amnesty International correctly observes that this opacity hides the extent of the content moderation problem and makes it difficult to design effective solutions.¹⁹

III. Recommendations

In this challenging and still evolving landscape of online content moderation, the ICCL stresses that it is important to centre rights based analysis in proposed solutions. We request that decision makers not engage in what some have called 'magical thinking' by continuing to rely on content moderation mechanisms that have been proven to be both ineffective and harmful. With this preface we provide the following four recommendations:

- **Rights compliant moderation.** As the Special Rapporteur on Freedom of Expression has made abundantly clear: 'States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy.'²⁰ The ICCL supports this position while noting that the precise mechanisms for achieving this have not yet been identified. Given this lack of clarity, it is the position of the ICCL that content moderation should adhere absolutely to a rights based approach which complies with constitutional and human rights standards. Legal

¹⁸ See in particular 'The Santa Clara Principles On Transparency and Accountability in Content Moderation', available at: <https://santaclaraprinciples.org>. The principles state that, at minimum, companies should (1) publish the numbers of posts removed and accounts permanently or temporarily suspended due to violations of their content guidelines; (2) provide notice to each user whose content is taken down or account is suspended about the reason for the removal or suspension; and (3) provide a meaningful opportunity for timely appeal of any content removal or account suspension. It is the position of the ICCL that states should be held to an equally high transparency standard.

¹⁹ Amnesty International (2018), '#TOXICTWITTER. Violence and abuse against women online', available at: <https://www.amnesty.ca/sites/amnesty/files/%23TOXICTWITTER%20report%20EMBARGOED.pdf>

²⁰ Freedex, 'The Special Rapporteur's 2018 report to the United Nations Human Rights Council is now online' (A Human Rights Approach to Platform Content Regulation, 6 April 2019), available at: <https://freedex.org/a-human-rights-approach-to-platform-content-regulation/>



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ambiguities relating to moderating online content should be resolved in favour of respect for freedom of expression, privacy, and data protection principles.

- **Transparency.** The ICCL supports the recommendations of the Special Rapporteur²¹ and also the Santa Fe principles²² for explicit transparency. We assert transparency is essential for both corporate platform and state content moderation. Transparency includes at minimum full disclosure of the rules used to moderate content and how those rules are applied together with functional appeals processes and accountability for wrongful takedown.
- **Harmful content definitions.** States must clarify definitions of harmful content so that they may be subject to a rights balancing analysis. It is unlikely that states can define harmful content to a level of specificity that avoids the need for an independent and impartial judicial authority to evaluate individual circumstances when applying this definition.
- **Blanket monitoring.** Blanket monitoring, particularly by infrastructure providers, cloud services, and private messaging services should be prohibited in order to protect fundamental rights. This includes prohibiting automated monitoring tools including filters that are used to surveil content generally and indiscriminately online.

²¹ UN Doc A/HRC/38/35 (18 June–6 July 2018).

²² 'The Santa Clara Principles On Transparency and Accountability in Content Moderation', available at: <https://santaclaraprinciples.org>. The principles state that, at minimum, companies should (1) publish the numbers of posts removed and accounts permanently or temporarily suspended due to violations of their content guidelines; (2) provide notice to each user whose content is taken down or account is suspended about the reason for the removal or suspension; and (3) provide a meaningful opportunity for timely appeal of any content removal or account suspension. It is the position of the ICCL that states should be held to an equally high transparency standard.



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About the ICCL

The Irish Council for Civil Liberties is Ireland's leading independent human rights organisation. We monitor, educate and campaign in order to secure full enjoyment of rights for everyone. Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. We have previously given submissions to Oireachtas Committees on digital rights and privacy questions, including the *Communications (Retention of Data) Bill* and *The Public Services Card*. We have also raised human rights questions guiding legislative responses to recent 2018 social media scandals including data protection breaches and degrading content. Please see our previous submissions on this topic at <https://www.iccl.ie/wp-content/uploads/2018/11/Digital-Safety-Commissioner-Bill-2017-ICCL-CIVICUS-Submissions.pdf>



Irish Heart Foundation

Submission to the Department
of Communications, Climate
Action & Environment

Public Consultation on the Regulation of
Harmful Content on Online Platforms and
the Implementation of the Revised
Audiovisual Media Services Directive

April 2019



Introduction

The Irish Heart Foundation welcomes the opportunity to make a submission to the public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive. The Irish Heart Foundation (IHF) promotes policy changes that reduce premature death and disability from cardiovascular disease (CVD). A number of the risk factors for CVD have been shown to be influenced by developments in the digital world. The rapid evolution of online platform capabilities and the sophistication of new forms of commercial communication has sparked the need for concrete action to be taken to protect children from exploitation and harms.

The Irish Heart Foundation sees an important role for the regulation of harmful content in protecting children's health and protecting them from privacy risks, loss of reputation, commercial exploitation of personal data, profiling and cyber harassment. Indeed, there is significant scope for a new regulator to recognise and support the position that children hold in the digital ecosystem, as articulated by UNICEF: "that of rights holders, entitled to be protected from violations of their privacy and deserving an Internet free from manipulative and exploitative practices."¹

Due to the current complexity of the regulatory framework on commercial communications – which covers media law, consumer protection law, e-commerce law and data protection law – policy makers and legislators are being faced with increasing difficulties in how to provide accountability mechanisms, and regulate for, commercial communications that appear across various platforms (traditional media and internet content).²

Few would argue against the fact that there are significant disparities in whether and how online content is regulated. Issues related to misleading political advertising, 'fake news' and bullying have, to date, been particular areas of focus in respect of social media platforms and resultant calls for regulation.

Harmful online content regulation is not impossible. The question is how. The Irish Heart Foundation believes that the outcome from this consultation must be strong, robust and independent regulation with effective monitoring, enforcement and transparency mechanisms. Neither parents nor law-makers could have anticipated how effectively children could be targeted by exposed to harmful content so easily nor targeted by technologies that are evolving faster than our capacity to respond to them, and wherein oversight is minimal and barriers to oversight are systemic.

Harmful content and conduct are the focus of multiple policy initiatives of Government, including the Online Safety Action Plan. However, the review of the Audio Visual Media Services Directive, coupled with the Children's Digital Protection Bill that is currently going

¹ UNICEF. (2018). Children and Digital Marketing: Rights, risks and responsibilities. Discussion Paper. Geneva, Switzerland: UNICEF Private Sector Engagement. [Online]. Available from:

[https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities\(2\).pdf](https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities(2).pdf) p3

² Lambrecht, I., Verdoodt, V. and Bellon, J. (2018). *Platforms and commercial communications aimed at children: a playground under legislative reform?*, International Review of Law, Computers & Technology, 32:1, 58-79 [Online]. Available from: <https://doi.org/10.1080/13600869.2018.1443378>

through Seanad Éireann, have added impetus to the need for legislation to protect citizens, especially children, from online harms.

This submission is broken down as follows:

- Part 1 - Background
- Part 2 - Harmful Content
- Part 3 - Regulation

Background

Internet access

The growth of technology and the internet has transformed modern communications and the pace of technological development is impacting almost all areas of modern life. Internet access and frequency of use have continued to increase, with 89% of Irish households having access to the internet at home in 2018.³ Indeed, the activities carried out most by individuals on the internet were *finding information on goods and services* (88%), *E-mail* (84%) and *Social networking and Reading or downloading online news* (both at 73%).

Growth in Social Media

Digital transformation has also brought on an explosion in the use of social media. Social networking sites and apps are not only gaining large numbers of members and sign-ups, but there are steady numbers of people accessing these everyday. In Ireland, for example, 65% have Facebook accounts and of these 69% use it daily; 32% have Instagram accounts and 51% use it daily; and 29% have Twitter and 37% use it daily⁴. Social networking is the third most common internet activity in Ireland at 73%, and for individuals aged 16 to 29 this was the most common activity at 92%⁵.

Research commissioned by the BAI on media plurality policy places Irish audiences in the online world, through a variety of sources: social media, digital born news sites, news aggregation sites, user generated content, video sharing sites, news Apps and messaging Apps.⁶ This online presence has been associated with a complementary increase in the share of advertising revenues going to the Internet: in Ireland, the share of advertising is highest on the internet is 31.6%, with television coming in second at 24.1%.⁷ Furthermore, online advertising revenues in Ireland have been estimated to be dominated by Google and Facebook with a combined share of 58%.⁸

In the UK, OFCOM have noted that in 2017, the time that people spent online reached more than 200 minutes per day – more than the time spent watching TV, with forecasts suggesting that average video viewing on the internet will continue to increase from around 30 minutes per day in 2018, to 42 minutes in 2027 - a 40% increase. Most concerning, are the trends among children and young people which shows the increasing popularity of

³ CSO. (2018). Information Society Statistics - Households 2018. [Online]. Available from:

<https://www.cso.ie/en/releasesandpublications/er/isshh/informationstistics-households2018/>

⁴ IPSOS MRBI (2017). Social Networking - Nov 17. [Online]. Available from: <https://www.ipsos.com/en-ie/social-networking-nov-17>

⁵ CSO. (2018). Information Society Statistics - Households 2018. [Online]. Available from:

<https://www.cso.ie/en/releasesandpublications/er/isshh/informationstistics-households2018/>

⁶ Kevin, D. (2018). Jurisdictional Review of plurality policies, guidelines, practices and rules. Prepared on behalf of the Broadcasting Authority of Ireland (BAI). Available from: <https://www.bai.ie/en/consultations/draft-bai-media-plurality-policy/>

⁷ European Audiovisual Observatory. (2018). YEARBOOK 2017/2018 KEY TRENDS. Strasbourg: European Audiovisual Observatory (Council of Europe). Available from: <https://rm.coe.int/yearbook-keytrends-2017-2018-en/16807b567e>

⁸ Kevin, D. (2018). Jurisdictional Review of plurality policies, guidelines, practices and rules. Prepared on behalf of the Broadcasting Authority of Ireland (BAI). Available from: <https://www.bai.ie/en/consultations/draft-bai-media-plurality-policy/>

short-form video with children aged 4-15 watching an average of 42 minutes of YouTube content every day in 2017, up from 8 minutes in 2011.⁹

Considering the utility of social networks in sharing and disseminating messages and creating relationships between people and organisations, and coupling this with the growth in usage and time spent on these networks, it is not hard to see why it is transforming the landscape for all organisations. Social media provides a perfect environment for businesses and for marketing, to recruit and maintain regular contact with customers, to spread key messages, to seek opportunities and to advocate for their products. However, it also comes with inherent risks and challenges that must be addressed.

Digital Protection for Children

While the online environment presents significant opportunities for children and young people to enjoy and exercise many of their rights, it also presents challenges with regard to safeguarding children and young people's privacy rights and risk exposure. As a generation of digital natives, children and adolescents have been observed to be "either intentionally providing or unconsciously 'bleeding' increasing amounts of their personal data online."¹⁰ Furthermore, research from the European Parliamentary Research Service indicates that video viewing is one of the earliest internet activities favoured by young children.¹¹

Taken together, these shifts in TV and video consumption, as well as the growth in social media use, present legislators and regulators with complex dilemmas, such as how to protect children from harmful content, while still ensuring and maintaining freedom of speech.

Social Media – A breeding ground for opportunism

Research suggests that social media users are more likely to consume information than to communicate information, with brands and advertisers using these social media platforms and networks to involve their brands in the social networks of individuals.¹² Unlike traditional media which is subject to regulation, social media has facilitated the advent of immediate advertiser-consumer interaction as advertisers create brand-related content that encourages consumers to engage and interact in the form of through comments, likes, shares, photos and videos.

Similarly, the WHO refer to the advent of the "attention economy" in the digital age, where "any product that is "free" – a website or social media product – is paid for with our

⁹ OFCOM (2018). Addressing harmful online content A perspective from broadcasting and on-demand standards regulation. 18 September 2018. [Online]. Available from:

https://www.ofcom.org.uk/_data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf

¹⁰ Macenaite, M. (2017). From universal towards child-specific protection of the right to privacy online: Dilemmas in the EU General Data Protection Regulation. *New Media & Society*, 19(5), 765–779. [Online] Available from:

<https://doi.org/10.1177/1461444816686327> p765

¹¹ European Parliamentary Research Service. (2019). Briefing EU Legislation in Progress. The Audiovisual Media Services Directive. 25 January 2019 Sixth edition. [Online]. Available from:

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI\(2016\)583859_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI(2016)583859_EN.pdf)

¹² Logan, K. (2014). Why Isn't Everyone Doing It? A Comparison of Antecedents to Following Brands on Twitter and Facebook. *Journal of Interactive Advertising*, 14(2), 60-72. [Online]. Available from:

<https://doi.org/10.1080/15252019.2014.935536>

attention and with our data”¹³. This has important implications for children as we see how the metrics employed by social media companies and websites allow for vast amounts of data about users to be gathered, thus facilitating the targeting of users by sophisticated algorithms to retain attention and maximise ad views.

As a result, platforms are now seen as gatekeepers and, as such, there is exponential potential for greater exposure to harmful content, as well as the abuse of children’s data. This is because platforms, contain large amounts of user-generated content, are heavily data-driven and are highly dependent on advertising revenues.¹⁴ Individual’s choices and data management capacities are intrinsically shaped by the design and functionalities of these platforms, which are far from neutral and have been extensively shown to have been created to advance business interests, rather than to allow the user to exercise their autonomy and control over their data.¹⁵ UNICEF has noted that there exists a lack of transparency in the current digital marketing landscape, coupled with a greater intelligence about how individuals view, react to and engage with digital advertising, which has the effect of incentivising the expansion of data collection and discouraging the publication of such information.¹⁶ This has come increasingly to the fore in recent times as a result of the UK Parliamentary Committee Report into Disinformation and Fake News. In its report, the House of Commons Digital, Culture, Media and Sport Committee found that

“what does need to change is the enforcement of greater transparency in the digital sphere, to ensure that we know the source of what we are reading, who has paid for it and why the information has been sent to us. We need to understand how the big tech companies work and what happens to our data. Facebook operates by monitoring both users and non-users, tracking their activity and retaining personal data. Facebook makes its money by selling access to users’ data through its advertising tools. It further increases its value by entering into comprehensive reciprocal data-sharing arrangements with major app developers who run their businesses through the Facebook platform.”¹⁷

Rapid technological developments have made it possible for companies to collect, process and interlink data in previously unimagined ways and this data is used by companies for various purposes, such as personalised services and marketing.¹⁸ Digitalisation has

¹³ World Health Organisation. (2019). MONITORING AND RESTRICTING DIGITAL MARKETING OF UNHEALTHY PRODUCTS TO CHILDREN AND ADOLESCENTS. Report based on the expert meeting on monitoring of digital marketing of unhealthy products to children and adolescents. [Online]. Available from:

http://www.euro.who.int/_data/assets/pdf_file/0008/396764/Online-version_Digital-Mktg_March2019.pdf?ua=1 p4

¹⁴ Lambrecht, I., Verdoort, V. and Bellon, J. (2018). *Platforms and commercial communications aimed at children: a playground under legislative reform?*, International Review of Law, Computers & Technology, 32:1, 58-79 [Online]. Available from: <https://doi.org/10.1080/13600869.2018.1443378>

¹⁵ Macenaite, M., & Kosta, E. (2017). Consent for processing children’s personal data in the EU: following in US footsteps? *Information & Communications Technology Law*, 26(2), 146–197. [Online]. Available from: <https://doi.org/10.1080/13600834.2017.1321096>

¹⁶ UNICEF. (2018). Children and Digital Marketing: Rights, risks and responsibilities. Discussion Paper. Geneva, Switzerland: UNICEF Private Sector Engagement. [Online]. Available from: [https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities\(2\).pdf](https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities(2).pdf)

¹⁷ House of Commons Digital, Culture, Media and Sport Committee. (2018). *Disinformation and ‘fake news’: Final Report* Eighth Report of Session 2017–19. HC 1791. 18 February 2019. [Online]. Available from: <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf> p5

¹⁸ Tikkinen-Piri, C., Rohunen, A., & Markkula, J. (2018). EU General Data Protection Regulation: Changes and implications for personal data collecting companies. *Computer Law & Security Review: The International Journal of Technology Law and Practice*, 34(1), 134–153. [Online]. Available from: <https://doi.org/10.1016/j.clsr.2017.05.015>

facilitated the pairing of data about customers' online activities with data about their offline activities, allowing advertisers to more accurately target customers across a range of media.¹⁹

From this, it is possible for sophisticated profiles to be developed that not only facilitate the categorisation of individuals, but it is also possible to predict preferences or future behaviours based on clever statistical methods derived from the use of algorithms.²⁰ In their research on children and digital marketing, UNICEF note that this process is referred to as "identity resolution" – the creation of a single view of the customer across platforms and media in order to serve advertising that is far more personalised, targeted, relevant and effective than ever before."²¹ This is also pertinent for the harmful content that is visible to individuals online.

In its consideration of disinformation and fake news, the House of Commons Digital, Culture, Media and Sport Committee looked at both the use of personal and inferred data, noting that despite the assertion made by Facebook that users own all the content they upload, the advertising profile that Facebook builds up about users cannot be accessed, controlled or deleted by those users. Similarly, it notes that 'inferred' data is not protected under GDPR, which includes inferred characteristics about a user not based on specific information they have shared, but through analysis of their data profile.²²

Existing Legislation: GDPR & the Data Protection Act

The key purposes of the Data Protection Act 2018 include giving further effect to the GDPR in areas in which Member State flexibility is permitted and to transpose the Directive into national law. The GDPR aims at regulating the processing of personal data – creating parameters around its acquisition, use, storage and sharing.

The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA), more specifically section 30 when commenced, has the potential to protect children from risks that arise from the use of their personal data online, including the algorithms and profiling that serves them with personalised content. This personalised content cannot be ignored when considering the proliferation of harmful content online and how it is visible to children, adolescents and, indeed, adults. Data protection laws alone will not be sufficient given the increasingly sophisticated algorithms available that can extract powerful insights, which can be deployed in ways that influence the decisions we make and the services we receive.

¹⁹ UNICEF. (2018). Children and Digital Marketing: Rights, risks and responsibilities. Discussion Paper. Geneva, Switzerland: UNICEF Private Sector Engagement. [Online]. Available from:

[https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities\(2\).pdf](https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities(2).pdf)

²⁰ Lambrecht, I., Verdoodt, V. and Bellon, J. (2018). *Platforms and commercial communications aimed at children: a playground under legislative reform?*, International Review of Law, Computers & Technology, 32:1, 58-79 [Online]. Available from: <https://doi.org/10.1080/13600869.2018.1443378>

²¹ UNICEF. (2018). Children and Digital Marketing: Rights, risks and responsibilities. Discussion Paper. Geneva, Switzerland: UNICEF Private Sector Engagement. [Online]. Available from:

[https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities\(2\).pdf](https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities(2).pdf) p8

²² House of Commons Digital, Culture, Media and Sport Committee. (2018). *Disinformation and 'fake news': Final Report* Eighth Report of Session 2017–19. HC 1791. 18 February 2019. [Online]. Available from: <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf>

It is important to recognise the responsibility of social media platform providers given their increased use of profiling, complex recommender systems and automated content classification mechanisms. Indeed, given that online behavioural advertising is achieved through the use of persistent identifiers, such as IP addresses and cookies, there is a greater onus on these platforms to take responsibility.

The dangers presented to children in respect of the internet and online platforms must be expressly recognised in regulation, as companies know far more about individuals than they know about the business models and the form and delivery of personalised marketing or content. The targeting of particular categories of people on the basis of personal profiles can arguably have a manipulative effect. This is especially true for children. For example, a cursory glance at the logic behind advergames- the gamification of commercial communications by integrating them with non-commercial content makes it nearly impossible for impressionable and young children to understand that they are being targeted with advertising.

Why we need to extend regulation to online platforms

In a 2015 report, the European Regulators Group for Audiovisual Media Services (ERGA) noted that the majority of its members held the opinion that “the EU-legislative framework should facilitate or even require that the protection from content that might seriously impair is enforced exclusively through **state regulatory arrangements**”.²³ Of importance was the recognition by ERGA that harmful content, or the content that might impair minors, that parents need a legal framework to support the protection of minors.

It has been pointed out that internet platforms are capable of taking varied steps to rid their websites of some, if not all, objectionable content.²⁴ Furthermore, these platforms play a critical role in selecting, organising, ranking, recommending and suppressing content and content providers. At present, there is no systematic means of assessing the impact of a platform’s content policies, algorithms and decisions, nor of holding intermediaries to account.²⁵

The decision to extend regulation to harmful content on the internet is welcome as currently European law limits the liability of platforms to situations in which they have ‘actual knowledge’ of illegal content.²⁶

²³ European Regulators Group for Audiovisual Media Services (ERGA). (2015). REPORT ON THE PROTECTION OF MINORS IN A CONVERGED ENVIRONMENT. 27th November 2015 [Online]. Available from: <https://ec.europa.eu/digital-single-market/news/erga-report-protection-minors-converged-environment> p42

²⁴ NYU Stern Center for Business and Human Rights. (2017). *Harmful Content: The Role of Internet Platform Companies in Fighting Terrorist Incitement and Politically Motivated Disinformation*. [Online] Available from: <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/59fb31bc0d929735d3d01d95/1509634510957/Final.Harmful+Content.+The+Role+of+Internet+Platform+Companies+in+Fighting+Terrorist+Incitement+and+Politically+Motivated+Propaganda.pdf>

²⁵ Mark Bunting. (2018). *Keeping Consumers Safe Online Legislating for platform accountability for online content*. [Online]. Available from: <http://static1.1.sqspcdn.com/static/f/1321365/27941308/1530714958163/Sky+Platform+Accountability+FINAL+020718+200.pdf?token=llv5b6G14vicGq8x%2BWRfKHhNTN4%3D>

²⁶ Mark Bunting. (2018). *Keeping Consumers Safe Online Legislating for platform accountability for online content*. [Online]. Available from:

Harmful Content

Among three sets of problems identified by the Regulatory Fitness and Performance Programme (REFIT) evaluation of the Audiovisual Media Services Directive was that there was insufficient protection of minors and consumers when consuming videos on video-sharing platforms.²⁷ Indeed, while some platforms have introduced some initiatives aimed at protecting their users from harmful content, concerns remain around the consistency and effectiveness of these measures. This is exacerbated by the lack of definition of what harmful online content actually is.

To date, there is no consensus on the concept of ‘harmful content’ and what it includes. Content that is pornographic or sexual, violent or aggressive and promotes drugs, racism, hatred, self-harm, suicide, or anorexia are some examples of harmful content. Indeed, the consultation document refers to three examples of content that could be considered:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

While there is consensus that specific groups, like children, need special protection from exposure to harmful content, there is no agreement on what content is harmful to children. In contrast to illegal content, the publication of harmful content is not prohibited by law. The Irish Heart Foundation recognises that attempts to regulate harmful content need to balance citizens’ rights to freedom of expression and anti-censorship laws, with the effect of harmful content on specific groups (such as children).

Within the UK White Paper²⁸, an initial list of online harmful content or activity is presented, based on an assessment of their prevalence and impact on individuals and society, with the caveat that the list is, by design, neither exhaustive nor fixed. This is in recognition of the fact that a static list could prevent swift regulatory action to address new forms of online harm, new technologies, content and new online activities. However, much of the content included is what is classified as illegal content, the scope of which is not included in the Irish consultation. Of note, is that the three indicative areas referenced in the consultation documents from the DCAE are not specifically included in the UK White Paper table of same. This should not preclude their inclusion in the definition of harmful content in the Irish content, nor should it preclude consideration of further content, as we recommend. Instead, the definition and monitoring of harmful content should be fluid.

As outlined, online behaviours and content have the potential to cause serious harm, especially to children, adolescents and vulnerable people. While much is known and written

²⁷ European Commission. (2016). COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. SWD/2016/0168 final - 2016/0151 (COD). [Online]. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0168&from=EN>

²⁸ HM Government Department for Digital, Culture, Media & Sport. (2019). *Online Harms White Paper*. April 2019. [Online]. Available from: <https://www.gov.uk/government/consultations/online-harms-white-paper>

about the use of the internet to harass, bully or intimidate, or in exposure to content related to self-harm or suicide, other potential harms run the risk of being neglected. This is especially true for materials designed to encourage prolonged nutritional practices that are proven to endanger health - not just nutritional deprivation, but also overconsumption. These experiences can have long-lasting health, as well as psychological and emotional impacts. For that reason, the Irish Heart Foundation would recommend that the examples of harmful content in the consultation document, particularly number 3, would be extended to incorporate wider nutritional habits that would have the effect of exposing a person to risk of death or endangering health. For that reason, we would suggest a definition similar to “Material designed to adversely influence nutritional consumption habits that would have the effect of endangering long-term health.”

The health implications of overconsumption: why materials encouraging nutritional overconsumption must be considered harmful

Foods high in fat, sugar and salt (HFSS) are a lead contributing factor to the burgeoning obesity crisis. This obesity crisis has major public health implications and is responsible for a considerable burden of health, social and economic harm at individual, family and societal levels.

Ireland faces losing a generation of children to obesity related disease. Safefood research estimates that 55,056 children currently living in the Republic of Ireland and 85,688 on the whole island will die prematurely due to overweight and obesity.²⁹ Research by the World Obesity Federation predicts that by 2025, 241,000 schoolchildren in Ireland will be overweight or obese by 2025 and as many as 9,000 will have impaired glucose intolerance; 2,000 will have type 2 diabetes; 19,000 will have high blood pressure; and 27,000 will have first stage fatty liver disease.³⁰ According to the WHO, 65% of the diabetes burden, 23% of heart disease and between 7% and 41% of certain cancers are attributable to overweight and obesity.³¹ Similarly, the risk of coronary heart disease, ischaemic stroke and type 2 diabetes grows steadily with increasing body mass.

How targeted junk food advertising is creating harms for children

The WHO (2013) states that ‘the promotion of potentially unhealthy food and beverage products is now widely recognised in Europe as a significant risk factor for child obesity and for the development of diet-related noncommunicable diseases’.³² The seminal 2003 Hastings Review³³ on the extent and impact of food promotion to children was the first to document that food promotion affects preferences not only at brand level but also, more importantly, at category level.

²⁹ Ibid

³⁰World Obesity Federation. (2017). Ireland National Infographic. Available from: <http://www.obesityday.worldobesity.org/fullscreen-page/comp-it36nur2/068a7dcd-eb0d-4dd7-9cf6-1220ddc79ef0/60/%3Fi%3D60%26p%3D0a2r2%26s%3Dstyle-j84eeb5h>

³¹ World Health Organisation (2009). Global Health Risks - Mortality and burden of disease attributable to selected major risks. Available from: http://www.who.int/healthinfo/global_burden_disease/GlobalHealthRisks_report_full.pdf

³² WHO Marketing of foods high in fat, salt and sugar to children: update 2012–2013. Available from: http://www.euro.who.int/_data/assets/pdf_file/0019/191125/e96859.pdf

³³ Hastings G *et al.* (2003). *Review of Research on the Effects of Food Promotion to Children – Final Report*. Report to the Food Standards Agency. Glasgow, University of Strathclyde, Centre for Social Marketing. Available from: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.134.1856&rep=rep1&type=pdf>

Evidently, Junk food marketing is a problem and there is a clear link between food promotion and children's food preferences, what they buy and what they eat.³⁴ Advertising influences how much children eat³⁵, and can lead to them 'pestering' parents to buy unhealthy products.^{36,37} Children are a vulnerable group who have the right to protection from advertising of harmful content due to their limited capacity to critically understand advertising and marketing practices.³⁸ Research shows that children as young as 18 months can recognise brands, with preschool children demonstrating preferences for branded products.³⁹

Marketing of unhealthy commodities has a range of impacts, including on awareness, attitudes, preferences, choice and consumption patterns. Indeed, **food promotions have been found to have a direct effect on children's nutrition knowledge, preferences, purchase behaviour, consumption patterns and diet-related health**⁴⁰. Several studies have shown that, relative to control conditions, food intake was greater after exposure to unhealthy food advertising. This is a critical consideration when examining how marketing affects children's health for a number of reasons identified in the American Journal of Clinical Nutrition in 2016⁴¹:

1. Small effects at an individual level can have huge impacts across populations because of the deep saturation of unhealthy food advertising amongst all children in Westernised societies
2. The current growth in obesity prevalence results from only relatively small but cumulative increases in absolute energy intake at the individual level
3. The collective effects of continuous exposure to food marketing that occurs over time may amplify these effects, particularly when the marketing is repetitious and delivered over multiple platforms across numerous settings.

³⁴ Public Health England (2015). Sugar Reduction: the evidence for action. Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470179/Sugar_reduction_The_evidence_for_action.pdf

³⁵ Emma J Boyland, Sarah Nolan, Bridget Kelly, Catrin Tudur-Smith, Andrew Jones, Jason CG Halford, Eric Robinson; Advertising as a cue to consume: a systematic review and meta-analysis of the effects of acute exposure to unhealthy food and nonalcoholic beverage advertising on intake in children and adults, *The American Journal of Clinical Nutrition*, Volume 103, Issue 2, 1 February 2016, Pages 519–533, <https://doi.org/10.3945/ajcn.115.120022>. Available from: <https://academic.oup.com/ajcn/article/103/2/519/4662876>

³⁶ Gerard Hastings, Laura McDermott, Kathryn Angus, Martine Stead and Stephen Thomson. (2006). The extent, nature and effects of food promotion to children [electronic resource] : a review of the evidence : technical paper / prepared for the World Health Organization. WHO. Available from: http://www.who.int/dietphysicalactivity/publications/Hastings_paper_marketing.pdf

³⁷ Laura McDermott, Terry O'Sullivan, Martine Stead & Gerard Hastings (2015) International food advertising, pester power and its effects, *International Journal of Advertising*, 25:4, 513-539, DOI: 10.1080/02650487.2006.11072986. Available from: <https://www.tandfonline.com/doi/abs/10.1080/02650487.2006.11072986>

³⁸ Young, B (2003). Does food advertising influence children's food choices? A critical review of some of the recent literature, *International Journal of Advertising*, 22:4, 441-459, DOI: 10.1080/02650487.2003.11072862. Available from: <https://www.tandfonline.com/doi/abs/10.1080/02650487.2003.11072862>

³⁹ Robinson TN, Borzekowski DLG, Matheson DM, Kraemer HC. Effects of Fast Food Branding on Young Children's Taste Preferences. *Arch Pediatr Adolesc Med*. 2007;161(8):792–797. doi:10.1001/archpedi.161.8.792. Available from: <https://jamanetwork.com/journals/jamapediatrics/fullarticle/570933>

⁴⁰ Cairns, G., Angus, K., Hastings, G. and Caraher, M. (2013). *Systematic reviews of the evidence on the nature, extent and effects of food marketing to children. A retrospective summary*. *Appetite* 62 (2013) 209–215. <http://dx.doi.org/10.1016/j.appet.2012.04.017>

⁴¹ Boyland, E.J., Nolan, S., Kelly, B., Tudur-Smith, C., Jones, A., Halford, J.C.G., and Robinson, E. (2016). *Advertising as a cue to consume: a systematic review and meta-analysis of the effects of acute exposure to unhealthy food and nonalcoholic beverage advertising on intake in children and adults*. *The American Journal of Clinical Nutrition*, Volume 103, Issue 2, 1 February 2016, Pages 519–533, <https://doi.org/10.3945/ajcn.115.120022>

Two recent studies show the link between junk food advertising and obesity amongst children – watching one extra junk advert a week is associated with an average increase of 18,000 calories to a child’s diet per year⁴² and teenagers are more than twice as likely to be obese if they can remember seeing a junk food advert every day compared to those who couldn’t recall any over a month.⁴³ This included ads on TV, billboards and social media.

The proliferation of programmatic advertising on the internet has created an environment where “the buying and selling of ads is automated, targeted to specific audiences, and occurs very rapidly. Programmatic advertising offers businesses large and small access to global audiences, with the ability to zero in on highly specific groups of consumers based on masses of demographic, behavioural, and interest-related user data compiled and segmented by the internet companies”.⁴⁴

In the paper *Keeping Consumers Safe Online Legislating for platform accountability for online content*, the damaging link between personalisation and harmful content is highlighted as the use of tools and algorithms allow intermediaries to ensure individuals get the particular content that maximises their value from the service, which has a dangerous potential as **“the greater the degree of personalisation, the more opportunities exist for providers and consumers of harmful content to find each other, often largely unseen by other platform users”**.⁴⁵

The 2016 report *Tackling food marketing to children in a digital world: trans-disciplinary perspectives*⁴⁶ from the WHO defines digital marketing as:

Promotional activity, delivered through a digital medium, that seeks to maximize impact through creative and/or analytical methods, including:

- creative methods to activate implicit emotional persuasion, such as building engagement in social networks (e-Word-of-Mouth); using immersive narratives or social-, entertainment- and humour-based approaches; using “influencers” popular

⁴² Christopher Thomas, Lucie Hooper, Gillian Rosenberg, Fiona Thomas, Jyotsna Vohra. (2018). *Under Pressure: New evidence on young people’s broadcast marketing exposure in the UK*. Policy Research Centre for Cancer Prevention, Cancer Research UK. Available from: http://www.cancerresearchuk.org/sites/default/files/under_pressure_-_a_study_of_junk_food_marketing_and_young_peoples_diets_0.pdf

⁴³ Fiona Thomas, Lucie Hooper, Robert Petty, Christopher Thomas, Gillian Rosenberg and Jyotsna Vohra. (2018). *A Prime Time for Action: New evidence on the link between television and on-demand marketing and obesity*. Policy Research Centre for Cancer Prevention, Cancer Research UK. Available from: http://www.cancerresearchuk.org/sites/default/files/a_prime_time_for_action.pdf

⁴⁴ NYU Stern Center for Business and Human Rights. (2017). *Harmful Content: The Role of Internet Platform Companies in Fighting Terrorist Incitement and Politically Motivated Disinformation*. [Online] Available from: <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/59fb31bc0d929735d3d01d95/1509634510957/Final.Harmful+Content.+The+Role+of+Internet+Platform+Companies+in+Fighting+Terrorist+Incitement+and+Politically+Motivated+Propaganda.pdf> p21

⁴⁵ Mark Bunting. (2018). *Keeping Consumers Safe Online Legislating for platform accountability for online content*. [Online]. Available from: <http://static1.1.sqspcdn.com/static/f/1321365/27941308/1530714958163/Sky+Platform+Accountability+FINAL+020718+2200.pdf?token=llv5b6G14vlgGq8x%2BWRfKHhNTN4%3D> p13

⁴⁶ World Health Organisation. (2016). *Tackling food marketing to children in a digital world: trans-disciplinary perspectives*. Children’s rights, evidence of impact, methodological challenges, regulatory options and policy implications for the WHO European Region. [Online]. Available from: http://www.euro.who.int/_data/assets/pdf_file/0017/322226/Tackling-food-marketing-children-digital-world-trans-disciplinary-perspectives-en.pdf

with children, such as YouTube “vloggers” (video bloggers); using augmented reality, online games and virtual environments; or

- analysis of emotions, responses, preferences, behaviour and location to target specific groups, individuals and particular moments of vulnerability or to maximize the impact of creative methods.

A major trend in the area of commercial communication is the use of personalised advertisements, where the collection of personal data of users harvested from online behaviours and preferences is used to tailor specific messages and advertisements to consumers.⁴⁷ Personalisation, profiling and behavioural targeting have quickly become the norm across digital and online platforms, creating opportunities for commercial use of children’s data, as well as the ability for direct targeting of harmful content.

In 2016, the IHF published a ground-breaking study - *Who’s Feeding the Kids Online?* - on digital food marketing to children in Ireland. The study revealed the sophisticated digital marketing techniques directed at children by the top food and beverage brands and how little parents know about the efforts being made to influence their children. Food companies magnify the known effects of broadcast advertising, by using the ‘3 Es’ – powerful engagement-, emotional- and entertainment-based tactics – in digital media. The tactics exposed in *Who’s Feeding the Kids Online?* - Europe’s first ever research on the tactics used by junk food, which was endorsed by the World Health Organisation - exposed microtargeting and profiling methods similar to those that were subsequently shown to have been used by Cambridge Analytica. Clearly, digital platforms extract huge amounts of individual information from children: who they are, where they live, where they go, who their friends are, their hobbies, heroes, favourite foods etc. Furthermore, and more worryingly, these platforms also deliberately manipulate children’s emotions or behaviour in order to increase the impact of advertising. The integrated, interactive and personalised nature of these platforms and communications makes it difficult for children to recognise the commercial, persuasive intent.

With the proliferation of advertising content, focussed on HFSS food and drinks, being targeted and accessible by children on online platforms without any regulation, there is an undeniable danger that the nutritional consumption habits of children and adolescents would be affected in such a way that would have the effect of endangering long-term health. Therefore, the **IHF would recommend that the definition and scope of harmful online content would be broader so as to include materials designed to encourage nutritional overconsumption, as well as nutritional deprivation.**

⁴⁷ Lambrecht, I., Verdoodt, V. and Bellon, J. (2018). *Platforms and commercial communications aimed at children: a playground under legislative reform?*, International Review of Law, Computers & Technology, 32:1, 58-79 [Online]. Available from: <https://doi.org/10.1080/13600869.2018.1443378>

Regulation

In Ireland, broadcast services are subject to longstanding regulation while some newer online services and content is subject to little or no regulation beyond the general law. It seems that while the regulatory landscape has evolved in other areas, online content is subject to little regulation, leaving a number of critical areas without specific regulatory coverage.

Regulatory Approaches

Self-regulation or alternatively co-regulation is widely promoted by industry as an alternative to state regulation. It is also often the Government's first policy choice. Voluntary approaches in the context of a highly competitive marketplace simply do not work - they do not work for public health objectives and they will not reduce exposure to harmful content. Reliance on principles, particularly when not underpinned by a strong regulatory authority, often result in commitments being made by the industry which are only implemented to a limited extent. There is a lack of in-depth and independent monitoring and evaluation, few documents are made public, and visibility of output and tangible results remains limited.

National legislative proposals on the regulation of harmful content on online platforms and the transposition of the revised provisions of the Audiovisual Media Services Directive must prevent excessive reliance on self-regulation, which has yielded poor results to date.

Protecting people, especially children, from harmful content online requires the legislature to set clear statutory objectives regarding content, as well as the regulation of platforms to ensure that they not only adopt practices or procedures designed to meet these objectives, but that there are clear sanctions for not doing so.

When assessing the regulatory approaches that can be employed to progress the regulation of the four streams, it is important to be cognisant of the processes that platforms currently employ, and their adequacy, to identify, assess and address harmful content, and their handling of subsequent complaints and appeals.

The goal of national regulation and the implementation of the revised AVMSD should be to make platforms better 'regulators' of content i.e. more transparent, evidence-based, accessible and proportionate, as well as ensuring the availability of appropriate mechanisms to test and validate their efforts to address complex content issues. However, this does not equate with "leaving them to it" – platforms and their activities must be underpinned by strong statutory regulation where possible, with the necessary independent monitoring and sanction systems in place. This will have the effect of managing the risks of harmful online content, greater safety of online content, and transparency in platforms' policies and impacts.

In the UK, OFCOM have recommended the wider applicability of broadcasting regulation principles in the regulation of harmful content online where Parliaments sets clear statutory objectives and standards as to the types of content and conduct that are likely to cause harm, with regulated parties required to adopt practices or procedures designed to secure

these objectives.⁴⁸ However, these practices are only meaningful if they come with means of assessing whether the objectives have been met and penalties for not achieving them.

Furthermore, it has been argued that a regulatory body would need to have backstop powers, for legislation to require periodic independent reviews to enable Government and the Oireachtas to assess its effectiveness, to run at arms-length from the industry and in line with public purposes defined in statute, noting that this would have the benefit of independence, flexibility and expertise.⁴⁹

Voluntary Codes of Practice do not work: The Example of Junk Food Marketing

Political, science and public health experts and researchers all advocate that Government lead the policies on protecting children from advertising of foods HFSS – not industry.¹¹¹ Overall, self-regulation of food marketing to children has been shown to lack independent assessment and is poorly monitored¹. A systematic review¹ of initiatives to limit food and drink marketing to children found that adherence to voluntary codes may not sufficiently reduce the advertising of foods which undermine healthy diets or reduce children’s exposure to this advertising.

To expect companies to implement anything more than the bare minimum takes no account of the fact that their purpose is to maximise shareholder wealth, not to protect the health of the nation’s children. Indeed, there are commercial incentives not to comply. Many shortcomings of HFSS regulation have been highlighted by public health advocates, including by the WHO, such as the fact that:

- Many companies have not endorsed the pledges and commitments
- Commitments are voluntary and can be changed or abandoned without notice
- Commitments are inconsistent between different companies, countries and media. For example, some company policies only apply to children under-6
- Implementation of the pledges lacks independent monitoring

Moreover, a 2013 systematic review¹ found significant divergence between the reported impact of marketing regulation (including self-regulation by industry) provided in peer-reviewed journals, or industry-sponsored reports, showing the need for external monitoring.

⁴⁸ OFCOM (2018). Addressing harmful online content A perspective from broadcasting and on-demand standards regulation. 18 September 2018. [Online]. Available from: https://www.ofcom.org.uk/_data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf

⁴⁹ Mark Bunting. (2018). *Keeping Consumers Safe Online Legislating for platform accountability for online content*. [Online]. Available from: <http://static1.1.sqspcdn.com/static/f/1321365/27941308/1530714958163/Sky+Platform+Accountability+FINAL+020718+200.pdf?token=llv5b6G14vlgGq8x%2BWRfKHhNTN4%3D>

Self-regulatory initiatives: current position pre-AVMSD review

Article 4(7) of the AVMSD agreed in 2008 encouraged Member States to use co-regulation and/or self-regulation as complementary approaches to legal provisions, in particular in relation to commercial communications and the protection of children. In Ireland, Regulation 13 of The European Communities (Audiovisual Media Services) Regulations 2010 (S.I. 258/10) provides for a system of co-regulation by media service providers of on-demand audiovisual media services in the State, including the creation of codes of conduct for on-demand audiovisual media service providers. Subsequent to this S.I., the On-demand Audiovisual Media Services Group (ODAS) was established under the auspices of IBEC and a code of conduct for on-demand audiovisual media service providers was created.⁵⁰

At a European level, with respect to audiovisual commercial communications on food and beverages high in fat, salt and sugars targeted at children, the second implementation report of the 2008 AVMSD revealed that most EU countries neither updated the current codes of conduct nor developed new ones.⁵¹ Indeed, in respect of the current regulatory mechanism, as outlined in the 2008 AVMSD, it has been noted that: “most national regulatory bodies do not monitor the implementation of the codes of conduct, except where co-regulatory systems are in place and rely instead on self-regulatory bodies, few of which report to the regulator in cases of non-compliance”.⁵²

The independence of regulatory bodies for audiovisual media services is critical for the effective enactment and application of the AVMSD, in particular in the areas of audiovisual commercial communications, jurisdiction and protection of children. However, the 2008 AVMSD contains no requirement on regulatory independence.⁵³

ODAS

In Ireland, the On-demand Audiovisual Media Services Group (ODAS) was established under the auspices of IBEC and a code of conduct for on-demand audiovisual media service providers was created. While the code is prepared in cooperation with the Broadcasting Authority of Ireland, and is subject to the Authority's approval, the authority for initiating a review rests with ODAS. The Code covers all on-demand audiovisual services made available under Irish jurisdiction and sets out the minimum standards required of service providers and provides for a complaint mechanism to the public. The Code of Conduct was last reviewed by ODAS, in consultation with the BAI, in 2014. In terms of the Code's operation,

⁵⁰ Parliamentary Questions to the Minister for Communications, Climate Action and Environment PQ42104/17 Available from: <https://www.kildarestreet.com/wrans/?id=2017-10-04a.412&s=ODAS#g414.r>

⁵¹ European Parliamentary Research Service. (2019). Briefing EU Legislation in Progress. The Audiovisual Media Services Directive. 25 January 2019 Sixth edition. [Online]. Available from: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI\(2016\)583859_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI(2016)583859_EN.pdf)

⁵² European Parliamentary Research Service. (2019). Briefing EU Legislation in Progress. The Audiovisual Media Services Directive. 25 January 2019 Sixth edition. [Online]. Available from: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI\(2016\)583859_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI(2016)583859_EN.pdf) p6

⁵³ European Commission. (2016). COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. SWD/2016/0168 final - 2016/0151 (COD). [Online]. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0168&from=EN>

the BAI's only role is that its statutory Compliance Committee acts as an appeals body, where a complainant is not satisfied with the decision of the on-demand service provider, on complaints relating to content. In this regard, a Memorandum of Understanding is in place between the BAI's Compliance Committee and ODAS.⁵⁴

The companies currently signed up to ODAS are:

- Association of Advertisers in Ireland (AAI)
- An Lár TV
- Ceann Nua Ltd
- Eir
- Element Pictures
- Institute of Advertising Practitioners (IAP)
- RTÉ
- eir Sports
- South East Television Ltd
- TG4
- TV3
- Vodafone Ireland
- ASAI

Of note is the fact that the Department for Communications, Climate Action and the Environment has no role in respect of the membership of ODAS and there is no Departmental representative on the group.

The Irish Heart Foundation welcomes that the revision to the AVMSD requires some increase in the level of oversight by Member States of on-demand audiovisual media services, which are currently not regulated by the Broadcasting Authority of Ireland but are subject to this co-regulatory code overseen by ODAS, the secretariat of which is provided by IBEC. The mechanisms in place prior to the review were wholly insufficient, with little transparency in ODAS, its membership or its operations.

Voluntary self-regulation has let industry set the terms of its own commitments, with the resulting provisions often so weak or unclear that they are meaningless. It also provides another 'last chance' or delay before government regulation.

The Irish Heart Foundation recognises the strong need for independence of audiovisual regulators to be strengthened, which can only happen if the regulator is legally distinct and functionally independent from the industry, operates in a transparent and accountable manner and has sufficient powers.

⁵⁴ Parliamentary Questions to the Minister for Communications, Energy and Natural Resources No 19558/17, 19559/17, 19560/17 [Online] Available from: <https://www.kildarestreet.com/wrans/?id=2017-05-02a.3389&s=ODAS#g3393.r>

Regulation in the revised AVMSD

It is regretful that co-regulation and self-regulation are still predominant in the AVMSD despite the requirement for video-sharing platforms to react quickly when content is reported by users as harmful.⁵⁵

However, where there is now a greater preference for co-regulation over self-regulation, it must follow that industry codes are developed with, and subject to the review of, national regulatory authorities. Similarly, there must efficient mechanisms for the compliance, monitoring and enforcement of such codes.

Of critical importance is that such criteria should not be defined by the industry alone. The Irish Heart Foundation would highlight the recommendation by the BEUC – the European Consumer Organisation – that co-regulatory codes should also be subject to a public consultation open to consumer organisations and other civil society organisations whose primary objective is protecting children’s from harms, including health.⁵⁶

Where the AVMSD fails in relation to HFSS foods

Although the revised AVMSD text takes a somewhat more proactive approach than in the past with respect to unhealthy foods and beverages, and recognises the WHO Regional Office for Europe Nutrient Profile Model in its recitals, it does not impose the mandatory restrictions recommended by WHO.⁵⁷ Rather, co-regulation and self-regulation are actively encouraged at Article 9(4):

“Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. Those codes shall aim to effectively reduce the exposure of children to audiovisual commercial communications for such foods and beverages. They shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.”

This is particularly disappointing, especially given that the Irish Heart Foundation would point to the need for these communications to be considered harmful content, given the “nutritional or physiological effect” these foods have and “excessive intakes in the overall diet are not recommended”.

⁵⁵ European Parliamentary Research Service. (2019). Briefing EU Legislation in Progress. The Audiovisual Media Services Directive. 25 January 2019 Sixth edition. [Online]. Available from: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI\(2016\)583859_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583859/EPRS_BRI(2016)583859_EN.pdf)

⁵⁶ BEUC (2016). REVISION OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE (AVMSD) BEUC Position Paper. BEUC-X-2016-111. [Online]. Available from: https://www.beuc.eu/publications/beuc-x-2016-111_beuc_position_paper_on_the_audiovisual_media_services_directive.pdf

⁵⁷ WHO Regional Office for Europe. (2019). MONITORING AND RESTRICTING DIGITAL MARKETING OF UNHEALTHY PRODUCTS TO CHILDREN AND ADOLESCENTS. [Online]. Available from: http://www.euro.who.int/_data/assets/pdf_file/0008/396764/Online-version_Digital-Mktg_March2019.pdf?ua=1

The revised text of the AVMSD has been found to fall short of the WHO's 2010 Set of recommendations on the marketing of foods and non-alcoholic beverages to children.⁵⁸ However, the Irish Heart Foundation believes that where the Directive allows that "Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in compliance with this Directive and Union law, including where their national independent regulatory authorities or bodies conclude that any code of conduct or parts thereof have proven not to be sufficiently effective"⁵⁹, Irish regulation should endeavour to impose standards exceeding the minimum levels as set out in the Directive.

Regulatory Options

In 2015, the European Regulators Group for Audiovisual Media Services (ERGA) identified the following minimum requirements of a co-regulatory system, in order to be successful⁶⁰:

- High level of organization and low administrative burden
- Quick decisions on complaints
- Take account of cultural differences built into the system
- Alignment of public and private interests
- Provide for an effective regulatory framework with constitutional guarantees
- Serious checks and balances, dealing with potential non-compliance and over-design
- Guarantee basic principles of good self- or co-regulation
- Evaluation mechanism

Furthermore, public awareness, transparency, significant industry participation, adequate resources, clarity of processes, ability to enforce codes, audits of performance, system of redress in place, involvement of independent members, regular review of objectives and non-collusive behaviour were identified by one ERGA member as stated good practice criteria for co-regulation.

However, the IHF would argue that where not required by the AVMSD, or European law, self and co-regulatory approaches should be avoided and the Government should go further than the minimum standards required. Strong regulatory structures are far superior to self-regulatory voluntary codes, and create a level playing field for all involved. Particular benefits to a strong regulatory structure are:

- businesses cannot choose whether to follow the rules or not
- there is universal application, applying to every business or activity within its scope
- there is credibility by virtue of its status, allowing the realisation of targets (to reduce online harmful content) which would not result from voluntary actions alone

⁵⁸ WHO Regional Office for Europe. (2019). MONITORING AND RESTRICTING DIGITAL MARKETING OF UNHEALTHY PRODUCTS TO CHILDREN AND ADOLESCENTS. [Online]. Available from: http://www.euro.who.int/_data/assets/pdf_file/0008/396764/Online-version_Digital-Mktg_March2019.pdf?ua=1

⁵⁹ Article 4(a)(3)

⁶⁰ European Regulators Group for Audiovisual Media Services (ERGA). (2015). REPORT ON THE PROTECTION OF MINORS IN A CONVERGED ENVIRONMENT. 27th November 2015 [Online]. Available from: <https://ec.europa.eu/digital-single-market/news/erga-report-protection-minors-converged-environment> p45

Online Harms White Paper: Regulatory Discussions in the UK

Of relevance to this consultation, and the consideration of harmful content in the Irish context, is the UK Online Harms White Paper⁶¹, where a new regulatory framework for online safety is proposed including, but not limited to:

1. A statutory duty of care to make companies take more responsibility for the safety of their users and tackle harm caused by content or activity on their services
2. Compliance with this duty of care will be overseen and enforced by an independent regulator
3. All companies in scope of the regulatory framework will need to be able to show that they are fulfilling their duty of care
4. The regulator will have a suite of powers to take effective enforcement action against companies that have breached their statutory duty of care. This may include the powers to issue substantial fines and to impose liability on individual members of senior management.
5. Companies must fulfil the new legal duty. The regulator will set out how to do this in codes of practice.
6. The regulator will have the power to require annual transparency reports from companies in scope, outlining the prevalence of harmful content on their platforms and what countermeasures they are taking to address these. The regulator will also have powers to require additional information, including about the impact of algorithms in selecting content for users and to ensure that companies proactively report on both emerging and known harms.
7. The regulator will encourage and oversee the fulfilment of companies' existing commitments to improve the ability of independent researchers to access their data, subject to appropriate safeguards.
8. Companies will be required to have effective and easy-to-access user complaints functions, which will be overseen by the regulator.
9. The development of an independent review mechanism

Of note in the UK proposal is that the regulatory framework should apply to companies that allow users to share or discover user-generated content or interact with each other online, which will have the effect of encompassing very wide range of companies of all sizes, including social media platforms, file hosting sites, public discussion forums, messaging services and search engines.

The UK White Paper calls for the establishment of an independent regulator tasked with forming a 'duty of care' framework for online content sharing companies - social media, search engines, video or blogging platforms - and empowered to enforce this with the threat of fines, the penalisation of company executives and even by instructing ISPs to block websites deemed unacceptably 'harmful'.

⁶¹ HM Government Department for Digital, Culture, Media & Sport. (2019). *Online Harms White Paper*. April 2019. [Online]. Available from: <https://www.gov.uk/government/consultations/online-harms-white-paper>

What should an Irish regulator look like?

The first regulatory option provided in the consultation is to restructure and reform the BAI as a Media Commission and assigning all four regulatory strands to the regulator. The IHF would note that the BAI has experience, familiarity with broadcast regulation, a strong research capability, and a track record of independence. However, this regulatory restructure option will not be without difficulty and the need for the recruitment of extensive expertise to expand its remit across the strands as this new Media Commission would be expected to cover a wide range of issues and it would have to work in new ways with a much wider range of stakeholders.

Critical to the success of regulation of harmful content online is the establishment of an independent regulator. Where the powers of implementation, oversight and enforcement for a new regulatory framework are bestowed, it is equally critical that it has sufficient resources and the right expertise and capability to perform its role effectively. This is especially true given the high levels of technical competence that will be required to keep abreast of the continuously evolving digital and online landscape.

The Irish Heart Foundation supports the recommendation in the UK White Paper that the new regulator will take an evidence-based approach to regulatory activity and would call for a similar approach in Ireland. More specifically, it is imperative that the regulator takes a proactive approach whereby regular programmes of consultations, in-depth research projects, and horizon scanning activities are undertaken to assess the changing nature of the digital landscape and harms and the risks associated with it.

An effective system of regulation should include:

1. Independent operation and monitoring

Unsupervised involvement in, and control of, the operation and monitoring of harmful content on their platforms effectively makes companies police, judge and jury. The absence of independent systems of regulation create a clear conflict between the role of industry in promoting its own profit-driven interests whilst simultaneously acting as a regulatory watchdog. Therefore, accountability requires independent evaluation to ensure credibility and legitimacy.

The IHF recognises that the new regulatory framework, as set out in the UK White Paper, notes that “it will promote a culture of continuous improvement among companies, and encourage them to develop and share new technological solutions rather than complying with minimum requirements”⁶², but this must be actively monitored and companies held to account.

2. Specific controls to ensure compliance before the fact

Related to independent operation and monitoring is the necessity to develop a comprehensive process of compliance and enforcement. More specifically, a post-

⁶² HM Government Department for Digital, Culture, Media & Sport. (2019). *Online Harms White Paper*. April 2019. [Online]. Available from: <https://www.gov.uk/government/consultations/online-harms-white-paper> p7

airing/publication complaint process alone is a wholly unsuitable means to monitor compliance, particularly in the case of children. In this system many children may have already seen content in advance of a complaint being made.

Within the regulatory framework, it is important that there is clarity and well-defined timeframes for how quickly platforms should be required to take down online harmful content. A critical aspect of this should be that this content is taken down not only when it is referred to them by users, but also when it is easily within their power and expertise to discover this content for themselves.

3. Meaningful sanctions for non-compliance

Codes of conduct do not, by definition, include meaningful sanctions for those who do not comply with the code, or who are found to be in breach. Rather, industry use the threat of “reputational damage” as an adequate deterrent for companies from breaching these codes. As mentioned previously, voluntary codes are particularly susceptible to breaches of all or some of their provisions when it is more commercially advantageous to do so and, in the absence of sanctions for non-compliance, companies will continue to flaunt the code. This is especially true if there isn’t a public awareness of the code or the complaints process.

Appropriate sanctions must be set for non-compliance- It is not enough to rely on the censure of civil society and the media for failure to comply. Indeed, on the issue of monitoring and restricting digital marketing of unhealthy products to children and adolescents, sanctions comparable to those that have been put in place for the GDPR, where fines of €20 million, or 4% of a business’s global annual turnover in the previous financial year, can be levied have been recommended.⁶³

The Irish Heart Foundation would strongly advocate that regulation ensures that platforms should not merely react to crises or harmful content, but that they should be forced to take the initiative and move proactively. The power to investigate, take enforcement action and impose sanctions should be an essential element of the regulatory regime. Indeed, enforcement incentivises regulated parties to fulfil their obligations quickly and effectively .

4. Transparency

The importance of transparency on the part of the services and platforms being regulated, and of the regulatory rules that are imposed on them, must be paramount in any new regulatory regime. In the first instance, platforms and on-demand providers must respond to requests for information from the regulator. Currently, information in the public domain about platforms’ approaches to dealing with harmful content is limited, with inconsistencies in the information that is available across platforms⁶⁴ - there is no way of assessing the impact and effectiveness of these approaches, either with respect to takedown of material or blocking of legal content. Evaluations are generally conducted by intermediaries and platforms themselves, who have discretion on what to measure and disclose, with the

⁶³ WHO Regional Office for Europe. (2019). MONITORING AND RESTRICTING DIGITAL MARKETING OF UNHEALTHY PRODUCTS TO CHILDREN AND ADOLESCENTS. [Online]. Available from: http://www.euro.who.int/_data/assets/pdf_file/0008/396764/Online-version_Digital-Mktg_March2019.pdf?ua=1

⁶⁴ OFCOM (2018). Addressing harmful online content A perspective from broadcasting and on-demand standards regulation. 18 September 2018. [Online]. Available from: https://www.ofcom.org.uk/_data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf

transparency reports provided by many platforms noted not to “represent a comprehensive assessment of the impact of their content governance activities.”⁶⁵

The Irish Heart Foundation would argue that it is critical that the new regulator would have the power to conduct its own investigations, rather than relying on self-reporting by tech firms, as well as having the power to demand information about the impact of algorithms in selecting content for users.

Pitfalls to be avoided

Within the proposed regulatory structure in the UK White Paper, the regulator will define a duty of care that internet companies must provide, as well as a code of best practices that internet companies can follow to show that they are fulfilling that duty of care. However, these best practices are provided as examples not requirements. Companies are free to argue that they are fulfilling their duty of care in other ways. Of significant concern to the Irish Heart Foundation is the danger of creative compliance - while platforms may embrace the concepts of responsibility and duty of care in respect of harmful content online, they may illustrate entrepreneurialism to subvert regulation and its enforcement to their own ends.

While increased transparency arrangements with platforms is important, any mechanism that is developed to monitor the removal of harmful content must be sure to avoid pitfalls of ‘creative compliance’. For example, while the UK White Paper has recommended that its new regulator would require annual transparency reports from companies outlining the prevalence of harmful content on their platforms and what countermeasures they are taking to address these, this exercise cannot and should be manipulated by platforms as a media exercise to see who does best. The regulator should ensure that the aims of the regulation are achieved- not through a token competition between companies to top a harm reduction league table that companies can manipulate creatively - but ensuring that platforms are responsible and avoiding harms being disseminated in the first place.

⁶⁵ Mark Bunting. (2018). *Keeping Consumers Safe Online Legislating for platform accountability for online content*. [Online]. Available from: <http://static1.1.sqspcdn.com/static/f/1321365/27941308/1530714958163/Sky+Platform+Accountability+FINAL+020718+200.pdf?token=llv5b6G14vicGq8x%2BWRfKHHNTN4%3D> p15

Conclusion

In today's world, the proliferation of personalisation of advertisements and commercial communications, as well as the ability to manipulate or nudge children towards certain behaviours and consumption patterns is evident. This has been greatly facilitated both by the digitalisation of society, migration of our activities online and the lack of regulation of online platforms and services.

While the long-term effects of HFSS food advertising and marketing online have not yet been examined in detail, the need for regulatory action and for recognition of the impact of materials designed to influence nutritional consumption habits in the definition of harmful content is clear: to reduce children's exposure, to improve their food choices, reduce intake of unhealthy foods and to improve long-term health outcomes.

Children need special protection as their cognitive abilities are still developing and are less likely to understand how their data is being used nor recognise how this then translates into content that is being targeted at them. For this reason a strong regulatory system is required and the Irish Heart Foundation calls for an independent regulator that will shift the burden of responsibility for exposure to this content from parents to online platforms, as well as ensuring that industry itself is not responsible for its actions as police, judge and jury.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

IMRO believes on demand services established in Ireland should be subject to the same rules and regulations as Television Broadcasting Services.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Yes – in the interest of fair competition, if non-linear services are to be regulated in the same manner as Television Broadcasting Services it is only right and reasonable they can have access to the same content production fund, thus allowing creatives across the entire value chain to have access to a broader based content production fund.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

IMRO does not see the need for the establishment of an additional regulatory body as this may cause confusion in the market place, we would favour the BAI being restructured as a Media Commission

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

The Media Commission should be funded by the Exchequer

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Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**

The World Wide Web has been around 30 years and for 20 of those ISPAI Hotline.ie has been an instrument of change and catalyst for collaboration between the public, private and non-for-profit sectors in combating illegal content online, i.e. child sexual abuse material - curb its availability and proliferation, disrupt the cycle of child sexual exploitation and support law enforcement efforts in identifying and rescuing children from sexual abuse as well as identifying perpetrators and bringing them to justice. Consideration of issues relating to Internet content governance and online safety in Ireland goes back to 1998 when the first Government's Working Group on Illegal and Harmful Use of the Internet was established by the then Minister for Justice, Equality and Law Reform. The 1998 Working Group "feels, however that harmful uses are difficult to identify with any great precision since they involve an assessment of their effect on different individuals. [...] While not explicitly prohibited by law, this kind of material could, in the context of certain individuals result in harm." (Illegal and Harmful Use of the Internet – First Report of the Working Group – Section 1.3.2 – Harmful Use - <http://www.justice.ie/en/JELR/IllegalUseofInternet.pdf/Files/IllegalUseofInternet.pdf>) "Having briefly considered this wide range of issues, the Group decided, [...], to concentrate on measures which would (a) address the protection of children (b) yield results in the short term and (c) provide a framework within which progress could be achieved. This Report therefore addresses: •the specific question of "Child Pornography"; •the more general question of structures which would be needed to underpin initiatives in this area;•legislative implications; and •international aspects." (Illegal and Harmful Use of the Internet – First Report of the Working Group – Section 1.3.3 – Final emphasis - <http://www.justice.ie/en/JELR/IllegalUseofInternet.pdf/Files/IllegalUseofInternet.pdf>)

Following on, as it relates to combating illegal content online, the report of the 1998 Working Group recommended that a non-statutory Industry self-regulatory framework should be established. Key to Government's agreement in allowing the Industry self-regulatory framework to be adopted was Internet Service Providers' (represented by ISPAI) commitment to (1) the development of an Industry Code of Practice and Ethics; (2) the establishment of an Internet Hotline Service where the public could report suspected illegal content online, such as "Child Pornography" (i.e. child sexual abuse images and videos) or activities relating to the sexual exploitation of children; and (3) an awareness programme to address concerns

regarding illegal and harmful material online. Since 1999, ISPAI: (a) has been managing the Industry Code of Practice and Ethics (the Code); (b) provides the Hotline.ie Service – the national Internet Hotline reporting mechanism where of the public may report suspected illegal content online, especially child sexual abuse images and videos and, in a secure, anonymous and confidential way; (c) provides content assessment expertise in determining whether or not the reported content is potentially illegal in accordance with rigorous standards and by reference to Irish law and guidelines (including INTERPOL's); (d) manages the national Notice and Takedown mechanism for the removal of identified child sexual abuse images/videos. On that note, all reports classified by Hotline.ie as "Child Pornography" where the content was accessible from Ireland through misuse of an ISPAI member's facilities have been removed from the Internet within 24/48 hours.; (e) notifies An Garda Síochána and INTERPOL of every confirmed "Child Pornography" occurrence, as the decision to initiate a criminal investigation is a matter for law enforcement alone, and provide any / further assistance as required; (f) provides cross-border response for the removal of "Child Pornography" hosted outside Irish jurisdiction through membership of INHOPE and cooperation with other 44 Internet Hotlines in 40 countries worldwide. Self-regulation is usually defined as a regulatory process whereby an Industry-level organisation, such as a trade Association, as opposed to a Government body set and enforces rules and standards relating to the conduct of companies in the Industry. However, in practice the Industry self-regulation model in Ireland, as it relates to combating illegal content online, is a form of co-regulation as the Department of Justice and Equality has primary oversight and responsibility to monitor, review and ensure appropriate operation of the Code, ISPAI Hotline.ie Service and wider self-regulatory system. While what is illegal is determined by specific Irish and EU law, the Code and ISPAI Hotline.ie service deliver a harmonised and coherent approach by providing: (i) a policy coordination function; (ii) a framework for multi-stakeholder participation and problem-solving; (iii) aggregate service for a wide range of companies having the advantage of being available to small, medium as well as large companies; and (iv) mainstream sound procedural practice, expertise in determining whether or not content is potentially illegal in accordance with rigorous standards and by reference to Irish law and guidelines (including INTERPOL's) applicable at the relevant date and cross-border response for the removal of CSAI. While we had hoped in starting this journey (1999) that the issue of child sexual abuse and exploitation would have been eradicated, yet we are proud of the important role the ISPAI Hotline.ie model and multi-stakeholder approach has played, and will continue to play, in the protection of countless children both within Ireland and abroad. The model described above has stood the test of time. Despite rapid evolution of Internet technology it remains as valid and effective today as when Hotline.ie was established (1999). The Hotline.ie figures and findings (note: we publish annual transparency reports) substantiate the statement. For example in 2018, Hotline.ie has received and processed an unprecedented number of reports 12,113 with a marked increase of 60% from 2017 and 335% from the annual average 2000-2017. 80% of the reports received quoted suspicion "Child Pornography", of which 3% of these reports where the target service was a social networking site indicated that the content had already been removed (in most cases due to violation of Terms of Use/Service) at the time of Hotline.ie assessment. While there was a marked increase in reports classified by Hotline.ie as potentially Child Pornography under Irish law (15% of the reports quoting Child Pornography as suspicion), less than 1%

appeared to be hosted in Ireland. We aim to keep this relevance by continually honing our assessment expertise, adapting our systems to meet the new challenges and building on the well-established partnership with Internet Industry and law enforcement, to ensure that the Irish jurisdiction continues to remain hostile to those who may seek to host or distributed child sexual abuse images and videos. It has become apparent to Hotline.ie that over the years certain websites solely dedicated to sharing child sexual abuse images/videos operate collectively, moving together across hosting providers in different countries and advertising their content across various platforms and channels. More so the child victim may be sexually abused in one country, the images of the sexual abuse uploaded to the Internet in a different one, hosted on servers in yet another and the content accessible anywhere in the world. Hence for an effective response it is imperative to continue to combat this crime against children within a coordinate multi-stakeholder and cross-disciplinary approach and work internationally to ensure that every child sexual abuse image and video is removed at source irrespective of where in the world it may be hosted. To that end Hotline.ie is one of the founding members of INHOPE (the International Network of Internet Hotlines) and works in conjunction with other 44 Internet Hotlines in 40 countries worldwide engaged in combating online child sexual exploitation and child sexual abuse imagery. The partnership between ISPAI Hotline.ie, the Internet Industry, An Garda Síochána and international law enforcement agencies is of utmost importance in ensuring, first instance, “Child Pornography” is removed from the Internet, and subsequently that child victims can be identified and rescued from sexual abuse, evidence trail preserved for law enforcement investigation, as well as combating CSAI production and distribution online. Given our unparalleled expertise in combating illegal content online we recognise the scale of the problem; the accelerated pace at which social and technological shifts are occurring and the need to do more to protect children and all of society alike. However, it is vital that any new framework/solution accounts for privacy and security; be outcome-based, scalable and future-proof. It is true that the model describe above could be used as a best practice example, however it is crucial to ensure that manifestly illegal content is not conflated with legal but age-inappropriate or harmful content; and equally important to recognise that the latter requires more careful considerations and the rules applying to such content may vary from Internet service to Internet service. Furthermore the notice and takedown procedure, described above, for removal of criminal content such as “Child Pornography” is already covered by European law, namely the eCommerce Directive 2000/31/EC articles 12 to 14 together with the prohibition on imposing general monitoring obligations contained in article 15. Content deemed criminal – such as “Child Pornography” also known as Child Sexual Abuse Material (CSAM) or Child Sexual Abuse Imagery (CSAI) – is clearly defined in national, European Union and international law and should be prohibited on all platforms. On the other hand, to date there is neither a clear definition of harmful content nor (national/EU/international) consensus on the best approach or whether solutions in one jurisdiction may be suitable or appropriate in another. It is however, undisputable that cultural context plays a major role in determining community standards in matters of decency and social acceptability, while the interconnected nature of the Internet, is such that social and cultural values inevitably collide, creates new challenges for policy and Internet content governance. Increasing convergence means that harmful content is not confined to online platforms but accessible across multiple and wide variety of digital mediums and potentially

subject to different regulatory regimes. Superimposed there is a continuum between offline and online behaviours which contributes to the complexity of developing effective responses and remedies. As outlined by the Law Reform Commission's Report on Harmful Communications and Digital Safety (2016) "the criminal law should only be employed as a last resort, to target the most serious behaviour for which other responses are unsuitable. The criminal law is not an appropriate response to some harmful digital communications for a number of reasons, including that a substantial amount of such activity is carried out by young people, as well as by adults behaving impulsively and without intending to cause harm." (Chapter 3 Digital Safety, Takedown Procedure and Civil Law – 3.02) It is quite challenging to address and identify effective processes - i.e. "system to facilitate the removal of harmful content from online platforms" - without a clear and workable definition of "harmful content", and taking due account of, inter alia, (a) different types of content may require different treatment; (b) other types of content providers i.e. gaming sites, message boards, forums etc. can also be misused for harmful content and behaviour (to this end the definition should be technology/platform agnostic); (c) the risk of over-criminalisation of online activity compared to offline activity, which may be avoided if the emphasis is not primarily on the means used to carry out harm; (d) extra-territorial jurisdiction etc. To be effective regulation should be concerned with setting goals for platform/content providers about what they are expected to do (in other words what are the responsibilities of companies) and how in terms of what are the process that are being deployed. To that end the Regulator could set standards for how platforms/content providers manage content i.e. if they act reasonably and proportionately, balancing rights and ensuring accountability for decisions. Additionally the challenge of regulating large and small companies should be considered. For example, as it relates to combating illegal content online, the ISPAI Hotline.ie model of providing an aggregate service for a wide range of companies has the advantage of being available to small and medium companies as well as large ones. Additionally the delineation of responsibility between the Regulator and the Data Protection Commissioner may warrant further consideration, particularly in light of the Data Protection Commissioner's responsibility for dealing with complaints by individuals related to their data protection and privacy rights under the GDPR. Effective Internet safety solutions require careful balance of public and private, legal and voluntary measures at various levels, based on shared responsibility between relevant stakeholders. It is hard to overstate that coordination and cooperation between multi-stakeholders is key. Once the Regulator has set out clear standards, criteria (threshold) and adequate timeline per type of harmful content; the most efficient system for handling complaints about harmful content would be one where in first instance the complaint is made with the content provider. The complaint should identify the type of harmful content reported, frequency (i.e. persistent, once-off) and provide as much detail as possible (contextual information) to allow the content provider identify the subject content. If deemed appropriate for the type of harmful content subject to a complaint, simple online counter-notice procedure should be made available. When a counter-notice is submitted, the content/platform provider should provide, particularly if the content previously notified is classified as not meeting the threshold for removal, a response together with the corresponding rationale that has informed the decision. In the event that the complaint is not dealt with satisfactorily and within the standard timeframe set by the Regulator, and provided it serious

harm is caused to the individual by the harmful content not being removed, the complainant could escalate it to the Regulator. In general complaint and counter-notice mechanisms should be available for the settlement of disputes. However, it is worth noting that in certain circumstances, particularly as it relates to criminal content such as child sexual abuse images/videos, informing the content provider and/or allowing for a counter-notice would not be appropriate, especially as this may interfere with ongoing investigations necessary for the prevention, detection and prosecution of criminal offences. To avoid the potential of unintended consequence of new forms of regulation, a regulatory impact assessment could be conducted with the aim of assessing the likely effects of the proposed new regulation i.e. ascertain whether or not the new regulation would have the desired impact, is scalable, future-proofed etc. As outlined by the Law Reform Commission's Report on Harmful Communications and Digital Safety (2016) a holistic approach to harmful content could consist of a "three level hierarchy of responses to (...): (i) Education: to create user empowerment and foster safe and positive digital citizenship; (ii) Civil law and regulatory oversight: where (...) law needs to be employed, civil law should be favoured as it is less onerous than the criminal law; and (iii) Criminal law: only the most serious harm should be subject to the criminal law." (Guiding Principles in the Report – 18). Behavioural change can only be instigated through education. To that end education and prevention will continue to play a key role in tackling both illegal and harmful content.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Ideally the Regulator should ensure a standardised process, set out clear criteria and associated timelines when action is required (i.e. removal of harmful content), with due regard that different types of harmful content would require different responses; and subsequently oversee and enforce the compliance mechanism.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

As stated earlier (question 1) to ensure future-proof solutions with due account of different types of harmful content may require different treatment; and other types of content providers i.e. gaming sites, message boards, forums etc. should not be overlooked; ideally the regulatory or legislative scheme should be technology/platform agnostic and should perhaps focus more on the actions and behaviour rather than the means used to carry out harm.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are

there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Criminal content such as child sexual abuse material is already adequately defined and addressed through a range of Irish and EU instruments. It is important to define if/what other additional offences will come within the scope of the new regulation. As it relates to legal content which may be age-inappropriate and harmful it is imperative to have a clear and not overly broad definition. Of the three examples provide, it is recognised that cyber-bullying is a very difficult and sensitive issue particularly where children and youth are involved. Acting on a complaint referring to online content that is alleged to be part of a cyber-bullying incident presents particular challenges, as almost every case is individual, often subjective and requires a substantive complaint to be made. Bullying irrespective of the means by which it is conducted, is a societal problem best tackled through changing social attitudes. It must be acknowledged that cyber-bullying is an extension of real world bullying whereby legitimate Internet services are misused as a tool to further that bullying. Internet service and content providers already cooperate with authorities to assist investigation of crime or the pursuit of a civil case. Such actions follow due process of law and this must apply equally where cyber-bullying is concerned. Bullying carried out online is often very difficult for a third party such as an Internet service and content provider to detect. In addition many of the sites used by persons within the State are provide from countries outside this jurisdiction. It is acknowledged that cyber-bullying while similar with real world bullying, has differences in that it can be carried out apparently anonymously and that it can be done any time and any place, as distinct from real world bullying which, generally takes place outside the safe confines of the home. The above reinforces the need to have a clear definition of “cyber-bullying” together with clear guidelines on the levels of “seriousness” and corresponding expected actions and timelines. As such balancing the “seriousness” of harmful content between the threshold of being too high and too low must be done carefully and is an issue that would require additional guidance from the Regulator. Procedures around how the regulator determines the level of “seriousness” would have to be as transparent as possible. It is hard to overemphasise the need for clear and specific guidance particularly as it relates to content which would be classified as harmful content, as such content can often be presented in non-local languages and framed in varying political and cultural contexts (e.g. parody, free expression, artistic context, etc.). This clarity is needed to avoid potential excessive censorship which would be thus undermining the fundamental rights of the users.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Channels or any other audio-visual services under the responsibility of a provider

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

co-regulation

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Our knowledge base and expertise relates to combating illegal content online as outlined in question 1.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Our knowledge base and expertise relates to combating illegal content online as outlined in question 1.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Our knowledge base and expertise relates to combating illegal content online as outlined in question 1.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

See detailed response to question 1 which is inclusive of the above

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

See detailed response to question 1

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

For a coordinated response the preference would be for a single regulatory body, however this should be further scoped.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

co-funded

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

The issue of both powers and sanctions require careful consideration. It is key for a Regulator to have the necessary resources and tools to assess compliance and to require redress; as well as having the authority to impose a range of sanctions as appropriate.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Clear processes and procedures in place where non-compliance should be subject to a graduated scale of sanctions

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Thresholds should apply

Page 2

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** It is believed that the most effective and efficient way for an individual to have a request for the removal of harmful content from an online platform dealt with is to go directly to the service provider first, via the provider's reporting mechanism, where such a mechanism is in place. However, the reporting mechanisms and complaints policies that some online platforms have in place are not always applied in the most consistent of ways. Should this be the case for an individual that such a mechanism is not effective nor efficient, nor the outcome satisfactory to the individual then they must have a right to appeal the online platform's decision, to a regulator. The ISPCC is of the view that an independent regulator would be the most effective and efficient route for an individual seeking the successful removal of harmful content directed towards them or about them removed successfully, with the least amount of burden being placed on the individual. It is imperative that an independent regulator is in a position to monitor, evaluate and adjudicate on such complaints and to use this data to build up a robust view of the issues appearing on online platforms, such data should then in turn be used to create resources to inform and educate on these issues. These resources should be developed for educators and parents to pre-empt and minimise such occurrences, and towards government to inform policies and laws that obligate online platforms to act in a more positive and constructive manner when dealing with similar issues in the future. The potential pathway of the individual to the online platform and then to the regulator should work well as it is envisaged that the regulator will be certifying the complaints mechanisms the online platforms have to put in place. By that end, the regulator is determining what constitutes an effective and efficient complaints mechanism. It is imperative that the new legislative framework operates in a manner that is respectful of existing legislative frameworks at both national, European and international level. Notwithstanding this, a complaint should be dealt with as expeditiously as possible and within clearly defined time lines with automated progress updates provided to the complainant. In determining the appropriate time limit, it is useful to consider the system in place in other jurisdictions. In Australia, a time limit of 48 hours has been introduced which has proven very successful and effective. The time limit should commence on receipt of the complaint by the online platform at which point the complainant should be notified that the time limit has commenced, as could the author of the content. Or, possibly it could be a ticketed type process where you are given a complaint

number when you have registered your complaint and a follow-up notice – also time defined – noting the commencement time of your complaint. This should make it easier for the individual to check up on the status of their complaint with the online platform. The author of the content could be afforded the opportunity to submit a counter notice within this specified period, upon receipt of this notification. This could be a way to balance the rights of both individuals, in particular in cases of harmful content as opposed to harmful behaviour directed at an individual. Failure by the author to submit a response to the notice should not affect the duration within which the service provider must make its determination on the matter. Co-regulation should be encouraged. It is appropriate to consult service providers as much as possible when implementing the appropriate measures. The benefits of co-regulation are the expertise and flexibility offered by a more specialised industry-based organisation and a detached regulatory organisation that nevertheless has a clear system of legal backstops and accountability. It is preferable that the regulator is operating in conjunction with the service providers as opposed to creating an oppositional dynamic.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Yes, a statutory test should be satisfied before the matter is escalated to the regulator. 'Reasonably practicable' is an example of a statutory test in our health and safety laws. This asks that an employer takes all steps deemed to be 'reasonably practicable' when putting safeguards in place for its employees following a risk assessment. Something similar should be incorporated into any statutory test that is proposed in this instance. Online platforms should be risk assessing their products and services – including the availability of effective and efficient reporting mechanisms – before they are released to market. A statutory test could comprise of defined pathways and timelines in cases where an individual is making a complaint to an online platform to remove harmful online content and who receives an unsatisfactory response that he/she can then appeal to a regulator, and while respecting the principle of proportionality should have their complaint dealt with in a satisfactory time-defined manner. Regulation can impose different challenges on smaller companies and stifling innovation is not in anyone's interest. Smaller online platforms who readily cooperate with the regulator should be supported in putting robust reporting mechanisms in place. The individual should have to comply with the statutory test in place, save in circumstances where there is cause for concern for the health and wellbeing of the individual by the content not being removed. Once an individual has made a complaint to an online platform and is unhappy with the response they have received, they should then have the option to appeal to an external body, in the form of a regulator. The regulator should also be subject to a time limit within which it must make its determination in relation to an individual's appeal. An individual should be required to exhaust all available alternative avenues of appeal before the matter can be escalated to the regulator and/or harm is being caused to the individual by the content not being removed. This will prevent unnecessary burden being placed on the resources of the regulator in circumstances where such a burden can be

managed/avoided. Consideration should be given to removing harmful content directed at a minor on a precautionary basis at point of reporting until the matter has been adjudicated on. Although the perishability/ephemeral nature of certain content may be an issue in certain circumstances, and the removal of such content on a precautionary basis could amount to a restriction of the right to freedom of expression, it is perhaps worth considering the merits of removing such content under these special circumstances in light of the potentially damaging ramifications of its existence. The longer the content remains accessible, the more harm that can be caused. The online platform should serve as the initial route and the regulator should only make a determination on the matter in the form of an appeal as a last resort. The appropriate time limit should be 48 hours in line with that introduced in Australia, which has proven very successful and effective. The time limit should commence on receipt of the complaint by the service provider, at which point the complainant should be notified that the time limit has commenced. It is noteworthy that an Australian e-safety Commissioner's report states that the office has an eight-hour turnaround to remove serious content. With this in mind, consideration should be given to the time limit being reduced to 24 hours in respect of complaints made by minors. Their complaints ought to be prioritised and expedited, as children are less equipped to deal with harmful content due to the very nature of them being children, and the assumption that the perpetrator is a child also, and possibly unaware of the potential harm they are causing.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

The ISPPC views this national legislative proposal will deal with two types of harmful content: (i) harmful content/conduct directed at an Irish citizen and (ii) harmful content viewed by an Irish citizen. The online platforms and individual services that should be included within the scope of the scheme being provided for should be; (i) Harmful content/conduct directed at an Irish citizen • Social network platforms. • Social media platforms. • Anywhere comments can be posted online to an individual and/or about an individual and can be viewed publically by the victim or others; forums, 'below the line' comment boxes, etc. (ii) Harmful content viewed by an Irish citizen • Social network platforms. • Social media platforms. • Video sharing platform services (VSPS). • Anywhere comments can be openly posted and can be viewed publically; forums, 'below the line' comment boxes, etc. • Sites with editorial responsibility and sites without editorial responsibility (user-generated content). Consideration should also be given to the UK's White Paper on Online Harms, in Chapter four where it explores the sites/services that should be included in its regulatory proposals. The regulatory scheme should be equally applicable to audiovisual media services platforms and traditional linear services. Audiovisual media services include user-generated audiovisual content on Video Sharing Platform Services, e.g. YouTube, for on-demand audiovisual services, e.g. RTÉ Player, Virgin Media Player, iTunes Store. Linear audiovisual services refers to traditional TV broadcasters, e.g. RTÉ. This should encompass both VSPS that have a non-editorial control and other services that have editorial control, as the distinction between these categories seems superfluous, given that such services are becoming more and more integrated. Consequently, in order to future proof the legislation, the regulatory scheme should be universally applicable.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Children have a right to access appropriate information. Often they will seek out this information online. However, as seen in the case in the UK of teenager Molly Russell, the technology behind the platform she was using was throwing up disturbing content on suicide and self-harm along with content offering support. For someone who is already feeling vulnerable and searching for some type of solace, viewing images and reading content reinforcing these feelings of hopelessness, isolation and desperation is not helpful. Children should be able to search safely online for appropriate support information – information that is accurate, helpful and signposts to helplines or other sources of emergency and/or therapeutic supports. Molly Russell’s father believed the harmful content she viewed online contributed to his daughter taking her own life, after looking at her online account after her death. In considering the definition of harmful online content that ought to be adopted, it is useful to consider definitions of harm that have already been developed both within this jurisdiction and in other jurisdictions. → The Non-Fatal Offences Against the Person Act 1997 defines “harm” as “harm to body or mind and includes pain and unconsciousness”. → In the Children’s Digital Protection Bill 2018 Harmful material is understood as content containing any of the following: (a) encouragement and incitement to suicide; (b) encouragement of any self-harm practices; (c) encouragement of prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health; (d) encouragement of any unsafe practices which would severely endanger the health and wellbeing of the child. → In 2015, Netsafe, a charity organisation operating in New Zealand since 1998 to help internet users stay safe online, was assigned responsibility for receiving, assessing and investigating complaints about online bullying, harassment and abuse under the Harmful Communications Act 2015. The Act defines 10 communication principles on which digital communications may be considered to cause harm. The communication principles are— Principle 1 A digital communication should not disclose sensitive personal facts about an individual. Principle 2 A digital communication should not be threatening, intimidating, or menacing. Principle 3 A digital communication should not be grossly offensive to a

reasonable person in the position of the affected individual. Principle 4 A digital communication should not be indecent or obscene. Principle 5 A digital communication should not be used to harass an individual. Principle 6 A digital communication should not make a false allegation. Principle 7 A digital communication should not contain a matter that is published in breach of confidence. Principle 8 A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual. Principle 9 A digital communication should not incite or encourage an individual to commit suicide. Principle 10 A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability. In this context harm means serious emotional distress. → The Children First Act 2015 defines harm as: (a) assault, ill-treatment or neglect of the child in a manner that seriously affects or is likely to seriously affect the child's health, development or welfare, or (b) sexual abuse of the child, Whether caused by a single act, omission or circumstance or series or combination of acts, omissions or circumstances. → In the Report of the Council of Europe on Protecting Children Against Harmful Content 2009, harm is defined as "material damage, actual or potential ill effect." This report deals with harmful material and that is distinguished from content that is generally illegal such as obscenity, child abuse images, incitement to racial hatred, etc. → The Audiovisual Services Media Directive developed by the European Union speaks of protecting "the physical, mental and moral development of minors as well as human dignity". The ISPCC supports the suggestions outlined in this consultation as areas that should be clearly defined as examples of harmful content. In addition, the inclusion of the harms outlined in the Harmful Digital Communications Bill 2017 should also be considered for inclusion, in particular the non-consensual sharing of images and the taking and distributing of images without consent. Overall, a principles-based approach in line with the one adopted in New Zealand is certainly advantageous in some respects, particularly given the evolutionary nature of technology. The definition ought to be developed with a view to encompassing future obstacles that may arise, as opposed to merely addressing the present issues, in order to ensure the sustained efficacy of the provision. It is imperative that this definition is designed in a future oriented and forward thinking manner. A precise and explicit definition of harmful content may leave certain unforeseen difficulties beyond the scope of the legislation, thus rendering the legislation useless. A principles-based approach facilitates a more expansive and adaptive definition of harmful content. However, in the absence of a clear definition of "harmful content", there is a risk that legitimate freedom of expression online could be curtailed and that the principles would not be equally interpreted. Furthermore, it is desirable that certain behaviours, namely those encompassed in the proposed definition, and those mentioned subsequently in this submission are classed as unequivocally unacceptable. For this reason, the definition adopted for the purposes of the proposed legislation ought to incorporate both a definitional aspect and a complementary principles-based aspect.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your

rationale and give examples.

[Section 3 of the explanatory note]

The Directive defines a Video Sharing Platform Service (VSPS) as one where ‘...the functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility...’ This definition is quite broad. In a report by leading legal and market experts at the European Audiovisual Observatory from July 2018, the authors clearly distinguish between Video Sharing Platforms (e.g. YouTube and Dailymotion) and Social Media Platforms (e.g. Facebook, Instagram, etc.). However, as the report describes, the two different platforms have been converging in recent years, as Social Media Platforms have added video sharing features. It also describes the difficulty in defining a VSPS for the purposes of legislation. It describes VSPSs as follows: “Their principal features are: open access for all; the lack of platform involvement in the choice of content published; the algorithmic or human curation of content; funding through advertising; and ex-post checks on the initiative of rights holders or the platform itself.” The idea of VSPSs being ‘user-generated’ is questioned in the report. As this would suggest that the platforms are being used by individuals uploading personal content. However, the content posted on VSPSs is much wider than this, for example, a television network uploading clips from a show that has been broadcasted on their network on television. The user-generated concept is clearly outdated and does not reflect how VSPSs are being used today; it is mainly used to differentiate between platforms with non-editorial control and those with editorial control. There is a willingness to differentiate between VSPS that have a non-editorial control, and with other services such as on-demand services that have editorial control. This differentiation is unnecessary if the result is that content is removed by the platform based on being harmful or criminal in nature. The difference is who is accountable. A platform with editorial control is accountable for removing harmful or criminal content that it has itself placed on the platform. A platform with non-editorial control is also accountable for the removal of harmful or illegal content placed on the platform by other users. Platforms with non-editorial control have limited liability under the eCommerce Directive in respect of defined illegal content. An example of this merging is YouTube TV, where someone can stream live sports from networks such as Sky Sports, and live TV from NBC, ABC, FOX and many other American TV networks, which would have previously been under the ‘linear, editorial’ category. Due to the ability to upload video to almost every social media platform, it may be necessary to question the distinction between social media platforms and VSPSs. Although there is a noticeable difference between YouTube and Facebook, they are becoming more integrated. In order to future proof the legislation, it may be necessary to bring every social media and VSPS type platform under the scope of the legislation. A definition of a VSPS is not only challenging but also possibly unnecessary and worse still, inhibiting the future applicability of the legislation or providing loopholes for platforms in the legislation. In short, it is not necessary to define the limits of VSPS and rather it would be more desirable to define any platform or service which allows for the possibility of uploading video content, whether under the editorial control of the platform or not, as a VSPS. This would be more expedient and future oriented. However, the definition could simply encompass editorial, non-editorial, linear and non-linear to be future proof. As the

Directive notes those providers without editorial responsibility are equally as responsible as those with editorial control are to protecting the public from harmful content (incitement to violence, etc.). The method for enforcing this responsibility is the requirement for the removal of such content. This is the same responsibility across the board (on demand services, VSPS, social media platforms etc.).

9 - Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The relationship between a VSPS established in Ireland and the Regulator should be based on constructive engagement as opposed to one based on avoidance and opposition in order to develop an effective working relationship. VSPSs established in Ireland will need to recognise Ireland's position as EU regulator for their service with whom engagements are ongoing, open, honest and transparent. The Regulator's expectations will be proportionate in respect of services of varying sizes, including maturity and skills and be proportionate in respect of the various stages of the regulatory process from bedding in to being fully established; working within legislation and engaging on proposed changes to legislation and policy; and at times of evaluating and/or investigating. There should be a direct reporting structure put in place where named individuals/roles within VSPSs report annually on requirements from an operational, accountability and transparency point of view, directly into the regulator. This annual report should cover the number and profile of reports of harmful and illegal content made by individuals; how the company dealt with these complaints under its terms of service and the outcomes of same, including reports to law enforcement agencies; identification of 'new content' or emerging trends/challenges; and evidence of upholding individuals rights, in particular a child's right to be protected and the necessary safeguards in place to achieve this. An evaluation system should be put in place by the regulator to 'grade' compliance and effectiveness.

Where there is non-compliance or compliance below a certain accepted level, then the VSPS should be subjected to a more regular monitoring period until an acceptable 'grade' or level of compliance has been reached. All these reports should be individually publically available on the site of the regulator, along with a summary report covering all the companies produced by the regulator itself, including visual representation of compliance for children to be able to consume readily and easily (educators may also be able to use this as part of their online safety awareness education in the classroom). The requirement for VSPSs to remove harmful content and illegal content must be appropriately implemented under the supervision of the regulator. This means the regulator should take a regulatory role over the VSPS. The harmful content should be identified and removed by the VSPS within an expedient time limit decided by the regulator. The regulator should promote self-regulation by the VSPS and promote the principles

of the Directive through assisting in the development of a standard identification and removal procedure. Both the regulator and VSPs should collaborate in the development of such a procedure. The VSP should be accountable to the regulator. The Directive notes the importance of the regulator being an independent, impartial body. An annual review of the measures implemented would allow the regulator to ensure the implementation of the principle through appropriate means.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The Irish regulator should monitor and review the measures that a VSP has in place on the basis of implementing the principles of the Directive, one of its primary functions. The regulator, in its supervisory role, must ensure that the VSP is implementing the principles through appropriate measures that have been developed and approved by the regulator. The regulator should seek improvements where there is evidence that the measures are not sufficient for the implementation of the principles. Evidence of such insufficiency could come in the form of an annual review by the regulator of the measures or excessive public complaint. The regulatory relationship should be similar to what is outlined in the previous question.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

The Irish regulator should have the same regulatory role over the television broadcasting services and on-demand audiovisual media services as it should with VSPs, notwithstanding the differences in standards/expectations/criteria outlined. As the services are becoming more integrated, there will be less need to distinguish between these services in the future. This would ensure the future proofing of legislation and the remit of the regulator. It does not make sense to have the same content subject to different regulatory standards because of the platform on which it appears. There should be parity of protection for the viewer in this instance. This would require the regulator to develop and implement procedures in collaboration with these services to protect minors from harmful content and protect the general public from illegal content. The supervisory role of the regulator requires that the regulator be an independent body. The principle goal of the regulator should be the implementation of the principles of the Directive on the basis of the protection of minors and the general public.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund

currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

The Directive recommends that Member States allow non-linear services to access the current content production fund and that the Member State should apply levies to services that are regulated in another EU Member State but target Ireland. However, unless every Member State agrees to this, updating the production fund in such a way may negatively affect the distribution of these services to Ireland. This could also negatively affect the value of content produced in Ireland, and about Ireland (including from a cultural, language, historical and heritage point of view). If this levy is introduced it could prevent smaller, independent production companies from targeting Ireland, diminishing the competitiveness of smaller production companies and Ireland's overall audiovisual and video content market. However, this could also potentially be viewed as a source of funding for the proposed regulator. A digital tax is being proposed by France, along with Italy, Spain and the UK.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

FREEDOM OF EXPRESSION Article 19 of the International Covenant on Civil and Political Rights states: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. Article 11 of the EU Charter of Fundamental Rights states: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected. Article 19 of the UN Declaration of Human Rights states: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 10 of the European Convention on Human Rights states: 1. Everyone has the right to freedom of

expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Freedom of speech must be protected in respect of the intentions of the above instruments. The right to freedom of expression is not an absolute right; there are restrictions. We have defamation laws, libel laws and laws against harassment and illegal hate speech; all forms of 'expression'. While it is important to respect the fundamental right to freedom of expression, it is also important to recognise its limitations, and the reasons for these limitations. These limitations can be in place to protect a person's good name and their livelihood; to prevent incitement to violence and hatred; terrorist activity and so forth. The right to freedom of expression as stated in all of the above instruments speaks of this right as it pertains to thoughts; opinions; ideas; the acceptance of a pluralistic society. It does not speak to this right in terms of directing commentary/content towards individuals that is deemed harmful and/or causes harm, with or without the intent to do so. Striking a balance between the right to freedom of expression and the right to privacy is an intricate task, particularly in the digital and online context. The implementation of heavy-handed law based measures may amount to an unjustifiable interference with freedom of expression and, impact negatively on the open and democratic nature of information sharing online which is vital to the internet. However, freedom of expression is not an absolute right and other rights need to be safeguarded in the online setting, most notably, the right to privacy that can encapsulate related rights including rights to safety, reputation and dignity. It is imperative that the principle of proportionality, which requires the least intrusive means of regulation, is upheld in relation to the regulation of content online. This principle favours minimal criminalisation and a focus on civil law as well as policy and education based measures as the central means of addressing harmful digital communications. Consequently, although criminal sanctions play a vital role in the deterrence of undesirable behaviour and the provision of remedy in the most severe cases, the best approach appears to be the prioritisation of less coercive solutions. Favouring minimal criminalisation is particularly suitable in respect of children, in light of their decreased maturity levels. In assessing the best approach towards balancing the competing rights at play in relation to the regulation of online content, it is useful to regard the approach set out by the New Zealand Law Commission in its 2013 Briefing Paper Harmful Digital Communications. This outlines a three-tier approach to regulating digital communications that prioritises education and self-regulation as the preferred methods of regulation, with the law only being employed where these prove ineffective. In this model, the first tier relates to user empowerment with emphasis on educating individuals as to their rights and responsibilities in relation to digital communications as a means of combating harmful behaviour. This idea is often referred to as "digital citizenship" and is alluded to in the Directive in the context of 'media literacy', which refers to

skills, knowledge and understanding that allows citizens to use media effectively and safely. In order to enable citizens to access information and to use, critically assess and create media content responsibly and safely, citizens need to possess advanced media literacy skills. It is therefore necessary that service providers, in conjunction with the regulator, promote the development of media literacy in all sections of society, for citizens of all ages, and for all media and that progress in that regard is followed closely. Something akin to the Be Media Smart campaign, created by Media Literacy Ireland (MLI) should be considered. The second tier refers to self-regulation by service providers and generally involves 'terms of use' agreements which most users agree to when they use such services. It is only on occasions in which user empowerment and self-regulation may prove inadequate in safeguarding individuals' rights that the final tier, relating to the law, may be employed. Such a hierarchical approach could be adopted in respect of the regulation of harmful content online in this jurisdiction, with the prioritisation of less coercive methods of regulation where possible. Irrespective, it is imperative that the principle of proportionality is upheld and individuals' rights are not unnecessarily and unjustifiably infringed upon.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

The Directive exempts intermediaries from liability for the content they manage if they fulfil certain conditions: • Service providers hosting content, once they are aware of the illegal nature of the hosted content, they need to remove it or disable access to it expeditiously. • To be covered by the liability exemption they have to play a neutral, merely technical and passive role towards the hosted content. But, online platforms are now monitoring and 'editing' content so can such platforms still be viewed as passive, and therefore covered by this article of the Directive? Strand 2 is in relation to Video Sharing Platform Services (VSPS). This is where the definition of VSPS comes into play. The eCommerce Directive allows limited liability for service providers with a non-editorial role. This would include service providers such as YouTube and Dailymotion. However, given the community guideline enforcement tactics which most VSPSs, for example, YouTube have in place, (including the demonetisation of a channel; suspension of a channel; removal of copyrighted content; etc.) these VSPSs cannot argue that they have a neutral, merely technical or passive role towards hosted content; they actually have an active and involved role. This is compounded by the fact that YouTube earns money from the user-generated content posted on its site via advertorials/advertisements. A financial interest is the antithesis to a passive role in the content hosted. This further exemplifies the argument that the terminology of editorial and non-editorial is outdated and encompassing it in the legislation will lead to confusion and loopholes in the future, as these 'old' classifications of media are converging and becoming more of the one/same, a point referenced earlier by this consultation. Following the Court of Justice of the European Union (CJEU) decisions in *LVMH v Google France* and *L'Oreal v eBay*, if a hosting platform treats user content non-neutrally it will not have liability protection for that content. By non-neutrally the CJEU means that the operator "plays an active role

of such a kind as to give it knowledge of, or control over, those data". Baroness Kidron, opening the House of Lords social media debate on 11 January 2018, went further, drawing an industry sector contrast between media companies and tech businesses: "Amazon has set up a movie studio. Facebook has earmarked \$1 billion to commission original content this year. YouTube has fully equipped studios in eight countries... The Twitter Moments strand exists to 'organize and present compelling content'. Apple reviews every app submitted to its store, 'based on a set of technical, content, and design criteria'. By any other frame of reference, this commissioning, editing and curating is for broadcasting or publishing."

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Although the AVMSD makes a distinction between linear and non-linear services, due to the evident future integration of these services, one Commission should be responsible for the regulation of these services. The Directive treats on-demand services lighter than linear services, introducing stricter rules for television broadcasts. This approach will be outdated in the future as these linear and non-linear services continue to converge. Member States are free to apply more detailed or stricter rules in the fields coordinated by the AVMSD to media service providers under their jurisdiction, provided those rules are consistent with the general principles of European Union law. Ireland should apply equally strict rules to linear services and non-linear services. Not only are non-linear and linear services converging, there is a clear integration of editorial and non-editorial online services. The distinction between the two is becoming less clear and the Directive indicates a merging of the treatment of both. An example being that VSPS should reduce the exposure of children to harmful content. Certain other rules have been extended to VSPS and audiovisual content on social media platforms. This is a clear merging of the law with regards to the four strands. Two regulatory bodies may experience overlap for it to be worthwhile having two separate bodies, including from a resourcing aspect and a knowledge base. Given the 'country of origin' principle of the single market and the high number of online services that have their central administration/legal base in Ireland, Ireland should take a strict/cautious approach to protect minors from harmful content. (This will depend chiefly on where their central administration is located and where management

decisions are taken on programming or selection of content. Further (subsidiary) criteria include the location of the workforce and any satellite uplink, and the use of a country's satellite capacity). The other problem with having two or more separate regulatory bodies is the possibility of unintentionally opening up loopholes that may be exploited. For example, if there is a regulatory body for non-editorial platforms such as YouTube, and a separate regulatory body for on-demand services such as Netflix, where does a service such as YouTube TV fall under? It should fall under the regulatory body for on demand services. However, that means that one company will have to be regulated by two different bodies for what is essentially the same service. This could lead to confused jurisdiction and assumingly convenient loopholes for the service providers.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

It is not uncommon that regulated bodies contribute to the regulation of their sector. Therefore, consideration should be given to placing a levy on the online platforms that will come under this regulatory structure. Proportionality has been mentioned in terms of meeting the regulatory requirements proposed and this principle should be taken into consideration when applying any levy, too. The online platforms with the most registered users could possibly be the best metric to use when gauging what portion of a levy they should have to pay. The burden of such a levy should not then push smaller online platforms out of the marketplace, or indeed prevent them from entering it in the first place. It is difficult to assess at first whether such a levy will meet the resource requirements of a new regulatory regime. Government benefits from having some of these online platforms based in Ireland and should consider channelling a portion of the revenues it receives from them into a regulatory structure, along with seeking funds from the EU Commission to fulfil its 'country of origin' regulator obligations.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The ISPC supports the proposed powers and functions provided for in the explanatory note that include: - A requirement that the services operate an Online Safety Code and must demonstrate their proposed approach to implement their obligations to the regulator, and that the regulator can certify that the approach is sufficient to a) meet the requirements of the AVMSD and b) meet the policy goal under the national legislative proposal, i.e. that the regulator will be certifying that the proposed approach is "fit for purpose" - That the regulator can require amendments to the proposed approach of the services before it certifies them as being sufficient or "fit for purpose". - Summons powers including the power to require regular reports from the services on the operation of particular aspects of

the service – i.e. content moderation, review, adjudication of appeals etc. - The power to assess whether the measures which a service has in place are sufficient in practice, by conducting audits of the measures which the services have in place or a more direct review of a company's content moderation teams as they are operating. - The power to issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator. - The power to impose administrative fines in relation to failures of compliance. - The power to publish the fact that a service has failed to comply or cooperate with the regulator. - The power to require a service to remove an individual piece of content (i.e. direct involvement in a notice and take down system) within a set timeframe, depending on the nature of the content, on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. - Where an offence is created of a service provider not cooperating with the regulator, e.g. by failing to put measures in place, by failing to provide information to the regulator, that the regulator would have the power to seek that criminal proceedings be brought against the service provider. Where an activity can give rise to criminal proceedings/prosecution – this activity must be clearly defined in law. The proposed functions and powers outlined in the explanatory note appear relatively comprehensive, however, additional functions regarding the promotion of digital and online safety, largely in line with those envisaged by the Law Reform Commission in respect of the Digital Safety Commissioner, should also come within the remit of the regulator. While Webwise creates excellent relative and relatable resources, the regulator could support Webwise in the promotion and dissemination of materials regarding online safety, particularly to schools and youth groups. The regulator should also provide annual progress reports regarding the efficacy of the new provisions. Moreover, the regulator should ensure that the take down procedure is equally available to all affected individuals, free of charge. Finally, provision should be made for the establishment of additional powers to the regulator, where the Minister deems appropriate, that are incidental, supplemental or consequential to the functions conferred on the regulator under this legislation. This will ensure that provision can be made in circumstances in which an unforeseen issue arises, thus protecting the longevity of the legislation. These powers and functions should be equally applicable across both proposed regulatory strands, except those pertaining to the dissemination of information regarding online safety. This matter should remain within the competency of the individual Member State to meet the particular needs and address the particular vulnerabilities of users in its jurisdiction. There are limitations to the content that can be regulated under the AVMSD so in order to offer the best overall protection to Irish citizens, additions to the provisions of the AVMSD are being considered which are welcome.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance

and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction. **[Sections 2, 4, 6, 7 & 8 of the explanatory note]**

The regulator must have sufficient powers to incentivise behavioural change in service providers. At its most basic, enforcement measures must include sufficient penalties that it is not simply easier for a platform to 'pay the fine' and carry on with commercially advantageous, but potentially harmful practices. The proposed sanctions appear adequate. The sanctions regime must be proportionate to the scale at which these companies operate. Given the size and scale of some service providers, that means that the magnitude of financial sanctions and wider enforcement measures must be significant. Regarding the administrative fines, these must be of sufficient magnitude to deter non-compliance, and to eliminate any financial gain or benefit from a platform's decision not to comply with its regulatory requirements in the first place. The regulator should credit timely disclosure of regulatory breaches, including meaningful cooperation and constructive engagement, and reduce financial penalties accordingly. In Germany, the Network Enforcement Act (2017) allows for fines of up to €50 million for non-compliance regarding the removal of particular content within 24 hours from online platforms with over two million registered users in Germany. In Australia the eSafety Commissioner can issue daily fines for non-compliance to a 'notice and takedown' order.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

The revised Directive requires Ireland to put in place some mechanism for the impartial settlement of disputes between users and VSPS. The ISPCC notes that Ireland is engaging with the European Commission to establish what the Commission's expectation is in relation to Ireland being required to put such a mechanism in place. The use of an independent mediation service may give rise to certain jurisdictional issues, as it may be difficult to discern where competency lies and place an unavoidable strain on resources. There must be concerted efforts to clearly define the parameters of such a mechanism. A threshold should apply before an issue is brought to the regulator. An independent mediator ought to be established in each member state to serve as the second instance of complaint after the service provider. The issue is only elevated to the regulator in circumstances in which a complainant is not satisfied with the response, having

already exhausted all of the avenues of appeal (the service provider first, then the independent mediator). It is only in the most egregious cases that the matter should be brought to the attention of/expedited to the regulator. The independent mediator should make its determination based on clearly defined procedures that are consistent throughout the EU and operate in conjunction with the various 'country of origin' mediators in order to ensure this consistency. The matter should be determined within a clearly defined time limit, which should be equally applicable across all member states. This time limit could be in conformity with what is suggested could be implemented in respect of the National Legislative Proposal, namely 48 hours in respect of adults, 24 hours in respect of children. It should be noted that in order for the regulator to operate in this capacity, the regulator would have to be adequately equipped to deal with the volume of complaints and overcome issues such as language barriers, cultural nuances, context issues; etc. Adequate resourcing along with personnel with the appropriate competencies and knowledge will be important in the creation of any regulatory structures.

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1 -Name

James Conway

3 -Email

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
It should be left up to the actual sites regulators rather than government regulating free speech.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

By not restricting any content as it is too difficult to determine where a person should be prosecuted.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

It should be left up to the actual sites regulators rather than government regulating free speech.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating

free speech.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

It should be left up to the actual sites regulators rather than government regulating free speech.

Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive

Group Submission on Common Principles



As organisations expertly involved in the areas of mental health, digital citizenship and the wellbeing, safety and empowerment of children and young people, we welcome Minister Bruton’s call for greater regulation of online platforms in Ireland.

Definitions

In order for any proposed legislation to be effective in this area, it is essential that it clearly sets out the issues it intends to tackle. In particular, the Online Safety Act must set out a clear definition of what constitutes “harmful content”. This scope of the definition set out in the consultation paper should be widened to include the following:

- Homophobic and transphobic bullying
- Hate speech
- Non-consensual sharing of intimate images
- Indirect as well as direct harassment online

The Online Safety Act should also clearly define what constitutes bullying and, in particular given the context of the Act, cyberbullying.

In addition, it is vital that the Act uses terminology that is up-to-date with best practice. The use of the term ‘online safety’ itself should be minimised, as this places an assumed burden on victims and potential victims to keep themselves safe online. Instead, we recommend that the term ‘Digital Citizenship’ be utilised as much as possible, as this more appropriately spreads the burden of responsibility amongst all citizens to behave respectfully and responsibly online.

Meeting the Needs of Young People

The impact of harmful content is felt by individuals of all ages, and the Act should consequently ensure that it covers and ameliorates harm done to all people, regardless of age. An Act which focuses solely on the needs of legal minors will let down thousands of people who deserve access to a safe, well-regulated online environment.

However, meeting the particular needs of children and young people will be essential to the success of any regulation. This current generation is the most technologically advanced in history, with far greater levels of digital literacy amongst young people than any other societal group. Therefore, the Department and legislators must work with young people, giving them a real voice in shaping the Online Safety Act.

One area in which the opinions of young people should be drawn on is in tackling the issue of age verification for online services. It is essential that the Act specifies regulations to ensure online platforms have an appropriately robust mechanism for age verification to assist in the protection of minors.

Empowering the Online Safety Commissioner

One outcome of the Act which we believe would be of fundamental importance is the strengthening of the role, funding and remit of the Online Safety Commissioner. We believe the Act should empower citizens to make a complaint directly to the Commissioner after having engaged with an online platform in the first instance and having not received a satisfactory remedy to their reported issue within a reasonable timeframe.

The Online Safety Act should, in the first instance, empower the Online Safety Commissioner to compel a platform or service provider to remove content. Furthermore, it should afford the Commissioner with sufficient powers to enforce such orders in entities across and, crucially, outside the European Union. Some of the most popular platforms amongst children and young people today are headquartered outside of the EU (for instance, Snapchat and TikTok).

One way in which the required takedown powers could be enforced is through a statutory code covering entities headquartered inside the EU, supplemented with a voluntary code for those based outside. Under no circumstances should the Act fail to take account of and seek appropriate solutions for the issues of enforcement around online providers based outside the EU.

The relationship between the Commissioner and the Gardaí should also be prescribed in the Act, as should the appropriate role of the Gardaí in relation to enforcement of the Act itself.

The Online Safety Act should further provide for a central role for the Online Safety Commissioner in coordinating sufficiently-funded public education campaigns in the area of digital citizenship and online safety.

Funding

As with any matter of public policy, the true test of commitment to this issue by the Government will be ensuring appropriate levels of funding for the effective enforcement of the Online Safety Act.

We believe that the regulator should be resourced with a budget of approximately €10 million initially, amounting to 66% of the current Data Protection Commission budget. Hotline.ie should continue to be fully resourced in relation to the reporting and monitoring of child abuse material. We are open to this unit being amalgamated into the new regulator if it would deliver a more impactful and cost-effective public service.

To meet the funding needs of this new regulatory body, we recommend that the feasibility of an industry levy be examined. However, we believe that this should be based not on revenues, but on the basis of online user numbers within either Ireland or the EU. In this way, those platforms whose services affect the most citizens can be called on to contribute the most towards safeguarding our common online space.





Joint Managerial Body

Submission

**Public Consultation on the Regulation of Harmful Content on Online
Platforms and the Implementation of the Revised Audiovisual Media Services
Directive**



Contact: John Curtis, General Secretary

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www.jmb.ie

Submission

Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive

The Joint Managerial Body (JMB) was founded in 1964 to represent the interests of all voluntary secondary schools in the Republic of Ireland. It is the main decision-making and negotiating body for the management authorities of almost 380 voluntary secondary schools. The JMB comprises two founding organisations: AMCSS, the Association of Management of Catholic Secondary Schools and the ISA, the Irish School Heads' Association, representing the Protestant Schools in the State.

There are approximately 180,000 students in our schools ranging from age 12 to 18 years.

In any matter relating to children, the child's best interests are of paramount importance.

Recognising that children are entitled to receive support and guidance in their discovery and use of the digital environment, the policy makers should formulate legislation, policies and other measures to promote the realisation of the full array of the rights of the child in the digital environment and address the full range of ways in which the digital environment affects children's well-being and enjoyment of human rights.

The JMB welcomes the plans for new internet safety laws that would see the appointment of an Online Safety Commissioner with powers to prosecute and fine companies who break the rules.

Having an Online Safety Act which would give the new regulator the power to order internet and social media firms to take down content that breaches agreed codes of conduct is welcome. Many of the calls to this organisation arise from breaches of community standards and are distressing for all involved.

Defining the harmful content helps individuals and schools in dealing with adverse social behaviour online.

On behalf of the school communities throughout the country, the JMB welcomes that elements of the act will be child specific and some of the take down powers will be clearly designed in that area.

Safety by design and best practice going forward should also be informed by the Council of Europe's Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*.

The JMB supports the Government's approach to building on international and European legal instruments in developing the regulation on harmful online content.

In conclusion, the JMB very much welcome the consultation Minister Bruton has launched and it supports its stated aim of achieving a proportionate and effective approach to dealing with harmful content online.

John Curtis
General Secretary JMB
5th April 2019

Page 2

1 -Name

Laurence Mc Manus

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** If the content is criminal, it should not be on the platform in the first place. It should be illegal for large internet providers (Google, Facebook, Twitter) to have illegal content on their platforms.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

The Regulator should be involved in deciding if the platform provider has removed the illegal content.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

The major ones: Google, Twitter, Facebook.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

I object strongly to this question. Surely the Department knows better than to conflate paedophilia with racism? Use the following axiom as your guide in defining, "harmful content": 'I disagree with what you say but I defend your right to say it.' Prosecute any internet provider (particularly the big three) that facilitates criminality, absolutely. However, any attempt to use the legislation to curb free-speech will only weaken the well-intentioned purpose of the legislation, i.e. to curtail criminals, terrorists, and paedophiles.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Video is any moving image that could be used for criminality. This should include so-called 'GIFs' on Twitter as well as more traditional long-play video, e.g. Youtube.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Again, I object to this question. I certainly hope that the Department is not attempting to use this much needed legislation (required to protect children from pornography, for example) to conflate, "incitement to...hatred" with paedophilia and violence? Assuming that this consultation is being conducted in good faith, however, I would suggest criminal sanctions (not merely fines) for Video Sharing Platform Services that facilitate criminality.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

This is an ongoing problem and one that needs constant enforcement and the full force of the law.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television

broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

On-demand and traditional broadcasts should be approached equally. If anything, on-demand should be regulated more vigorously.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

By all means, get foreign broadcasters to fund the hard-pressed Irish tax payer. However, the Department should be aware and very conscious of the fact that not everyone watches TV or views the internet, or indeed wishes to; these citizens should not have to pay for a service that they will never use. I would suggest redirecting the current licence fee currently going to inflated RTÉ personalities.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The UN Special Rapporteur makes a fundamental but plainly obvious point. Criminality against individuals causing direct harm is entirely different to a vague sense of offence against an entire race or religion based on what someone has said. This is plain common sense.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Prosecute the big internet providers when required.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

No more quangos please. First option, as long as it is not an attempt to bring in a media tax in place of the licence fee.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Google and Facebook are worth trillions and pay an effective 2.5% tax rate in this country. Surely they would consider funding this?

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Legislation, laws. Criminalise the hosting of criminal content.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Criminal sanctions are the only effective tools against internet giants that have unlimited funds.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

No threshold.

Page 2

1 -Name

Luke Wonner

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**

I think that 'harmful content' should refer not to the expression of ideas, but to actually dangerous and harmful things, such as child pornography, rather than 'protecting people' from the expression of ideas which they dislike. Referring to that definition, I would advise a report system that would reflect upon service providers, to control the showing of child sexual abuse material, therefore incentivizing them to keep such content off of platforms.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

I think the statutory test should refer to whether or not the content in question violates any existing law referring to pornography, or threats. If not within those bounds, it should not be escalated to regulator.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

I do not think any online platforms should be included, as they should be seen as private enterprises, free from interference from any legislative scheme.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)

- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

I do not believe that the government should have such control over the expression of ideas. Referring to provocation to commit a terrorist offense, or ones concerning child abuse, those should certainly be controlled and removed, but referring to the subjective idea of racism, xenophobia, and personal opinions, those should not be controlled or censored, as it is ones God given right to think freely. The government should not control what we Irish think, but should rather allow us to be independent, and deal with complex and challenging ideas, even ones we may find offensive, or different from our own.

Page 4

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

I wholeheartedly disagree with the idea of the general public being 'protected' by the Irish government, as it shows that they have no confidence in our ability to consider complex and challenging ideas, which is completely preposterous. We should ALLOW ourselves to be challenged, and be treated like thinking, reasoning, ADULTS. The regulatory relationship, if any, should be limited, to consulting at most.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

It should only review if there has been a reported clear video of pornography or terrorist encouragement, that has not been taken down.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of

expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

It cannot. It should follow said concerns, and focus on preserving the rights to freedom of opinion and expression for all Irish citizens.

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18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

The power to publish the fact that a service is not in compliance.

Page 2

1 -Name

Marina Doyle

2 -Organisation if applicable

n/a

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
A new regulatory framework is needed to improve user's online safety. It should set clear expectations and standards of companies. A statutory duty of care needs to be established to make companies take more responsibility for online safety and deal with harm. An independent regulator needs to oversee and enforce this duty of care. They could set out how to do this in codes of practice. The regulator needs to have a range of powers to take enforcement action against any company that breaches their statutory duty of care. As has been suggested in the UK White Paper on 'Online Harms' – 'This may include the powers to issue substantial fines and to impose liability on individual members of senior management'. Also from the UK White Paper – 'The regulator will have the power to require annual transparency reports from companies in scope, outlining the prevalence of harmful content on their platforms and what countermeasures they are taking to address these....The regulator will also have powers to require additional information, including about the impact of algorithms in selecting content for users and to ensure that companies proactively report on both emerging and known harms'. Technology can be part of the solution. Measures could be introduced to boost the tech-safety sector in Ireland so that companies are encouraged to develop innovation in online safety. Companies need to be encouraged to share new technological solutions. Measures also need to be introduced to help users manage their safety online.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Please go to Q3

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Any and all

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Yes to all

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Please go to Q6

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The UK 'Online Harms – White Paper (see: Executive Summary at <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper-executive-summary--2>) sets out a possible relationship between VSPS's and the regulator: 'The government will establish a new statutory duty of care to make companies take more responsibility for the safety of their users and tackle harm caused by content or activity on their services. Compliance with this duty of care will be overseen and enforced by an independent regulator. All companies in scope of the regulatory framework will need to be able to show

that they are fulfilling their duty of care.... The regulator will assess how effectively these terms are enforced as part of any regulatory action. The regulator will have a suite of powers to take effective enforcement action against companies that have breached their statutory duty of care. This may include the powers to issue substantial fines and to impose liability on individual members of senior management. Companies must fulfil the new legal duty. The regulator will set out how to do this in codes of practice... Reflecting the threat to national security or the physical safety of children, the government will have the power to direct the regulator in relation to codes of practice on terrorist activity or child sexual exploitation and abuse (CSEA) online, and these codes must be signed off by the Home Secretary. ...The regulator will have the power to require annual transparency reports from companies in scope, outlining the prevalence of harmful content on their platforms and what counter measures they are taking to address these. These reports will be published online by the regulator, so that users and parents can make informed decisions about internet use. The regulator will also have powers to require additional information, including about the impact of algorithms in selecting content for users and to ensure that companies proactively report on both emerging and known harms... As part of the new duty of care, we will expect companies, where appropriate, to have effective and easy-to-access user complaints functions, which will be overseen by the regulator. Companies will need to respond to users' complaints within an appropriate timeframe and to take action consistent with the expectations set out in the regulatory framework.To assist this process, this White Paper sets out high-level expectations of companies, including some specific expectations in relation to certain harms. We expect the regulator to reflect these in future codes of practice. For the most serious online offending such as CSEA and terrorism, we will expect companies to go much further and demonstrate the steps taken to combat the dissemination of associated content and illegal behaviours. We will publish interim codes of practice, providing guidance about tackling terrorist activity and online CSEA later this year.

10Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Please go to Q13

Page 5

11Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Please go to Q13

12Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?
[Section 4 of the explanatory note]

Please go to Q13

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?
[Section 2, 4, 5, 7, & 8 of the explanatory note]

Please go to Q13

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Please go to Q13

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Please go to Q13

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

The regulator could be funded by industry in the medium term. After that, fees, charges, or levies could be used. Fines imposed on companies can go towards funding.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The regulator should have a range of enforcement powers such as: The power to disrupt the business activities of a non-compliant company The power to impose substantial fines on companies The power to impose liability on individual members of senior management. The power to impose measures to block non-compliant services

Page 2

1 -Name

Match Group

2 -Organisation if applicable

Match/Meetic Group

3 -Email

morgan.cauvin@eu.match.com

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Match Group is a leading provider of online dating services across the globe. We operate a portfolio of brands, including Tinder, Match, PlentyOfFish, OkCupid, OurTime, Meetic, and Pairs, each designed to increase our users' likelihood of finding a romantic connection. Through our portfolio of trusted brands, we provide tailored products to meet the varying preferences of our users. We currently offer our dating products in 42 languages across more than 190 countries (Group official website: <http://mtch.com>). Match Group is proud to have a significant EU footprint thanks to our European subsidiaries, with over 250 employees across our main offices in Paris, London, Munich and recently a new office in Dublin. As a fully engaged corporate citizen, Match Group, which operates a portfolio of brands including Tinder, Match, PlentyOfFish and OkCupid, supports regulation that aims to increase trust in the digital economy and make a safer internet for all. In this context, Match Group wants to use this consultation to argue that efforts to make the internet a safer place should not only be focused on online harmful content – images, videos, etc. – but should include specific, harmful behaviours as well. Match Group supports regulation that aims to criminalise damaging behaviour online ranging from ‘catfishing’ (online impersonation or intentional identity theft on a social platform with the aim to defraud, manipulate or abuse other users) to the sharing of self-generated sexually explicit visual materials or pictures to other users without the recipient’s consent – as well as regulation that provides platforms with greater flexibility to report criminals to law enforcement. As such, we urge the Irish Government to develop a regular that treats what is unacceptable offline as unacceptable online. Match Group also believes that effective online safety regulation aiming to tackle harmful content should be based on a very clear and precisely defined definition of which communications will be subject to which regulations. For example, the majority of communication on many popular platforms is entirely – or mostly – public, created by users and seen by multiple other users. On a dating app, by contrast, a much greater proportion of the communication will be exchanged in private channels, between two users. We urge the Government to provide clarity on whether it is this communication to which the regulator’s ‘take-down’ powers will apply – or whether private, individual-to-individual communication will also fall within the scope of the regulation. Secondly, this will require clearly defining the type of content considered harmful. As the explanatory note states, creating a list of harmful content by reference to already

existing unlawful legal categories of content appears to be the right approach in order to prevent conflicts with freedom of speech and avoid confusion in the application of the law. To ease the workload and resource requirement of the new regulator, it would be advisable to establish minimum standards which platforms themselves must maintain – to make ‘take-down’ requests as efficient as possible. For example, where a platform allows users to interact with publicly available content, that platform should, as a minimum, make use of: • A human-operated customer care service, available 24/7 • Automated tools to monitor and remove unwanted publicly-available content • Easy-to-access tools for users to report on other users’ harmful behaviour or content The regulator could ensure that harmful content is removed efficiently by regulating platforms’ own safety protocols (ranging from reporting mechanisms to take-down systems), supported by powers to impose legal sanctions upon those failing to meet standards set by the regulator. The direct involvement of the regulator would therefore be limited to cases where harmful content that has been reported by a user remains online for more than a certain period of time without any action by the platform. Finally, any new regulator or regulation must clearly explain how new powers are consistent with privacy legislation, particularly where private communications are concerned.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Match Group believes that if the regulator is to be involved in the process of deciding whether or not individual pieces of content should be removed, then there will need to be a statutory limitation upon what content can be brought to the attention of the regulator. If private content is to be brought to the attention of the regulator, then it must occur within the framework of existing privacy legislation.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

We urge the Government to consider how any proposals will apply to dating platforms, which are sometimes included in the category of ‘social media’ without adequate understanding of the clear differences between a dating platform and a social media platform. While each dating platform has unique characteristics, most online dating websites and apps share several common traits, and this impacts the way in which they deal with user-generated content. Match Group’s platforms are adults-only peer-to-peer interrelationship and private communication platforms and not one-to-many publication content platform types. Dating platforms are closed networks, strictly geared towards adults-only; the vast majority of interaction on our platforms is through private peer-to-peer messages; and content is generally not available for public consumption (unlike Facebook or Twitter where content may be available before users join the network themselves). Secondly, Match Group’s business model is based not upon the monetization of users’ data or through targeted ads, but on subscriptions paid by users. We only collect the data we need in order to provide the best service possible and we have made a global and

company-wide commitment not to sell or share our users' data to third parties for commercial purposes. We therefore suggest that a one-size fits all approach, which does not recognise the diversity of platforms and business models in existence, is likely to struggle in enacting its mandate – and could skew the market in favour of larger platforms which have the resources to deal with complex or unwieldy legislation. We believe the solution to this issue would be to demarcate public and private content, with publicly available content subject to the new regulator, but private content beyond its scope. Alternatively, the new regulator could differentiate platforms based upon their business model, rather than the service they offer. Public concerns over privacy and data security suggest that companies which harvest and then profit from users' data may be a logical place to start.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

As in our response to question Question One, we urge the Government to consider the question of behaviour, as well as content: for example, the sharing of unsolicited sexual images, or 'catfishing'. Because these behaviours may take place in private communication, it may be necessary to introduce new criminal offences to enable platforms to work with police and judicial authorities to ensure that victims receive justice.

Page 2

1 -Name

Matthew Kivlehan

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
None. Is it dangerous and inappropriate for the state or any authority to bring upon them the power to “protect” the public from “harmful” or “potentially harmful” views. Should someone post a tweet that blatantly encourages people to hate Irish people, and someone else -inspired by said tweet- kills 10 Irish people, the problem still isn't the person who posted the tweet. It is not upon you. Free speech, rational and honest discourse will always win. You are not necessary and Irish people need not be protected. The mentions of minors are pathetic; minors shouldn't be online and their online presence shouldn't be used as an excuse to curb free speech and the expression of ideas that people of a certain political swaying may find highly disagreeable.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Rigorous testing and transparency. IF.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

NONE. Absolutely none. All the bad stuff you propose to fight is illegal and banned from near every site ever anyway. This is Orwellian and several steps too far.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Harmful content should credible threats to a child and nothing more. Anything else is several steps too far on the part of the state. We've all seen how this went in the UK; with being being arrested every single day for dubious "harmful" online content and turning up at doors to "talk" to people about how their views on transgenderism are "harmful". The problems this legislation purports to attempt to solve can easily be solved in other ways.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

None. Not the state's place. At all.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Absolutely none. There should be no regulation. "Incitement to hatred" is a vague phrase (surrounded with promises of wanting to protect the children) hijacked by progressive political quasi-fascist leftists to silence dissenting political opinion and this has been proven countless times.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The regulator monitor should not do that.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No regulatory relationships whatsoever.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The only way to balance the rights of all is for the state to stay away from what people can say unless it is a credible threat. This kind of state-powered censorship has gone wrong everywhere it's been tried.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive?

[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]

the EU

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-

demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Yes they should consider none. We're edging closer to fascism.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

No.

Page 2

1 -Name

Michael Ahern

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Given that certain websites can have a very significant number of videos etc. (millions), where a regulator makes a determination the determination should have two applications - a. to the specific video and b. more general application to similar such videos. Consideration should also be given to requiring that people accessing such websites who can post must validate their identities with the website, that would be required to keep a record of their identify, in the event that the postings made were criminal in nature and an individual needed to be identified and prosecuted.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Care needs to be taken that the regulator is not swamped by individual complaints. Therefore, if the regulator makes a decision such a decision should have far reaching implications, across all platforms, with all platforms required to comply with the spirit of the adjudication. Where further complaints are made websites should be able to either explain how they have complied with the spirit of the determination. Perhaps such determinations can have qualitative tests applied to them, for example, the potential to cause harm to individuals, to groups of individuals, to minorities, to groups of population (e.g. under 18), and so forth. Any test should include the potential impact on an individual and on a group of individuals - for example, pornography on Under 18s and how it can harm their long term capability to have healthy relationships and how they regard females or males, on minorities and how falsehoods or generalisations could cause the standing of a minority in the community to diminish, etc.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Pornography & anything that harms humans, animals or any other creature or that may potentially harm individuals, intellectually, spiritually, morally, developmentally and so forth. Incitement to harm or hatred also. Where communication is possible

between two people on platforms available to the general public, there should be a regulatory requirement that individuals must validate their identity and age so as to a. minimise inappropriate communication between adults and children and b. prevent children from accessing adult platforms.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Yes. However, rather than defining the behaviour, consider defining the potential impact of the harmful material on the general population, with a particular focus on the protection of the vulnerable, and especially children, minorities, and so forth. Missing categories include pornography which damages the image and understanding many children have of what is normal behaviour in relationships, websites that demean males or females, websites that may diminish how males or females are viewed in society, websites that encourage or portray violence or harm to humans and other living creatures etc. We observe that the examples provided are quite limited and exclude very broad categories of harmful websites or websites where engagement between people can have harmful consequences. For example, the ability of paedophiles to contact/groom children appears to be completely ignored. As parents we can testify that for us and any other parents we know, this is a huge concern.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Any video that is uploaded without the consent of the individual where initial consent was on the understanding that the video would be private. Any video that portrays harm or death of humans and animals. Such videos are becoming very commonly viewed in our children's environments - we are aware of children from as young as 13 upwards viewing these. We observe that any website showing

adult content or that allows communication between users should have identification requirements, both to protect children and to identify predators. Whilst many predators may find ways to circumvent such requirements, such requirements would undoubtedly reduce such inappropriate content.

9 - Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

In our view it is unrealistic for the regulator to control every video etc. A principles based approach therefore seems appropriate. It should be a requirement for every platform to demonstrate that they take all reasonable required steps to comply with the law. Where they don't, the platform should be banned. However, given that certain platforms could well be inundated with inappropriate material the regulator should have the ability to consider if out of the ordinary circumstances, including hacking, are responsible, which would provide an element of protection for the platform.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The platforms should be able to demonstrate, on an ongoing basis, that they are compliant with the guidelines set by the platform. It is certain that with even the best drafted guidelines, that experience will demonstrate to the regulator that certain regulations are deficient. The regulator should have the capability on an ongoing basis to implement / enhance new regulations. If one considers that the premise is to protect individuals etc., the regulator should be able to act and regulate immediately and at very minimal notice.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Certain content on 'reputable' platforms such as Netflix is exceedingly explicit. The requirement of both individuals (parents) and the platforms to ensure that no child

can see inappropriate content should be strengthened. For example, a simple credit or debit card charge of 1c to validate identify where content is over 18 would appear to be warranted, given the damage certain such material can cause to children. A small price to protect the innocent and defenceless in our society.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No opinion

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Core principals such as the protection of users (e.g. children) and those portrayed (e.g. there is no benefit to a human or animal that is tortured or killed) would appear to be sensible. Controls that ensure this is possible should ensure that consenting adults thereafter have the rights that are noted by the UN.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

No opinion

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

I would consider that at least two regulatory bodies are required. Perhaps an enhancement of what BAI is responsible for, but a body that focuses exclusively on the protection of individuals and the rights of the general population through digitally delivered services.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

These should be funded by those who commercially benefit from the use of digital communication. For example, commercial websites and advertisers benefit from digital communication, and a tax / levy on their commercial activities, related to how much they benefit / spend, would appear to be reasonable. Organisations that do not gain commercially, including not for profit organisations and voluntary organisations, should be excluded.

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Common sense should prevail, with perhaps initial powers but with the regulator having the power to change these as time moves on. Digital deliver is dynamic, and fixed rules are best avoided. A regulator should have the power to close down a website, to fine it, to hold its directors / owners responsible (within reason), to publicise a sample of its findings (including naming the offenders), and so forth. Common sense and flexibility would be key. This project is a 'first'.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Agree with above. There should also be a power to fine, prosecute, publicise the names of individuals who post onto such platforms, as such individuals are essentially responsible for the content.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

This is not ideal. The internet entities will all gravitate towards the jurisdiction that serves their needs best. If there is mediation, it should be time bound (e.g. 3 months). It is very concerning that the above appears to be accepting that Ireland shall not have control over what is digitally delivered to its population, and that such a fundamental matter rests with other countries in many cases.

Page 2

1 -Name

Miranda O'Sullivan

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Freedom of speech and expression should be upheld beyond anything else. Censorship is wrong. How about prosecuting parents who do not look after their children's welfare online (as well as in real life) rather than bringing in new regulations to ban things?

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Absolutely yes. No idea. People should have the right to not like other people and state that (in a non-bullying, non personally attacking way). freedom of speech should be legislated for and protected strongly in law before you bring in any of these potentially censorship-based regulations.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Very uncomfortable with all this, I think you are censoring the internet.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Yes, I suppose so, if you already have censorship powers, then add a few more.
Where does this end up?

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Parents should control their children's internet use. If this is really "all about the children" then fair enough, however I suspect this will be used to shut down any views that deviate from the politically correct; ie no-one will be able to say anything because someone who takes offence will be able to prosecute them. Welcome to 1984.

Page 7

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

How about the EU fund this as they seem to be the ones wanting to censor the internet?

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Only the power to remove material and I'm tempted to suggest after a random panel (like a jury) has voted

Page 2

1 -Name

Morpheus Matthews

2 -Organisation if applicable

Open Internet - No Censorship

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Who decides what is 'harmful content' ? The Irish Govt ? The EU ? Leo Varadkar or Simon Coveney ? Nama ? Zuckerberg ? Who is the Regulator ? Who regulates the Regulator ? Who appoints him ? What qualifications will this bureaucrat have ? Will he be a political appointee or crony ? What you are really after is the removal of dissent. You are clearly dancing to an EU tune requiring the restriction of free speech against the clearly faltering EU project.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Govt regulation will not work regardless of your pretended concern for keeping us 'safe'. Just keep your snouts out of it. How well did you regulate the Banks ? Not a great success was it ? How well have you regulated improved or successfully managed the Health Service, the Housing shortage, broadband etc etc ?

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

If the above categories are already criminalized and are still widely available no amount of so called 'regulation' will have much effect removing any other newly categorised 'harmful' comment. And who decided what constitutes 'xenophobia' ? Would calling for pitchforks for deaf Irish political elites be considered 'harmful' ? So it seems 'regulation' for regulation's sake and state overreach not for the safety of the public. The whole proposal reeks of disgusting hypocrisy and EU power grabbing.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Scrap the proposal.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Scrap the proposal.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Scrap the proposal.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this,

what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Scrap the proposal.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Scrap the proposal.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Scrap the proposal. Education and parental control should be foremost in protecting minors online.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Scrap the project the EU is a failing project.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Scrap the project. Its a quango that should throttled in its infancy. Or aborted to use a term more suitable for the current administration.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Scrap the project. Ban the proposed regulation it wont protect anyone but might give cover to corrupt incompetent politicians of which we have many in Ireland.

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Scrap the project. All these questions are designed to obscure the truth that the consultation is a charade.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Scrap the project. This consultation is a charade.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of

mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Scrap the project.

On-Demand Audiovisual Services Group submission to the public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive.

Date: [REDACTED]

Introduction

The On-Demand Audiovisual Services (ODAS) Group welcomes the opportunity to respond to the public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive (AVMSD).

The ODAS Group was established to develop and administer a code of conduct for on-demand services as provided for under Section 13(1) of the Statutory Instrument entitled SI No 258 of 2010 European Communities (Audiovisual Media Services) Regulations 2010. The purpose of the code is to cover all on-demand audiovisual services made available by on-demand service providers regulated in the Republic of Ireland. All such service providers are entitled to subscribe to the code. Service providers and other related parties who subscribe to the code are members of the ODAS Group. The current membership is listed in the annex to this submission.

The ODAS Group has functioned well in the last decade with the support and active participation of industry. It is clear that the current system is not capable of implementing the obligations in the revised Directive. However, industry can continue to play a role in the implementation of the Directive. Based on the experience of implementing the current code of conduct and in consideration of the incoming obligations, the ODAS Group can make an important contribution to the discussion on the structure of the future regulatory system.

The below comments are in relation to strands 3 (AVMSD) and 4 (regulatory structures) of the consultation.

Detailed comments

1. Requirement to establish and maintain an up to date list of media service providers

Article 2 of the revised AVMSD requires member states to establish and maintain an up to date list of media service providers (article 28a also requires this for video sharing platform services). The current ODAS Group receives secretariat support from Ibec. It does not have the resources to comply with the reporting and auditing obligations contained in the revised Directive. It is clear that a resourced regulatory entity is the appropriate vehicle to comply with such obligations. This could probably best be done by an existing regulator.

Recommendation

Based on the experience of the ODAS Group to date, we recommend that in order to efficiently establish and maintain an up to date list of media service providers and video sharing platforms, a register of entities in scope is required.

Under the current system, entities cannot be compelled to register with ODAS; it is not within the remit of the ODAS Group to actively search for service providers and compel them to join. This means that the ODAS Group cannot guarantee it has a comprehensive list. The revised AVMSD

considerably broadens the range of entities to be regulated as well as the role of the regulator. Therefore, from a regulatory perspective and based on the experience of the ODAS Group, a registration/licensing mechanism would enable the regulator to fully implement the Directive. Such a register should be established on a legislative basis so that the regulator has the required data to comply with the reporting and auditing obligations as well as to enforce the code of conduct e.g. the requirement to provide for regular, transparent and independent monitoring and evaluation; and to provide for effective enforcement including effective and proportionate sanctions (article 4a.1). The ODAS Group, currently supported by Ibec, is not resourced to implement a registration/licensing system. However, the co-regulatory model has functioned well and industry looks forward to continuing the positive engagement with the relevant authorities on the provisions set out in the revised Directive.

2. Requirement for responsible body to provide information to and process complaints from EU citizens and implement code of conduct

The ODAS Group, currently supported by Ibec, is not resourced to provide information to or process complaints from EU citizens as envisaged by the Directive.

Recommendation

Under the 2010 legislation the ODAS Group developed, in conjunction with the relevant regulatory and supervisory authorities, a code of conduct for on-demand audiovisual media services. The code sets out the minimum standards required of service providers and provides for a complaint mechanism for the public. The code has been in place since 2010 and has a number of companies signed up. Based on the experience of the ODAS Group in developing and implementing this code of conduct, we believe that the group can play an important role in helping to develop the existing code to meet the requirements of the revised AVMSD. In the longer term, it will be crucial for industry to be involved in the process so that the regulators and policy makers are kept informed of changes in technology.

Conclusion

The ODAS Group wishes to continue to make an important contribution to the regulation of on-demand services. It believes this can be made in the areas of code development and review, in conjunction with the regulatory body. It also can play a valuable role through participation in any compliance committees that result further to the relevant legislation.

Contact details

Torlach Denihan
Director Telecommunications Industry Ireland
Ibec
84/86 Lower Baggot Street
Dublin
D02 H720
Email: firstname.surname@ibec.ie

Annex 1: ODAS Group current membership

April 2019

Company

Advertising Standards Authority for Ireland (ASAI)

Association of Advertisers in Ireland (AAI)

An Lár TV

Ceann Nua Ltd

Eir

eir Sports

Element Pictures

Institute of Advertising Practitioners in Ireland (IAPI)

RTÉ

South East Television Ltd

TG4

Virgin Media Television

Vodafone Ireland

From: [REDACTED]
To: [REDACTED]
Subject: FW: Public Consultation submission from Press Ombudsman/Press Council
Date: 07 March 2019 15:30:57

[REDACTED]
[REDACTED]

From: Peter Feeney [mailto:Peter.Feeney@pressombudsman.ie]

Sent: 07 March 2019 15:07

To: Dualta OBroin

Subject: Public Consultation submission from Press Ombudsman/Press Council

Dualta,

Given the limited and specific remit of the Offices of the Press Ombudsman and Press Council we don't have much to offer on the public consultation on the regulation of harmful content online.

We would welcome the establishment of a regulatory mechanism provided that a balance between freedom of expression and the avoidance of harm can be achieved. We would favour a process whereby the online provider is given a notice that harmful content must be taken down within a specified period and if that does not occur the regulator can investigate and fine the provider if harmful material remains online. We would also like to see a mechanism for an appeal to be available so that either the platform or the complainant (if there is one involved) could get a second opportunity for consideration if dissatisfied with the first response.

We believe a regulator should have the power to initiate its own investigation and not have to wait until it receives a complaint.

We would like to see a board with an overall public interest majority to have oversight of a regulator (rather than have the regulator answer directly to a government department)

We would welcome the regulator's brief extending to cover content considered to be an incitement to violence and hatred, to promotion of terrorism, to racism, xenophobia, homophobia, misogyny, harmful to children, encouragement of self-harm (including suicide), provision of health care information which is prejudicial to the well-being of people.

We would have no issue with an extension of the remit of the BAI to cover social media and online content provided the current remit of the Press Ombudsman and Press Council, national and local newspapers (print and online), magazines (print and online) and online-only news publishers is maintained. We recognise that there might be a small amount of overlap in regard to the social media accounts of member publications of the Press Council, but believe that this limited overlap would be easy to manage and would not cause confusion. As the Press Council is not a statutory body and any regulator would be statute based we do not foresee any difficulty in establishing a good working relationship with a regulator.

We believe the operations and decisions of a regulatory should be fully open to public scrutiny and all its operation should be made public.

Best wishes

Peter Feeney

Press Ombudsman

Office of the Press Ombudsman

Ground Floor

3 Westland Square

Pearse Street

Dublin 2

D02 N567

PH: 01 6489130 (office)

Twitter: @PressOmb_Irl

Page 2

1 -Name

Oisín Kinsella

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
No system - our existing laws for incitement to violence and defamation are enough.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

No, because regulators should not be involved. How can a test designed by the government or government employees themselves decide what is or isn't harmful? The government can't be trusted to make those decisions.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None. Leave the internet alone and don't be like Britain who are the laughing stocks of the world with their hate crime legislation.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

No they shouldn't. Each of the above can be sorted out case by case by the relevant channels that produce or distribute these materials. The government should under no circumstances be involved in deciding what is or is not harmful.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

You shouldn't be defining what is or isn't a video sharing platform and neither should the EU. You should leave the internet free and safe from regulations. For example, if you start to regulate Youtube, then you are either disadvantaging Irish content creators or discouraging them.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Absolutely none. Ireland does not need to regulate online content - we have one of the lowest pornography production rates in the world and our online presence is minuscule. We should not waste our resources regulating content that isn't even being produced here.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

No basis and never. Leave the internet alone.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

There shouldn't be one because the government needs to stop regulating our entertainment (which we pay for). Television broadcasting services and radio should have the same regulations as it always has - watershed.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Ireland shouldn't seek to apply levies to anything - Irish money to be kept in Ireland

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

There is no way to accomplish this while pursuing regulation of online content. They are mutually exclusive - you can't have freedom of expression if certain expressions (which will be decided by the government in power by the way - very dangerous thing) will be blocked/no platformed/ regulated. You must NOT pursue internet regulation, issues should be dealt on a case by case basis against our current laws.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Ireland should implement nothing - fitting into the EU framework for regulating online services sounds too much to me like totalitarianism.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Yes there is another option - do not create a regulatory body. The FCC in America is one example of just how horribly wrong these censorship corporations can be.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

It shouldn't be funded - it would be a gigantic waste of money that could be spent on our crumbling public services.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

None. No regulations on the internet.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

A sanction for anyone that regulates internet content

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service

will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

No thresholds, no censorship, no regulation



Department of Communications, Climate Action and Environment:

**Public Consultation
on the Regulation of Harmful Content on Online Platforms and the
Implementation of the Revised Audiovisual Media Services Directive**

**Submission by the Ombudsman for Children's Office
April 2019**

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Introduction

In March 2019, the Minister for Communications, Climate Action and Environment initiated a public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive (AVMSD).¹

The stated aim of this consultation is “to seek the views of citizens and stakeholders as to an achievable, proportionate and effective approach to regulating harmful content, particularly online”.² In this regard, it is envisaged that new legislation will focus on the introduction of new regulation under four strands:

- Strand 1 – new online safety laws to apply to Irish residents
- Strand 2 – Regulation of Video-Sharing Platform Services
- Strand 3 – Regulation of on demand services
- Strand 4 – Minor changes to regulation of traditional TV.

The Ombudsman for Children’s Office (OCO) is an independent statutory body. One of the OCO’s core statutory functions under the Ombudsman for Children Act 2002, as amended (2002 Act) is to promote the rights and welfare of children up to the age of 18 years. The OCO has prepared this submission pursuant to Section 7(4) of the 2002 Act, which provides that the Ombudsman for Children may advise on any matter relating to the rights and welfare of children, including proposals for legislation affecting children.

A wide range of children’s rights are engaged in the online environment. It presents opportunities for children and young people to exercise many of their rights as well as risks to children’s rights to privacy and to protection from harm, abuse and exploitation. On the one hand, the internet is an important resource for children and young people’s education and learning; it facilitates them to access and share information; it supports them to maintain contact with family; it provides opportunities for play, recreation and engagement with cultural life and the arts; it affords access to health information and support services; and it is a means through which they express their views and participate in decisions affecting them. On the other hand, the internet can present challenges with regard to safeguarding children and young people’s privacy and expose them to risks such as online fraud, violence and hate speech, cyberbullying, grooming for sexual exploitation, trafficking and child pornography, and targeting by armed or extremist groups.

In this regard, the OCO shares the serious concerns held by many stakeholders about the risks that children can be exposed to online. The OCO therefore welcomes this current public consultation and in particular its focus on strengthening the protection of children online by seeking to provide for a

¹ The materials relating to this public consultation, including the revised AVMSD, are available at <https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Regulation-of-Harmful-Online-Content-and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.aspx>.

² Department of Communications, Climate Action and Environment, *Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive. Explanatory Note* (2019), p.1. Available at <https://www.dccae.gov.ie/en-ie/communications/consultations/Documents/86/consultations/Consultation%20Explanatory%20Note.pdf>.

statutory system of oversight and regulation. As this current submission notes, the idea of establishing a digital or online safety commissioner has been a salient feature of discussions on how to strengthen provision for children's online safety since the publication of the Law Reform Commission's report on Harmful Communications and Digital Safety in 2016.³ The considerable support that exists for this idea is informed by a recognition that putting in place an appropriate, viable and effective non-judicial regulatory mechanism underpinned by primary legislation is a complex undertaking.

The OCO appreciates that this public consultation is not solely about matters affecting children. However, as per the OCO's statutory remit, this submission concerns itself with children. In doing so, this submission focuses on Strand 1, albeit with an awareness that Strand 1 connects with other strands and in particular with Strand 2.

Noting that the current proposals are at an early stage of development and that the consultation materials make no explicit reference to children's status as rights holders or to the State's obligations to respect, protect and fulfil children's rights, the primary purpose of this submission is to highlight the State's obligations to children, in particular under the UN Convention Rights of the Child (UNCRC) and with regard to the related areas of children's rights online and children's rights and business. In this regard, the OCO is of the view that the Department of Communications, Climate Action and Environment (DCCAIE) needs to consider and seek to give effect to children's rights in the context of developing proposals for an Online Safety Act and the establishment of an Online Safety Commissioner.

As the DCCAIE indicates in the public consultation materials,⁴ among the challenges that need to be addressed is to ensure that proposals for a new national regulatory structure for dealing with the removal of harmful online content are rights compatible. In preparing this submission, the OCO has sought to highlight guidance and concerns contained in a number of relevant instruments and documents, which the DCCAIE might usefully consider for the purposes of providing for a rights-compatible approach. This submission also addresses itself to several specific aspects of the current proposals under Strand 1 that require further attention in this regard, including the matter of identifying and defining harmful online content.

³ Law Reform Commission, *Harmful Communications and Digital Safety* (2016). Available at <https://www.lawreform.ie/fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf>.

⁴ Department of Communications, Climate Action and Environment, *supra* note 2, p.7.

1. Giving effect to children's rights

International obligations to children and their rights

The UN Convention on the Rights of the Child is the primary international legal instrument relating to children's rights. Adopted by the UN General Assembly in 1989, this Convention sets out the rights of all children under the age of 18 years.⁵ Having ratified the UNCRC in 1992, Ireland has an obligation under international law to take all appropriate measures, including legislative measures, to respect, protect and fulfil the rights of children defined in the Convention.

The rights of children set out under the UNCRC are wide-ranging and are to be understood as inalienable, indivisible and interdependent. Among the ways in which children's rights under the UNCRC can be grouped is under the following headings:

- **Survival and development rights** recognise the conditions necessary for children's survival and full development. They include the right to clean water, adequate food, shelter, education, healthcare, rest, play and recreation, and cultural activities.
- **Protection rights** provide for children's protection from all forms of abuse, neglect, exploitation and cruelty. These rights include an obligation on the State under Article 17(e) to encourage the development of appropriate guidelines for the protection of children from information and material that is injurious to their wellbeing, having regard to Article 13 (children's right to freedom of expression) and Article 18 (parents' responsibilities and State assistance to parents).
- **Participation rights** include children's right to freedom of expression, information and association and provide for children's right to express their views freely in relation to all matters affecting them and to have due weight given to their views, in accordance with their age and maturity.

Four UNCRC rights are recognised as integral to the realisation of all children's rights under the Convention. Known as the general principles of the UNCRC, they are:

- **Non-discrimination** (Article 2) – States parties to the UNCRC are required to respect and ensure the rights set out in the Convention to every child within their jurisdiction without discrimination of any kind and to take all measures necessary to ensure that children are protected against all forms of discrimination.
- **Best interests of the child** (Article 3) – The best interests of children must be treated as a primary consideration in all actions concerning them. In this regard, the UN Committee on the Rights of the Child (UN Committee) has emphasised that all measures, including legislative measures, affecting children and relevant to the implementation of children's

⁵ United Nations, *UN Convention on the Rights of the Child* (1989). Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

rights under the UNCRC must involve active, systematic consideration being given to how children's rights and interests are or will be affected by a given decision or action.⁶

- **Life, survival and development** (Article 6) – States are obliged to provide optimal conditions for childhood and are expected to interpret 'development' as a holistic concept encompassing all aspects of children's physical, mental, spiritual, moral, psychological and social development.⁷
- **Right to be heard** (Article 12) – States must assure to every child who is capable of forming their own views the right to express their views freely in all matters affecting them, with due weight given to the child's views in accordance with their age and maturity.

In light of Ireland's ratification of the UNCRC, the State's obligations to children are as follows:

- **Respect** – The State's obligation to respect children's rights is an obligation to refrain from interfering directly or indirectly with children's enjoyment of their rights.
- **Protect** – The State's obligation to protect children's rights is an obligation to prevent third parties, including businesses, from interfering with children's enjoyment of their rights.
- **Fulfil** – The State's obligation to fulfil children's rights is an obligation to adopt the necessary measures to achieve the full realisation of children's rights.

Having regard to these obligations, the DCCAE's future work to develop the current proposals to create a new Online Safety Act and to establish an Online Safety Commissioner will need to involve appropriate consideration being given to two related areas: children's rights in the online environment and children's rights and business.

Children's rights in the online environment

Although the UNCRC pre-dates the digital era, its principles and provisions are very relevant to the online environment. Among the rights of the child engaged in this environment are:

- children's right to non-discrimination (Article 2)
- children's right to have their best interests treated as a primary consideration in all actions concerning them (Article 3)
- children's right to be heard and to have due weight given to their views in all matters affecting them (Article 12)
- children's right to freedom of expression, which includes the right to seek, receive and impart information and ideas (Article 13)
- children's right to freedom of thought, conscience and religion (Article 14)

⁶ UN Committee on the Rights of the Child, *General Comment No.5: General measures of implementation of the Convention on the Rights of the Child* (2003), CRC/CGC/2003/5, para. 12. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en.

⁷ *Ibid*, para. 12.

- children’s right to freedom of association and peaceful assembly (Article 15)
- children’s right to protection from arbitrary or unlawful interference with privacy, family, home or correspondence (Article 16)
- children’s right to access information and materials from a variety of sources and to be protected from harmful information (Article 17)
- children’s right to be protected from all forms of violence, abuse and exploitation (Articles 19, 34 and 36)
- children’s right to the highest attainable standard of health (Article 24)
- children’s right to education (Articles 28 and 29)
- children’s right to engage in play and recreational activities and to participate freely in cultural life and the arts (Article 31).

Accordingly, the UN Committee on the Rights of the Child has decided to prepare a new general comment on children’s rights in the digital world. Preparatory work in this regard is underway and, as with previous general comments, this new general comment will provide guidance to States that have ratified the UNCRC, including Ireland, on how they can respect, protect and fulfil children’s rights in the online environment. Recognising that children’s rights are engaged in this environment, the UN Committee has previously considered this matter in the context of a Day of General Discussion (DGD) on digital media and children’s rights held in 2014.⁸ Among the recommendations made by the UN Committee following this DGD were:

- States should recognise the importance of access to and use of digital media and ICTs for children and their potential to promote all children’s rights.⁹
- States should adopt and effectively implement comprehensive rights-based laws and policies which integrate children’s access to digital media and ICTs and ensure children’s protection when using digital media and ICTs.¹⁰
- States should promote and facilitate the active involvement of all stakeholders, in particular children, parents and carers, and professionals working with or for children, before adopting draft laws, policies, strategies and programmes. In this regard, States should ensure that children’s views and experiences are taken into account in the context of developing laws, policies, programmes and other measures relating to digital media and ICTs.¹¹
- States should undertake research, data collection and analysis on an ongoing basis to better understand how children access and use digital and social media, as well as their impact on children’s lives. This data should be disaggregated and cover both risks and opportunities for children. The data should be used for establishing baselines, including for the formulation, monitoring and evaluation of relevant laws.¹²
- States should address the risks posed by digital media and ICTs to the safety of children, including online harassment, sexual exploitation of children, access to violent and sexual content, grooming and self-generated sexual content, through holistic strategies that ensure

⁸ UN Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion ‘Digital Media and Children’s Rights’* (2014). Available at https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf.

⁹ *Ibid*, para.85.

¹⁰ *Ibid*, para. 86.

¹¹ *Ibid*, paras. 87 and 99.

¹² *Ibid*, paras. 89 and 90.

children's full enjoyment of their rights under the UNCRC and its Optional Protocols. In doing so, States should always ensure a balance between promoting the opportunities provided by digital media and ICTs and protecting children from harm. Among the actions that States should take in this regard are to:

- coordinate with the ICT industry so that it develops and puts in place adequate measures to protect children from violent and inappropriate materials and other risks posed by digital media and ICTs to children
- provide fast and effective procedures for removal of prejudicial or harmful material involving children.¹³

The opportunities and risks presented by the online environment, including for children, have also been considered at European level by the European Union and the Council of Europe. Deliberations in this regard at European level are reflected in a range of conventions, regulations, directives, recommendations and strategies, including the revised AVMSD, which is included as a focus within the DCCAE's current public consultation.

Among these instruments is a 2018 Recommendation of the Committee of Ministers of the Council of Europe to member States on guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018 Recommendation).¹⁴ This Recommendation merits attention by the DCCAE, in particular because it considers children's rights online in a holistic manner rather than focusing on one or more specific rights of the child in isolation from children's other rights. With reference to Member States' obligations and commitments under several international and European conventions, the 2018 Recommendation emphasises that States have primary responsibility to respect, protect and fulfil children's rights. The corresponding guidance to Member States, including Ireland, includes the following:

- In all actions concerning children in the digital environment, the best interests of the child must be a primary consideration. In assessing the best interests of the child, Member States should make every effort to balance, and wherever possible, reconcile a child's right to protection with other rights, including the right to freedom of expression and information as well as participation rights.¹⁵
- Having regard to children's right to non-discrimination, targeted measures may be needed for children in vulnerable situations given that the digital environment has the potential both to increase children's vulnerability and to empower, protect and support them.¹⁶
- States should actively engage children to participate meaningfully in devising, implementing and evaluating legislation, policies, mechanisms, practices, technologies and resources that aim to respect, protect and fulfil the rights of the child in the digital environment.¹⁷

¹³ *Ibid*, para. 105.

¹⁴ Council of Europe, *Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (2018). Available at https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/recommendation_of_the_committee_of_ministers_of_the_council_of_europe_to_member_states_on_guidelines_to_respect_protect_and_fulfil_the_rights_of_the_child_in_the_digital_environment.pdf.

¹⁵ *Ibid*, para. 1.

¹⁶ *Ibid*, para. 4.

¹⁷ *Ibid*, para. 7.

- Taking into account the development of new technologies, children have the right to be protected from all forms of violence, exploitation and abuse in the digital environment. Any protective measures should take into consideration the best interests and evolving capacities of the child and not unduly restrict their other rights.¹⁸
- In accordance with children’s right to an effective remedy when their human rights and fundamental freedoms have been infringed in the digital environment, Member States should ensure the provision of available, accessible, affordable and child-friendly avenues through which children, their parents or legal representatives can submit complaints and seek remedies. Depending on the violation in question, effective remedies may include inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation. In addition to judicial mechanisms, where appropriate, Member States should provide children, their parents and legal representatives with adequate and effective non-judicial redress mechanisms for handling violations or abuses of children’s rights in the digital environment.¹⁹
- As regards legislation, Member States should ensure that legal frameworks give due account to relevant international and European legal instruments and create a clear and predictable legal and regulatory environment which helps businesses and other stakeholders to meet their responsibility to respect the rights of the child in the digital environment through their operations.²⁰

Taking into account Ireland’s obligations and commitments under international and European standards and guidance, among the challenges that the DCCA will need to address in the context of developing its proposals for an Online Safety Act and an Online Safety Commissioner is to make sure that legislative provisions made for the primary and specific purposes of strengthening the protection of children online are framed in a manner that demonstrates due regard having been given to other children’s rights that are engaged in this environment. In this regard, particular attention will need to be given to ensuring that such provisions are balanced, reasonable and proportionate and, as such, do not entail an unnecessary or unwarranted interference with children’s other rights.

Children’s rights and business

Following its most recent examination of Ireland’s progress in implementing its obligations to children under the UNCRC, the UN Committee recommended that the State should establish and implement regulations to ensure that the business sector complies with international and national standards, particularly with regard to the rights of the child. Among the specific recommendations made by the UN Committee in this regard is that the State should strengthen its regulatory framework for industries and enterprises operating in the State to ensure that their activities do not negatively affect the rights of the child. Furthermore, the UN Committee recommended that, in

¹⁸ *Ibid*, para. 50.

¹⁹ *Ibid*, paras. 67, 69 and 70.

²⁰ *Ibid*, paras. 74 and 78.

pursuing this measure and other measures, the State should be guided by the UN's "Protect, Respect and Remedy" Framework.²¹

This Framework was set out in a 2008 report to the UN Human Rights Council by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. It comprises three core and complementary principles:

- **Protect** - the State duty to protect against human rights abuses by third parties, including business
- **Respect** - the corporate responsibility to respect human rights
- **Remedy** - the need for effective access to remedies.²²

This "Protect, Respect and Remedy" Framework provided a basis for the Guiding Principles on Business and Human Rights (Guiding Principles) that were adopted by the Human Rights Council in 2011.²³ Applicable to all States and to all business enterprises and having the objective of improving standards and practices in respect of business and human rights, these Guiding Principles recognise:

- States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms
- the role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights
- the need for rights and obligations to be matched to appropriate and effective remedies when breached.²⁴

Under these Guiding Principles, the State's duty to protect human rights comprises foundational and operational principles. Operational principles associated with the State's duty to protect human rights encompass States' regulatory and policy functions. In this regard, the Guiding Principles advise that measures, which States should take in meeting their duty to protect include enforcing laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically assessing the adequacy of such laws and addressing any gaps.²⁵

Equally, the Guiding Principles set out foundational and operational principles for business enterprises to respect human rights. The operational principles outline how business enterprises can embed their responsibility to respect human rights and how they can identify, prevent, mitigate and

²¹ UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (2016), CRC/C/IRL/CO/3-4, para. 24. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fCO%2f3-4&Lang=en.

²² Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008), A/HRC/8/5. Available at <https://www.refworld.org/docid/484d2d5f2.html>.

²³ Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (2011), HR/PUB/11/04. Available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.

²⁴ *Ibid*, p.1.

²⁵ *Ibid*, p.4.

account for how they address adverse human rights impacts, including by conducting human rights due diligence.²⁶

As regards access to remedies, the Guiding Principles clearly state that States must take appropriate steps to ensure through judicial, administrative, legislative and other appropriate means that access to an effective remedy is available to those in their jurisdiction whose rights have been abused. In this regard, the Guiding Principles consider State-based judicial mechanisms, State-based non-judicial grievance mechanisms, and non-State-based grievance mechanisms. In relation to non-State-based grievance mechanisms, the Guiding Principles identify a role for States, which involves States considering ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. In the interests of addressing grievances early and providing direct remediation, business enterprises themselves are advised to establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely affected. Notably, the Guiding Principles set out effectiveness criteria for non-judicial grievance mechanisms, whether these mechanisms are State-based or non-State-based. In order to ensure their effectiveness, non-judicial grievance mechanisms should be:

- (a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes
- (b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access
- (c) **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation
- (d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms
- (e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake
- (f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognised human rights
- (g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be:

- (h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.²⁷

²⁶ *Ibid*, pp.13-26.

²⁷ *Ibid*, pp.27-34.

These Guiding Principles have informed the subsequent development of instruments relating to business and human rights at European and national level: in 2016 the Committee of Ministers of the Council of Europe adopted a Recommendation on human rights and business²⁸ and in 2017 the Department of Foreign Affairs published a National Action Plan on Business and Human Rights covering the period 2017 to 2020.²⁹

As regard business and children's rights, in 2013 the UN Committee on the Rights of the Child published a general comment on State obligations regarding the impact of the business sector on children's rights.³⁰ In its opening comments, the UN Committee notes the opportunity and threat presented by business for children's rights:

“Business can be an essential driver for societies and economies to advance in ways that strengthen the realisation of children’s rights ... However, the realisation of children’s rights is not an automatic consequence of economic growth and business enterprises can also negatively impact children’s rights.”³¹

Among the sectors that the UN Committee expresses concerns about in this regard are the digital media and ICT sectors:

“Digital media is of particular concern, as many children can be users of the Internet but also become victims of violence such as cyberbullying, cyber-grooming, trafficking or sexual abuse and exploitation through the Internet. Although companies may not be directly involved in such criminal acts, they can be complicit in these violations through their actions; for example, child sex tourism can be facilitated by travel agencies operating on the Internet, as they enable the exchange of information and the planning of sex tourism activities. Child pornography can be indirectly facilitated by Internet businesses and credit-card providers. ... States should coordinate with the information and communication technology industry so that it develops and puts in place adequate measures to protect children from violent and inappropriate material.”³²

Building on, among other things, the Guiding Principles and work undertaken by the UN Global Compact, Save the Children and UNICEF to develop a set of principles on children's rights and business principles,³³ the UN Committee focuses its guidance on States' obligations to ensure that children's rights are respected, protected and fulfilled in the context of the business sector and that effective remedies are available to children when infringements or violations of their rights occur.

²⁸ Council of Europe, *Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business* (2016). Available at <https://rm.coe.int/human-rights-and-business-recommendation-cm-rec-2016-3-of-the-committee/16806f2032>.

²⁹ Government of Ireland, *National Plan on Business and Human Rights 2017-2020* (2017). Available at <https://www.dfa.ie/media/dfa/alldfawebstimedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>.

³⁰ UN Committee on the Rights of the Child, *General Comment No.16 on State obligations regarding the impact of the business sector on children's rights* (2013), CRC/C/GC/16. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRC%2fC%2fGC%2f16&Lang=en.

³¹ *Ibid*, para. 1.

³² *Ibid*, para. 60.

³³ UNICEF, The UN Global Compact and Save the Children, *Children's Rights and Business Principles* (2012). Available at https://www.unicef.org/csr/css/PRINCIPLES_23_02_12_FINAL_FOR_PRINTER.pdf.

In setting out a framework for States' implementation of their obligations to children in this area, the UN Committee highlights the importance of legislative, regulatory and enforcement measures. Noting that legislation and regulation are essential instruments for ensuring that the activities and operations of business enterprises do not have a negative impact on or violate children's rights, the UN Committee advises that "*States should enact legislation that gives effect to the rights of the child by third parties and provides a clear and predictable legal and regulatory environment which enables business enterprises to respect children's rights*".³⁴ In this regard, the UN Committee recommends that "*States will need to gather data, evidence and research for identifying specific business sectors of concern*" in order to "*meet their obligation to adopt appropriate and reasonable legislative and regulatory measures to ensure that business enterprises do not infringe children's rights*".³⁵

As regards enforcement measures, the UN Committee observes that "[g]enerally, it is the lack of implementation or the poor enforcement of laws regulating business that pose the most critical problems for children."³⁶ Correspondingly, the UN Committee recommends that States should employ a range of measures to ensure effective implementation and enforcement. These measures include:

- strengthening regulatory agencies responsible for the oversight of standards relevant to children's rights so they have sufficient powers and resources to monitor and investigate complaints and to provide and enforce remedies for abuses of children's rights
- providing effective remedy through judicial and non-judicial mechanisms and effective access to justice.³⁷

This guidance with regard to legislative, regulatory and enforcement measures is echoed by the UN Committee in its Report of the 2014 Day of General Discussion on Digital Media and Children's Rights. Among other things, the UN Committee recommends in this report that States should:

- ensure a clear and predictable regulatory environment which requires ICT and other relevant industries operating in the State to respect children's rights
- establish monitoring mechanisms for the investigation and redress of children's rights violations, with a view to improving accountability of ICT and other relevant companies
- strengthen regulatory agencies' responsibility for the development of standards relevant to children's rights and ICTs
- require businesses to undertake child-rights due diligence with a view to identifying, preventing and mitigating their impact on children's rights when children are using digital media and ICTs.³⁸

In terms of remedies, the observations of the UN Committee in its 2013 general comment are noteworthy:

³⁴ UN Committee on the Rights of the Child, *supra* note 30, para. 53.

³⁵ *Ibid.*

³⁶ *Ibid*, para.61.

³⁷ *Ibid*, paras. 61(a) and 61(d).

³⁸ UN Committee on the Rights of the Child, *supra* note 8, paras. 96 and 97.

“Non-judicial mechanisms, such as mediation, conciliation and arbitration, can be useful alternatives for resolving disputes concerning children and enterprises. They must be available without prejudice to the right to judicial remedy. Such mechanisms can play an important role alongside judicial processes, provided they are in conformity with the Convention and the Optional Protocols thereto and with international principles and standards of effectiveness, promptness and due process and fairness. Grievance mechanisms established by business enterprises can provide flexible and timely solutions and at times it may be in a child’s best interests for concerns raised about a company’s conduct to be resolved through them. These mechanisms should follow criteria that include: accessibility, legitimacy, predictability, equitability, rights compatibility, transparency, continuous learning and dialogue. In all cases, access to courts or judicial review of administrative remedies and other procedures should be available.”³⁹

Drawing on existing international and European instruments, including the UN Guiding Principles and the UN Committee’s general comment highlighted above, the 2018 Recommendation of the Committee of Ministers of the Council of Europe also engages with children’s rights and the business sector and does so with particular reference to the digital environment. The Recommendation states that the Governments of Member States need to “require” business enterprises to meet their responsibility to respect children’s rights in the digital environment.⁴⁰ The implementing measures that the Recommendation advises Member States to take include legislative, regulatory and remedial measures. In outlining these measures, the Recommendation can be seen to recall, affirm and urge Member States to implement measures promoted by UN instruments and mechanisms, including with respect to ensuring that:

- legal frameworks give due account to relevant international and European legal instruments and create a clear and predictable legal and regulatory environment which helps businesses and other stakeholders meet their responsibility to respect the rights of the child in the digital environment through their operations⁴¹
- children, their parents or legal representatives have access to effective remedies via appropriate, accessible State-based judicial mechanisms, State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms.⁴²

Recommendations

The DCCAE’s future work to develop the current proposals for an Online Safety Act and an Online Safety Commissioner needs to include a purposeful focus on giving effect to children’s rights, including by:

- employing a rights framework and making appropriate provision for children’s rights within this framework, including the general principles of the UNCRC as set out under Articles 2, 3, 6 and 12

³⁹ UN Committee on the Rights of the Child, *supra* note 30, para. 71.

⁴⁰ Council of Europe, *supra* note 14, p.3.

⁴¹ *Ibid*, paras. 74 and 78.

⁴² *Ibid*, paras. 67-71.

- providing children and young people under 18 with a meaningful, timely, age-appropriate and child-friendly opportunity to express their views in relation to those aspects of the current proposals which affect them so that the DCCAE's future work to develop the proposals is informed by and gives due account to the perspectives of children and young people themselves
- giving careful attention to international and European guidance and recommendations concerning the interrelated areas of children's rights online and children's rights and business, including guidance and recommendations relating to legislative, regulatory and remedial measures.

2. Providing for appropriate regulation

Since the publication of the Law Reform Commission's report on Harmful Communications and Digital Safety in 2016, the idea of establishing a statutory digital or online safety commissioner has become a salient feature of debates and deliberations on measures needed to strengthen provision for online safety, in particular for children. The idea enjoys considerable support, including among legislators and among civil society organisations working in the area of children's rights and child protection.⁴³ It has also been recognised, however, that putting in place an appropriate, viable and effective non-judicial regulatory mechanism underpinned by primary legislation is complex.

In November 2018 the UN's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur) wrote to the Permanent Mission of Ireland to the UN in Geneva to outline his concerns about the Digital Safety Commissioner Bill 2017 (2017 Bill),⁴⁴ a Private Members' Bill that is currently at third stage before Dáil Éireann.⁴⁵ As the Tánaiste and Minister for Foreign Affairs noted in his letter of response of 31 December 2018,⁴⁶ a number of concerns highlighted by the Special Rapporteur have also been raised at national level, including in the context of examination of the 2017 Bill by the Oireachtas Joint Committee on Communications, Climate Action and Environment.⁴⁷

In addition to instruments referenced in the previous section of this submission and due to its specific focus, the Special Rapporteur's communication about the 2017 Bill will be an important and useful reference point for the DCCAE in the context of its work to develop proposals for an Online

⁴³ Joint Committee on Children and Youth Affairs, *Report on Cyber Security for Children and Young Adults* (2018). Available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_children_and_youth_affairs/reports/2018/2018-03-29_report-on-cyber-security-for-children-and-young-adults_en.pdf.

⁴⁴ *Digital Safety Commissioner Bill 2017*. Available at <https://www.oireachtas.ie/en/bills/bill/2017/144/>.

⁴⁵ This communication is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24169>.

⁴⁶ This communication is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=34462>.

⁴⁷ See, for example, Joint Committee on Communications, Climate Action and Environment, 25 October 2018 and 6 November 2018, available at https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_communications_climate_action_and_environment/2018-10-25/debate/mul@/main.pdf and https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_communications_climate_action_and_environment/2018-11-06/debate/mul@/main.pdf.

Safety Act and the establishment of an Online Safety Commissioner. As well as facilitating the development of viable proposals, this communication, together with previous reports by the Special Rapporteur, including a report to the UN Human Rights Council in 2018 on online content regulation,⁴⁸ will further assist the DCCAE to develop proposals that are rights compatible.

While the focus of the Special Rapporteur is necessarily on the right to freedom of opinion and expression, his communication of November 2018 expresses respect for the Government's interest in ensuring the online safety of children and other users.⁴⁹ This recalls a reference to the importance of protecting children in a report by the Special Rapporteur's predecessor to the Human Rights Council in 2010:

*"While upholding the right to freedom of expression, Governments have a duty to protect children from information that could undermine their dignity and development. They should therefore establish protective mechanisms and define their content, scope and implementation methods in their domestic human rights law."*⁵⁰

In providing this guidance, the former Special Rapporteur references a subsequent section in his 2010 report that sets out permissible restrictions and limitations on the right to freedom of expression. Making specific reference to Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR)⁵¹ and emphasising that the protection fundamental human rights must be the prevailing consideration for any proposed restriction or limitation, the Special Rapporteur highlights that permissible restrictions must be exceptional and must meet three well-established conditions:

- **Legality** – Any restriction or limitation on the right to freedom of expression must be provided by law. Among other things, laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous and must set out the remedy against or mechanism for challenging an illegal or abusive application of the restriction or limitation.
- **Necessity** – Any restriction or limitation must be specific, proportionate and no more than is necessary. The burden of demonstrating that the restriction or limitation is the least intrusive possible and that it actually protects, or is likely to protect, a legitimate State interest, lies with the State.
- **Legitimacy** – Any restriction must only be imposed to protect legitimate aims, whereby these aims are limited to those specified under Article 19(3) of the ICCPR and include respect for the rights or reputations of others.⁵²

⁴⁸ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report of the Special Rapporteur to the Human Rights Council on online content regulation* (2018), A/HRC/38/35. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement>.

⁴⁹ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 45, p.6.

⁵⁰ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report of the Special Rapporteur to the Human Rights Council on groups in need of attention, limitations to the right to freedom of expression, and protection of journalists* (2010), A/HRC/14/23, para. 52. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/130/49/PDF/G1013049.pdf?OpenElement>.

⁵¹ United Nations, *International Covenant on Civil and Political Rights* (1966). Available at <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

⁵² Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 50, section C, pp. 12-16.

In setting out his views on the 2017 Bill, the current Special Rapporteur recalls this three-part test and expresses concern that restrictions established by the Bill are inconsistent with it and, therefore, with the requirements of Article 19(3).⁵³ Among the corresponding issues raised by the Special Rapporteur that are of direct relevance to aspects of the DCCAE's current public consultation are those highlighted briefly below.

Identifying and defining harmful content

In his communication of November 2018, the Special Rapporteur notes that the 2017 Bill does not provide any guidance on what forms of digital communications would be considered 'harmful'. He expresses corresponding concern that, due to the absence of any definition of the scope of 'harmful digital communications', the 2017 Bill would *"lead to undue censorship and incentivise social media platforms and other "digital service undertakings" to restrict content that is perfectly legitimate and lawful."* He also expresses concern that the absence of any definition would effectively delegate significant control over interpretation to non-judicial mechanisms, i.e. to digital service undertakings and the proposed Digital Safety Commissioner.⁵⁴

Among the questions posed by the DCCAE in its public consultation is how harmful online content should be defined in national legislation and whether certain categories of content should be considered as harmful content. The categories of content referenced by the DCCAE in this regard are:

- serious cyberbullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- material which promotes self-harm or suicide
- material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health.⁵⁵

Having regard to the Special Rapporteur's concerns, it is vital that the DCCAE's work to develop the current proposals for an Online Safety Act and an Online Safety Commissioner provides for concrete, clear and unambiguous definitions of any terms that it plans to use in the proposed legislation (e.g. 'harmful', 'threatening', 'intimidating', 'harassing', 'humiliating') and ensures that these definitions are included in legislation itself.

If particular categories of content are to be included on the basis that they constitute harmful online content, any such categories will need to be clearly and precisely defined in order to provide for transparency and shared understanding. Furthermore, any such categories, if included, will need to form part of a prescribed list. In this regard, the OCO suggests that it would be prudent for the DCCAE to ensure that decision-making about what to include in any such list is transparent and appropriately evidence-based. In addition to mitigating against any risk of *"heavy-handed viewpoint-*

⁵³ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 45, pp. 3-6.

⁵⁴ *Ibid*, p. 6.

⁵⁵ Department of Communications, Climate Action and Environment, *supra* note 2, p. 3.

based regulation”,⁵⁶ which the Special Rapporteur has cautioned against, this approach will enable the DCCAE to provide an objective explanation and justification as to why it is proposed to include certain categories of content and not others.

Status of proposed Online Safety Commissioner

While the regulatory structures have yet to be worked out, it is currently envisaged that the proposed Online Safety Commissioner will be established on a statutory basis under an Online Safety Act.

With reference to his 2018 report to the Human Rights Council, the Special Rapporteur emphasises in his communication of November 2018 that “*States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression.*”⁵⁷ With reference to the 2017 Bill, and having regard to the role and powers proposed for a Digital Safety Commissioner under this Bill, the Special Rapporteur expresses concern that the Commissioner would be an extrajudicial mechanism appointed by the executive branch. Among the related concerns raised by the Special Rapporteur is a concern about how the independence of the Commissioner will be guaranteed.⁵⁸

If the proposal to establish an Online Safety Commissioner as a statutory non-judicial mechanism is pursued, it will be necessary to make explicit provision in the proposed Online Safety Act for the statutory independence of the Commissioner, where such provision is to the effect that the Commissioner shall be independent in the performance of their functions under the Act. Furthermore, for the purposes of demonstrating and safeguarding the independence of this statutory body, it will be important for the DCCAE to give serious consideration to who will formally appoint the Commissioner and who the Commissioner will be accountable to, and to make appropriate corresponding legislative provision for these matters. It will also be important to ensure that there is an open and transparent public recruitment process for the appointment of a Commissioner. While the Commissioner would not be a strictly judicial authority, such measures may assuage concerns about and mitigate against any real or perceived risk of interference by the executive.

Functions and powers

The DCCAE has proposed several roles for an Online Safety Commissioner and this is compounded by the consideration that it appears is being given to the idea that the Commissioner – however called and structured – might also act as a National Regulatory Authority in respect of Video-Sharing Platform Services (VSPS) under the revised AVMSD. In this regard, among the functions currently being contemplated for the Commissioner under Strands 1 and 2 are:

⁵⁶ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 48, para. 66. The Special Rapporteur reiterates this point in his communication of November 2018 (see p. 5).

⁵⁷ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 45, p. 6.

⁵⁸ *Ibid*, pp. 6-7.

- **Certification** – certifying that services are operating an Online Safety Code in a manner that is ‘fit for purpose’ as regards meeting the requirements of the AVMSD and meeting “*the policy goal under the national legislative proposal*”
- **Oversight** – requiring regular reports from services on the operation of particular aspects of their service
- **Audit** – conducting audits of the measures services have in place in order to assess whether they are sufficient
- **Issue of notices** – issuing interim and final notices to services regarding failures of compliance, with the power to seek Court injunctions to enforce such notices
- **Imposition of fines** – imposing administrative fines in relation to failures of compliance
- **Reporting** – publishing the fact that a given service has failed to comply or cooperate with the regulator
- **Appeals** – direct involvement in a notice-and-takedown system through requiring a service to remove an individual piece of content within a set timeframe, depending on the nature of the content and having received an appeal from a user who is dissatisfied with the response they have received from a service provider to a complaint they have made
- **Mediation** – providing independent mediation or impartial dispute resolution between VSPS and service users.⁵⁹

In the context of developing its proposals in this regard, the DCCAE will need to assess, determine and clarify a number of matters, including:

- whether the performance of each of the proposed statutory functions by a statutory non-judicial mechanism is rights compatible
- what specific objective(s) will be achieved through each proposed statutory function and, as such, whether it can be demonstrated that the function in question is necessary and legitimate
- whether the proposed statutory functions complement each other
- how the proposed functions position the Commissioner vis à vis other bodies and whether one or more of the proposed functions duplicate or overlap with functions currently performed by other bodies
- whether tasking the Commissioner with also fulfilling the function of a National Regulatory Authority in respect of Video-Sharing Platform Services (VSPS) under the revised AVMSD is appropriate and viable.

Recommendations

For the purposes of ensuring that provisions made for an Online Safety Commissioner under a proposed Online Safety Act are both viable and rights compatible, areas that the DCCAE should also give further attention to in the context of future work to develop its current proposals include:

- identifying and defining harmful online content in a manner that is objective, evidence-based, specific, concrete, clear and unambiguous

⁵⁹ Department of Communications, Climate Action and Environment, *supra* note 2, pp. 10-11.

- providing for the statutory independence of an Online Safety Commissioner, however called and structured
- assigning statutory functions to an Online Safety Commissioner that are necessary, legitimate, appropriate and compatible, and that complement the functions currently performed by other bodies.

Page 2

1 -Name

Pa O'Sullivan

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
Nothing, it's not your place to tamper with a public network

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Nothing

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None of them

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

It shouldn't, the state has no right to declare words to be violence, you are using

children to mask your plans for censorship, that is sick

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

None of them,

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

None, disband the regulator

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

It shouldn't, ██████████

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Regulate the rte player if you wish and ██████████ from the rest, you didn't make it, you are not entitled to censor it.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No [REDACTED]

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

By not regulating free expression at all, [REDACTED]

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Scrap the whole thing and add free expression as a constitutional right.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Another option would be to [REDACTED] and stop policing language

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

It should receive no funding you [REDACTED]

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

None

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

The power to [REDACTED] and get a real job

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

If it's adults on the internet, it's none of your [REDACTED]

Page 2

1 -Name

Patrick Guinness

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
The AVMSD approach is from the wrong direction. Children and sensitive adults must never be allowed unsupervised access to the internet. Their guardians should be liable for any lapses. The alternative is a really expensive, limiting and wasteful system of oversight that could also be used in future to limit content for political purposes. Considering the nature of the internet

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

The regulator's function should be to fix what types of "harmful content" can be defined, and to ensure that if children have mobile phones, these must be basic models and not smart phones. I appreciate that this would seriously impact the mobile phone business, but it is easier than trying to police the unpoliceable. The problem with AVMSD-type statutory tests is the unlimited nature of human imagination using an unlimited system like the internet. I have used the internet since 1993 and find that 99% is acceptable. I have 5 children and took a law degree, so I have considered this aspect for many years.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

All platforms, but the platform that really matters is in between a child's ears.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

As indicated above, I prefer access limits for children or child-like adults. The basic problem is that we do not educate children to think for themselves, and the child who is easily led, in matters of politics, religion, etc., is the child who will be worst affected. Critical thinking should be on all school curricula at all levels.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

The content should be unlimited, but as indicated above the regulator will have to determine what user limits can be introduced to protect the young and simple-minded adults. Personally I am deeply offended by videos of paramilitary marches, be they IRA-style or the Orange Order, but I am also aware that the Irish educational systems to a large extent justify the underlying sentiments. I am prepared to live with this, while hoping for top-down reform that can only be made by politicians.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The problem of defining "harmful" and "incitement to violence" is as easy as it is difficult. Adults should of course never have access to child porn, nor videos showing us how to commit a crime. Incitement to violence comes in many forms, and a trip to Kilmainham Prison or the GPO could also be said to incite some people to violence or hatred. The regulator must be aware that such incitements will only affect 1% of us, and the problem is really in the heads of the 1%. If they have not been educated to think critically or sympathetically, then obviously they must be more prone to irrational incitements of every kind.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

On a daily basis of course, 7 days a week. In all such social experiments a review after 1 or 2 years will be essential, and that review will identify the needed improvements.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No, because television is inherently more controllable than the internet. The watershed of 9pm or 10pm for certain content works.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No. These are 2 different business models. A TV broadcaster has inherent income security and social duties. Compared to the UK licence fee, the Irish fee is already considerably more expensive. Internet funding models are much more precarious and should remain so, as this will make them try harder.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

I agree with the Rapporteur. Owing to the nature of the internet, the State's task must be to educate the young to cope. The Department of Education does not appear to be aware of this need. The real problem is therefore an organisational one within government. One person's innocent pop video may appear deeply blasphemous to another. Ireland does not yet have the right structure to strike a balance between an objective basic right and a subjective definition of "harmful".

Until it does, it is best to restrict the obviously criminal but give leeway to the objective right, or else we shall all be submerged in endless nit-picking and definitions of hurt feelings. The basic tenet should be: if one doesn't like content, one can switch it off.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

The Directive should have been argued more openly than it has been. The best route is self-policing, as "harmful" can range from film of a massacre to saying that a politician's dress looks awful. Ireland cannot alienate the considerable internet business that has landed providentially on our shores, and Ireland must plan how best to control the excesses by mutual agreement. Oversight from Brussels is welcome, but not to the extent that China and Russia want to limit access. I worry that too much poorly-understood legislation is being pushed out, without allowing us all time to assess what works best. I don't see any crowds in the streets calling for restrictions, but I do see interest groups making their pitch.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Media Commission - no, as indicated there there 2 business models, even 2 philosophies. A regulator of Video platform sharing services could require a workforce of 50,000 monitors; the inherent nature of the internet requires targeting of overtly criminal videos by a smaller workforce. As I have indicated, removing accessing equipment from the young and weak minded is actually the most obvious and practical course.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Any regulator of content who may propose prosecuting or editing an offender will

of course have to be funded by the Department of Justice.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

The same regulatory system - separate from the BAI - can cover all internet content. The priority should be protecting the young and weak minded. The functions, ranging from the prosecution of individuals, to arranging co-policing by and with internet corporates, are far ranging, but the necessary powers exist in one form or another. The issue will be, as elsewhere, creating a corpus of law that is then not applied. The recent example of a child pornographer being arrested here for trail in the USA reveals how supine we can be. There is no point in a box ticking exercise to please the EU without some minimum control of criminal content. As I have indicated, less law and more education is preferable for our interface with the "knowledge economy".

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

A notice system with a large fine to be implemented on a due date, in the event of non-compliance, will be adequate. Experience will fill in any gaps. It also depends upon how ambitious Ireland wants to be. If we are to plan to amass all the world's data in server farms on the island, as we should, then the civil service mentality may not be up to the task.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a

system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Thresholds should not apply, because the EU's function should be to propose standards and monitor how well they work. Each member state has a judiciary to enforce whatever standards are agreed, if one has a handle on a business. A service providers can change addresses several times a day, and have no legal presence at all in the EU, but still be accessible and sell services here. Two categories of service provider will emerge, those we can control or mediate with, and those we can't.

Page 2

1 -Name

Patrick Moore

2 -Organisation if applicable

No

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
Existing legal/defamation system is sufficient

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

None

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None, free speech is primary

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Existing legislation sufficient, free speech is primary

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Use any definition you like, just don't curtail my free speech

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Voluntary guidelines based on primacy of free speech

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

See above

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Free speech, voluntary guidelines

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Abolish licence fee, privatise everything

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Absolute free speech

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Free speech, no regulation

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Shouldn't be funded

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Existing legislation sufficient

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Existing legislation sufficient

From: [Patrick Robinson](#)
To: [Online Safety Consultation](#)
Subject: Question 12 submission
Date: 05 March 2019 08:03:20

Dear Sir/Madam,

I am making personal submission in relation to question 12 (regulatory structure).

In my opinion, the Government should avoid setting up a separate regulator given the associated set up cost (finding an office etc) and running that office (need to maintain separate back office team (HR, finance, legal)).

Instead I would suggest increasing the role and scope of the office of the data protection commissioner. From my limited background, this office seems to be well regarded and efficient in carrying out its function. In short, the government should give the role to an office with a good track record. Perhaps the BAI could be merged into this increased data protection body.

Finally, the industry seems to be moving from traditional forms to everything being “content”. In that case, every content publisher should have the same regulator to have a level playing field. So a newspaper and an entity like YouTube would all have one regulatory body in this space.

Yours sincerely

Patrick Robinson

Sent from my iPhone

Page 2

1 -Name

Paul Taylor

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**

None

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

None

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Child abuse only, racism and xenophobia are meaningless far left jargon nowadays

used only to shut down debate.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Youtube vimeo rte Facebook twitter bbc, they all share video.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

None, if a crime had been committed the Gardai should do their job

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

None

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No state broadcasters already have an unfair advantage

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No The licence fee should be scrapped

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Allow freedom of speech

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

The EU has just banned memes, they can't be taken seriously on the intrtnet.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

None

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

No funding, you mean how much more should taxpayers pay?

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow

them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.
[Section 2, 4, 5, 7, & 8 of the explanatory note]

None

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

None

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

None, the EU have no credibility online.

Page 2

1 -Name

Vivian Cullen

2 -Organisation if applicable

PixAlert

3 -Email

vivian.cullen@pixalert.com

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
There is software (PixAlert) available to tackle some of the challenges of this task...Once an appeal is received the topic or post in question should be tagged with a warning about the post is allegedly/potentially unfit. Audit software can then review certain content for possible offensive words or content (including PixAlert Image Auditing technology) the solution will then (based on policies) automate next actions to a) remove the post or b) Quarantine the content for review by appointed individuals or groups (which may include the regulator - depending on the severity of the offence).

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Because the potential of large volumes it is impractical for this NOT to be totally or semi automated... Using techniques employed by PixAlert (an Irish company) we know there is a requirement to automate findings based on common findings cross referenced with policy drivers and historical (predetermined offensive content) severity based automation can do a considerable amount of tasks and the unknown or more severe offensive content (Data or Image) can be reviewed by manual means which may or may not include the regulator. NOTE: An AUDIT trail is a vital component of the procedure - providing evidence if it is deemed an offence has taken place.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

All platforms/networks within business, social media, forums, portals where structured and unstructured content (data & image) can be posted and/or viewed. In today's society, data is produced without thought for context or perception. In addition the rate at which data is being produced and circulated is at rates which are beyond monitoring without the assistance of AI (Artificial Intelligence). Tools

with built in sentiment capabilities are required to do decipher the bulk of the offences.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Other suggestions... BULLYING of any kind - of a child/adult in the work place/adult in the public domain (including social media platform/content promoting self-harm/suicide/taunting to gang-up an other person or group/posting images or videos of people in uncompromising situations/images and videos of death or harming others/inappropriate sexual images and videos (Pornography)/terrorism. As mentioned previously, automated tools are available to decipher and manage the bulk of the issues raised which means the need to rely on human management is far smaller than envisaged.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Firstly, "Video sharing platform" is to lose a term... Lots of people use video sharing to learn new skills, languages, etc. so it is important to understand the difference between this and posting "sensationalism" type videos on social media outlets in the pursuit of gaining popularity (likes and potentially revenue). Again as mentioned in previous questions there are tools which can decipher certain levels of content to deem them as safe / unsafe / or unsure. An example of this is PixAlert's ability to detect pornography (including some child porn) is available to tackle the huge potential volume of images and videos. The additional benefit which can be built is the trail of offensive material which others may partake in the distribution. In most cases the early detection of such material is vital in the prevention of spread.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The relationship between data, image or video content providers should be no different. The only difference may be output but the principles, objectives and policies must be the same with each media having nuances. The relationship should be a willing to be transparent on the part of the provider. It should also be a collaborative relationship - not a "them and us" type engagement. The regulator needs to be seen as a benefit to the business/platform in question.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The presence of technologies to aid and assist in the management of illicit or inappropriate content give way for the regulator to be better able to manage and regulate content sharing platforms. At this juncture it is possible for such organisation to provide audit reports (a bit like revenue commissioner does) to provide anonymised audit report of non offensive and offensive incidents but in the case of a criminal occurrence provide a detailed report of the content and the source (user information - subject to GDPR criteria including recognition of other innocent individuals contained in the material. Ireland is the home of some of the best solutions in the world to solve a lot of the issues mentioned in this form and submission - it needs to have a cohesive and collaborative approach from the industry.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

I mentioned this previously... the relationship should be the same across media and platforms (it's not a one size fits all. Each platform will have nuances which need to be facilitated - It's the relationship and collaboration method is what's important. These organisations need to have a buy-in... the employment of a technology which is designed to "Help" them police their output with out hindrance

or financial (or market) exposure will be the winner.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

All players in vying for the same client base (whether it be demographic or geographically based) should be all working from the same level - provided the origin of the content is based in that country.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

We all have the right to express ourselves but it does not require the need to bully, harm or humiliate others. Offence must be allowed because one person's opinion may be offensive but the originator can not be denied their freedom (unless it is in breach of the categorization policies mentioned earlier. Harmful content is not excusable now should it ever be. However, it is subjective and some level of acceptance is required - technology can help.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

There is always a culprit and a victim. However in this Media platforms there is a facilitator (a dealer if you will) who has a part to play. In regulation terms this should NOT be self regulated 100%. It is required that platforms are answerable for the distribution and management of content (Data, Image, Music, Video). They also hold the key to having a decisive regulation responsibility. They realize this but are not prepared to surrender resources and funding to ensure they are managed by external influences. Regulations like GDPR, PCI DSS impose financial fines. Imposing fines will undoubtedly meet resistance but this is a trade-off whether to pay the fines or become compliant. More on this discussion will be required to involve other countries from within the EU to gain proper traction and adherence.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

A single entity is the more sensible answer because it ensures there is less fragmentation in rule setting and more cohesion across all platforms.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

First funding should be from the government. Second level should be from support by the platforms. As an adviser on the PCI DSS standards Council - it is a industry funded standard. Funding comes from membership of transactions companies and issuing banks as well as the merchant organisations who become members to learn more about PCI. Regulation consultants become certified (in this case GDPR consultants) can help regulate the market.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The powers of the regulator should be clearly set out include submission of monitoring efforts and escalation of offensive or malicious content - remedial or enforcement taken... evidence of findings and enforcement efforts reported.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Yes... all of the above. But, we also need to employ the additional sanctions put in place by other standards like PCI DSS - for example if an organisation is deemed non-compliant for a certain period of time or fails to consistently comply - it's services are denied by the card companies (Visa, MasterCard, etc).

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

With the help of monitoring technologies a large portion of the workload should be prevented prior to the publishing/distribution of the offensive material - preventing exposure and thus reducing offence and complaints. However, a certain level of content does require publishing as it may be in the public interest. This will require closer monitoring based on general content policies and with a scoring matrix should determine if manual remedial action is taken.

Page 2

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Page 3

4Question 1:

What system should be put in place to require the removal of harmful content from -online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**

What matters most in this context is that the takedown procedure is simple, accessible, and effective. "Effective" in this context means that the takedown procedure reacts swiftly and broadly enough to prevent as much harm as possible to the person(s) impacted by, or at risk of being impacted by, the harmful online material in question. Takedown procedures run by service providers themselves need to be regulated by an independent regulator/oversight body. Such regulation might take the form of a statutory duty to comply with Codes of Practice on takedown procedures, enforced by the regulator through inspections and reporting requirements, for example. Where takedown procedures are perceived not to be working in an individual case, they should be subject to an independent appeal process which is itself simple, accessible and effective. Whether this independent appeal process is standalone or part of the independent regulator's functions is less important than the necessity to ensure that the appeals process acts on the same principles as those put forward and enforced by the independent regulator in Codes of Practice which must be followed by service providers.

5Question 2:

If the regulator is to be involved in deciding whether individual pieces of content -should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

It seems to us that as far as online child sexual exploitation and abuse materials are concerned (1) , and as far as sexual cyber-bullying content is concerned (2) (whether or not children or vulnerable persons are its intended or actual victims), a simple takedown request from an actual or prospective victim, an appropriate adult acting on behalf of a minor actual or prospective victim, or a professional or other third party who has been asked to make a takedown request on behalf of any actual or prospective victim, in each case acting in good faith and making reference to material which is illegal or otherwise harmful or potentially harmful - should be enough to trigger an effective takedown procedure. There should not be any requirement to prove actual harm, or serious harm. It should be enough that the material has the potential to cause harm, not least because time is of the essence.

6Question 3:

Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

RCNI recommends that the approach taken in the UK Government White Paper on Online Harms (published April 2019) is considered very carefully. See this online link:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf. The issue of its scope is discussed from p 49 of printed version. Its authors propose that the new Government strategy on online harms will apply to all companies which provide services or tools allowing, enabling or facilitating users to share or discover user-generated content, or interact with each other online. This is far-reaching. However, the authors stress that they do not want to impose heavy administrative etc burdens on small and medium enterprises. Our experience of working to address sexually abusive behaviours, including criminal behaviours, online is that abusers will use every possible means to continue abusing, therefore it is important to cast the regulatory net as widely as possible. This is especially the case when dealing with sexually abusive content online as it always has the potential to cause grave harm, and especially to children and to otherwise vulnerable persons.

Question 4:

How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

RCNI's view is that the definition of "harmful content" should be drawn widely. This is for two discrete reasons: (1) the early stages of grooming a child for future sexual exploitation can look and sound harmless enough in isolation, nevertheless they are the harbingers of actual or attempted serious sexual crime - indeed such communications often fit the definition of grooming as a criminal offence anyhow; and (2) instances of sexual cyber-bullying of a adult who may not fit any legal definition of a vulnerable person - may also look and sound harmless enough when viewed in isolation. It is the context which determines whether this is an abusive behaviour or not. Sometimes, sexual cyber-bullying may form part of a pattern of harassment or coercive control, both of which are criminal offences. RCNI submits

that a category of harmful online content does not have to be clearly or easily defined, to be capable of inflicting lasting damage on those affected by it, and that therefore, every effort should be made to capture (and have taken down) material which might not at first blush look or sound abusive but in its context, is so or capable of being so. RCNI respectfully suggests that close attention is paid to the preliminary list of online harms at page 31 (printed version) of the UK Government White Paper on Online Harms cited above, and also, to the definition of harmful material in the recently published Children's Digital Protection Bill 2018 (see www.oireachtas.ie)

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

RCNI cannot supply an exhaustive list of all Video Sharing Platform Services now available to the public. The example most often given is Youtube, over which as we understand it, there is no prior editorial control though that there are contents standards and complaint and takedown procedures. It seems to us that it is appropriate to draw the Irish legislative definition as widely as possible, so that it covers not only such obvious examples as Youtube, but also all social media platforms, messaging and email services, on which or over which any video material may be communicated through the internet or through other electronic means (e g SMS). This is because abusers will use any and all means to carry out abusive behaviours, and to be effective, any definition must encompass as many different forms of VSPS as possible.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

RCNI submits that with regard to Child Sexual Exploitation and Abuse material, and to sexual cyber-bullying material (both themselves widely defined) - it is important that the regulatory relationship between any VSPS and the Regulator, be as effective as possible. This is not just a matter of stringent and frequent oversight by the Regulator, but also a matter of having clear Codes of Practice to be followed by VSPS's, backed up by support in the form of information, training and ongoing research in this area by the Regulator. RCNI recommends that the approach of the UK Government in its White Paper on Online Harms is examined closely, especially with regard to its idea of creating a duty of care for all companies to take all reasonable steps to prevent harms to users and others

affected by harmful content (see page 41 inter alia of the printed version of the WP), and its list of possible Actions to be included in a Code of Practice to set out what "reasonable steps" would involve in practice (pages 65/66 of printed version of WP). RCNI also commends the White Paper's concept that any company's response should be proportionate to the level of harm which could be caused by certain material, including but not limited to, child sexual exploitation and abuse material (referred to as CSEA in the document) (See page 62 of printed version). Finally, any compliance regime must be underpinned by effective and where appropriate, stringent sanctions. The White Paper suggests "civil fines", requirements to comply with directions of the Regulator, possible publication of compliance reports, ISP blocking, disruption of business activities, and ultimately at the most serious end of the scale, criminal liability of individual members of senior management in any persistently non-compliant company (see pp 59 et seq of printed version of WP).

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

RCNI submits that the Irish regulator should take a proactive approach to monitoring and reviewing measures to safeguard VSPS users and others. The Regulator, in consultation with both VSPS companies and outside experts, should devise Codes of Practice to be followed in order to ensure that all VSPS companies do take all reasonable steps to prevent harms to users or others affected by their service, that all users and others have access to a simple and effective complaints and takedown procedure and to an independent appeals process, and that all VSPS companies educate themselves not only about known on-going risks to users and others from various potential online harms, but also about any possible negative effects of new technology as it develops, so that they can then take steps to counteract them. Monitoring of compliance by the Regulator should be both regular and formal (annual or six monthly reports, for instance) and irregular, more informal and unexpected (spot inspections, perhaps in response to a concern raised by an appeal issue e.g). The Regulator should also have powers to gain access on request to information and documents held by the company which are relevant to safety concerns, though not of course to publish either. Where improvements are necessary in the view of the Regulator, s/he must have the powers to give directions and set timetables for compliance, and there must be a scale of escalating sanctions for failure to comply with any of these.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

RCNI accepts of course that both television broadcasting and on-demand audio-visual media services (e.g. Netflix) should be, and are, allowed to address difficult and distressing subjects such as the sexual exploitation and abuse of children, vulnerable people and others. Silence about these horrors does nothing to prevent them or help their victims. It seems to us very important that neither television broadcasting nor on-demand audio-visual services should escape editorial control stringent enough to detect and exclude material which condones, excuses, or advocates for any form of sexual violence or abuse. What matters is the context, the theme and purpose behind any given programme: it is in order to include an interview with an unrepentant sex offender to show how difficult it is for some offenders to change their behaviour, but it is not in order to include the same interview in order to show would be offenders how best to evade detection for the same behaviour. Accordingly, it seems to us that the rules should be broadly the same for television broadcasting services and on-demand audio-visual media services with regard to content. We do not see any reason why the regulatory relationship between either service and the Regulator should not be broadly the same.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

RCNI does not have a view on this point.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

RCNI submits with respect that the right to freedom of opinion and expression must have limits. In fact, it already has, enshrined in our criminal law. It is not lawful, for example, to distribute child pornographic material online or otherwise for purposes of child sexual exploitation. It seems to us that as far as sexual harms are concerned, provided that "harmful content" is comprehensively and clearly defined, only abusers, potential abusers and those who facilitate their proclivities will be restricted in their ability to express themselves and share their opinions and other materials. It seems clear to us that the public interest good of preventing and addressing sexual violence overrides any alleged right of a person to express themselves freely online as well as off-line.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

RCNI respectfully submits that the duty of care principle elaborated at length in the UK Government White Paper on Online Harms (see e.g. page 41 of printed version) facilitates a proactive, preventative approach to combating the scourge of child sexual exploitation and abuse online. It goes beyond the reactive approach which limits itself to take-down policies and measures (where the e-Commerce Directive takes effect). It must be underpinned of course by properly resourced support in the form of high quality on-going research, information and training facilitated by the Regulator. It seems to us that there is nothing in the revised Directive, as described, which would stand in the way of this approach. A concrete example of an innovative development which might be deployed as part of a proactive approach is the UK based Project Arachnid, which is a tool via which the web can be trawled to identify child sexual exploitation and abuse material (see page 39 of the printed version of the White Paper on Online Harms cited above).

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

RCNI's view is that this division of labour should be decided on the basis of knowledge as well as resources: whichever organisation has the appropriate knowledge base and the capacity to go on learning more about the area as technology evolves, should be the first one to be considered to regulate a particular stream of work. Beyond that, we do not have a view on the best way forward on this point.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

RCNI does not have a view on this point, except to say that if at all possible, the regulatory structure should be funded publicly - ie independently of the

organisations who will be policed by it and on whom the regulator may have to impose sanctions. It will gain more public confidence and acceptance if this is the case.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

The Regulator must have powers to find things out through regular inspections, interviews, disclosure of documents, online materials, and explanations of technological phenomena, to require regular (and irregular) reports on compliance, to carry out on the spot checks, "dummy runs" to see whether inappropriate material which could have been identified and blocked, is actually identified and blocked, whether complaints are acted upon, and so on. S/he should also have at their disposal the resources to consult with, advise, support, warn, inform and train, company personnel, and of course the powers to impose any one of a range of sanctions which might be appropriate in a particular case. S/he should have the power to direct changes to existing practices to ensure compliance with the law including any Codes of Practice. It seems to us that the oversight powers needed would be greater in respect of VSPS companies than for television broadcasting or on-demand audio-visual services.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction. **[Sections 2, 4, 6, 7 & 8 of the explanatory note]**

RCNI considers that all these measures listed might be used as and when appropriate. In addition, we note that the UK Government White Paper on Online Harms lists a couple more, both we understand measures of last resort: (1) ISP blocking and (2) Disruption of business activities (forbidding company from displaying ads or accepting new ad contracts e.g.). They are draconian in nature, clearly, but they might have a significant impact e.g. where even a very large fine

might not, because the company's means are so great. They are also both PR disasters for companies, of whatever size. Further, (3) a real risk of imprisonment for senior management could be a very effective deterrent, in the worst cases of non-compliance. (4) Could we also suggest that where it is clear that a user or other person HAS been harmed by e.g. failure to take down material when so requested, that a company might be ordered to pay them meaningful compensation?

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

RCNI suggests that the threshold for bringing a complaint should be as low as possible - it should be enough for the aggrieved person to identify the abusive material or action for action to be taken. This will only work if there is a comprehensive but still, clear and unambiguous definition of "harmful content".

Page 2

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Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
Direct involvement of the regulator is essential

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

PlayStation also needs to be looked at as kids can message each other on this platform also and I have dealt with a very serious cyber bullying incident on this platform recently

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Cyber bullying of children through gaming systems such as Playstation needs to be urgently reviewed

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services.

Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Definitely not those used by children as this incites bullying behaviors

9 - Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Full oversight by regulator and ability to remove content

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Full disclosure

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Yes. Same rules should apply

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Yes

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the

right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Full oversight be regulator to monitor content

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Restructure bai

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Yes

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Same rules should apply

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,
- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

All of the above. This is serious

Page 2

1 -Name

Robert Power

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
I am sceptical about the need for removal of harmful content but if it happens it should only concern what is already illegal e.g. child abuse. It is absolutely essential that people have a strong right to appeal. and it is absolutely essential that good clear reasons are given. it is quite worrying if social media companies only run their own nontransparent systems

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

As little as possible in my opinion. I think there is a huge risk of free expression being curtailed. It is impossible for any regulation to keep up to date with how fast social media evolves

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

child sexual abuse should be defined and included. I do not believe that material that has racist and xenophobic perspectives or incitement to violence or hatred should be regulated I also think sites encouraging starvation should not be

included, unless it is somehow targeting young children.

Page 4

8 Question 5:

- The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

I do not think any definition can possibly hope to live up to its goal. The online video world is changing too fast.

Page 5

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

The licence fee system should be ended

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

As outlined earlier, I do not believe this new body needs to come into existence. If it does come into existence I think it should be under the BAI to save money and avoid duplication.

Page 8

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,
- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

No fines or criminal sanctions

Page 2

1 -Name

Roisin ni hEilidhe

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
Existing laws are good enough.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

None required

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

None required

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Existing legislation adequate

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Leave status quo alone

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Only if Video sharing platform contravenes existing legislation should the regulator get involved

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

On no basis

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No as RTE is now a waste of time and more innovative material can sometimes be found in the "less regulated" media

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

I would scrap this fund altogether as RTE is a shadow of its former self and just a stale pale localised form of the very crappy BBC

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

UN is just full of self serving and over paid bureaucrats some with personal axes to grind. Irrelevant for Irish purposes

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

EU is another bloated globalist body - best ignored.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Neither

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

No new legislation needed. Just better enforcement of existing

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

In practice the relevant regulator won't be able to police all of the material and best leave indie media self regulating and reporting

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Power to publish non compliance notice + Power to apply sanctions in extreme cases which are not a matter of differences of opinion on subject matter (as defined by current legislation)

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

It is strongly inappropriate for EU to dictate anything as there are massive lobby groups in Brussels and elsewhere who have their own agendas

Page 2

1 -Name

Ronan Fallon

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
- The role of a regulator as a "go to" place for those who come across harmful content online would be very desirable. However, this would require huge number of staffing. Given how quickly information spreads on the internet, if staffing levels in the thousands (given Ireland will be regulating Europe on these matters is not feasible - perhaps it could be funded through an internet services level or EU funding?) that would allow for judgement by the regulator within 2 hours maximum (this has to be rapid, but two hours might be more realistic) then it would be better for the regulator to have an investigatory role, if this is the case they need the power to levy huge fines as a discouragement for breaking the law. Otherwise, given the huge amount of material available it might be more efficient for companies to pay the fines than employ moderators. Large companies have protocols in place for take-downs, they should be required under law to take down certain content.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

All, while this would be cost intensive of running e-businesses in the form of content moderation (this should be considered in point A - perhaps an online businesses central tax that can properly fund moderators that can make judgement quickly would make this more fair) if it's only a ban on large sites, this harmful content will merely migrate elsewhere. If the regulation doesn't apply to the whole internet it might as well not exist.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening,

seriously intimidating, seriously harassing or seriously humiliating)

- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

All of the above, yes. Why "serious" cyber bullying and not just cyber bullying? I would support the removal of the word serious in favour of the phrase "cyber bullying". I think given the rise of the far-right world wide and the associated terrorist attacks, that far-right, white nationalist propaganda should be explicitly linked to the material already deemed illegal in law. Given the third point "material designed to encourage prolonged nutritional deprivation" I think there are strong links between this and "anti-vaccination" material - both "would have the effect of exposing a person to risk of death or endangering health". Anti-vaccination material is harmful and should be added to the list in legislation. Final point: this would be very difficult to regulate, but I think something like "deliberately misleading information", such as what TheLiberal.ie would publish about immigration for example in an attempt to fear monger should be made illegal.



Submission to the DCCAÉ Public Consultation
on the Regulation of Harmful Content on Online
Platforms and the Implementation of the Revised
Audiovisual Media Services Directive

Strand 1 – National Legislative Proposal

Q. 1. – What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**

A. 1.- One of the functions of regulation is to respond to the need to protect people from harm. Given the level of public concern about online harms, not just in Ireland but worldwide, a new regulatory framework needs to be put in place to improve safety online. The internet has revolutionised how people communicate and access news, entertainment and other media creating an increasingly converged communications market. According to the CSO's Information Society Statistics 89% of households in Ireland have access to the internet at home. 73% of individuals use it for social networking, and reading or downloading online news. Behaviour and Attitudes, Sign of the Times research 2019 found that 41% of adults share posts, videos, photos etc., online, rising to 72% of adults aged 16-24. While more relevant to strands 3 and 4 of this consultation, it is also of note that 42% of adults use online on-demand televisual services, rising to 54% of 16-24s. (<https://banda.ie/wp-content/uploads/BA-Sign-of-the-Times-2019.pdf>). However the regulatory regime governing online content has evolved only to a limited degree in this jurisdiction

Over five years have passed since the Internet Governance Advisory Group (“IGAC”) was put in place by the then Minister for Communications Pat Rabbitte. The IGAC was asked to consider the emerging issues arising from pervasive access to online content, its impact on society as a whole and in particular to take account of issues of online safety arising from children and young people's use of the internet. It was tasked with considering whether the existing national regulatory and legislative frameworks around electronic communications, internet governance and the sharing and accessing of content online remain relevant. It made a number of significant recommendations. Of note their report identified a fragmented range of regulators from the BAI, the Internet Safety Advisory Committee (ISAC), various Government Departments, Office of the Data Protection Commissioner, ComReg, the ODAS Group. Their report identified what was lacking. This was an overarching strategic and policy framework to inform and co-ordinate a response to governance arrangements concerning online content.

Together with the amended AVMS which now takes in increased regulation of on-demand services, as well as for the first time, the regulation of video sharing platforms (VSPs) in Ireland, this presents an opportunity to re-align the regulatory environment in the context of audiovisual services both “online” and “offline” and to put in place a new policy framework underpinned by regulation. There remain significant disparities in whether and how online content is regulated in Ireland. There are currently a range of regulatory approaches with broadcast services subject to longstanding regulation and online services subject to little or no regulation beyond compliance with the general law and voluntary codes. Under current non-statutory self-regulated and voluntary initiatives, individuals can report harmful content to social media sites with a request that it be removed. Most prominent social media sites have content policies which outline their approach to harmful content, and which take in hate speech, sexual violence, serious threats, harassment, content promoting self-harm. However there is no effective oversight of complaints, response times, and it is not clear that all complaints are dealt with in the same way, depending as it does on a system of self-governance.

The realities of an increasingly converged media experience require new regulatory guidelines and protections. The regime for the regulation of broadcasting is designed to ensure maximum audience protection (whilst safeguarding freedom of expression). In traditional linear broadcasting there is comprehensive regulation of standards. Compliance is given a statutory basis in the Broadcasting Act, 2009 whereby a broadcaster is obliged to comply or be found in

breach of the relevant statutory code following a detailed and transparent complaints procedure which is clearly set out and accessible to members of the public. These codes ensure that the public can maintain trust in their content.

In order for any system of oversight to be effective, it must be given a statutory basis and needs to provide for efficient and swift/immediate take down procedures by reference to national digital safety standards. RTÉ submits that there should be a new regulatory framework for online content taking in safety concerns with a single independent regulator appointed on a statutory basis. As RTÉ points out above, this regulatory infrastructure is in place for linear broadcasting through the BAI, where content standards and audience expectations and recourse are set out in a clear statutory code. RTÉ suggests a new regulatory framework for harmful online content can extend and build on this existing model (see below A 4). On this basis, RTÉ submits that the regulator would have a responsibility for overseeing and regulating a wide group of digital/online service providers. This is the approach proposed in the UK in its recently published Online Harms White Paper (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf) which proposes that the regulatory framework there includes services that are offered by a broad range of companies including social media platforms, file hosting sites, messaging services and search engines. The UK White Paper is categorical in that it proposes a clear statutory duty of care to ensure that online service providers and platforms take on more responsibility for the safety of their users and to counter illegal activity.

In the context of Ireland, RTÉ submits that whilst taking in a broad range of services, the regulator should take a risk based and proportionate approach across a broad range of business types. That is to say the regulator's initial focus should be on those service providers which pose the biggest and clearest risk of harm to users as a result of the scale of the platform. RTÉ is aware of the balancing exercise between freedom of expression and in considerations of harm and breach of privacy (see further below response at Q10). RTÉ submits that proportionate effective statutory civil procedures/remedies should not encroach on freedom of expression.

In this regard and to ensure a proportional response, the statutory role of the regulator should enable it to :- (i) work with offices of the Ombudsman for Children, the Office for Internet Safety, the Department of Children and Youth, and the Department of Education in consulting on national digital safety standards (ii) devise and implement an online media literacy strategy (RTÉ notes that the BAI already has role in relation to media literacy to educate users and promote safety), (iii) to ensure the oversight and the implementation of a timely and efficient "take down procedure" that is the timely/swift removal of harmful content in accordance with a statutory code on take down measures/procedures (iv) to consult with the industry in relation to such a code which should outline steps taken, timelines/response times pending the category of complaint. Any such regulator clearly needs enforcement powers where the challenge is to ensure compliance by service providers that are not only established here but which have a significant presence in Ireland.

These measures reflect the regulatory infrastructure currently in place in jurisdictions such as Australia where illegal and offensive conduct is regulated through the Online Content Scheme under Schedules 5 and 7 of the Broadcasting Services Act, 2015. This scheme is designed to protect consumers particularly children from exposure to inappropriate or harmful content. The scheme has a clear legislative basis with an e-Safety Commissioner appointed in Australia as regulator on a statutory basis.

The statutory code proposed above could build on the existing voluntary codes already in place by online platforms/service providers. Accordingly an individual would initially request the online platform/social media provider to remove the content swiftly and within an agreed timeframe. It would be essential therefore to ensure that this system of oversight is effective in that the regulator would be directly involved in the process by way of appeal, if the take down procedure did not operate in accordance with the statutory code. In a situation where a concerned individual has invoked the complaints procedure and the online provider refuses to remove or take down the relevant content within the specified time-line, the individual should have the right of appeal to the regulator who would be authorized to investigate and seek submissions from both parties before making a decision on the appeal. This would ensure that the appeal process is both timely and efficient. It is RTÉ's view that this approach which represents a proportionate civil law response, reflecting education, oversight and enforcement is timely and now needed. As the Explanatory Note points out, the era of self- regulation is over; therefore the statutory and regulatory framework must become sufficiently robust to meet this challenge.

Q.2- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate. **[Sections 2, 4 & 8 of the explanatory note]**.

A.2- Yes, a statutory test should be put in place before an appeal can be escalated to the regulator. RTÉ notes the statement in Section 8(a) of the Explanatory Note that Ireland is engaging with the European Commission in order to establish what the Commission's expectation in relation to the requirement under the AVMSD for the impartial settlement of disputes between users and VSPs. Subject to any constraints upon Ireland's discretion in relation to this issue, RTÉ submits that the statutory test should simply require the individual or user to have exhausted the complaints procedure or mechanism available. Thereafter if the online provider refuses to take down or remove the content or fails to do so within the timeline specified, then the appeals process could be invoked. In that way the online provider is the first recourse for the user in terms of the complaints process. RTÉ has looked in detail at the Australian legislation in this area and in particular the provisions of the Enhancing Online Safety Act, 2015 which was significantly amended during 2018 by way of the appointment of an e Safety Commissioner with clear regulatory authority in the area of online content standards with particular regard to the safety of children and with a comprehensive complaints system. The point here is that there should be a clear, accessible and transparent process in place for dealing with complaints (the BAI regulatory model currently applies those principles in dealing with complaints concerning content in linear broadcasting services). A decision of the regulator may be appealed by a dissatisfied party to the Courts.

Q.3 – Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme? **[Sections 2, 5 & 6 of the explanatory note]**

A.3 – RTÉ notes from the explanatory note that proposed regulation would apply to “a broader category of services (not just video sharing services) and to all user-generated content (not just audiovisual, including photos and user comments). RTÉ interprets this to mean that the Department is envisaging extending the scope of regulation to social media/online platforms such as Facebook, Instagram, Snapchat, and Whatsapp for example. RTÉ submits that as outlined at A.1 above, the scope of regulation in this regard should be broad in scope given that the aim is to secure a system which protects the public and in particular children from harmful content. In this regard, RTÉ would assert that the rapid pace of technological development requires a principles-based approach. Regulation needs to be flexible enough to take on new challenges and needs to be “technology neutral”. By this we mean that regulation needs to set out standards and expectations of service providers and regulation needs to focus on behavior regardless of the medium/specific kind of platform. RTÉ notes that the Law

Reform Commission's Report in 2016 which is referenced in the explanatory note focuses on the concept of "harmful communications" rather than the medium or platform of delivery and the definition of "communication" takes in any kind of communication whether visual (by image), by text, by way of any digital communication be it by way of search engine or social media sites. In similar vein the proposed definition of "digital undertaking" takes in a very broad spectrum of online service providers/platforms and this similar to the approach which has been taken in the Australian jurisdiction.

In the very recent DCMS Select Committee Report in the UK entitled "Regulating in a Digital World" (March 2019), <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf>, one of the principles advocated at Chapter Two is the principle of parity. The report defines parity to mean that regulation should seek to achieve equivalent outcomes online and offline particularly in relation to harmful content and exposure of children and adults to harmful content. This report advocates that it is behavior and outcome and not the medium or platform which ought to be the focus of regulation thereby taking in a range of online and digital platforms and ensuring accountability. Consistent with this approach, the UK Online Harms White Paper https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf advocates an approach which takes in very broad range of companies developing the concepts of accountability transparency and reporting. Work undertaken in this regard in the UK has included consultation with those companies to assess how their reporting structures work so that the proposed regulator can engage with current industry practices. The UK Government's first annual transparency report is due to be published later this year. It would be instructive for the proposed regulator in Ireland to undertake a similar approach

Q. 4 – How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered? For example,

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health
- **[Sections 2, 4 & 6 of the explanatory note]**

A.4- As outlined above, RTÉ supports a broad definition of harmful content. At a minimum the categories of content outlined above should be included within any definition of "harmful content". By way of general comment, there are clear priorities for online standards setting in the context of legislation/regulation. The protection of minors is a serious concern in relation to content. Access by children to the content referred to above and specifically provided for in the AVMS Directive in terms of setting minimum standards across Member States of the EU is a clear priority for a regulator. People want to be protected from illegal content, in that people should be able to expect that they are protected from hate speech and other illegal material as they are through content and standards regulation such as exists for traditional broadcast services licensed in Ireland and throughout the EU. Violent content, content that promotes incitement to crime/terrorism also needs to come within this definition also. RTÉ suggests that is instructive to look at the nature of the harmful content or activity which the UK views in scope in its White Paper. These take in "extremist content and activity", "coercive behavior" and "disinformation".

In this regard, Ofcom in its paper entitled “Addressing Harmful Content Online (A perspective from Broadcasting and On-Demand Standards Regulation)”

https://www.ofcom.org.uk/data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf correctly identifies that amongst the priorities for online standards setting, standards in news is a particularly complex area and one where there is a growing public concern about misleading content, including disinformation and “fake news” which has consequences for public trust and democratic processes and is therefore “harmful” in this way. Accuracy in news is an extremely important area of protection regardless of how content is delivered. There are areas where accuracy is critical online- for example where inaccuracy is deliberately designed to mislead large numbers of user and sometimes to influence key events such as elections or referendums. At present we have a regulatory system where a linear broadcasting is regulated in the context of election coverage however online is subject to no regulation in this area. A Report in the UK by DCMS in February 2019 entitled “Disinformation and Fake News” (<https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/1791.pdf>) includes a reference to a detailed report completed by the ICO in the UK last year into use of the data analytics in political campaigns. The Report points to the fact that “non-broadcast political advertising remains unregulated and the ability of social media companies to target content to individuals is a new phenomenon which creates issues in relation regulation of elections”. Most people do not realise that their social networks affect what news they see or that much of the content that they see draws on data about their online history.

Any proposed regulator with responsibility for harmful content should have a statutory duty to promote digital literacy. The BAI currently has an important role as regards the promotion of media literacy. Children and adults need to be equipped with the necessary information to work out what is accurate and trustworthy. Diminishing standards in this regard is a real harm in the context of this question, as well as online manipulation of what people read. This directly affects the trust that people have in the media. An EBU study Trust in Media 2018 (<https://www.ebu.ch/publications/trust-in-media-2018>) found that various national and international studies come to the same conclusion: trust in media is at an all-time low. The study found that broadcast media are trusted the most, while social networks are trusted the least, and the gap is widening. The increasing prevalence of misinformation and fake stories in the internet is seen as the main cause for declining trust levels, as they pose major threats to modern societies and democracies. This is a harm.

In terms of the national context, Reuters Institute Digital News Report (Ireland) report (https://fujomedia.eu/wp-content/uploads/2017/06/BAI_FuJo_digital_news_2017_WEB.pdf) shows that Ireland's news consumers have higher levels of trust in the news media than the international average, which needs to be protected. RTÉ's own research however found a decline in trust of media outlets available in Ireland as a source of news in the past year, albeit that RTÉ remains more trusted as a source of news than any other media organisation, with 78% agreeing. RTÉ suggests that the relatively high levels of trust that it sustains, is linked to the clear statutory obligations set out in the Broadcasting Act, 2009; the effective system of regulation and oversight in terms of content by the BAI; as well as the BAI codes which have a clear statutory basis. The extension of a statutory code enshrining content standards for online particularly in relation to harmful content is to be encouraged and can only assist in rehabilitating standards of trust in the media.

In this context it is instructive to examine the concept of “harm” in the context of linear broadcasting. There are for example both clearly defined and prohibited commercial communications for broadcasters that were deemed to be harmful. Underpinned by primary legislation (Section 42 of the Broadcasting Act 2009) the BAI's ‘*General Commercial Communications Code*’ sets out very clear objectives:

- To ensure that the public can be confident that commercial communications are legal, honest, truthful, decent and protect the interests of the audience.

- To ensure that commercial communications do not impinge on the editorial integrity of broadcasts.
- To provide guidance to the general public on the standards they can expect from commercial communications on broadcasting services.
- To provide clear guidance to broadcasters as to the standards to which commercial communications shall adhere.
- To provide broadcasters with a simple, flexible and comprehensive code that does not impede in an unwarranted manner their right to communicate commercial messages.

These objectives are relevant and appropriate in the context of the regulation of harmful online content. Harmful and often misleading commercial (paid for) communications has been a key feature of the internet for many years and given that online video ads are now sharing the same screens as broadcast ads, the current regulatory deficiency stands to undermine the objectives of the current *General Commercial Communications Code* for broadcasting.

Of particular concern is the dramatic rise in the use of paid for video advertising and content, distributed largely through social media and video sharing applications, directed towards political ends. Ireland (and the UK) currently has a very clear regulation relating to prohibited commercial communications for broadcasters, which includes advertising directed towards a political end. The BAI code states that: *'Commercial communications that are directed towards a political end or that have any relation to an industrial dispute are prohibited.'* This is underpinned by Section 41(3) of the Broadcasting Act, 2009 which is statutory prohibition on broadcasting of advertisements with a political end. If democracy as a whole is to be protected and to thrive, it is timely that greater consideration is given to an appropriate regulatory framework which addresses the current disparities between broadcasting and online services.

Similarly, present operations and policies operated by broadcasters infer stricter guidelines for commercial communications on their online properties than are operated by non broadcast online properties, leading to ambiguous commercial messaging on the internet. There is opportunity in aligning commercial principles here.

In the UK the DCMS Committee in its workings on internet regulation has proposed that the standards objectives in broadcasting regulation could be used by the UK Government as “a basis for setting standards for online content”. RTÉ submits that the BAI Code of Programme Standards has as amongst its key underlying principles; respect for privacy, protection of children, protection from harm. The objectives of this code are to promote responsible broadcasting, to advise viewers and listeners of “the standards they can expect from broadcasting services, and to enable viewers and listeners to hold broadcasters to account“ by way of an accessible complaints system with the BAI publishing the outcome of such complaints. Whilst it would be over simplistic to transport the linear broadcast regulatory system to online, RTÉ submits that the regulatory system for online needs to incorporate a broad definition of harm just as the BAI code currently does with a view to ensuring responsible standards in the interests of users.

At law, impartiality requirements do not apply to online news. The regulatory framework for impartiality was created specifically for broadcast content. Whilst the broadcasting rules would be technically impossible to transpose to an online environment, regulation in this area needs to be mindful that people should be able to know who has created the content they see and what choices online platforms make in how they prioritise, present or exclude different content, particularly where content is sensitive or influential. A new law in France passed in November, 2018 allows judges to order the immediate removal of online articles that they decide should constitute disinformation during election campaigns. The law states that users must be provided with “information that is fair clear and transparent” on how their personal data is being used, and

sites have to disclose money that they have been given to promote information. With due regard for the important principle of freedom of expression (on all platforms), RTÉ submits that the approach to “harmful” content must take on board threats to the integrity of elections and referenda which are vital aspects of a democratic society.

Strand 2 – Video Sharing Platform Services

Q. 5 – The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples. **[Section 3 of the explanatory note]**

A.5. - RTÉ notes the definition of “video sharing service” in the AVMS Directive which refers to services where an “essential functionality” of the service or “principal purpose” of the service is devoted to providing programmes, user generated videos or both ...for which the [VSP] provider does not have editorial responsibility..” RTÉ notes that the definition furthermore requires that the “organisation of [content] is determined by the [VSP] provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.” The Recitals to the Directive provide some indication on their interpretation and Recital 5 in particular. This provides that the Commission should where necessary issue guidelines after consultation with the Contact Committee on the practical application of the essential functionality criterion of the definition of a “video-sharing platform”. Recital 6 further provides that where a “*dissociable*” element of a service constitutes a VSP, only that section should be covered by the Directive. Video clips embedded in the editorial content of electronic newspapers and magazines would not be covered. RTÉ does not take issue with this in that the inclusion of a video clip or audiovisual material may be ancillary or secondary to the overall function of the service. Without prejudice to guidelines that may be issued by the Commission, RTÉ submits that the definition of VSPs should be interpreted in a manner which in addition to the obvious examples of Facebook and YouTube also includes social media platforms such as Twitter, Instagram, Whatsapp etc., and particularly platforms which are used by younger people. It may be necessary to assess VSPs on a case by case basis given that technology is expanding the concept of “sharing” with an ability to review or revise the list of regulated VSPs in Ireland. RTÉ submits that the overall regulation of VSPs should come under the remit of the single statutorily appointed content regulator (see A.1 above) which RTÉ suggests could expand and/or build upon the existing template of content regulation in place via the BAI.

Q. 6 – The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator? **[Section 3, 4, 5, 6 & 8 of the explanatory note]**

A6 - RTÉ agrees with a principles-based approach to regulation of online content and particularly with regard to protecting the public from harmful content, hate speech and the distribution of content which may be criminal in nature; terrorist or racist material. RTÉ notes that VSPs are required to take appropriate measures to protect the public in this regard. The measures are set out at Articles 28a and 28b of the AVMS Directive. It is also noted that these requirements will also apply to platforms in respect of other user generated content relevant under strand 1. As the Department is aware provisions of Article 4 of the Directive permits Member States to require media service providers (under their jurisdiction) to comply with more detailed or stricter rules in the fields coordinated by the Directive. This provides an opportunity for Ireland as a Member State to ensure that national safety standards regarding online content are consistently applied.

RTÉ has offered detailed comments in relation to the regulatory structure which should apply in relation to Strand 1. To some extent, RTÉ would replicate its comments here. In order to ensure that there is an effective system of regulation and oversight of VSPs with regard to the measures outlined in the Directive, such relationship must have a statutory basis and any code of practice that is put in place by a VSP must be approved by the regulator which in turn should have the authority to ensure its compliance. The regulator should have the authority to ensure that any code of practice complies with national digital safety standards in consultation with the relevant bodies and stake holders as outlined at A.1. above.

In addition to the requirements set out in the Directive, RTÉ submits that those VSPs which come under the jurisdiction of the regulator in Ireland also comply with the same regulatory principles such as obligations to remove content, compliance with take down procedures. VSPs which are the subject of regulation in Ireland must ensure that its users are given transparent and accurate information concerning its service. In similar vein their terms of use should be made available to the regulator for approval and/or for confirmation of compliance. Similarly other measures which VSPs are obliged to put in place such as the provision of age verification and parental control systems to users should be made available to the regulator for prior approval. In addition any proposed dispute resolution procedures should be made available to a regulator (for approval) with a default position that such disputes can be dealt with by the regulator in the absence of resolution.

Q. 7 – On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place? [Section 3, 4, 5, 6 & 8 of the explanatory note]

A7 - Article 28b(5) of the AVMS Directive places an obligation on each Member State to establish the necessary mechanisms to assess the appropriateness of the specific measures outlined in the Directive. RTÉ submits that the most effective way of doing this is to ensure that that VSPs are subject to the oversight regime as that which is put in place under Strand 1. In this regard, RTÉ submits that this would ensure consistency of standards with little differentiation as to platform type. For example whilst the measures applicable to VSPs require them to put in place measures of self-regulation, those measures need to be approved in accordance with relevant national digital standards. By this we mean standards which the regulator should be in a position to assess and put in place in conjunction with the Office of Internet Safety, the Ombudsman for Children (OCO), the Department of Children and Youth Affairs as previously outlined above. Standards change with technology and the regulator could work with relevant advisory groups taking in the above to ensure that all digital services comply with best practice.

Thereafter RTÉ submits that the regulator should be in a position to seek compliance reports from VSPs, proof of age verification measures in place and other proactive technological tools to enable identification, flagging or blocking, removal of illegal and harmful content and behavior, as well as sight of user terms and conditions for approval. In addition annual reports on compliance, timelines for responding to complaints should be made available to the regulator. The regulator in turn should have the power to publish those reports to ensure transparency and accountability and so users can make informed decisions about online use. The AVMS Directive refers specifically to the obligation on Member States to ensure that there effective and efficient mechanisms to handle disputes. RTÉ submits that the regulator should have approval over any proposed mechanism with the regulator being involved in an appeals process as necessary.

Strands 3 & 4 – Audiovisual Media Services

Q. 8 – The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services? **[Section 4 of the explanatory note].**

A8 - As we know the media landscape has shifted dramatically in less than a decade. Millions of people within the EU and particularly younger people access content online, on demand and on mobile devices. Global internet video share in consumer internet traffic is expected to increase to 80% by the end of 2019. As we know as part of the Digital Single Market Strategy in 2015, the Commission proposed a new AVMS Directive that included a new coordinated approach to online platforms disseminating audiovisual content. The AVMS Directive recognises further the growing convergence between traditional audiovisual media services such as television and existing and emerging on-demand services and in doing so it seeks to realign content requirements and level the playing pitch between providers. As things stand, ODPS are not regulated by the BAI but are subject to voluntary regulation pursuant to the ODAS code.

RTÉ suggests that quite aside from the further closer alignment of content requirements which the AVMS Directive now requires, Ireland is already out of step in terms of regulating on demand audiovisual services. In the UK these services are already regulated by Ofcom. ODPS services coming within the jurisdiction of Ireland should now be subject to the same content standard as linear television. Changes to the then AVMS Directive in 2010 demonstrated that there was substantial overlap in content between ODPS and linear television. This has since been borne out by practical experience, RTÉ submits that the newly revised AVMS Directive presents an important opportunity (along with the other changes to regulation required in respect of harmful content etc., at Strand 1) to ensure that in the interests of maintaining standards of quality and trustworthiness, transparency and predictability that content standards and procedures in respect of ODPS are aligned to reflect those for linear television. In addition there is no enforcement record for ODPS in terms of compliance. We say that this is now urgent not just in relation to the areas of content depicted and highlighted in the AVMS Directive but also particularly with regard to guidelines/content standards for on demand audiovisual content at the time of elections and referenda where currently the BAI's jurisdiction appears to be limited to linear.

In addition the BAI should have the regulatory authority to ensure compliance by ODPS (coming within its jurisdiction) with the obligation to ensure that 30 % of their content is European in origin and given due prominence. As RTÉ understands it, the 30% quota is intended to foster European diversity. RTÉ would favour an interpretation of transmission hours (rather than titles) to place a necessary emphasis volume of content, and that this would also have regard to the quality of culturally relevant European Works. This is to avoid a potential risk around increasing titles, regardless of quality or duration, purely to meet this quota. RTÉ sets out its views in relation to the potential for a levy under A.9 and would advocate that a mechanism to enable investment in the creation of European Works is necessary to ensure that the 30% quota remains meaningful in this context.

RTÉ notes that the issue of prominence arises in the context of on-demand services. However this issue is one which merits close consideration in the context of any regulatory reform. The AVMS Directive also recognises the need for due prominence of local content on audio visual services and on-demand platforms. It provides that Member States may impose prominence requirements.

National cultural expression and audience choice will ultimately be best supported if there is a sufficiently strong and vibrant national media sector. A healthy, diverse and pluralist media sector requires national policy objectives and activities to foster and support enhanced sectoral sustainability and to ensure prominence of culturally relevant content. The value of such content is however only fully realised when audiences are enabled to access it, and select it.

RTÉ would therefore suggest that in terms of a greater realignment between the regulatory framework for both linear and online content providers, that due consideration is given to the matter of prominence. In this regard, RTÉ shares the BAI's view that the provisions of Sections 74 and 75 of the Broadcasting Act 2009 are outdated.

In the UK for example, Ofcom have proposed revisions to the EPG Code and is considering extending the prominence regime to VOD discovery and the rules around navigation to PSB content.

RTÉ's own research demonstrates that Irish audiences expect public service content and channels to be easily findable and discoverable, and furthermore believe this is important that they are. The transposition of the revised AVMS Directive can ensure prominence for public service media providers, and presents the opportunity to modernise the legal and regulatory framework to give efficacy to culturally relevant content: that it is not only produced, but available, findable and discoverable. RTÉ would urge that nationally a more pro-active role is taken in this area, now and over this transposition period.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund? [Section 4 of the explanatory note]

The Sound & Vision scheme, among other policy initiatives, has helped to foster the independent creative sector, which is to be welcomed. This is of benefit to the Irish public and to media plurality generally and as such RTÉ fully supports the principles that under-pin this scheme.

In the context of AVMSD transposition RTÉ supports the principle of financial contributions from ODPS, and indeed opt-out television services, based on revenues earned in the targeted Member State in order to support the creation of culturally relevant content. The Sound & Vision scheme is already established and operates effectively, and there is potential scope for it to evolve further in this regard.

This concept has already had some initial considerations in Ireland. DCCAE commissioned consultants Indecon to conduct a Review of the Impact of 'OptOut' Advertising on the Irish Broadcasting Sector. (<https://www.dccae.gov.ie/en-ie/news-and-media/publications/Documents/27/Review%20of%20Impact%20of%20Opt-Out%20Advertising%20Redacted%20Version.pdf>).

Published in May 2018 the report advocated inclusion of the option in that now exists in AVMSD Article 13 to *permit Member States to require a financial contribution from broadcasters targeting audiences in their territories to assist in funding the production of local/indigenous content*, and further recommended that *consideration should be given to introducing a nondiscriminatory levy to assist the funding of indigenous content*, and that the German state aid case could be an *indicative blueprint*. Indecon noted that the impact and implementation of such a levy should be considered.

An overview of the existing approaches of European Member States with regard to the imposition of investment obligations for on-demand audiovisual media services providers, supported of the Flanders Department of Culture, Youth and Media was conducted by the Research group Centre for Studies on Media Innovation and Technology (SMIT). (http://smit.vub.ac.be/wp-content/uploads/2018/12/VUB-VOD-report-2018-.pdf?utm_source=Policy+Briefs+%28NL%29&utm_campaign=dd1c70a3af-EMAIL_CAMPAIGN_2017_09_20_COPY_01&utm_medium=email&utm_term=0_f4752da522-dd1c70a3af-337161161) .

This report published in 2018 and titled *Obligations on on-demand audiovisual media services providers to financially contribute to the production of European works* found that there are three ways of promoting investment in European works by on-demand audiovisual media services: 1. quota for carrying audiovisual works in catalogues; 2. direct investment obligations based on a percentage of revenue; 3. investment obligations in the form of a levy to be paid to an audiovisual fund. The first option is encompassed in the AVMSD and see our views under A8.

The study found that in total, nine countries in the EU27 already impose financial obligations on the providers of on-demand audiovisual media services. Four have a so-called 'Netflix tax' in place i.e. obligations for non-domestic providers of on-demand audiovisual media services.

The overall conclusion of this European study was that 'requiring a direct, levy-based financial contribution to a film fund or other agency supporting the creation of audiovisual works seems to be the most straightforward way to ensure on-demand audiovisual media services providers are contributing to the production of European works'.

RTÉ would therefore strongly advocate that ODSPs earning revenues via targeting Irish audiences should contribute back via a levy. At present opt-out television services and on-demand services are earning significant commercial revenues with no benefit for locally produced content. Given that media consumption trends have changed and on-demand viewing is here and exists alongside traditional live linear broadcasting, any such levy or scheme should be generally reflective of media behaviours and preferences, and should support investment in indigenous production. Any scheme should be accessible to contributors in a non-discriminatory manner.

Q. 10 – The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content? [**Section 2, 4, 5, 7, & 8 of the explanatory note**]

A10 - As previously outlined above, regulation of online content will give rise to freedom of expression concerns. We have already seen the principles based approach to protection of personal data in the context of GDPR which seeks to balance freedom of expression with individual/ data subject's entitlement to privacy in the context of data protection. This has been described as privacy by design however the legislation seeks to balance that right with freedom of expression. This task is an even more challenging one in the digital and online context. There are however a number of privacy concerns that arise in the online context and particularly in relation to social media platforms. Social media platforms have huge volumes of users and use of social media is commonplace amongst all age demographics and particularly younger age demographics from as young as eight or nine. This has affected accepted norms around privacy. The reality is that a large section of society has become comfortable with sharing personal content with large audiences where content becomes permanent once posted. The permanence aspect is one which gives rise to further privacy concern where the self-regulatory approach taken by social media platforms is no longer adequate in terms of redress where a user

experiences harassment or other privacy interferences online. RTÉ supports an approach to reform in this area which is largely based on civil law (as proposed by way of the National Legislative Proposal under Strand 1) with a statutory system of enforcement and oversight (without the necessity to criminalise behavior save in certain situations) and reforms around policy, education, and media literacy as means of addressing harmful online content. (This is similar to the approach taken in New Zealand which favours user empowerment as a method of dealing with online harm). Such an approach presents less risk of interference with rights to freedom of expression.

RTÉ would also point out that as is stated on page 3 of the Explanatory Note, online platforms are already required to remove content which it is a criminal offence to disseminate when they are notified of it. This 'requirement to remove' represents an encroachment on freedom of expression, but the encroachment can be challenged in an individual case by recourse to the Irish courts. The courts would be bound to consider the compatibility of the restriction with Article 10 of the European Convention on Human Rights. In creating a requirement for online platforms to remove content which it is not a criminal offence to disseminate, Ireland must ensure that providers of content to online platforms, and the operators of such platforms, have access to appeals mechanisms which allow freedom of expression considerations to be taken into account. While a regulatory authority may be tasked with dealing with complaints, the decisions it makes must be capable of being reviewed judicially by the courts.

Q. 11 – How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the e Commerce Directive? [Section 2, 4, 5, 6, 7, & 8 of the explanatory note]

A11 - Under the current liability regime which is derived from the EU's e Commerce Directive, platforms are protected from legal liability for any illegal content that they host (rather than create) until they have actual knowledge of it or are aware of facts or circumstances from which it would have been apparent that it was unlawful, and have failed to act "expeditiously" to remove or disable access to it. That is to say that they are not liable for a piece of user generated content until they have received a notification of its existence. The existing liability regime does not provide any mechanism to ensure that proactive action to identify and remove content is taken. Proposals for reform in this consultation process with regard to Strand 1 and 2 should focus on a regulatory framework which ensures that online services have effective processes to deal with online harm and effective and proportionate policies and procedures to assist with take down of illegal content and effective oversight of same by way of a statutory regulator. The EU Commission has already acknowledged in its Communication on Online Platforms and the Digital Single Market that further guidance and greater clarity is required in relation to these liability provisions if online services are to take more responsibility in terms of effective take down procedures etc. RTÉ submits that there has already been a significant review of this approach in the context of EU Copyright Directive which has now been accepted by the EU Parliament and which in certain instances places a more active monitoring responsibility on qualifying host providers with regard to liability for copyright infringement. There is no reason why the liability regime cannot be reviewed and extended in similar vein in relation to harmful online content.

Strands 1-4 – Regulatory Structures

Q. 12 – Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,
- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on- demand audiovisual media services, to a restructured BAI and creating another regulatory body with

responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered? **[Section 5 of the explanatory note]**

A12 RTÉ considers that a single regulator would be preferable covering all four streams identified in the Explanatory Note. The present BAI model of specific Committees reporting to the Board rather than a multi-person Commission with a Commissioner for each different sector would in RTÉ's view ensure a more consistent approach to issues of online safety and harm, as well as ensuring consistent standards with regard to online content. A restructured BAI could as a Media Commission also regulate content standards in the context of linear and on demand platforms at specific Committee level. The Media Commission/Regulator could also work and liaise closely with relevant interest groups including those from industry as well as building on the work of the Internet Safety Committee in the Department of Justice and Equality, as well as the office of Ombudsman for Children, and other relevant Government Departments particularly in drafting and reviewing acceptable national standards for digital safety in Ireland. The Media Commission could also play a key role in a media literacy strategy and improved education and guidance in relation to online and digital communications within schools in liaison with the Department of Education and Skills.

The AVMS Directive is clear and unambiguous in its requirement that Member States put in place an independent and adequately resourced regulatory authority to ensure compliance with the AVMS Directive and RTÉ strongly supports this position.

Q. 13 – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated? **[Section 5 of the explanatory note].**

A. 13 The funding arrangements currently in place for the BAI's current remit should be maintained. As previously pointed out at Q12, tasking an existing regulator (such as a Media Commission by way of a re-structured BAI) to assume responsibility for online safety and regulation of content in relation to ODPS and VSPs would mean that a new regime would have the advantage of regulatory experience and credibility as well as an existing funding structure/model. In this regard a Media Commission/new regulator should be funded by way of a levy or a fee from those additional services which are in scope. RTÉ submits that the levy should be assessed in a proportionate manner in terms of the scale of the online service and its presence in the market place. Appropriate thresholds could be put in place in this regard in terms of calculation of fees or levies. What is important is that any new regulatory structure is put on a sustainable footing and supported in a fair and proportional manner by relevant services.

Strands 1 & 2 –Sanctions/Powers

Q. 14 – What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

Q. 15 - What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,
The power to issue administrative fines,
- To issue interim and final notices to services in relation to failures of compliance and the

power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction. **[Sections 2, 4, 6, 7 & 8 of the explanatory note]**

A.14/15 - Noting that, as stated on page 10 of the Explanatory Note, it is a matter for Ireland to decide what powers and sanctions are appropriate in order to ensure that Ireland meets its obligations under the AVMS Directive, and noting further that under the National Legislative Proposal Ireland is at liberty to decide what powers and sanctions are appropriate and needed by the regulator in order to ensure that the policy goal is met, RTÉ agrees with the proposed powers and sanctions set out on pages 10 and 11 of the Explanatory Note. Subject to its comments at A.16 below, RTÉ does not see a case to differentiate between regulation for VSPs under Strand 2 and regulation adopted in respect of the National Legislative Proposal.

Q. 16 - Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate? **[Sections 2, 4, 6, 7 & 8 of the explanatory note]**

A.16 – Establishing an independent mediation service appears to be the optimum means of meeting the AVMSD requirement for Ireland to put a mechanism in place for the impartial settlement of disputes between VSPS providers and users. While we note that Ireland is engaging with the European Commission to establish what the Commission's expectation is regarding this requirement, which will shed light on the extent to which criteria can be imposed to limit the use of the mediation service to the most serious cases, RTÉ submits that no such criteria should be established at the outset but rather that the mediation service be empowered to 'consolidate' complaints so that a single solution can be found to multiple complaints about the same or similar content.

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Samaritans is concerned that harmful material is abundant and easily accessed on online contents, for example, detailed instructions on how to construct suicide devices. We need a stronger approach to suicide and self-harm related harmful content. Samaritans research with the University of Bristol (2017) shows that many young people use online spaces to access help and/or share stories of recovery or healing and that is recognised to be an important source of support for individuals. However, some content on issues like self-harm and suicide can be easily identified as dangerous and can be triggering and upsetting. There is also a growing grey area of content whose effects are harder to determine with the limited intelligence we have on the subject, so the solution is not straight forward. Greater research is required in this area. Samaritans believe challenges around harmful content in the online environment and social media need to be tackled as part of a broader approach to children and young people's mental health, rooted in public health. For many, it is an ordinary part of their lives and therefore can't be tackled in isolation. Teachers, clinicians, and other professionals working with children all have a role to play in understanding children and young people's digital use and helping them to keep themselves safe. A robust code of conduct needs to be set for online platforms that sets out quality standards for the removal of online harmful content. Clear standards are needed to set out consistent expectations for responsible practice by online companies and ensure harmful content is restricted across the internet, not just on social media. An independent regulator should also be established to monitor the online environment and removal of harmful online content. This regulator should scrutinise companies' policies and progress, monitor reporting progresses and investigate complaints from the public, holding companies to account for meeting the agreed standards. For any user who raises concerns, there should be clear processes in place to ensure they are also directed to support in case they need it or are aware of other people who would benefit. Designated bodies or experts in online harms (such as Samaritans in the area of self-harm and suicide) should be able to bring 'super' complaints and evidence-based concerns to the attention of the regulator. An independent regulator should be established to monitor the online environment and removal of harmful online content. This regulator should scrutinise companies' policies and progress, monitor reporting progresses and investigate complaints from the public, holding companies to account for meeting the agreed standards. For any user who raises

concerns, there should be clear processes in place to ensure they are also directed to support in case they need it or are aware of other people who would benefit. Designated bodies or experts in online harms (such as Samaritans in the area of self-harm and suicide) should be able to bring 'super' complaints and evidence-based concerns to the attention of the regulator. With regards to the removal of harmful content from online platforms and the role of the regulator in individual complaints, work needs to be undertaken to identify the scale of the issue to ensure the most effective use of the regulator's capacity. A reporting mechanism enabling users to raise complaints to the regulator within categories, enabling the regulator to review groups of complaints and therefore provide an independent assessment of whether companies are effectively and consistently implementing their policies, may be the most effective way of dealing with individual complaints.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

N/A

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Online platforms that provide spaces for user generated content and enable interaction between users that are not subject to any other forms of regulation should be within scope. This would include: • Social media platforms and chatrooms (i.e. Facebook, Twitter, SnapChat, Instagram) • Search engines and information sites (i.e. Google, Bing, Wikipedia, chatrooms) • Video Sharing Platforms: (i.e. YouTube, Vimeo) Traditional media and video streaming on-demand services often already comply with press and broadcasting rules, especially if created and broadcast in Europe.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Samaritans agrees that each of the examples outlined should be included in the definition for harmful content, but that a specific strategic approach is required for each different harm. It must also be noted that when carefully managed and designed, the online environment can provide a supportive forum for people to seek help when they have suicidal thoughts, as well as to interact and build relationships that could help build their emotional resilience. Samaritans believe more resources and funding are required towards exploring technological solutions to both minimising harmful content, and positive ways online platforms can be used to provide supportive, safe places.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

N/A

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Our research with University of Bristol found that online content that glamourises, normalises and informs users on self-harm or suicide techniques can be harmful for vulnerable users. Video content may normalise this even further for young people. An independent regulator should be given the power to monitor video sharing platforms and order removal of harmful content. This regulator should scrutinise companies' progress, monitor reporting progresses and investigate complaints from the public. This would be similar to the powers of the BAI and Press Council of Ireland.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

N/A

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

N/A

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

N/A

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Suicide and self-harm related content is available across the internet: on social media platforms, on chatrooms, on webpages, on news outlets and information sites. Many of these online platforms are based outside of the Ireland, or Europe, and/or don't have executives that can be easily held accountable. Therefore, effective removal will only be possible with the cooperation of multiple government agencies, private sector companies, end users and their families. In terms of suicide prevention, public health, child protection and human rights, there are clear lines of responsibility and statutory frameworks in place: • It is the government's statutory responsibility to reduce deaths, promote health and wellbeing and protect young people from harm. • Online platforms have a duty of care towards to their users. • Parents, families and guardians have a responsibility to protect young people. In balancing the fundamental rights of all users, Ireland already balances freedom of expression and harmful content through regulation of the press and broadcast media. Pursuing regulation of the online space would provide consistency in approach to harmful content across all spaces. Taking a global approach to the issue will be important to maximise its impact on vulnerable users in Ireland.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits

into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

N/A

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

N/A

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

N/A

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

N/A

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance

and the power to seek Court injunctions to enforce the notices of the regulator,
and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

N/A

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

N/A

Page 2

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** Screen Ireland welcomes the proposal to regulate harmful content on online platforms. The manner and details of such regulations are not within the statutory remit of Screen Ireland.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.
[Sections 2, 4 & 8 of the explanatory note]

See Above (Q1)

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?
[Sections 2, 5 & 6 of the explanatory note]

See Above (Q1)

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

See Above (Q1)

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Screen Ireland supports the full and timely implementation of the AVMSD including in relation to Video Sharing Platform Services. The manner and details of this implementation are not within the statutory remit of Screen Ireland.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

See Above (Q5)

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

See Above (Q5)

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

On demand audiovisual media services established in Ireland should either be licensed in the same way as existing television broadcasters (apart from public service broadcasters) are licensed. If there is a new regime both private sector broadcasters and on demand audiovisual media services should be regulated in

the same way. The same content rules should also apply to both television broadcasting services (apart from public service broadcasters) and on demand audiovisual media services save as specified in the AVMSD (e.g. in relation to quotas for European Works which are 50% for broadcasters and 30% for on demand services). Public Service Broadcasters in Ireland should be subject to funding commitments to specific levels of expenditure on feature films, TV drama and TV animation. These levels should be percentages of television programme production expenditure as certified on the financial statements of the relevant broadcaster, e.g. Children and young peoples in RTE now 2% of €220m i.e. €4m per annum; should be immediately increased to 5% i.e. €11m per annum. This is so that there are “Irish stories for Irish children” on RTE television.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

1. Screen Ireland Fund The question implies that Ireland has only one content production fund which is the BAI Administered Sound and Vision Fund. This is not correct. Screen Ireland is also a state agency and a content production fund established under the Irish Film Board Act (1980) as amended. Screen Ireland provides funding to feature films, feature documentaries, TV drama series, TV animation series and to short films. These projects are then distributed in cinemas (where appropriate) and across all audiovisual services platforms including public service and private sector broadcasters and on demand audiovisual media services. 2. BAI Sound and Vision Fund The BAI Sound and Vision Fund is currently funded by 7% of the television licence fee and is limited to projects made available on broadcast services which transmits “free to air” to over 90% of Irish audiences during “primetime”. These services include broadcasters which are licensed or regulated by the BAI and broadcasters which are not regulated by the BAI e.g. BBC. The BAI does not exercise a creative/ editorial role when deciding which projects to fund but relies on the creative/ editorial decisions under the broadcasting contracts entered into by the relevant broadcasters for the projects selected. To extend this remit and creative/ editorial reliance to non linear on demand audiovisual media services available (“free to air to 90% of Irish audiences in primetime”?) in Ireland would appear to stretch this remit beyond credible levels. The BAI Sound and Vision Fund was set up in the early 2000’s and its current remit is legislated for in the Broadcasting Act 2009. As its clear from the AVMSD itself the whole framework that was “broadcasting” has completely changed and what is now to be put in place is a whole new regulatory environment for which “free to air to 90% of Irish audience in primetime” is wholly irrelevant. The whole basis for a fund like the BAI Sound and Vision fund linked to “broadcasters” is no longer in existence and consideration should be given to reallocating the funding so that it is deployed by personnel directly connected to the creative screen content development and production process. 3. Supporting Irish Creative Talent BAI Sound and Vision funding is based on the subject matter of the content and its quality (as assessed by a panel of assessors who do not engage with the applicants) rather than on supporting the talent who create the

work and how it is developed creatively. Screen Ireland on the other hand, focuses on developing Irish creative talent through early stage development funding as well as production funding across all the genres referred to above. The BAI Sound and Vision Fund does not provide development funding for projects (which as with research and development (“R+D”) funding in other areas) is the lifeblood of creative development. Unlike Screen Ireland it does not have staff who engage with the writers, directors and creative producers as they develop the work. With the severe limitations on funding for indigenous TV Drama in Ireland in particular and with the BAI Sound and Vision spending 40% of its fund on factual programming and only 30% on TV drama. The BAI Sound and Vision Fund is not responding to the urgent needs of the creative and audiovisual sector. This is in turn reflected in expenditure in RTE where only approximately 12% of total indigenous programme expenditure is devoted to TV Drama (€24m out of €220m in 2017 figures).

4. Regulator and Funder The question also has to be asked about the role of a regulator (particularly a proposed newly enhanced regulator) which is also administering a fund which is provided to projects which benefit those entities which it regulates. This would be virtually unique in an EU or worldwide context and is particularly strange when it comes also to awarding funding for projects for broadcasters it does and does not regulate. Are there not two conflicts of interest here the first being the regulator/funder conflict and the second being the regulated/non regulated broadcaster conflict?

5. Levies on Services The second part of Q9 then asks about levies on services regulated in other EU Member States targeting Irish audiences to part fund “an updated content production fund”. Screen Ireland strongly supports levies for content funding of Irish stories for Irish audiences and believes that such levies (in order to comply with EU requirements) would need to be levies both on services established in Ireland targeting Irish audiences and established in other EU States targeting Irish audiences including Netflix and Amazon as well as existing channels etc.

6. Mostly non Irish Services Since the vast majority of revenues paid by Irish audiences for screen content goes outside the country to other EU member states (even after Brexit where current UK based services will have moved to another EU jurisdiction) the overall majority of the revenues from those levies would be coming from non Irish based services. Such non Irish based services would include UK broadcasters (opt out channel advertising), satellite broadcasters (Sky) and cable operators (Virgin Media) delivering non Irish broadcast services to Irish audiences as well as on demand services such as Netflix, Amazon and the many new more recently announced services from Disney and Apple.

7. Revenues Leaving Ireland Screen Ireland would estimate that revenues for screen entertainment content which are paid by Irish audiences and Irish advertisers to non-Irish owned and/or based services exceeds €2 billion annually whereas revenues including advertising revenues paid to indigenous audiovisual services (excluding the television licence fee and TG4 subsidy which should not be included in calculating levies) is less than €250m i.e. almost 90% of all screen content revenues leave Ireland. That such services should contribute to Irish culture, Irish storytelling and to creative Irish talent generally is, we believe, something which should, now that it is possible to do, be made to happen in Ireland. The future of Irish culture and storytelling on screen is at stake here.

8. EU Precedents Attached is a Report prepared by the European Audiovisual Observatory entitled Mapping of National Rules for the Promotion of European Works in Europe. It provides details of all the various regulations (including levies

and quotas) which are applied in all the EU Member States to promote European Works. It is clear from this report that there are many precedents in the EU for applying levies in particular and there should be no difficulty in arriving at a suitable system which could be introduced in Ireland. A good EU member State example is Croatia where there are levies on cinema tickets (0.5% of revenues) on VOD platforms (2% of revenues) on broadcasters (from 0.5% to 2%) on cable and satellite service providers (0.5%) and internet connected operators (0.8%). Assuming total revenues from Ireland going to other EU jurisdictions was €2 billion per annum even a 0.5% levy would realise €10m per annum and a 2% levy would realise €40m per annum. 9. Income From Levies in Other EU Member States There is also a separate confidential report, which has already been supplied confidentially to the Department, entitled Income Breakdown of National | Federal Film Funds. One statistic from the report is that 40% of income sources for federal | national film funds in Europe comes from levies. The high contribution of levies to funds is in circumstances where in some EU countries no levies at all are applied e.g. UK where much funding for the British Film Institute (BFI) is provided by the National Lottery in the UK. In some countries almost 100% of funding comes from levies e.g. Romania and France where virtually all the funding for the Centre National de Cinematographie (CNC) (total over €600m per annum comes from levies). Levies are applied in at least 12 EU countries and Ireland owes it to its creative talent to follow their lead.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

See Above (Q9)

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

See Above (Q9)

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

The BAI should be restructured as a Media Commission responsible for all the four strands, referred to in the consultation document. These include regulating those involving editorial control (television, radio and on demand online services) and those not involving editorial control and to be covered by a proposed digital safety commissioner. Ireland already has a telecommunications regulator in COMREG and to set up two further regulators in a small country seems to be excessive and unnecessary. The role of the BAI as a full service regulator should be enhanced, protected and promoted. The management of the BAI Sound and Vision Fund should be reassigned to a newly established state agency for screen content production which would also include Screen Ireland. This is so that there is one overall state body creatively lead, providing funding for screen content production in Ireland (“storytelling by Irish creative talent for Irish and continental audience”).

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

The funding of the regulator should be a matter for government. Any levies or charges to be collected from service providers should be devoted to screen content which supports Ireland’s screen content industries particularly those telling Irish stories for Irish and international audiences.

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The functions and powers assigned to the regulator should be comprehensive and applied equally to all services. In relation to disputes between users and VSPS’s, given the EU wide nature of the jurisdiction of the regulator for services established in Ireland, Screen Ireland believes that the regulator should be empowered to deal with the most serious cases where the individual is being harmed. In relation to the National Legislative Proposal this is a matter for government policy and does not fall within the remit of Screen Ireland.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.
[Sections 2, 4, 6, 7 & 8 of the explanatory note]

See Above (Q14)

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

See Above (Q14)

**Replies to Questions in the Public Consultation on the Regulation of Harmful Content on
Online Platforms and the Implementation of the Revised Audiovisual Media Services
Directive:**

Strand 1 National Legislative Proposal: Q1 to Q4

Screen Ireland welcomes the proposal to regulate harmful content on online platforms. The manner and details of such regulations are not within the statutory remit of Screen Ireland.

Strand 2 Video Sharing Platform Services: Q5 to Q7

Screen Ireland supports the full and timely implementation of the AVMSD including in relation to Video Sharing Platform Services. The manner and details of this implementation are not within the statutory remit of Screen Ireland.

Strand 3 and 4 Audiovisual Media Services:

Q8. On demand audiovisual media services established in Ireland should either be licensed in the same way as existing television broadcasters (apart from public service broadcasters) are licensed. If there is a new regime both private sector broadcasters and on demand audiovisual media services should be regulated in the same way. The same content rules should also apply to both television broadcasting services (apart from public service broadcasters) and on demand audiovisual media services save as specified in the AVMSD (e.g. in relation to quotas for European Works which are 50% for broadcasters and 30% for on demand services). Public Service Broadcasters in Ireland should be subject to funding commitments to specific levels of expenditure on feature films, TV drama and TV animation. These levels should be percentages of television programme production expenditure as certified on the financial statements of the relevant broadcaster, e.g. Children and young peoples in RTE now 2% of €220m i.e. €4m per annum; should be immediately increased to 5% i.e. €11m per annum. This is so that there are “Irish stories for Irish children” on RTE television.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

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which are licensed or regulated by the BAI and broadcasters which are not regulated by the BAI e.g. BBC. The BAI does not exercise a creative/ editorial role when deciding which projects to fund but relies on the creative/ editorial decisions under the broadcasting contracts entered into by the relevant broadcasters for the projects selected. To extend this remit and creative/ editorial reliance to non linear on demand audiovisual media services available (“free to air to 90% of Irish audiences in primetime”?) in Ireland would appear to stretch this remit beyond credible levels. The BAI Sound and Vision Fund was set up in the early 2000’s and its current remit is legislated for in the Broadcasting Act 2009. As its clear from the AVMSD itself the whole framework that was “broadcasting” has completely changed and what is now to be put in place is a whole new regulatory environment for which “free to air to 90% of Irish audience in primetime” is wholly irrelevant. The whole basis for a fund like the BAI Sound and Vision fund linked to “broadcasters” is no longer in existence and consideration should be given to reallocating the funding so that it is deployed by personnel directly connected to the creative screen content development and production process.

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6. Mostly non Irish Services Since the vast majority of revenues paid by Irish audiences for screen content goes outside the country to other EU member states (even after Brexit where current UK

based services will have moved to another EU jurisdiction) the overall majority of the revenues from those levies would be coming from non Irish based services. Such non Irish based services would include UK broadcasters (opt out channel advertising), satellite broadcasters (Sky) and cable operators (Virgin Media) delivering non Irish broadcast services to Irish audiences as well as on demand services such as Netflix, Amazon and the many new more recently announced services from Disney and Apple.

7. Revenues Leaving Ireland Screen Ireland would estimate that revenues for screen entertainment content which are paid by Irish audiences and Irish advertisers to non-Irish owned and/or based services exceeds €2 billion annually whereas revenues including advertising revenues paid to indigenous audiovisual services (excluding the television licence fee and TG4 subsidy which should not be included in calculating levies) is less than €250m i.e. almost 90% of all screen content revenues leave Ireland. That such services should contribute to Irish culture, Irish storytelling and to creative Irish talent generally is, we believe, something which should, now that it is possible to do, be made to happen in Ireland. The future of Irish culture and storytelling on screen is at stake here.

8. EU Precedents Attached is a Report prepared by the European Audiovisual Observatory entitled Mapping of National Rules for the Promotion of European Works in Europe. It provides details of all the various regulations (including levies and quotas) which are applied in all the EU Member States to promote European Works. It is clear from this report that there are many precedents in the EU for applying levies in particular and there should be no difficulty in arriving at a suitable system which could be introduced in Ireland. A good EU member State example is Croatia where there are levies on cinema tickets (0.5% of revenues) on VOD platforms (2% of revenues) on broadcasters (from 0.5% to 2%) on cable and satellite service providers (0.5%) and internet connected operators (0.8%). Assuming total revenues from Ireland going to other EU jurisdictions was €2 billion per annum even a 0.5% levy would realise €10m per annum and a 2% levy would realise €40m per annum.

9. Income From Levies in Other EU Member States There is also a separate confidential report, which has already been supplied confidentially to the Department, entitled Income Breakdown of National | Federal Film Funds. One statistic from the report is that 40% of income sources for federal | national film funds in Europe comes from levies. The high contribution of levies to funds is in circumstances where in some EU countries no levies at all are applied e.g. UK where much funding for the British Film Institute (BFI) is provided by the National Lottery in the UK. In some countries almost 100% of funding comes from levies e.g. Romania and France where virtually all the funding for the Centre National de Cinematographie (CNC) (total over €600m per annum comes from levies). Levies are applied in at least 12 EU countries and Ireland owes it to its creative talent to follow their lead.

Strand 1 and 2 European and International Context: Q10 and Q11

Screen Ireland supports the protection of the right to freedom of expression set out in the Irish Constitution. However, there are constraints on this freedom set down in law and these constraints should fully apply equally to the online world as they already apply to traditional media. The limited liability regime for online services under the eCommerce Directive (the safe harbour exception) should be limited to the purposes it was originally conceived to protect (interpersonal communications) and should not apply to screen content available online and accessible by the

public particularly where advertising forms part of the content available. Regulating harmful content online is a matter for government policy and is not within the remit of Screen Ireland.

Strands 1 - 4 Regulatory Structures

Q12 The BAI should be restructured as a Media Commission responsible for all the four strands, referred to in the consultation document. These include regulating those involving editorial control (television, radio and on demand online services) and those not involving editorial control and to be covered by a proposed digital safety commissioner. Ireland already has a telecommunications regulator in COMREG and to set up two further regulators in a small country seems to be excessive and unnecessary. The role of the BAI as a full service regulator should be enhanced, protected and promoted. The management of the BAI Sound and Vision Fund should be reassigned to a newly established state agency for screen content production which would also include Screen Ireland. This is so that there is one overall state body creatively lead, providing funding for screen content production in Ireland (“storytelling by Irish creative talent for Irish and continental audience”).

Q13 The funding of the regulator should be a matter for government. Any levies or charges to be collected from service providers should be devoted to screen content which supports Ireland’s screen content industries particularly those telling Irish stories for Irish and international audiences.

Strands 1 – 2 Sanctions/Powers

Q14-16 The functions and powers assigned to the regulator should be comprehensive and applied equally to all services. In relation to disputes between users and VSPS’s, given the EU wide nature of the jurisdiction of the regulator for services established in Ireland, Screen Ireland believes that the regulator should be empowered to deal with the most serious cases where the individual is being harmed. In relation to the National Legislative Proposal this is a matter for government policy and does not fall within the remit of Screen Ireland.

Public consultation on the Implementation of the revised Audiovisual Media Services Directive

2019

Introduction

Screen Producers Ireland (SPI), as the national representative body of Irish Independent Production Companies, welcomes the opportunity to give our views in relation to the revised AVMSD and its implementation into Irish law.

About Screen Producers Ireland

Screen Producers Ireland (SPI) is the national representative organisation of over 100 independent film, television and animation production companies.

SPI promotes the growth and sustainability of a strong independent production sector. SPI is focused on shaping a sector that is comparable to best international standards. SPI encourages state organisations charged with developing the industry to put in place development plans and policies for the sector that will maximise its potential.

Irish Independent Productions have been lauded worldwide, including this year when SPI member, Element Pictures, produced the multi-nominated Oscar winning film 'The Favourite'.

Other film productions made by our members include Fastnet Films produced 'Black 47', Samson Films 'Cellar Door', Ripple World Pictures produced 'Never Grow Old'. Television productions made by our members include Indie Pics produced 'Ear to the Ground', Coco Television produced 'First Dates Ireland', Crossing the Line Films produced 'The Game', and Sea Fever produced 'Ireland's Deep Atlantic'.

The Irish Independent Production Sector

The Irish film and TV sector is a vibrant industry with a sophisticated infrastructure of production companies, studios, service companies and expertise, all of which provide valuable employment in the Irish economy.

The Department of Culture commissioned Olsberg/SPI-Nordicity report into economic activity in the AV sector in Ireland stated that there are over 7,070 FTEs of employment in the live action film, TV and animation sectors. These sectors of the industry contribute €692 million in GVA and generate €184 million in export earnings. ¹

The Irish independent production sector comprises a diverse range of companies of different scale which are located throughout the country. These companies create employment in Dublin and the regions and provide skills development opportunities. They produce high quality content for PSBs and commercial media. This content is culturally relevant and loved by Irish audiences.

¹ <https://www.chg.gov.ie/app/uploads/2018/06/economic-analysis-of-the-audiovisual-sector-in-the-republic-of-ireland.pdf>

Irish Public Service Broadcasters (PSBs) are dependent on the Independent Production Sector to produce the most popular factual, entertainment and drama shows at the heart of their schedules. The Independent Production sector produces international standard programming often for substantially less than by the PSBs themselves.

The sector is currently funded by a mixture of TV Licence Fee revenue, BAI S&V funding, Creative Europe Media funding, Irish Language Broadcasting Fund, S481 tax relief, co-production financing, and sponsorship.

However, the sector is currently facing a funding sustainability issue. Over the last 9 years, there has been a consistent reduction in investment to the Independent production sector, from RTÉ, in particular.

In 2008, RTÉ spent approximately €80 Million on independent productions and this amount has consistently reduced since then, and currently stands at €39.5 Million in 2018. There is also an issue where there is consistent oversubscription of the Sound and Vision Fund with a declining level of funding awarded round on round.

However, both RTÉ and the S&V Fund are supported by the TV Licence Fee and there is still no significant political action being taken to reform the Licence Fee to ensure its long term sustainability.

SPI believes that the next five years will define the future of Irish television as the evolving media landscape continues to move to non-linear programming and online distribution. The traditional ways of engaging with media content are being left in the past and the competition from international content providers for viewers is an ever increasing threat to the traditional methods of distribution and consumption.

The Government's implementation of the revised AVMSD is an opportunity to show their commitment to the sustainability and growth of the Irish Independent Production Sector.

Consultation questions

SPI is making this submission in relation to specific questions outlined in the consultation document that deal with the implementation of the revised Audiovisual Media Services Directive.

This submission is structured as a response to each of the questions in the consultation document, which are included below as a reference.

Q. 8 – The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

The explanatory document gave the following further details on question 8:

“The Directive requires a number of other changes in the regulation of linear services (i.e. traditional TV) and non-linear services (i.e. on-demand services – e.g. RTÉ Player, Virgin Media Player, iTunes, etc.).

Some of these changes are:

- *The revised Directive further aligns the rules and requirements for Television Broadcasting Services and On-demand Audiovisual Media Services.*
- *The revised Directive requires a 30% quota of European Works on On-demand Audiovisual Media Services.*
- *The revised Directive allows an EU country to levy revenues a Television Broadcasting Service or an On-demand Audiovisual Media Service makes in that country even if it is based in another EU country.*

The most significant change from an Irish perspective (apart from the provisions which apply to VSPS) is the requirement to more closely monitor the activities of on demand services. This consultation seeks the views of stakeholders and the general public as to how Ireland should approach the implementation of this aspect of the revised Directive.

For example:

- What type of regulatory relationship should exist between an on-demand service established in Ireland and the Regulator?

- Should the same content rules apply to both linear and on-demand services?”²

Regulatory relationship

The implementation of the revised AVMSD represents an opportunity for the Broadcasting Authority of Ireland (BAI) to follow the example of OFCOM in the UK and regulate the On-demand Programme Services (ODPS) operational within the jurisdiction of Ireland to the same

² <https://www.dccae.gov.ie/en-ie/communications/consultations/Documents/86/consultations/Consultation%20Explanatory%20Note.pdf>

regulatory standards as linear services. This includes the same content standard as linear television.

The proliferation of non-linear services is increasing at a substantial rate and our regulatory body must be in a position to respond to the changes in the market, and ensure a level playing field for all participants in the Irish broadcasting market.

In 2016, the European Coordination of Independent Producers (CEPI), which SPI is a member of, in their submission on the then draft revised AVMSD noted:

“... that the distinction in the rules on commercial communications between linear and non-linear services is no longer relevant for several reasons. On the first hand, media convergence is changing the paradigm and will continue to do so in the future, blurring the lines between linear and non-linear services. Consequently, the current distinction creates an unfair framework in which AV players are discriminated and are subject to different legal burdens.”³

The implementation of the revised AVMSD is an opportunity to create a situation where no one provider of content is allowed an unfair advantage over another simply due to their subscription or broadcast model.

SPI recommendation:

- The Broadcasting Authority of Ireland (BAI) should regulate the On-demand Programme Services (ODPS) operational within the jurisdiction of Ireland to the same regulatory standards as linear services, including content standards.

30% Quota for European Works

The other element of question 8 is the revised AVMSD requirement that a quota of 30% of European works be maintained on On-Demand Audiovisual Media Services (ODAVMS).

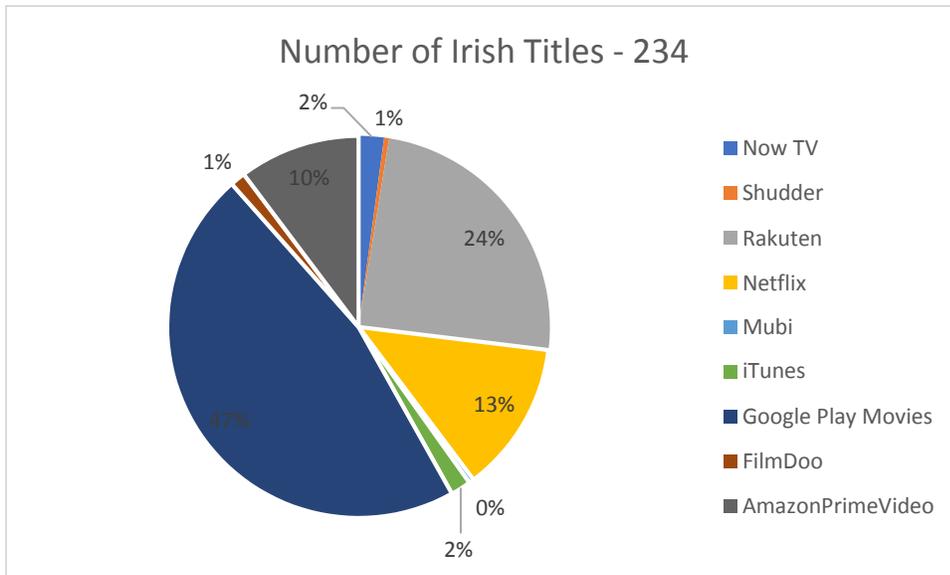
From the perspective of Irish Independent Producers this requirement creates the conditions for an increase in content commissioning from ODAVMS. At a time of tightening budgets and fewer opportunities for commissioning from PSBs and other state funds, the requirement could provide opportunities for the Irish industry.

A recently launched project of the European AV Observatory gives a current listing of Irish content on European VODs. The new LUMIERE VOD is a directory of European films, developed by the AV Observatory, available on on-demand services in Europe. You can search all the services and countries where a film is released on VOD by country.⁴

³ <https://www.cepi-producers.eu/position-papers>

⁴ <http://lumierevod.obs.coe.int/>

On April 15th, it listed 235 Irish and Irish co-produced films available across 9 VODs that can be accessed by Irish consumers.⁵



LUMIERE VOD lists 5848 European films listed as being available on these 9 VODs in Ireland.⁶

A total of 4% of European films available on VODs available to Irish consumers are Irish. This needs to be substantially increased. Though it must be noted that this figure does not include content made for television which may be on VOD services.

The quota requirement under the revised AVMSD offers an opportunity to increase the amount of Irish content available on these services.

The issue of prominence is also dealt with in the revised directive and all opportunities to maximise the prominence of Irish content on the main home pages of VODs, in Ireland, should be utilised.

SPI recommends that:

- The BAI should have the regulatory authority to monitor the application of the quota.
- This monitoring should not only be on ODAVMS within our jurisdiction but should also extend to monitoring Irish content on all ODAVMS available to Irish consumers.

⁵ http://lumierevod.obs.coe.int/f/filters?prod_countries=IE&service_country=IE

⁶ http://lumierevod.obs.coe.int/f/filters?service_country=IE

- The BAI should release yearly figures on the percentage of Irish content available on these ODAVMS and coordinating, with other relevant bodies, campaigns to increase the amount of Irish content available.
- Every effort should be made to ensure the prominence of Irish content on the homepages of ODAVMS available in Ireland.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

The issue of increased funding for the Irish Independent Production Sector has been raised by SPI constantly and consistently with Government Departments, State Bodies and Broadcasters over the last number of years. The issue of funding is a constant concern among our members and a topic of discussion at every SPI Committee and Board meeting.

SPI continues to campaign for wide ranging reform of the TV Licence Fee and the creation of an opt out advertising levy. Action on both of these issues would increase the amount of funding that is available to the Irish Independent Production Sector.

Parallel to these issues is the continued growth of SVOD players who currently have no statutory obligations to invest in the Irish Independent Production Sector. According to a Mediatique report the expected growth SVOD penetration in Irish homes by 2022 will be 47%.⁷

Current Funding Trends

Funding for the Irish Independent Production Sector is currently on a downward trend as evidenced by the below tables.

The following two tables, A&B, show how spend from RTÉ has decreased in the sector since 2010 and the consistent oversubscription of the current S&V fund.

Table A details the reduction in spend from RTÉ to the Independent Production Sector, highlighting the downward trend discussed above⁸:

Table A

Year	Statutory Obligation	Actual Expenditure	Excess over Statutory Obligation
2017	€39.5m	€40.16million	1.67%

⁷ https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/04/180410-Mediatique-Report.pdf, p56

⁸ <https://www.kildarestreet.com/wrans/?id=2018-11-21a.380&s=irish+independent+production+sector#g382.q>

2016	€39.5million	€40.3million	2%
2015	€39.5million	€40.6million	3%
2014	€39.4million	€40.9million	4%
2013	€39.3million	€40.8million	4%
2012	€38.5million	€42.1million	9%
2011	€37.7million	€48.9million	30%
2010	€37.6million	€53.944million	43%

This table shows the potential investment of millions to the independent production sector that has been lost.

This reduction in investment is compounded by RTÉ's expectation that independent production companies can create more content for less investment on an ongoing basis.

This is not sustainable and will lead to job losses and a serious contraction of the sector.

The need for increased funding for the sector can also be evidenced by the differentiation between the amount of funding applied for against what is awarded by the current Sound and Vision Fund. See Table B⁹ below

Table B

Round number	Amount applied for	Amount awarded
32	€19.8M	€5.738
31	€17.5M	€5.971
30	€17M	€5.991

It is clear that the demand for the scheme far exceeds the amount available. This is an indication of the number of production companies trying to make content and the lack of funding that is available to help them achieve their projects. It is also concerning that the amount awarded is declining round on round.

SPI Member Survey

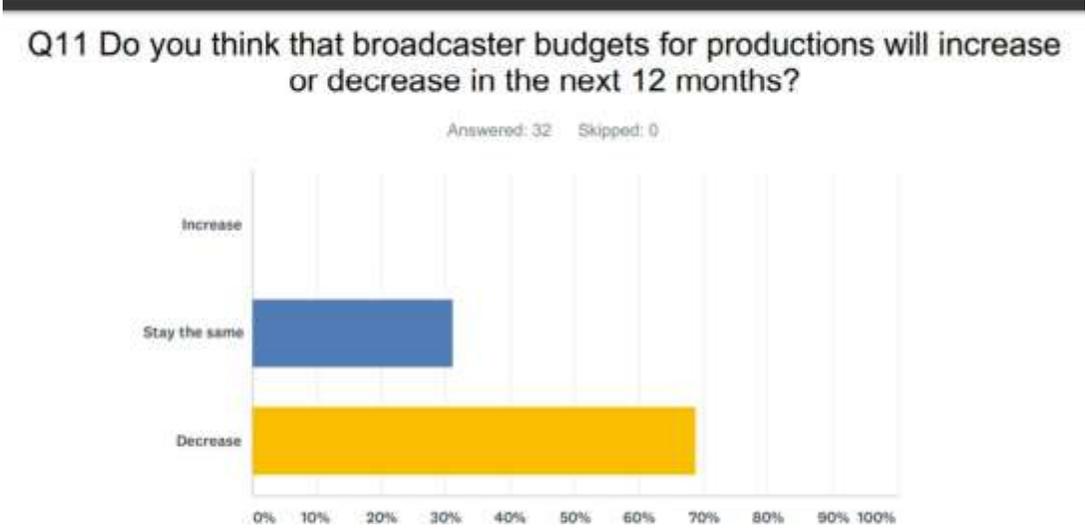
As part of the preparation for this submission, SPI undertook a survey with our members. The survey dealt with a variety of issues but key to this submission are the following questions. 32 members responded to the survey.

We asked our members if they thought that broadcaster budgets for productions would increase or decrease in the next 12 months. The results demonstrate the trepidation that

⁹ <https://www.bai.ie/en/>

producers are experiencing about broadcaster budgets. This impacts on how they can plan for the future.

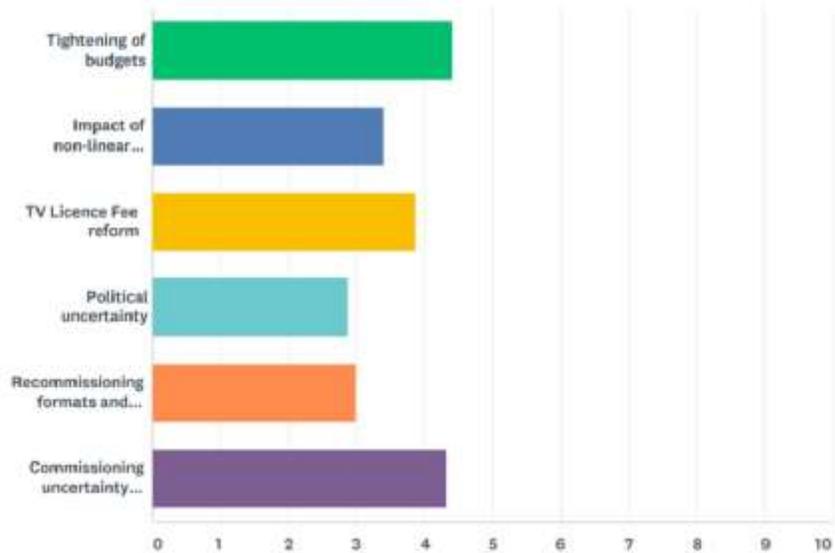
- 69% responded that they would decrease
- 31% responding they would stay the same



We asked them what concerns them most about the Irish Independent Production Sector over the next 12 months:

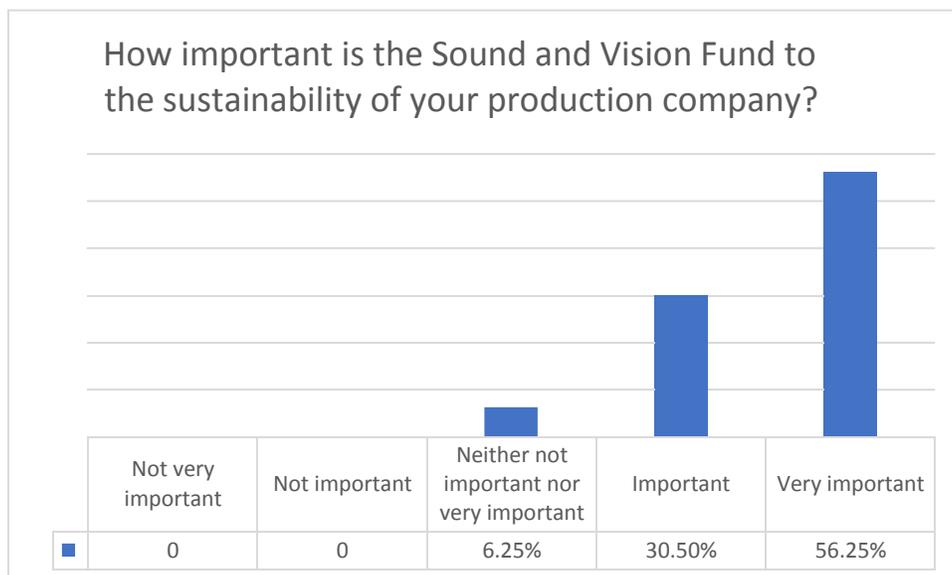
Q12 What concerns you most about the Irish Independent Production Sector over the next 12 months?

Answered: 32 Skipped: 0



This graph shows the core concerns of producers are tightening of budgets and commissioning uncertainty.

Given that the question in this consultation is whether or not to reform the current Sound and Vision Fund to allow more applicants to apply for the funding than currently are able; SPI asked our members how important the S&V Fund was to the sustainability of their production company:



86% of companies that responded to our survey stated that the Sound and Vision Fund is important to the sustainability of their business.

Any changes that allow a sudden increase in the number of applicants to the fund would need to consider the importance of the fund, as currently constituted, to the sustainability of Irish Independent Production companies.

In the survey we asked producers for their views on what they thought of the proposal to allow non-linear providers access the fund. Here are a sample of responses we received.

All responses were received anonymously.

- *If this new content fund is in addition to the current S&V fund, then yes, absolutely. If it was to replace S&V, then no, unless the overall funding would be at least doubled.*
- *SVODS have access to a global market and will produce very little 'local cultural' content. The nature of S&V fund is that independent producers are already producing content for public service broadcasters. I believe the independent sector are better positioned to produce innovative, creative work.*
- *The independent sector is under severe pressure and opening up this fund would surely only weaken the sector.*
- *S&V is designed to provide premium content to Irish viewers that is available on a 'free to air' basis. The definition of free to air broadcasters may be expanded (mindful of that provider's cost per hour for original content) to include 'free' online platforms - but S&V should not fund any subscription services whether broadcast or online. The subscription providers (including SVOD) should pay a levy or allocate funding to allow Irish viewers view Irish content on those services - an argument for another day.*
- *The fund should be kept ring fenced for Irish Independent Production companies. The bigger players will swallow it up and compete with the independent sector. This will have only one effect which will be to weaken the cultural and language impact of the fund.*
- *I would worry about the independent sector if we had to compete against broadcasters. Broadcasters have the in house staff to focus on applications such as these where many independents need to employ people specifically for this type of application process. It essentially pits broadcaster against indies but the indies needs the support of the broadcaster to apply in the first place. The incentive for broadcasters to back independent companies ideas will be compromised.*

As evidenced by the comments above, there is serious concern that opening the S&V fund to non-linear operators would dilute the cultural output of the fund while reducing the amount of funding available to Irish independent production content.

SPI supports the extension of a levy on non-linear operators that receive money from Irish consumers but there are serious concerns about the impact that opening up the fund to these same operators would have on the sustainability and growth of the Irish production sector.

These are SPI recommendations on question 9:

SPI recommendation:

- Allow non-linear providers to access the Sound & Vision fund only if:
 - they pay contributions to the fund,
 - can only apply to the fund through an Irish Independent Production Company
- Ireland should seek to apply levies to services which are regulated in another EU Member States but target Ireland in order to fund or part-fund an updated content production fund.

Q. 12 – Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- **Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,**
- **Two regulatory bodies. Assigning the responsibility for editorial services, e.g. ondemand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.**

Is one of these options most appropriate, or is there another option which should be considered?

SPI supports reforming the BAI as a single regulator for all four strands, as set out in the consultation document. We support this position due to the international trends for media companies to be active across all four of the identified strands.

A potential for this type of reform was set out in the consultation document:

“Restructuring and Reforming the Broadcasting Authority of Ireland as a Media Commission and assigning all four regulatory strands to this regulator. This could involve restructuring the BAI into a multi-person Commission, using the Competition and Consumer Protection Commission as a potential model. This could provide for a Commissioner for television and radio broadcasting; a Commissioner for on demand services and other functions; and a Digital

Safety Commissioner with responsibility for both the European and national regulatory functions in relation to online safety.”¹⁰

Any reform to the current role of the BAI that involves an expansion of its role and remit must be matched by an equivalent increase in financial and human resources to ensure that it has the capacity and capability to fulfil such an expanded role.

SPI recommendation:

- Reform the BAI as a single regulator to be responsible for all four strands conditional on adequate funding.

Q. 13 – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

Currently, the BAI operate a funded levy structure whereby the organisations it regulates financially support the running of the regulator.

“The BAI levy model is cost-recovery in nature, i.e. it is designed to ensure full recovery of the costs properly incurred by the Authority and its constituent committees in the period for which the levy is raised.”¹¹

The BAI levy model is “a regressive sliding scale element, whereby the levy amount paid (expressed as a percentage of the total qualifying income) falls as the value of qualifying income rises.”¹² It also “incorporates a de minimis rule, which ensures that all broadcasters make some contribution towards their costs of regulation.”¹³

The BAI already has in place the process for levying the bodies it regulates to fund its activities. As the BAI evolves into a media regulator across the 4 strands identified in the consultation, the current levy model should be modified and extended to incorporate these organisations who would be regulated by it.

It is important that the current levy transparency on the bands of payment is continued as it is in the public interest that the organisations which are able to fund the levy at the highest levels, continue to do so.

SPI recommendation:

¹⁰ <https://www.dccae.gov.ie/en-ie/communications/consultations/Documents/86/consultations/Consultation%20Explanatory%20Note.pdf>

¹¹ <https://www.bai.ie/en/about-us/levy/>

¹² *ibid*

¹³ *ibid*

- The current BAI levy model is modified and extended to the organisations that fall under its remit and it continues to be funded by the bodies it regulates.

Conclusion and recommendations

The implementation of the revised AVMSD comes at a moment of significant shift in how content is viewed by consumers, and how content is commissioned. The next five years will define the future of linear distribution as the evolving media landscape continues to move to non-linear programming and online distribution.

The traditional ways of engaging with media content are being left in the past and the competition from international content providers for viewers is an ever increasing threat.

Bringing all providers of content, linear and non-linear, under the same regulations will ensure a more level playing field for all providers of content, regardless of how that content is distributed. This is why SPI supports significant changes to how Ireland will regulate audiovisual content, both offline and online, under the new directive.

SPI supports the extension of a levy on non-linear providers targeting Irish consumers as long as Irish Independent Producers are a key element of the application process for the content fund. There is serious concern that opening the S&V fund to non-linear operators would dilute the cultural output of the fund while reducing the amount of funding available to Irish independent production content.

The Government's implementation of the revised AVMSD is an opportunity to show their commitment to the sustainability and growth of the Irish Independent Production Sector.

SPI Recommendations:

- The Broadcasting Authority of Ireland (BAI) should regulate the On-demand Programme Services (ODPS) operational within the jurisdiction of Ireland to the same regulatory standards as linear services, including content standards.
- The BAI should have the regulatory authority to monitor the application of the quota.
- This monitoring should not only be on ODAVMS within our jurisdiction but should also extend to monitoring Irish content on all ODAVMS available to Irish consumers.
- The BAI should release yearly figures on the percentage of Irish content available on these ODAVMS and coordinating, with other relevant bodies, campaigns to increase the amount of Irish content available.
- Every effort should be made to ensure the prominence of Irish content on the homepages of ODAVMS available in Ireland.
- Allow non-linear providers to access the Sound & Vision fund only if:
 - they pay contributions to the fund,
 - can only apply to the fund through an Irish Independent Production Company

- Ireland should seek to apply levies to services which are regulated in another EU Member States but target Ireland in order to fund or part-fund an updated content production fund.
- Reform the BAI as a single regulator to be responsible for all four strands conditional on adequate funding.
- The current BAI levy model is modified and extended to the organisations that fall under its remit and it continues to be funded by the bodies it regulates.



From: [Shane Crowley](#)
To: [Online Safety Consultation](#)
Subject: Suggestions
Date: 02 April 2019 16:32:01
Attachments: [image007.jpg](#)
[image008.jpg](#)
[image009.jpg](#)

Hi, I am a parent with a 10year old child.

I would make the following suggestions

- A child under 16 years of age must have parental consent to create any social media account (I understand this is required in France)
- Smart phones should be banned in all schools. If any child needs access to a phone a dumb phone for calls and texts only could be provided
- Significant fines (as a percentage of company revenue – not lump sums) should be applied to any social media company which allows their platform to be used for pornography / on-line bullying / slander

Thanks for considering these options

Best regards,

Shane Crowley

Director



This email message, with any attachments, is intended for the addressee or addressee's business entity only. It is confidential and may be subject to legal, professional or other privilege. It may not be copied or forwarded to others without the express written authority of the author.



Page 2

1 -Name

Sharon Boyle

3 -Email

Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
There should be a watchdog to oversee global tech companies that provide services in the Republic of Ireland. Where there is a dispute over the removal of specific content, this should be referred onto an independent watchdog to evaluate the complaint. If there are several complaints about the same material, this should be taken more seriously.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Absolutely, this would be essential as many people don't like their opinions being challenged, or may not have a legal understanding of what people are allowed to post or of freedom of expression. Escalation to a regulator should only happen when the dispute appears legitimate and clearly is disturbing/obscene/defamatory etc. content. The regulator should also alert appropriate authorities in certain circumstances (e.g. cyber stalking, exploitation of children etc.) if the service provider has failed to. Or if there is a suspicion of a deeply disturbed person that has the potential to physically and seriously harm others but has somehow evaded the attention of the Garda

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Online services that have a significant amount of Irish citizens subscribing to the service. Social media platforms such as Facebook, Twitter, Instagram, Snapchat. Video sharing platforms like YouTube. Attention should also be given to new apps that are quickly being subscribed to by a younger audience.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences

concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

- cyber bullying of an adult should also be considered with the same categories as above. Particularly if it is an attack on their right to freedom of expression. - cyber blackmailing - cyber stalking and intimidation. It is really important to get the balance right here, public figures can't expect to be treated in the same manner as private citizens, they have a wide reach, and if they use social media to advance their careers and followers, they can't hide behind a regulator. However, it is important that all citizens, including public figures should feel safe and able to defend themselves from extreme individuals online. The reason I bring this up is keeping particularly in mind when Paddy Jackson's lawyers threaten to sue individuals that had tweeted about him during and after the Belfast trial.

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

This is a difficult one. It is important that the broadcasting rules are extended into video sharing platforms and that they are burdened with the same responsibilities as traditional broadcasters. The problem is trying to define these services. Digital technologies are evolving so rapidly and the lines are becoming very blurred. This needs to be carefully considered and should be advised by experts in an international context. There definitely needs to be better oversight on the porn industry and the ease at which children can access disturbing and violent pornography. Some services may not initially be designated as a VSPS but may evolve into one. Also, this shouldn't be at odds with EU definitions. Levies on these service providers would lead to an unwelcome additional charge for consumers. I expect to pay the same as other Europeans. I am happy to pay a TV licence style charge but not any additional charges especially if it pertains to individual services, then it would be outright unfair.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video

content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Given what has transpired in New Zealand in recent weeks, I think there are lessons to be learned in how live streaming events and subsequent re-sharing of these events are to be handled. The regulator should have sufficient powers to be able to insist on the VSPS doing everything it can to prevent such escalations. Some things may not be technologically possible to prevent, but the service should always be striving to do what it can to cooperate with the regulatory body and the requirements to protect its users in a particular jurisdiction.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

If there are technological advancements that can prevent the redistribution of obscene/harmful etc material, the VSPS must be updating it's service appropriately. It is galling to see CEO's throwing their hands up in the air and saying that the governments need to introduce better legislation. They have proven that they can't regulate themselves, so they need tough measures - but it should be proportional. I think Data Protection has made some great advances, particularly since the introduction of GDPR, similar powers to this regulator would be good.

Page 5

11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

It would probably be too stifling to administer the same content rules as TV broadcasting, and would cause problems for individual content creators. But a line should probably be drawn for content creators that have a huge influence, for example some of the YouTubers on the preferred network. If they have a large younger audience following them, then pushing out a video of for example Logan Paul's suicide forest, should contravene broadcasting regulations.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns

regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Probably better classification of content would be helpful. We know what to expect when we are watching programmes on RTE etc, as they give a warning in advance of explicit content, a similar system may be used, but could be very difficult to implement. It is important not to be overly prescriptive. To be honest, I am more concerned about how easy it is for a child to watch very disturbing pornography online from a Google search. I am also concerned that the porn industry is grooming children and exploiting minors and young women.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

The following suggestion is a good one: Two regulatory bodies, one of which would involve restructuring the BAI and assigning it responsibility for content which is subject to editorial control (traditional television and radio broadcasting and on-demand services). The second regulator would be a new body responsible for online content that is not subject to editorial controls (both national and European strands related to online safety)

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

The first two are important, the latter two should be available for serious non-compliance.



Sky Ireland's Response to DCCAE's Public Consultation on the Regulation of Harmful Online Content and the Implementation of the revised Audiovisual Media Services Directive

1. Sky Ireland welcomes the opportunity to respond to the Department's Consultation on the Regulation of Harmful Content on Online Platforms. As Mark Zuckerberg has put it "the question isn't "should there be regulation, or shouldn't there be?" It's "how do you do it?"
2. The growth of the large online content intermediaries in the absence of any meaningful regulatory infrastructure and inadequate enforcement has exposed society to serious risks in relation to illegal and harmful content online. The current model, which relies on a combination of voluntary measures and an ineffective 'notice and action' regime, is insufficient to meet demands from the public for greater accountability and more transparency.
3. It is vital that the gaps in content protection online are clearly articulated. Too often discussion gets derailed by multiple 'online' problems bundled together, which makes the challenge of 'regulating the internet' appear insurmountable.
4. This is not about regulating the internet, it is about regulating the online companies that use the internet to share potentially harmful content.
5. A new governance framework is needed, underpinned by legislation. It should set appropriate boundaries for user protection, create standards of accountability, and allow proper oversight of companies that have escaped the scrutiny of traditional regulation/regulators.
6. Changes in this area can be brought in which are entirely compatible with the implementation of the revised Audio-Visual Media Services Directive.

Strand 1 – National Legislative Proposal Q. 1. – What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. [Sections 2, 4, & 8 of the explanatory note]

7. It is important that users can flag harmful content and have a reasonable expectation that reports will be acted upon in an effective and consistent manner. Users should also be kept informed about the outcome of any reports made.
8. The current model, which relies on a combination of voluntary measures and an ineffective 'notice and action' regime, is insufficient to meet demands for greater accountability and transparency.
9. Online platforms should have transparent processes for dealing with such complaints overseen by an appropriately empowered regulator. An effective process, with improved accountability, will also encourage more users to report their concerns.



- 10. All online platforms must be required to report on the standards they seek to follow, the efforts they make to comply, and their performance must be independently and rigorously assessed.
- 11. If processes are not followed properly, users should have recourse to a regulator with effective enforcement powers.
- 12. The regulator must also have strong information gathering powers, the power to initiate enquiries, and the ability to impose effective sanctions including the ability to fine for non-compliance.

Q.2 – If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

- 13. In the first instance, platforms should make it easy for users to notify potentially infringing content, give feedback on policies and processes, and access straightforward and quick complaint and appeals processes.
- 14. Appeals/escalations to the regulator should not necessarily require a statutory test, but clear regulatory principles need to be applied in a proportionate manner and in this context, it is reasonable to expect users to demonstrate the relevant policies and processes have not been followed as part of any appeal.

Q.3 – Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme? [Sections 2, 5 & 6 of the explanatory note]

- 15. We believe that the framework outlined by Communications Chambers in the paper ‘Keeping Consumers Safe Online: Legislating for Platform Accountability for Online Content’¹ is particularly useful here.
- 16. The report recommends including services in scope that facilitate exchange between providers and consumers of content and information, including by selecting, sorting, ranking, recommending and suppressing content to users, and that (directly or indirectly, e.g. through advertising) earn revenue by taking a share of value created by such exchange. Services that make available content that is already regulated, should not be within scope.
- 17. It also recommends an approach based on procedural accountability, whereby intermediaries are judged by whether they used appropriate processes to reach a decision.

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- 18.** As the report notes, disproportionate regulation and over-reaction to under-cooked theories of harm threaten users' interests in a competitive, innovative and open Internet. The report therefore puts forward a proposal to develop a list of in scope intermediaries based on evidence of harm and regulatory tiers, analogous to the tiers that exist in broadcast regulation:
- All firms below a certain de minimis userbase would be excluded from scope of any regulatory action, except where there is evidence of illegal and significantly harmful material on their platforms
 - In Tier 1, intermediaries would be obliged to provide an independent assessment of harm on their platforms, with supporting data, in response to a reasonable, evidence-based and specific request; or to provide data to enable the oversight body to make that assessment. These would be the only Tier 1 obligations
 - In Tier 2, based on a harm assessment, named intermediaries would be required to have a policy that meets the regulatory conditions (or particular parts of them), and to disclose performance against the determined objectives. A list of intermediaries in scope for Tier 2 would be maintained and made publicly available
 - In Tier 3, in exceptional circumstances and based on clear thresholds for action, requests could be made of specific intermediaries to take particular actions to address substantial harm
- 19.** This model seeks to ensure that the scope of regulation is limited only to those intermediaries where there is robust evidence of harm, while also providing flexibility for the companies in scope to change over time and from issue to issue.
- 20.** Expectations would generally be greater for the greatest harms, usually associated with illegal content. Smaller firms should generally be subject to fewer or no expectations, in line with their reduced impact and the greater proportionate impact of regulation.

Q 4. How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- *Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)*
- *Material which promotes self-harm or suicide*
- *Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health*

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21. We think this is best left to the regulator themselves to determine. They should have delegated powers that allow them to develop harm assessment models that are adaptable, and which give them the flexibility to add or remove types of content and/or adjust thresholds, as appropriate.

Q. 5 – The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples

22. The central question here concerns 'essential functionality'. Simply put, a social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service.²
23. As far as we understand, there is no existing definition of essential functionality provided within the EU legislative framework. The logical thing to do in this instance is therefore to look to the existing legal corpus for elements that would provide a sound basis for deciding whether essential functionality is established.
24. Our understanding is that where social media services are of an active nature, this is a deliberate commercial choice they make to promote programmes and/or user-generated videos, and therefore by definition constitutes a core (rather than ancillary) part of their service. Platforms would not promote videos if this were not directly relevant to their business model as a means of retaining and/or boosting user engagement.
25. Recital 42 of the e-Commerce Directive sheds some light on what constitutes a passive (vs active) platform stating:

*The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; **this activity is of a mere technical, automatic and passive nature**, which implies that the information society service **provider has neither knowledge of nor control over the information which is transmitted or stored.** [bold/underline added for emphasis]*

26. Further, the Court of Justice of the European Union (CJEU) clarified (Case C-324/09 L'Oréal and others) that when a platform optimises the presentation and/or promotes the content on their platform it is deemed as active and therefore cannot

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benefit from liability exemption (Article 14 e-Commerce Directive). The same rationale therefore flows for significant criteria.

- 27. We would therefore propose the following guideline: where social media services are actively promoting video content as set out in the eCommerce Directive and existing case law then this is sufficient for this content to be considered an essential functionality. For example, where services index, promote and/or organise programmes and user-generated videos this should constitute an essential functionality of these services.

Q. 6 – The revised Directive takes a principles-based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures. Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

- 28. VSPs arrangements with the relevant regulator should be akin to the relationship that established broadcasters have with their equivalents. It is illogical that if you watch something on your TV it is highly regulated, but if that video comes through YouTube or Facebook, our existing policy framework gives it a free pass.
- 29. To do this, the processes and mechanisms through which content on video sharing platforms is flagged and moderated need to be transparent and subject to regulatory scrutiny. In any future regulatory relationship, there cannot be an accountability gap whereby measures of compliance, and penalties for not achieving agreed standards are poorly or incompletely defined- if they even exist at all.

Q. 7 On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

- 30. The overarching goal should be that Video Sharing Platforms are ultimately as accountable as traditional broadcasters; it makes no sense for there to be the least regulation where there is the most potential for harm.
- 31. The same logic applies to commercial communications. Video Sharing Platforms are competing for the same advertising revenue as traditional broadcasters and on demand services. The limits and rules that are in place to protect European citizens from excessive or misleading advertising in these domains need to also apply on Video Sharing Platforms, who share an equal responsibility to prevent misleading and harmful practices.

Q. 8 – The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of

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regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

- 32.** On-Demand media service providers should have the same regulatory arrangement with the relevant regulators as ‘traditional’ broadcasters and the revised AVMS provides a good basis for this. In many instances, the content that is aired ‘on-demand’ is the same content that is aired (at one time or another) via linear channels and hence while it makes sense to avoid lacunas, this is unlikely to be the area of most potential harm.
- 33.** In the context of wider European implementation, we would also point out that it makes sense that, in instances where a broadcaster is making the same content available via both linear and on-demand means, that this content should be regulated in one-member state- where that broadcaster has established jurisdiction.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

- 34.** Allowing non-linear services to access the current content production fund seems reasonable, although we do not have a strong view in this regard.
- 35.** In as far as levies are concerned, we have previously provided a detailed submission on the similar topic of a potential levy on opt-out advertising levies and our position on this topic has not changed.
- 36.** Non-domestic broadcasters have offered Irish consumers more choice, quality and competition, while driving greater investment in original Irish content and the economy more widely.
- 37.** Sky Ireland has made significant investment in Ireland, particularly since the opening of our Burlington Plaza offices in 2013. We directly employ almost 1,000 people in Ireland and indirectly support over 2,100 jobs in total. Furthermore, our annual contribution to the exchequer, in terms of corporation tax, VAT and employer PRSI is in excess of €150 million.
- 38.** Should the Department come to the view that additional funding be required for domestic production therefore, we believe there are a number of other avenues that should be pursued before levies are considered.
- 39.** We note, for instance, that licence fee evasion results in a loss up €40,000,000 to PSBs, primarily RTÉ, annually. It would seem clear then that measures need to be



taken to either reduce this level of evasion or, alternatively, a replacement for the licence fee, which brings more households into the net, needs to be found.

- 40. While Sky is agnostic as to how this can be best achieved, we strongly hold the view that should the Government believe that intervention in the market is required, any such market intervention should be done in as minimally a distortive way as possible. The least distortive manner of funding is recognised to be via general taxation (or variations thereof).
- 41. We also note that RTE are on the record as stating that money raised through reform in this area would allow them to increase their spend on domestic productions, including those made by independent producers.
- 42. Should the Department come to the view that even after these issues have been tackled that levies are required, we would suggest the following. First, that the new (or expanded) media regulator that is proposed in this consultation is established and given the opportunity to carry out the necessary research to ensure any such levy is appropriately structured so as to not create any perverse incentives. And second, that any such levy is applied with a broad scope, so as not only to target 'traditional' broadcasters, but to also ensure SVOD platforms and VSPs are included.

Q. 10 – The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

- 43. Fundamental rights must be balanced: freedom of expression, respect for privacy, dignity and non-discrimination, protection of intellectual property and the right to conduct business, for example, must all be considered. This is not something unique to online platforms however and a range of legal and regulatory requirements address the appropriate balancing of these rights in other areas.

For instance:

- Publishers are liable for damage or injury arising from defamatory or libellous content, or copyright infringement
- Broadcasting is subject to a range of statutory regulation, both to reduce the availability of harmful and illegal content, and to promote positive objectives such as freedom of expression and media diversity
- Advertising content is regulated by the Advertising Standards Authority of Ireland to ensure it is legal, decent, honest a truthful

- 44. Furthermore, the idea that freedom of speech concerns prevents the regulation of online platforms falls down on its own terms, given the sheer volume of content the platforms are already taking down.



45. Indeed, the scale of this privatised decision making/censorship, is in and of itself all the more reason why these companies need to be accountable. It is not logical that someone's freedom of expression should be determined solely by a private company or conversely, exploited by them for commercial gain.
46. If you believe that proactive monitoring undermines free speech, then you must also accept that private internet platforms are no longer private but in effect equate to the open internet – i.e. the public sphere, and these platforms already regulate themselves.
47. In this case the level of regulation required is much greater, equivalent to the type of rules you would apply to any public utility. How can national regulators be effective in ensuring the online world is a safe space if they don't have the opportunity to verify what these private companies are doing?
48. In order to better address this balance a number of changes are needed therefore some that will be possible as part of this domestic process and some that may require steps to be taken at the EU level. These include:
 - A change in focus away from a reactive notice and takedown system where proactivity is disincentivised as it can lead to actual knowledge and therefore the risk of liability. Instead the burden of proof should be reversed. These platforms should only benefit from a liability exemption if they can demonstrate they have taken active measures to prevent harm.
 - Sufficient oversight for regulators over such measures, with powers of sanction should these measures be judged insufficient. There must be a clear and accountable way to verify that rules are complied with and laws are respected.

Q. 11 – How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive?

49. Recital 48 of the eCommerce Directive makes it clear that in relation to online hosts that Member States can: “apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal content”.
50. Article 16 also sets out that Member States shall encourage the drawing up of Codes of Conduct.
51. The Government should therefore avail itself of the current provisions within the eCommerce Directive to update legislation to both impose a duty of care and to create Codes of Practice underpinned by statute.



52. In the absence of a statutory backed frameworks, including sanctions for non-compliance overseen by a new regulator, any codes of conduct produced will remain entirely voluntary meaning there are no guarantees that sufficient companies sign up, or that signatories actually abide by the terms in any codes.
53. The consultation represents an opportunity to serve as the linchpin of a new regulatory and governance framework to ensure that online content intermediaries are made accountable and responsible in managing the content published, shared and commercialised via their services.

Q. 12 – Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include: - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,. - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services. Is one of these options most appropriate, or is there another option which should be considered?

54. We are agnostic on the precise regulatory structure that is adopted. What is clearly needed however is a structure where, notwithstanding the complexities that apply to Video Sharing Platforms, that the goal is to bring regulation up to the same high standards as exist in the broadcast world; it makes no sense for there to be the least regulation where there is the most potential for harm.

Q. 13 – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

55. The same principles which underpin existing regulators, such as BAI or Comreg (or Ofcom in the UK) should be applied, i.e. that those who are regulated pay a levy to cover the cost of the regulation.

Q. 14 – What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples

56. The new (or expanded) regulator will need to be established in statue and given responsibility for oversight and enforcement, with similar functions to other Irish regulators, such as Comreg, the CCPC and the BAI. Regulatory powers will need to be granted in relation to:

- Information gathering and monitoring;
- The creation of Codes of Practice



- Publication of annual transparency reports with common metrics detailing effectiveness of take down processes;
 - Investigation for breaches; and
 - Enforcement and sanctions, including the power to impose financial penalties for serious non-compliance and in extremis the ability to direct ISPs to block sites or other ancillary service providers to withhold services.
57. Regulators should be given oversight over the agreed measures and have powers of sanction should they be judged insufficient. There must be a clear and accountable way to verify that platforms comply with rules and respect laws that apply to them.
58. These functions and powers should apply both for VSPs under the revised directive and to online platforms (who are often also VSPs) under the regulation adopted at the national level.

Q. 15 - What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include - The power to publish the fact that a service is not in compliance, The power to issue administrative fines, - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and, - The power to apply criminal sanctions in the most serious cases. Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction. [Sections 2, 4, 6, 7 & 8 of the explanatory note]

59. We have outlined a non-exhaustive list of sanctions we feel are necessary above.
60. Sanctions are clearly needed as self-policing simply has not worked. Policymakers need to apply the same framework to online world as they do to the offline one.
61. A framework should be organised around rules, oversight, and consequences. Without consequences, organisations may respond to their own incentives, which are not necessarily aligned with what is good for society.
62. Enforcement tools and sanction powers are therefore crucial in ensuring a regulator can properly carry out its functions – without an effective regulator, regulation is essentially meaningless.

Q. 16 - Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?



- 63.** As part of this overall process, all VSPs should be required to produce clear and comprehensive codes of practice. Users should be able to come before the regulator or mediator if they can
- a) Provide evidence that the VSPs code of conduct has been breached
 - b) Show that they have brought this to the VSPs attention and
 - c) Demonstrate that the VSP has failed to act to uphold the code of practice on foot of the users' appeal.

Sky

April 2019

C S S A S I L O B P L D T L I
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Page 2

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
The role of the Online Safety Commissioner should be enhanced. The Commissioner should have sufficient powers and remit to compel platforms to remove content, and should be open to complaints from the public in the form of immediate appeals to unsatisfactory responses from online service providers. It is also important that the Commissioner is able to enforce takedown orders for companies based outside of the EU, but who provide online services within it. If this is not done, some of the most popular online platforms for young people, such as Snapchat, will be beyond the reach of the Commissioner and therefore able to operate with impunity where citizens are dissatisfied with their conduct. We suggest a voluntary code of conduct for such companies, signing them up to high standards of cooperation with the Commissioner mirroring those required from companies based within the EU.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Citizens should be able to appeal to the regulator in all cases where they can present a record of engagement with the online service provider hosting the content in question, and where they, the citizen, consider the outcome of discussions to have been unsatisfactory. It may be necessary to set a time period in which providers can address concerns before appeal is possible, however this would have to include allowance for failure by a provider to deal immediately with content which is illegal, abusive or similarly requiring of swift action.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

The Department should move forward with its own Option Two proposal, and establish a separate regulator for online content not subject to editorial control. In addition, the BAI should be restructured to include the regulation of digital content

which is subject to editorial control, such as on-demand streaming services. In terms of the operation of both regulators, a Single Point of Contact protocol should be agreed with each provider and the appropriate regulating body.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

The Act should, at a minimum, clearly define what constitutes content that involves homophobic and transphobic bullying; hate speech; non-consensual sharing of intimate images; indirect as well as direct harassment; and bullying and cyberbullying. In as far as possible, the term 'digital citizenship' should be used in preference to the out-dated 'online safety' which places more of a burden of responsibility on victims rather than conceptualising the online space as something which it is up to all of us to maintain as a pleasant, respectful place to be.

Page 2

1 -Name

Stephen Foskin

3 -Email

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
No strong opinions.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

If any law is broken at all. If not there's nothing to be taken down.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Social Media, Video Sharing, Adult Categories of Video are accessible in Ireland to any minor with an electronic device.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Exposure of minors to Adult sexual content. credible threats of violence or lawbreaking.. It shouldn't be any form of speech, Blasphemy or debate no matter how offensive to any individual or group similar to US law on the matter,

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

No opinion.

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

No opinion.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

No opinion.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

No opinion.

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

No. No.

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Ireland needs to enshrine a US style 1st amendment into its constitution subject to the exception of a credible threat of violence and protecting minors from adult material to make the matter of free speech clear to all parties operating in Ireland. Replacing the blasphemy laws with new ones only stifles debate. Ireland can also at the Internet Service Provider level make access to adult material opt out by default. Those who want access can opt-in by explicit consent.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

No opinion.

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

No opinion

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Multinationa/ISP tax.

Page 8

17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

No opinion.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

No opinion.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

No opinion.

Page 2

1 -Name

Susan Jones

2 -Organisation if applicable

Ait

3 -Email

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
The company should take action on complaints with an option to refer to regulators if complaint is unhappy with outcome.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Yes. There should be a test is the material hate speech, pornographic, anti proven science etc.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Facebook, Instagram, Twitter etc. Any Irish based company.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Material designed to encourage prolonged nutritional EXCESS that would have the effect of exposing a person to risk of death or endangering health eg feederism, pro obesity material etc.

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16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

By taxpayers



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April 2019

PUBLIC CONSULTATION ON THE REGULATION OF HARMFUL CONTENT ON ONLINE PLATFORMS AND THE IMPLEMENTATION OF THE REVISED AVMSD

Technology Ireland is an Association within Ibec, which represents the ICT, digital and software technology sector. The Association is a pro-active membership organisation with over 200-member companies located throughout Ireland. We advocate on behalf of Ireland's indigenous and foreign direct investment technology companies to Government and policy makers.

Technology Ireland, and our members, fully acknowledge the very clear expectation for service providers to take reasonable steps to ensure the safety of the users of their service.

As such, Technology Ireland welcomes this opportunity to respond to this public consultation. Our members are fully committed to working with policymakers to identify workable solutions to achieve a proportionate and effective approach to regulating harmful content online.

We hope our responses provide a balanced, considered and proportionate response to this most complex regulatory matter.

Kind Regards,

Eoghan Ó Faoláin
Acting Director
Technology Ireland

QUESTIONS FOR PUBLIC CONSULTATION

Strand 1 – National Legislative Proposal

Q. 1. – What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider.

- To be valid and enforceable, any system must be compatible with EU law, in particular Articles 12 to 15 of the E-Commerce Directive 2000/31/EC.
- The E-Commerce Directive provides strong incentives for service providers to have an effective notice and takedown process in place, as they have limited legal liability for content they host only where they act expeditiously to remove illegal content upon gaining knowledge of its unlawfulness.
- To ensure that these incentives remain in place, and to ensure harmony with EU law, the National Legislative Proposal should aim to build on and be consistent with the E-Commerce Directive, rather than creating a separate regime that might create conflicting demands on both users and service providers.
- On the question of whether the regulator should become involved in appeals relating to individual pieces of content, we would caution that such a system could prove unwieldy. A regulator which undertook to have a role in deciding on individual cases where a user was not satisfied with the determination of the service provider would risk quickly becoming overwhelmed by appeals with little additional benefit to users.
- Instead, Technology Ireland favours an approach where the regulator’s powers are limited to monitoring the operation of the notice and takedown practices of online platforms and is empowered to intervene in certain circumstances for example where, in its determination, systemic improvements are required.

Q.2 – If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

- As mentioned above, Technology Ireland favours an approach where a regulator would intervene only where an appeal reveals a systemic issue with a service provider's notice and takedown process.
- Setting a low threshold at which a regulator would acquire a right to intervene is (mere "dissatisfaction" on the part of the user) would be very problematic. In effect the regulator would acquire legal right to enforce a company's terms of service which would be inappropriate for a statutory body, and would represent a highly unusual state interference in contractual relations. Technology Ireland asks that the government reject this approach as it is not in line with best practice internationally.
- We suggest that a separate consultation process would be necessary on any new statutory test and/or appeal process. Platforms can provide assistance in the gauging of proportionality and practicalities of 'take down' procedures. Further, and more generally, we would see this applying after the normal escalation paths and notice and take down processes pursuant to the notice and takedown procedures under EU law (articles 12-14 of the E-Commerce Directive) have been exhausted.
- If a regulator is given a role in respect of appeals concerning individual instances of "harmful content", it is essential that a defined process is put in place whereby the regulator only becomes involved after the user has exhausted the service provider's own processes including use of whatever online tools are available to request removal of content and that this power is limited to adjudication over processes not the company terms of service. This safeguard is essential to ensure that existing systems which are currently responsible for the reporting and removal of large volumes of unlawful content and content that contravenes the service providers' own policies continue to operate effectively, and that the regulator is not overwhelmed by matters which can be adequately resolved between the user and the service provider.

Q.3 – Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

- Technology Ireland believes that a clear and formal definition of the services within the scope of any legislative scheme is needed. Such a definition should be limited to the category of "hosting services" as defined in the E-Commerce Directive. "Mere conduits" (for example telecommunications services) and "caching services" (for example search engines) should not be included in this definition.
- Additionally, there will be a need to define which categories of hosting services are in scope of the proposal. Social media and online video sharing platforms may be appropriately captured in the scope but the legislation should make it clear that, for example, a digital news media site that allows user comments would not be included.

- The government should also not include services which are provided from Ireland but not well used by Irish residents to acknowledge that a range of technology companies choose to base their regional business in Ireland, but services may be developed for markets outside the country.

Q. 4 – How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example;

- **Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)**
 - **Material which promotes self-harm or suicide**
 - **Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health**
- Technology Ireland welcomes the recommendation to target the proposal at specific categories of harmful content, rather than potentially “harmful content” in general, which would inevitably lead to inconsistencies, be contested and subject to differing opinions, and liable to change over time. Irish residents would then acquire rights for the removal of content which is lawful and this would hamper and unduly interfere with free of expression rights online.
 - The categories of content targeted by the legislative proposal should be clearly defined in primary legislation and not deferred for a later decision by the regulator. Such categories should be defined in line with international standards of free expression. Government must consult in more detail with industry and other relevant stakeholders on any proposed definitions.
 - It is possible that some ‘harms’ are not capable of robust and clear definitions, particularly where they rely heavily on individual context. Where this proves the case, government must forebear from regulatory action in these areas and explore alternative, non-legislative approaches.
 - As the Index on Censorship has said, many definitions of ‘harmful content’ currently offered do not go beyond categories of speech that are already illegal, both in Ireland and most

European jurisdictions. *“It is vital that any new system created for regulating social media protects freedom of expression, rather than introducing new restrictions on speech by the back door. We already have laws to deal with harassment, incitement to violence, and incitement to hatred. Even well-intentioned laws meant to tackle hateful views online often end up hurting the minority groups they are meant to protect, stifle public debate, and limit the public’s ability to hold the powerful to account.”* - Jodie Ginsberg, Chief Executive of IOC.

- That the proposed content categories overlap with existing rules on many platforms goes to a larger issue around avoiding duplication and undue regulatory burden. We submit that it’s preferable to have a consolidated regulatory regime rather than many different statutes, all of which regulate content, leading to confusion, onerous compliance processes, and extra cost for all involved (e.g. the Broadcasting Act, the e-Commerce Directive, existing AVMS Regulations, new AVMS Regulations, new digital safety regulations). The benefits of having an Irish regulatory regime which is closely aligned to regimes in other EU Member States should also be considered.
- It would be valuable for there to be a greater body of (i) explanatory memos and guidelines, and (ii) indicative precedents. The current AVMS consultation does not disclose enough details of the proposed transposition legislation, thereby inhibiting the capacity of prospective respondents to make specific comments. It is suggested that the Department could open a further public consultation when it is in a position to publish draft legislation.

Strand 2 – Video Sharing Platform Services

Q. 5 – The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn’t be considered Video Sharing Platform Services? Please include your rationale and give examples.

- The revised Directive sets out a harmonised definition of Video Sharing Platform and there does not appear to be discretion in law for member states to adopt a definition different from that provided under Article 1, paragraph 1, (aa) of the Directive, nor to interpret it in a way different from what is detailed in the recitals to the Directive (e.g. Recitals 4, 5 and 6). For this reason, it would seem prudent for the Irish implementation to adopt the definition in the Directive verbatim to ensure harmonisation throughout the EU.
- Government should interpret the definition narrowly so as not to extend the AVMS framework beyond its original scope – i.e. services whose primary purpose is the sharing of video. The government should seek to influence the European Commission’s guidance accordingly. Arbitrary measures of ‘essential functionality’ must be avoided.

Q. 6 – The revised Directive takes a principles-based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

- Technology Ireland believes that a principles-based approach marked by ongoing dialogue with video sharing platforms, users and civil society is the most effective approach in this respect. The regulator should be encouraged to engage as fully as possible with video sharing platforms to understand their business models and the considerations that apply to compliance with the obligations of the Directive. In addition, the regulator should seek regular input from users, NGOs, trade associations and other civil society actors to ensure the policy framework being applied remains up to date.
- Technology Ireland would favour an approach whereby the regulator sets out a regulatory framework or code of conduct based on this engagement with relevant stakeholders and works on an ongoing basis to monitor the extent to which the policy goals are being met by video sharing platforms.

Q. 7 – On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

- Technology Ireland suggests that the regulator should draw on the monitoring arrangements of models already in place in the EU, for example the Code of Conduct on Countering Illegal Hate Speech Online. Government should consult with the relevant companies on the details of such arrangements.

Strands 3 & 4 – Audiovisual Media Services

Q. 8 – The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the

relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

- The Directive has maintained clear distinctions between the rules applying to broadcasters and on-demand providers. These distinctions take appropriate account of the differences between the technology, business and services models of these sectors. Technology Ireland believes that in line with these clear distinctions, the regulator should apply separate rules to each service type.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

- At this time, Technology Ireland has not formed a view on Question 9.

Strands 1 & 2 – European & International Context

Q. 10 – The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

- The Special Rapporteurs have advised governments to ensure that definitions are sufficiently clear and defined in law so that individuals know how to moderate their behaviour. They have also counselled governments to avoid legislating hastily, delegating inappropriate levels of responsibility for free expression rights to companies and appointing regulators rather than judicial authorities to be the arbiters of lawful expression online.
- We encourage government to take the necessary time to reflect on this guidance and adapt proposals accordingly.
- Internet freedom and online expression remain under significant pressure and constraint across the world, a trend that has been observed in platform transparency reports. While we share a common goal to ensure online spaces are healthy for users - sources of high-quality information and discussion - there is a concern that this goal is being pursued in several jurisdictions through regulation that is having or will have unintended consequences and

chilling effects on freedom of opinion and expression rights. For example, the German Network Reinforcement Act (NETZDG) legislates on content that was already considered illegal and incentivises the speedy removal of content that would, in some cases, be considered fairly innocuous and lawful in an Irish context. Since its enactment, the law has been criticised by the UN rapporteur on freedom of expression and groups such as Human Rights Watch. Russia, Singapore and the Philippines have all cited NETZDG as a positive example of how harmful content should be removed. That these historically restrictive governments would praise the law is an indicator of the consequences that have flowed from its passing.

- Daphne Keller, Director of Intermediary Liability at the Center for Internet and Society at Stanford Law School, has noted how other recent legislative developments - such as Australia's Sharing of Abhorrent Violent Material Act - establish nominally law-based rules, but the process by which these rules are developed is too often rushed, do not reflect human rights law or constitutional obligations, and are tailored with a specific business model in mind rather than taking a broader principles-based approach that might endure beyond a particular technological cycle.
- Therefore, in contemplating a structure that balances the right to freedom of expression and the accepted need to mitigate harm to users, Ireland could look to the Digital Millennium Copyright Act (1998) and the Telecommunications Act (1996) - examples of highly durable, principles-based US legislation that are platform and business agnostic while providing clear guidelines and procedures for industry.
- Building on the above, we propose the six principles below:
 - i) **Constitutional clarity:** Regulation should differentiate between State responsibilities and corporate responsibilities. This should be based upon transparent and clearly articulated standards of what content is and is not illegal, and how due process will provide methods of recourse to citizens and businesses. Legislation should not require the proactive filtering of or removal of legal speech. The presumption should be that a removal request for illegality should normally be accompanied by validly scoped due process. New categories of illegal speech should not be created without legislative oversight and public consultation.
 - ii) **Be global in scope and rooted in human rights protections:** Regulation should ideally recognise that many platforms operate across borders and at a global scale. Accepted precedent and norms, set internationally with regard to human rights and free expression, should be front of mind.

- iii) **Protect and promote open competition and internet innovation:** Regulation should safeguard the free and open internet and promote competition, innovation, and free expression while respecting user rights, including privacy. Regulation should not be prohibitively burdensome for new entrepreneurial entrants and small businesses, nor seek to establish uniform rules across platforms. This should include strong Net Neutrality rules, intermediary liability protections, and safe harbour protections along with so-called “Good Samaritan” protections for companies acting in good faith in a notice-and-take down system.
- iv) **Empower the public through transparency:** Citizens should understand when a regulatory intervention leads to impact on their activities and accounts, so public notice (where appropriate) along with direct user notice should be provided. Government should seek to provide meaningful transparency on the actions they request of platforms, including publicly-available notices and statistics on a platform-by-platform level.
- v) **Evidence-based and outcome-led:** Regulation should be based on independent evidence and analysis, with the nature of the problem and associated harms clearly articulated, and the outcome sought defined along with ways of measuring progress. Regulation should avoid specifying specific methods or approaches.
- vi) **Commercial neutrality:** The scope of legislation should be clear, reflect the diverse range of businesses that exist online and focus on the problem to be solved rather than a particular business or business model. This will drive long-term sustainability in the framework, while limiting regulatory loophole hunting. The context of different services and business models is an essential part of any framework.

Q. 11 – How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive?

- We welcome the government’s commitment to act consistently with the EU legal framework on limitations to liability enshrined in the E-Commerce Directive. This framework exists primarily to safeguard the free expression rights of users.

- As noted above, action against harmful content in Strand 1 must be limited to content which is subject to clear and robust definitions in law. Regulatory oversight should focus only on company processes and leave companies to define and enforce their respective terms of service.
- Government should be careful not to seek combinations of enforcement and other powers for the regulator which create new liabilities for companies or undermine the proper functioning of the E-Commerce Directive regime in the interests of users.

Strands 1-4 – Regulatory Structures

Q. 12 – Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions.

These options include:

- **Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,**
- **Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.**

Is one of these options most appropriate, or is there another option which should be considered?

- Technology Ireland members can see arguments in favour of both models, but whichever structure is ultimately chosen it is essential that there is a proper separation between the regulatory framework for legacy broadcast content and the more future looking policy relating to the responsible operation of open internet services and content generated by users.
- It would not be sufficient to apply the existing capacity of the broadcasting regulator to the very distinct challenge of regulating video sharing platforms and other open internet services. At a minimum, the governance structures of a restructured BAI/Media Commission would need to reflect its new responsibilities.

Q. 13 – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

- We recommend that the government consults further on this issue. Government must pay attention to the scope of regulation and the impact the funding model has on innovation, investment and competition in the sector.

Strands 1 & 2 –Sanctions/Powers

Q. 14 – What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples

- At this time, Technology Ireland has not formed a view on Question 14.

Q. 15 - What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include;

- **The power to publish the fact that a service is not in compliance,**
 - The power to issue administrative fines,**
 - **To issue interim and final notices to services in relation to failures of compliance and**
 - the power to seek Court injunctions to enforce the notices of the regulator, and,**
 - **The power to apply criminal sanctions in the most serious cases.**
- Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction.**

- As noted above, the Government should be careful not to seek combinations of enforcement and other powers for the regulator which create new liabilities for companies or undermine the proper functioning of the e-Commerce Directive regime in the interests of users. The combination of short take down times and heavy fines in the draft EU Regulation on Terrorist Content, for example, have been widely criticised as undermining other policy goals and incentivising overreaction against content which may be lawful.
- Administrative fines have quickly become the enforcement power of choice for a range of internet-related laws. Governments must acknowledge that the cumulative effect of multiple fines on the same segment of the economy will begin to impact investment. We would urge government to prioritise responsible practices over punitive sanctions which may have unintended consequences for future tech investment in Ireland.

Q. 16 - Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

- Many platforms already provide for effective mechanisms to handle and settle disputes between users, or between users and the platform providers.
- That being said, as per Article 28b of the revised Directive, the independent mediation service to which the revised Directive makes reference should only concern disputes related to a limited number of topics, i.e. those listed under Article 28b, paragraphs 1 and 3 of the revised Directive.
- Further, Ireland would have to coordinate the mediation service provided under the revised with the mediation service envisaged under the forthcoming Platform to Business Regulation. In this perspective, it could be opportune to limit the access to the AVMS mediation to the disputes between platform providers and consumers, while those between platform providers and professional users would be dealt with by the mediation services provided under the Platform to Business Regulation.

Public Consultation on the
Regulation of Harmful Content on Online
Platforms and the Implementation of the
Revised Audiovisual Media Services Directive

NOTE: The questions contained in this online form/consultation should be read in conjunction with the accompanying explanatory note

Strand 1 – National Legislative Proposal

Q. 1. – What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**

Initially a user should engage with the service provider and request take down but if a user is dissatisfied the direct involvement of the regulator in deciding whether individual pieces of content should or should not be removed would be effective.

Q.2 – If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate. **[Sections 2, 4 & 8 of the explanatory note]**

TG4 has no view on whether a statutory test should be put in place, but we would expect that the regulator would publish a code and guidelines which would detail the circumstances in which a regulator would require take down of content.

Q.3 – Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme? **[Sections 2, 5 & 6 of the explanatory note]**

All online platforms including social media services should be included within the scope of a regulatory or legislative scheme.

Q. 4 – How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered? For example,

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)

- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

TG4 agrees that the categories listed above should be considered as harmful content.

Strand 2 – Video Sharing Platform Services

Q. 5 – The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples. **[Section 3 of the explanatory note]**

Social media services should be considered Video Sharing Platform Services.

Q. 6 – The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures. Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator? **[Section 3, 4, 5, 6 & 8 of the explanatory note]**

VSPS should be governed by the existing linear regulator - the BAI, which is an independent statutory body.

Q. 7 – On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place? **[Section 3, 4, 5, 6 & 8 of the explanatory note]**

The revised Directive specifies a distinct set of rules for VSPS which are not as restrictive as the rules which apply to media service providers.

The Directive states that national legislation may choose to impose more detailed or stricter measures on VSPS. TG4 believes that Irish legislation should impose stricter measures identical to those which apply to media service providers, while acknowledging that any such measures must be compliant with EU law and the E Commerce Directive.

The examples of sanctions and powers detailed at section 7 of the explanatory note in respect of online content should be applicable for VSPS, without prejudice to the previous comment.

Strands 3 & 4 – Audiovisual Media Services

Q. 8 – The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services? **[Section 4 of the explanatory note]**

The on-demand audiovisual media service established in Ireland should be governed by the existing linear regulator – the BAI.

In so far as is possible the same content rules should apply to both television broadcasting services and on-demand audiovisual media services.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund?

The 'Sound & Vision' fund has been launched, administered and carried out in an exemplary fashion. It has promoted innovation and maintained a level of variety in output for Irish

audiences which has been recognised by many international awards. The fund has managed to minimise complexity and avoided over-expensive bureaucracy while at the same time remaining very transparent.

The S&V fund must face the future and must remain flexible enough to adapt to the changing behaviour and needs of audiences as well as keeping a close eye on output for Irish audiences. However, the core strength of the S&V fund has been that it has not let itself become over-diluted and has worked with the BAI-licensed broadcasters to achieve the impact which broadcasting institutions can achieve.

All BAI-licensed broadcasters already have non-linear services. However, giving access to the fund to non-linear-only services raises many questions. How does a service qualify? User-generated non-linear channels are multiple and defining whether or not they create public service will be very difficult. Funding non-linear-only services would probably lead to an increase in administration costs and a dilution of the impact of the S&V fund on Irish audiences.

Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?
[Section 4 of the explanatory note]

Applying levies to external services which target Ireland could generate some funding for the S&V fund, but the calculation and collection of the levies might be complicated and costly.

Strands 1 & 2 – European & International Context

Q. 10 – The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful

online content and those creating said content, in pursuing the further regulation of harmful online content? **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

[See response to question 7.](#)

Q. 11 – How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

[It is acknowledged that the eCommerce Directive must be complied with but TG4 has no view on how this should be done. See response to question 7.](#)

Strands 1-4 – Regulatory Structures

Q. 12 – Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered? **[Section 5 of the explanatory note]**

[TG4 believes that restructuring and reforming the Broadcasting Authority of Ireland as a Media Commission and assigning all four regulatory strands to this regulator is probably the best way forward. Audiences would probably appreciate a one-stop-shop regulator for their content queries. As the regulator moves to a broader role, it should continue to advocate for support and public funding for Irish Public Service Media.](#)

Q. 13 – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated? **[Section 5 of the explanatory note]**

[The BAI Levy model has worked well since its inception and could be tweaked to accommodate Europe-wide non-linear services and non-editorial online services. This may also be a better source of funding for an enhanced S&V fund.](#)

Strands 1 & 2 –Sanctions/Powers

Q. 14 – What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. **[Section 2, 4, 5, 7, & 8 of the explanatory note]**

[The examples of sanctions and powers detailed at section 7 of the explanatory note would seem appropriate.](#)

Q. 15 - What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

-The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

The powers detailed above would seem appropriate.

Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction. **[Sections 2, 4, 6, 7 & 8 of the explanatory note]**

Q. 16 - Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate? **[Sections 2, 4, 6, 7 & 8 of the explanatory note]**

TG4 has no views but we would expect that the regulator would publish a code and guidelines which would include guidance on this issue.

Page 2

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4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** The Audio-visual Media Services Directive defines a "media service provider" as a person with editorial responsibility for the choice of content and who determines the manner in which it is organised. This would not include Three Ireland which does not exercise any control over content. Three Ireland is a provider of telecommunications services, and as such is a "mere conduit" within the meaning of Regulation 16 of SI 68/2003 (implementing Article 12 of "eCommerce" Directive 2000/31/EC). This provision applies to certain providers of information society services, and means that they are not liable in respect of any information they transmit, where their involvement is limited to the mere transmission of that information. Notwithstanding the above, on its own initiative, Three provides internet filters to limit access to material that may not be suitable for children. These filters are automatically applied for pre-pay accounts, which are the accounts most likely to be used by children. Pre-pay customers who are over 18 can remove filtering by verifying their age. As postpay customers are 18 and over, this filter is not automatically applied but postpay customers can opt-in for this service by contacting customer care. We submit that any mechanism for the removal of harmful material should be addressed to platforms acting as publishers of said materials, and not to entities such as Three who provide "mere conduit" services. We believe that any such mechanism would be in breach of Article 15 of Directive 2000/31/EC, which prohibits member states from imposing any general obligation on providers "to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity" Article 15 does permit member states to require service providers to "promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service", but we submit that this does not permit the filtering or blocking of content which, though offensive or harmful, is not illegal. It is further noted that even the draft Digital Copyright Directive also proposes to exclude electronic communications service providers (or telecommunications service providers) as designated under the European Electronic Communications Code Directive 2018/1972 such as Three Ireland from the scope of online content sharing providers in this Directive, due to the fact that Three Ireland does not control content.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content

should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

As noted above, we submit that no requirement be imposed on telecommunications service providers to block or remove materials which are “harmful” but not illegal, these are excluded from the definition of media service provider in the Audiovisual Media Services Directive.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

We submit that, for the reasons outlined above, telecommunications service providers should not be included within the scope of such a regulatory or legislative scheme.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

As noted above, we submit that no requirement be imposed on telecommunications service providers to block or remove materials which are “harmful” but not illegal.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Three Ireland does not have a view on this question

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Three Ireland does not have a view on this question

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

Three Ireland does not have a view on this question

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Three Ireland does not have a view on this question

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Three Ireland does not have a view on this question

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13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

As noted above, we submit that no obligation should be placed on telecommunications service providers to block or remove content which, though offensive or even harmful, is not illegal. In making this distinction we submit that regard should be had to Freedom of Expression norms, and right to engage in unpopular speech or robust debate.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

The Audio-visual Media Services Directive defines a "media service provider" as a person with editorial responsibility for the choice of content and who determines the manner in which it is organised. This would not include Three Ireland which does not exercise any control over content. We again note that Article 12 of the eCommerce Directive 2000/31/EC provides that telecommunications service providers shall not be liable for the content of information communicated. Further, Article 15 prohibits any obligation on providers to monitor the information which they transmit or store, and limits any obligation on providers to report the activities of user to public authorities to cases where those activities are illegal. We submit that no regulatory or legislative scheme which imposes obligations on telecommunications service providers in respect of the content of communications is permitted under the above provisions.

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15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:
 - Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands
 - Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

We submit that telecommunications providers are already subject to sectoral regulation under national and EU law. We submit that it is not appropriate that they be included in the scope of any of the regulatory schemes proposed herein. We note again that any such inclusion would be likely to bring the relevant domestic legislation into conflict with the Audiovisual Media Services Directive and Articles 12 and 15 of the eCommerce Directive 2000/31/EC.

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

Three Ireland does not have a view on this question.

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17 Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Three Ireland does not have a view on this question, subject to the views set out in response to Question 15 below.

18 Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include

- The power to publish the fact that a service is not in compliance,

- The power to issue administrative fines,

- To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,

- The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Three Ireland would have a concern about a regulator being able to issue administrative fines and consider that any penalties including financial penalties would be best left to a Court to impose, from a due process perspective.

19 Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Three Ireland does not have a view on this question.

Regulation of Harmful Online Content and the Implementation of the revised Audiovisual Media Services Directive

Submission by:

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The pressures and negative effects associated with 24/7 social media access on the mental health of young people

In a modern world there are new dangers to protect young people from, sometimes these dangers can be very visible to adults and sometimes they are not. In the last decade there has been what can only be described as a cataclysmic shift in our use of the internet for social purposes. We are now connected in ways we could only have dreamt possible a few short years ago. Our use of social media is shifting constantly like the movement of the tides, what arrives on the shore can look inviting and harmless but if we look closely underneath the surface it becomes dangerous, foreboding and bringing risk into our homes and our young people's lives we hadn't envisaged .

Young people are given access to mobile devices so we can keep connected and keep tabs on them but in doing so we are also connecting them to the outside world like never before. These interactions are sometimes great fun, educational, create connections to peer groups, but left unchecked can unwittingly bring danger into the hands of the child you spend your life trying to protect from harm in other ways, until they are at least old enough to deal with them maturely.

Social media can be beneficial in many ways but is it worth the risk of the negative experiences that also come as part and parcel of internet use at such an impressionable young age?

For the purpose of this project social media is defined as; websites and applications that enable users to create and share content or to participate in social networking(*Google.com. (2019)*)

With these points in mind, in this project we aim to highlight the affect that social media use is having on our young people, we will explore how children are using it as a medium for communication, sometimes secretly; putting them in grave danger of exploitation by older adults or bullying by their peers.

Young people can now access social media 24/7 in the palm of their hand there is no leaving it behind at the school yard or bus stop. It follows them home, into their bedrooms and previous safe spaces. WIFI connects us when we are out and about, often for free, but does it come without a real cost to the person?

This study will examine young people from the age of 11 to 14 from mixed socio-economic backgrounds. We will determine which applications they are using, are some more popular defined by gender, just how long are they spending on line, what worries them about social media and what does this tell us about how young people are growing up today? What are the most popular applications they use? If it is having a negative effect why do parents continue to facilitate this behaviour by providing children who are often vulnerable with access to this technology? What happens when we remove this technology from the school environment? Will the new digital age of consent have a positive impact?

Data Gathering

As a group we decided to use different forms of data gathering, to establish trends and gather information in the short time frame we were allocated. As our primary source of data gathering we used both questionnaire and focus group styles. We decided to use questionnaires targeting young people in our localities, to ensure comprehensive accurate data from source. We chose this method because the advantages include precise answers,

short timeframes, detailed articulation of viewpoints from survey respondents, easily accessible raw data and the respondents feels fulfilled.

We also contacted national service providers, specifically Pieta House, Samaritans, CAMHS, Jigsaw and ISPC, who provide services resulting from problems associated with social media use by young people. Not all furnished us with a response.

We found that by using questionnaires, interview, phone calls, emails and focus group chats we were able to access large numbers of people very effectively in a short period of time and we then combined this information with our online and hard copy research.

Literary Review

During our research we found the first report on the impact of phone ownership on childrens academic development. ESRI reported on data collected from 8,500 nine year old children from the 'Growing up in Ireland Study', measuring if long or short mobile phone use affected standardised reading and maths tests. It found that children who owned a phone at 9 years old scored 4% less on average in standardised reading and Maths by the time they were 13 years old. Commenting on the publication of the research, Selina McCoy, Associate Research Professor at the ESRI commented, *"This is the first time the ESRI has looked at the impact of mobile phone ownership on children's academic development. It is important to keep monitoring this going forward in order to provide evidence for the growing debate about the potential effects of screen time and mobile phone use of young people in Ireland."* Estri.ie. (2019).

The Children's commissioner for England study "Life in Likes" explored the use of social media in children aged 8-12 years old. Being a similar age cohort to our study it was interesting to find we could see comparisons in our results from 11-14 year olds showing most children in these age groups had their own phones and could access their social media accounts when they wanted. Reaching secondary school it was seen as more important to be on social media throughout the day as opposed to just after school or when they had some free time. When asked how long they spent on social media, these were some of the responses: *"Most of the time, when I am not on my Xbox" Harry, 11, "At break time, we go*

into the loo that has Wi-Fi and use our phones there because there is nothing else to do”
Merran, 12, Childrenscommissioner.gov.uk. (2019).

Chambers & Standford examine in their article “Learning to be Human in a Digital world” the idea that children are not equipped to critically appraise the dangers of being a modern “digital native”, The Irish Times.(2019). They explore the role of education through their research in helping young people to navigate this new landscape, the idea that school must help prepare young people for the world as it is at present is not a new one from their findings;(1995 Greene, M. (1995). *Releasing the imagination: Essay on education, the arts and social change*. San Francisco, CA: Jossey-Bass. [[Google Scholar](#)]) Suggested that young people must be well informed and have the educational abilities and sensitivities needed to critically examine the world in which we live. *Www-tandfonline-com.ucc.idm.oclc.org*. (2019).

Newspaper articles covering the topic of social media use by young people often reflected the negative aspects of internet use and confirmed the data we gathered in our research; “A large number of the users on the app appear to mitigate their own privacy risks in favour of creating new online friendships,” study of the Yubo app by Liam Challenor doctoral researcher at DCU’s national anti-bullying centre, The Irish Times. (2019)

However in contrast to the research we found on the negative effects of social media on young people, there were some positives as found by a study released for “Safer Internet Day” an international collaboration to highlight safe internet use; In a survey of 2,000 eight to 17-year-olds about their feelings and attitudes towards social media, 68% said chatting to their friends online cheers them up .A further 88% also said that, when a friend was feeling sad or upset, they used social media to send them a kind message. The report reveals that, despite the often-publicised negative effects of social media on children, new research reveals it plays a positive role in how young people develop relationships.

But this survey also highlighted the confused reactions in relation to how social media affected young people’s emotions;

Reporting on their recent interactions online, “74% of the young respondents said using social media made them feel inspired and 82% said it made them feel excited. In contrast, 56% experienced sadness, and 52% felt angry”, Irishexaminer.com. (2018).

We also found conflicting statements from the founders of tech companies who gain to profit from their use by young people in the age cohort we studied; ‘When a journalist once commented to the late Steve Jobs that his children ‘must love the latest iPad’, his response was: “They haven’t used it. We limit how much technology our kids use at home.’ Many executives in Silicon Valley reportedly send their children to Waldorf Steiner Schools, which exclude screen time before the age of twelve”, (Kilbey, E. (2017). *Unplugged Parenting*. Headline Publishing Group.)

During the course of research for this assignment, we accessed multiple online and hardcopy journals, news paper articles, books; all struggling to keep up to speed with the constant evolution of social media. As a result our efforts were somewhat hampered by the information available being outdated as quickly as it is published by latest developments, some of the Apps and sites mentioned were no longer in existence or had been pushed far down the popularity list so were no longer as relevant a topic to our study cohort. This presents a real challenge to anyone wishing to publish research in this field.

Analysis

We had a total of 200 respondents aged 11-14, this consisted of 98 boys and 102 girls. They ranged from fifth class in Primary to second year of Secondary school. Our findings show that the average age of first-time phone owners was ten years old, the youngest being six years old and the oldest being thirteen years old. Findings also showed us that 28% of respondents didn’t have a phone as of yet. While just 4% of our respondents didn’t have any Social Media or device access, that left a staggering 96% of this age cohort having access to Social Media. When we broached the subject of cyber bullying concerns, 41% responded that their friends would be most upset by online bullying.

We queried how long they spent on devices per day, 44.5% stated they were using the internet for one to two hours per day, but a startling 53.5% had access to social media for three hours or more in any 24 hour period. We asked how social media affected their

happiness, the results showed 26.5% were never effected, 44.5% were sometimes effected, 17% were often effected, 6.5% were always effected and 5.5% didn't comment.

While several Apps were mentioned in the course of our research we found that the top three Apps most used were; Snapchat, Instagram and YouTube. Our data showed that overall girls are more active on social media platforms, while boys are more interested in gaming. 58% of respondents with social media accounts had a Snapchat account, 45.3% of respondents had Instagram while 31.25% had a YouTube account. We found that with YouTube accounts there was an even distribution between girls and boys.

Platforms such as Instagram and Snapchat were more popular with the girls so we concluded that girls are more consumed with chatting and image related topics while boys are more interested in gaming and watching videos on YouTube.

CSO survey on Teenagers VS Social Media 'Are We Addicted' showed similar results to our findings with many having access to social media for over three hours per day, while Snapchat users were mainly girls, using it for latest news and gossip.

A National Mental Health Service provider told us; 98% of their users had access to social media on a daily basis, again the age range was similar to our school questionnaire findings. *"Many parents and guardians do not create many restrictions for their children, which shows in the children's disruptive and destructive behaviours. Problems are being dealt with by using psychiatric education to resolve issues between parents and users in implementing boundaries for social media safety for users. Recalibration for children whose behaviours are effected and affected by social media use is constantly being used in our organisation. Service users are being subjected to inappropriate age content, pornographic content, access to live chat rooms and several other age inappropriate sites".*

Blennerville National School in Kerry spoke to us about how they introduced an 11 week pilot phone ban. They had found several issues arising between students from accessing inappropriate content and sites on social media, spilling over into the classroom. The content of the groups that the children were involved with shocked parents and teachers and resulted with more and more school time being spent on sorting out the issues arising among the children. They were the first school in the country to introduce a ban of this nature in schools. There were some children who showed signs in the first week or two of withdrawal

symptoms, however besides these minor blips, friendships, class dynamic and engagement has improved since the ban and it was decided by children, parents and teachers to continue to enforce it after the pilot study ended.

METHODOLOGIES

We used a number of methodologies to research our project which included questionnaires, two group discussions using semi-structured interviews, telephone calls, internet research of published journals, national surveys and newspaper articles, we also searched through any relevant hard copy reference books.

We prepared three questionnaires, one for children aged 11 to 14 years of age, one for teachers and one for service providers. We drafted the questionnaires twice within the group and then asked our tutor for guidance before issuing to an agreed list of primary and secondary schools and national mental health service providers.

We received exceptional feedback from students and teachers, all responding within the timeframe we requested, and giving full and expansive answers to our questions.

In hindsight we could phrased some questions more concisely, some information became inconclusive due to a yes/no/none answer.

We facilitated a group discussion in a girls youth group and found this to be very beneficial, they were very enthusiastic and willing to talk through our questions with us, discussing each question posed in full and we were able to clarify their answers and reasonings.

Throughout this group discussion they interacted with each other, forgetting the purpose of it being research for us, and therefore we got real information they may not have written on a form. All were very strong in their views about the negative effects of social media regarding pressures around physical appearance and the affect it had on their mental health.

A youth group from the travelling community also answered our questionnaires with their leader who then fed back the results to our group. There were no differences in their replies and opinions. We had wrongly assumed that access to Internet might have been an issue and therefore restrict the use of social media but there were no obvious signs of this.

Telephone calls were made to mental health practitioners, service providers and to Blennerville National School in Kerry. In all cases people were very willing to provide information to us on their knowledge and experience and give direction on where to obtain further information. All were of the opinion the nature of our project was hugely important and creating conversation around helping our youth regarding social media was to be welcomed and could only be beneficial.

Questionnaires and emails sent to service providers proved impossible. We encountered either no reply or promise of reply not materialising. From our enquiries we have been told there is no policy on refusal to co-operate with such requests but we had the same experience with four of the five we contacted.

Researching their websites we gained information on their services and located annual reports. The reports did give us a lot of information on mental health but nothing specific to our project. Online searches of Government publications did give us a lot of information on statistics plus it was useful to review consultation papers, both current and archived.

Conclusions

With reference to the aforementioned Steve Jobs comment; this for us, highlights what the creators and developers of social media devices have foreseen. they have deliberately designed their products to be both attractive and addictive. They understand the dangers and potential negative affects for young people using social media in our study age cohort, yet no warnings are issued publicly.

Young people also use social media to find community's they fit in with, but that too can be a negative experience on their mental health, as the culture of comparison and bullying has taken root. Lack of recognition or likes on a posted image or comment can result in lowered self esteem, injured confidence or result in detachment from face to face peer activities. The "Growing Up In Ireland" Study confirmed the need for policy makers and parents to consider whether benefits of social media availability to children are sufficient to justify the cost to education as the report highlighted.

The use of social media by young people has created an entirely new culture of living. Online communities have larger attendances than any local youth or community group. Through the many forms of social media applications we checked, a common theme that carried through all was how addictive social media is, how it is created to be addictive, with many sites being owned by the same companies collaborating and sharing details, enticing young people to spend longer periods of time on line, in return changing the essence of what childhood should be.

Social Media can be considered the pandemic of the new millennium. The pace at which it has swept across the globe and taken over our lives is staggering. We now find ourselves in the unenviable situation of trying to 'close the stable door after the horse has bolted'. Policy and protocols which should have been considered at the outset now needs to be established and implemented.

Online communities and chat rooms are easily accessed by impressionable young people without the skills to critically analyse the associated dangers as shown by Chambers & Stanford research; online interactions are taking up more free social time than meeting face to face. The pressures and negative affects associated with 24/7 social media access on the mental health of young people are staggering and can potentially trigger many underlying long term mental health conditions. Many of our young people's issues are initiated and exasperated by social media usage. Young people who are released from rehabilitation are advised on deleting apps and online social interactions in a bid to take back control.

Our research supports the idea that girls are using social media platforms that are more images and networking related, where boys prefer gaming such as Fortnite, Roadblox, Call of Duty. This leaves our young girls open to pressure; to conform to a certain body shape, style of dressing, too much value placed on consumerism and comparison to others instead of focusing on building face to face relationships through sport and activities unconnected to social media. Young boys face similar risks to girls from online bullying, physical threats, grooming, being exposed to pornography from a young age and the inability to entertain oneself without the use of social media. All these negative aspects were cited by our study participants.

Parental pressures are also insurmountable, allowing your child to conform to society is so important, often for the sake of peace and harmony in these relationships; however rules need to be instilled in young people's online journey and parents play a pivotal role in setting these and implementation.

Recently we have seen an attempt to "close the door", change of our digital age of consent upwards from 13 to 16 on the 4th of April 2019. Unfortunately though this new age limit will not be implemented retrospectively for under 16s who already have access to social media that is not age appropriate. There is much debate about who will police this new age of consent, with the responsibility being shifted about from government, tech companies and parents. There was little to no advertising campaign for this for young people or for their unsuspecting, ill-advised parents/guardians.

Senator Naughton responding to CEO of Facebook Mark Zuckerberg's age of verification, which is one of the few ways of protecting children on line, stated; *"people or children should not have to provide biometric data or their PPS numbers to Facebook, we need to find a way to verify age without having to share sensitive data with Facebook or any other social medial platform, my concern in this area is due to paedophiles online masquerading as young people and preying on and grooming children"* Finn, S. (2019).

The CSO reports that while 98% of young people have social media access, 91% have accounts on several sites, while they are not addicted they use at least one hour and fifty minutes per day. While Apps may come and go, the reasons for using them remains the same. While use of Facebook may be dwindling in the youth sector, Snapchat, Instagram and WhatsApp which we found to be the top three most popular apps in our research, are owned by the very same company - Facebook.

Parents assume Snapchat is a single use platform; it offers many doorways to other online sites such as Tellonym and adult dating app Tinder. Snapchat founded itself as an alternative to Facebook for younger users worried about sharing information on the same sites as their parents. It has changed substantially and collaborates with other appsto gain access to larger audiences and advertising revenue. Pictures and videos no longer disappear after a few seconds and can now be stored to be used maliciously by other users. 90% of our 13-24 year

olds have access to Snapchat and it was by far the most popular social media platform from our research findings.

Social networking app Yubo, is considered “Tinder for Teens”, allowing them to connect to strangers by sharing their username or snap-code. Swiping right or left depending on your visual preference, if both users like each other you are able to chat with them on Snapchat and send any photos they choose even if you have never met. Tellonym marketed as the “*most honest place on the internet*”, the app allows users to ask and answer questions about each other anonymously. “*Experts say it is enabling cyber-bullying and cruelty; previous incarnations of anonymous interaction apps have been shut down after high profile cases of bullying and child suicide connected to their use*”, Kraus, R. (2019) *Tellonym, an anonymous messaging app, is freaking parents out. [online]*

There were some good initiatives such as the pilot study in Blennerville National school but it’s success was very dependent on parental co-operation it is unsure yet if this could be replicated longer term on a wider scale because of the immense pressure put on young people which is then transferred as pester power to parents to provide access to social media.

The ABC anti-bullying initiative was also something we felt merited mention in our report. It provided a range of age appropriate downloadable resources for students, parents and teachers to help open the conversation up and prevent cyber-bullying. “*The invasive nature of a cyber-bullying incident in that it can happen in one’s own home and the potential for a larger audience, can contribute to increased levels of shame, embarrassment, humiliation and a feeling of a lack of control for the victim. It can also make it more difficult to prove a cyberbullying incident, as identities can be kept anonymous and there are often no witnesses to the initial posting or sharing of the photo, video or information*” Anti-Bullying Centre. (2019).

Young people’s perception of what is a healthy sexual relationship, are being clouded by what they are viewing on line; in response to the ‘ Positive Sexual Relationships report’ conducted by Youth Work Ireland, Minister for Children Katherine Zapone said, ‘*We must also listen to the concerns fears and experiences of children and teenagers; They are crucial if we are to find solutions that are to work,*’ Youthworkireland.ie. (2019).

The limitations we found in our research were; while there were many websites, journal articles, news articles; the CSO and ERSI provided surveys and data on the usage of apps and young people's reliance on social media there seemed to be very little publications that were keeping pace with the rapid changes and pandemic effects of social media. Due to the time of year the most current reports we were able to access were from 2017, in social media terms 2017 is almost archaic.

Recommendations

- Parents/Guardians and young people need to be provided with guidelines to ensure that they become responsible digital citizens.
- At present there is no legislation on the age restriction at which young people can purchase a device that allows access to social media, unaccompanied by a parent we recommend a change in this policy.
- We recommend an independent Social Media Watchdog agency to implement legislation and handle complaints. At present Facebook polices its own App content. This is not effective and content that is inappropriate is often not taken down.
- We recommend warning signs and age restrictions like those on films, alcohol, cigarettes and sexual consent for Social Media. We concluded as a result of our research social media is an area that needs strong legislation and implementation of strong warning messages as it is accessed by children of all ages, with very little verification sought or policing of content.

- While primary schools teach awareness on nature, alcohol, sexual education and the environment to name a few, the time allocated to school curriculum emphasising the importance of online safety is not sufficient in our view. Schools need to play an increasingly pivotal role in safe internet education.
- Recommendations from the youths who completed our questionnaire were, *“A family link should be installed on parents and minors devices”*. *“Used safely in a kind way and spend a short time at it”*; *“there should be more security online to protect young people and adults”*; *“Don’t put out personal information, as it can be used against you and put you in danger”*, *“ don’t talk to people you don’t know”*, *“if someone is being bullied on social media, the bully comes home with them.”* From this we can see young people understand there needs to be changes in this area. We recommend to have their voices heard in the formation of a safe internet for the future.
- Teachers who completed our surveys also reported *‘Children should be banned from receiving phones for their confirmations’*, *‘children are interactive in school; however their heads go into the phones straight after school’*, *‘Parents expect schools to negate the online problems faced by children rather than by restricting or removing access to internet’*, *‘by complaining to school, parents often feel they have carried out their parental duties’*. We recommend the question of whose responsibility it is to set boundaries needs setting clearly in each environment.
- We feel strongly that social media is a contributing factor in a national mental health crisis in young people; this needs to be further assessed and for policy to be created to get to grips with this digital lifestyle addiction.

Bibliography

Anti Bullying. [online] Available at: <https://www.antibullyingcampaign.ie/> [Accessed 4 Apr. 2019].

Children's mobile phone usage may have negative impact on development, report says. [online] Available at: <https://www.irishexaminer.com/breakingnews/ireland/childrens-mobile-phone-usage-may-have-negative-impact-on-development-report-says-897751.html> [Accessed 25 Mar. 2019].

Cyberbullying - Anti-Bullying Centre. [online] Available at: <https://antibullyingcentre.ie/bullying/cyberbullying/> [Accessed 10 Apr. 2019].

Kilbey,E.(2017). Unplugged Parenting. Headline Publishing Group.

Mark Zuckerberg tells TDs that Facebook is working proactively on child protection issues . [online] TheJournal.ie. Available at: <https://www.thejournal.ie/mark-zuckerberg-dublin-4573690-Apr2019/> [Accessed 10 Apr. 2019].

Morgan,N. (2014). Teenage Guide to Life Online, the. London: Walker Books Ltd.

Morgan,N. (2014). Teenage Guide to Stress, the. London: Walker Books Ltd.

Murray, M. and Keane, C. (1997). The ABC of Bullying. 1st ed. Dublin.

Research examines association between early mobile phone ownership and children's academic outcomes | ESRI. [online] Available at: <https://www.esri.ie/news/research-examines-association-between-early-mobile-phone-ownership-and-childrens-academic> [Accessed 8 Apr. 2019].

Shibboleth Authentication Request. [online] Available at: <https://www.tandfonline-com.ucc.idm.oclc.org/doi/full/10.1080/13573322.2018.1515071> [Accessed 10 Apr. 2019].

Social media a mostly positive experience for young users. [online] Available at: <https://www.irishexaminer.com/breakingnews/technow/social-media-a-mostly-positive-experience-for-young-users-826622.html> [Accessed 8 Apr. 2019].

Teens using Yubo may be at risk – study. [online] Available at: <https://www.irishtimes.com/news/education/teens-using-yubo-may-be-at-risk-study-1.3754117> [Accessed 5 Apr. 2019].

Tellonym, an anonymous messaging app, is freaking parents out. [online] Mashable. Available at: <https://mashable.com/article/tellonym-cyberbullying-teens/?europa=true> [Accessed 10 Apr. 2019].

The myth of 'digital natives'. [online] Available at:

<https://www.irishtimes.com/news/education/the-myth-of-digital-natives-1.3459381>

[Accessed 5 Apr. 2019].

Young people turn away from teachers and parents and towards the internet for sex education

| Youth Work Ireland. [online] Available at: [http://www.youthworkireland.ie/what-we-](http://www.youthworkireland.ie/what-we-do/news/young-people-turn-away-from-teachers-and-parents-and-towards-the-internet-f)

[do/news/young-people-turn-away-from-teachers-and-parents-and-towards-the-internet-f](http://www.youthworkireland.ie/what-we-do/news/young-people-turn-away-from-teachers-and-parents-and-towards-the-internet-f)

[Accessed 6 Apr. 2019].

definition of social media - Google Search. [online] Available at:

https://www.google.com/search?q=definition+of+social+media&rlz=1C1CHBF_enIE735IE736&oq=definition+of+social+media&aqs=chrome...69i57j0l5.12971j1j7&sourceid=chrome&ie=UTF-8 [Accessed 10 Apr. 2019].

<http://www.childrenscommissioner.gov.uk/wp-content/uploads/2018/01/Childrens-Commissioner-for-England-Life-in-Likes-3.pdf> [Accessed 26 Mar. 2019].

<https://www.cso.ie/en/media/csoie/newsevents/documents/johnhooperresults2014/teensocialmedia.pdf> [Accessed 8 Apr. 2019].



Uplift Submission on Harmful Content

Introduction

Uplift is a people powered campaigning community that connects over 211,000 people who share progressive values to take action on and offline across Ireland.

Our community has been active in advocating for greater regulation of online platforms particularly in relation to political advertising, the spread of disinformation and sharing of racist content designed to fuel far right activities in Ireland.

We welcome Minister Bruton's initiative and the move towards making online platforms accountable. They hold significant power and influence over the lives of many Irish residents.

We welcome the intention to move towards a systemic approach to addressing the problem of harmful content - especially the focus on the responsibility of the platforms themselves.

We acknowledge that this is a complex process and that the context is ever changing. Any new regulatory framework must take account of this evolving nature of online activity.

Our community is particularly concerned with online and social media-based hate speech which causes a great deal of harm. It often targets groups and individuals on the basis of race, religion, ethnic origin, sexual orientation, disability, or gender. It poisons debate, fuels prejudice and can enable and incite real-world violence and divide society.

In considering the formation of new legislation and approaches to tackling harmful online content, a number of key areas are outlined in this submission.

Holding online platforms to account

Tech companies such as Facebook, Google and Twitter carry huge responsibility for allowing the uploading and sharing of misleading and harmful content. They have **been** shown to be reluctant to cooperate with efforts to be regulated in the past. Facebook's recent efforts are welcome but do not go far enough.

Wider consideration should also be given to their business model which has been largely driven by the very features that allow the spread of harmful content. Putting it simply, many tech giants profit from the spread of disinformation, making it even more important that they are monitored and regulated by external bodies and Irish law. Given that many of the tech giants are based in Ireland we are ideally placed to address these issues.

Scope of legislation

The scope of the proposed legislation in Ireland should not just include social media companies, but also public discussion forums and file sharing sites. However, care must be taken to ensure that legal requirements would not force all these companies to implement measures that only work for the largest companies.

Regulatory Infrastructure

Platforms should be required to have a 'duty of care' to protect their users from so-called online harms. An approach that shifts focus onto regulating systems and instilling procedural accountability would be welcome and necessary to truly hold these platforms to account.

Harmful content and harmful activities.

It's important to move beyond a focus on harmful content to also address problematic behaviour. Harmful content ie disinformation, hate speech as well as harmful behaviour ie trolling, racist targeting cause untold problems and should be addressed as part of a new regulatory approach. In addition while some harmful content and behaviour will fall under existing legislation, many forms ie disinformation will not be covered by existing legislation - therefore really clear definitions will be needed.

Racism

The growth of racist abuse online is overwhelming. Trolling is a particular phenomena that has emerged as a modus operandi of those intent on spreading hate and racist speech online. Racism is a particular feature of alt/far right mobilisation and in Ireland there's been a noticeable increase in in recent months.

The inadequacy of the 1989 Prohibition of Incitement to Hatred Act in dealing with racism has been well [documented](#) and must not be used as any sort of measurement for dealing with harmful racist content.

Disinformation, 'Fake News'

Disinformation is a growing problem and needs to be addressed in a new regulatory framework tackling harmful content. Disinformation means deliberately misleading or biased information; manipulated narrative or facts; propaganda.

However there are real concerns about what is classified as disinformation. For example, there is a real risk it could be interpreted too broadly and therefore end up including speech which is protected by the right to freedom of expression. Adequate safeguards to prevent this must be put in place.

Duty of Care.

In ascribing a duty of care on digital platforms it will be vital to define what this means in detail. At the core of a duty of care should be the principle of protecting human rights.

Freedom of expression

Without clear definitions of what is considered harmful content there is a real risk that the platforms will interpret content too broadly and end up including speech which is protected by the right to freedom of expression. It is vital that agreed definitions are set out and that this process is not left up to the tech platforms. This is one of the greatest areas of concern for Uplift members and the wider public.

Safeguards

A transparent process for how content and harmful behaviour is to be reported and dealt with will be required. Speedy response rates are desirable - however if platforms rely solely on AI to manage this process they must also put in place safeguards to prevent non harmful content from being also removed. Much of the harmful content and behaviour visible online is informed by context and automated solutions will not be able to address this reality.

Enforcement

Legislation should not be developed without the input of experts in the area of protecting freedom of expression.

Given the complexity of the challenge of addressing hate content and behaviour we recommend an approach that is innovative and trials/pilot approaches that help to foster a culture of innovation and learning across all sectors.

Digital Citizenship

A focus on digital citizenship as well as encouraging online safety, including digital and media literacy is vital in any new regulatory framework that seeks to address harmful content. Digital citizenship incorporates creating the conditions where online users understand the rights and responsibilities that come with being online and contribute to creating norms and standards that make being online a positive experience.

Independent Regulator.

An independent regulator should have the power to determine how online content control works. It must be rights based approach and take account of the need for healthy civic dialogue, protections for freedom of speech,

A regulator should be tasked with a role of implementing legislation and policy from the principles of protecting fundamental human rights, promoting civil discourse, human dignity, and individual expression; an internet that prioritises critical thinking, reasoned argument, and verifiable facts; protects individuals' security and privacy.

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April 2019

***Public Consultation on the Regulation of Harmful Content on Online Platforms and the
Implementation of the Revised Audiovisual Media Services Directive***

Written response from Verizon Media

April 2019

1. Introduction

- 1.1.** Verizon Media is pleased to respond to this consultation. Our company takes seriously the goals behind both the EU Directive and the proposed national legislative initiative which, respectively, aim to safeguard and empower consumers of audiovisual content and explore options for enhancing online safety.
- 1.2.** Created in 2017, Verizon Media is a complex and fast evolving business. We have operating businesses in Ireland, the UK and the US providing a range of digital entertainment and news content, as well as community services, to users across the Europe-Middle East-Africa (EMEA) region. We are committed to constructive engagement in the diverse areas of policy but also require legal clarity and predictability to inform investment and operational decisions about how to best serve our users in this region. Online content and community services are scale businesses and our ability to compete depends on fair, consistent and proportionate interpretation of EU regulation and well-scoped national laws which are aligned with international norms upon which our services are created.
- 1.3.** This response focuses on Strand 1, Strand 2 and Strand 3 of the consultation.

2. About Verizon Media

- 2.1.** Verizon Media is a global house of digital media and technology brands. Verizon Media's brands include Yahoo, AOL, Ryot, HuffPost, Tumblr, TechCrunch and BUILD. We are a challenger in digital advertising and a competitor to the market leaders. Through our own operations, and in partnership with others, Verizon Media helps drive diversity and choice in consumer services and brand advertising.
- 2.2.** Verizon Media operates as a business division of Verizon Communications Inc. Verizon Media operates in Ireland as Oath (EMEA) Ltd.

3. Strand 1: New online safety laws to apply to Irish residents

- 3.1.** We support the goals set out in the consultation to ensure that internet users have confidence in online services, are resilient, can identify problems and have strategies to deal with them. Companies have an important role to play in promoting positive online behaviours and responsibly managing community spaces. We also understand the desire to ensure that effective programmes are in place to tackle specific harms and that the relevant

partners - industry, government, civil society and others - are engaged in working towards shared goals.

- 3.2.** Verizon Media brands are committed to tackling illegal content, including CSAM or terrorist content, and continue to invest in high impact company and industry initiatives aimed at advancing this challenging work. Through our involvement with global organisations such as the Internet Watch Foundation (IWF) and the Global Internet Forum to Counter Terrorism (GIFCT), and our willingness to develop and share our own thinking, we are working continuously to create responsibly managed online environments with engaged and educated users.
- 3.3.** Many companies in our industry, including ourselves, are making material investments of time, policy/operational expertise and resource to develop high impact international initiatives aimed at thoughtfully and effectively tackling illegal content online. The most high profile focus on the fight against CSAM and terrorist content. These commitments are global and aim at safeguarding the interests of internet users around the world. These initiatives are ground-breaking and are yielding positive results. We seek support from governments around the world to favour and promote global approaches where the nature and scale of a challenge lend themselves to international collaboration.
- 3.4.** Our approach to harmful content – which is generally legal but potentially harmful to some vulnerable or young users – is framed by community guidelines which are developed to promote diverse speech and positive user behaviours. We remove content which violates these guidelines and take appropriate action against users posting such content.
- 3.5.** Our efforts are shaped by our company-wide business and human rights program, which drives our efforts to uphold our responsibility to respect the rights of our users while also addressing online harms.
- 3.6.** At a time when policy-makers and users are calling on companies to take steps to embed user-centric approaches to tackling harms and develop sophisticated and thoughtful policies and processes, it is important that the available space for such programmes is not simultaneously and unintentionally eroded through prescriptive policies and regulation.
- 3.7.** Ireland is among many governments currently considering interventions around illegal and harmful online content which involve the creation of regulators with powers to order or influence take down of content, including content created by users outside their jurisdiction and under different laws and rights frameworks. Developing policy which works in concert with international norms and responsible company programs will require careful and considered formulation.
- 3.8.** We commend government’s commitment to preserve limitations to intermediary liability and free expression online, both of which underpin and safeguard the space for company programmes. We also welcome government’s commitment to respect the various global frameworks which are already in place. It should be one of the guiding principles for the national initiative to champion existing approaches, to ensure there is no fragmentation or duplication of effort, or competition for the same resources.
- 3.9.** While the consultation sets out at a high level steps that government proposes to take to introduce a national legislative proposal, it stops short of examining the more complex

matter of how such a framework would operate in practice and of setting out the policies and processes that would underpin it. While it acknowledges the absence of clear legal definitions for harm and the need for more clarity, it overlooks some of the crucial challenges associated with action against harmful content, some of which may be lawful.

3.10. We believe government should take more time to develop this detail and undertake a further stage of consultation before making any decision on how to proceed.

3.11. Of particular relevance in this regard are the joint views of the UN Special Rapporteurs on the nexus between States' proposals to act against illegal and harmful online content and their duty to protect user rights, in particular free expression. While the Rapporteurs are understanding of the public interest and security concerns of governments, they have:

3.11.1. Cautioned against hasty presentation and expedited adoption of legal change, without in-depth consideration of the impact of proposals and public consultation on detailed proposals. In particular, the Rapporteurs are concerned that overly broad or imprecise laws can unduly interfere with governments' obligations under international human rights law;

3.11.2. Reiterated that any restriction to free expression must be necessary and proportionate and clearly defined in law, "*formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly*"¹ and be subject to the regular legislative process;

3.11.3. Urged States to "*refrain from adopting models of [online content] regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression*";

3.11.4. Counselling States to avoid delegating responsibility to companies as adjudicators of content and to avoid complex legal frameworks which can create competing considerations and incentives. For example, accelerated time lines for assessing content do not allow Internet platforms sufficient time to examine requests in detail, and may in practice mean that companies will consistently produce an abundance of caution, for concern of financial fines and other consequences, which may undermine free expression and the public interest;

3.11.5. Re-stated that it is for governments to indicate how proposals for new law and their proposed enforcement are compatible with Article 19 of the International Covenant on Civil and Political Rights.

3.12. A further phase of government-led consultation would provide time and space to specifically address these points in detail and provide Irish companies with greater clarity as to the scope of services and types of harms government means to tackle. Companies are already hard at work tackling a range of harms and we do not share the view that regulation is necessary to encourage companies to take action to protect users. These issues are challenging for many reasons, particularly where the assessment of content depends heavily on context. The focus on legal but 'harmful' content is fuelling the vagueness of this

¹ See <https://freedex.org/wp-content/blogs.dir/2015/files/2019/04/OL-AUS-04.04.19-5.2019-2.pdf> and <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24234>

exercise. For this reason, we favour government narrowing its focus on harms which are illegal in nature.

3.13. This phase of consultation should focus on a clearly defined scope and bring forward detailed drafting of new offences and robust legal definitions, where necessary, as well as how a legal and regulatory framework would account for context. We would not favour a ‘duty of care’ approach of the kind recently proposed by the UK government. This provides no legal clarity, transparency or predictability for companies, and serves to fragment and duplicate existing efforts as well as erode space for company programs aimed at tackling online harms while respecting user rights.

3.14. Drawing on our company’s experience of similar initiatives around the world, we would urge government to pay particular attention to the following in designing the next phase of work:

3.14.1. Rely on industry-led development of new and effective technology which tackles illegal content and avoid mandating technology solutions;

3.14.2. Acknowledge that there is very little or no technology that can accurately identify content or behaviour mentioned in section 2 of the consultation;

3.14.3. Refrain from empowering a regulator to determine company terms of service;

3.14.4. Limit regulatory oversight to content which is illegal and refrain from oversight of company terms of service;

3.14.5. Consider that companies take action on lawful but potentially harmful content consistent with their existing terms

3.14.6. Avoid combinations of policies/powers which skew incentives for company action – e.g.: condensed take down times, heavy fines and vague legal definitions will likely result in over action against content;

3.14.7. Ensure any authority empowered to influence or order take down of content is transparent and accountable, with explicit duties to act in a rights-respecting way;

3.14.8. Take care not to impose local law standards on content created by users outside local jurisdiction and under different laws and rights frameworks;

3.14.9. Abstain from introducing individual rights of action against platforms for third party content.

3.15. In this regard, we find the long list of possible enforcement powers on pages 10 and 11 of the consultation document troubling and respectfully ask government to review them in the light of the UN Special Rapporteurs’ comments and in close consultation with stakeholders including civil society and human rights organizations and companies. Of particular concern are the suggestions that a regulator have powers to audit a company’s systems and processes (and/or “*direct review of a company’s content moderation teams as they are operating*”), to require companies to remove individual pieces of content where an individual is “*dissatisfied with a response to a complaint they have received from a service provider*” and to impose administrative fines for “*non-compliance*” (over and above those available under GDPR and proposed in the draft EU Regulation on terrorist content).

3.16. Ireland has historically sought approaches to regulation which prioritise the promotion of effective practice and process over heavy sanctions for individual instances of non-compliance. This list of possible enforcement powers represent a significant shift in government's posture without clear justification. There are good reasons to proceed with caution in such a novel area of regulation and focus first on establishing skilled and expert public institutions before assigning them combinations of powers which skew incentives for company action and deliver poor outcomes for users.

3.17. Ireland has standing and influence as one of the leading digital economies in the world and as an active participant in the promotion of political and personal freedoms under international law. Our experience shows that overseas governments will not hesitate to seize on vague laws developed in rule of law countries in order to justify actions which suppress their citizens' privacy and personal freedoms. It is therefore crucial that all legal and regulatory initiatives around digital content in Ireland meet the highest standards and are worthy of emulation overseas.

Services in scope

3.18. Providing legal certainty and predictability to Irish companies must be a priority for the national legislative initiative. Given Ireland's position as a digital-first economy which attracts significant domestic and international investment in technology-based enterprises, it is important that new policy and legislation supports innovation and is proportionate and workable for companies of all sizes.

3.19. We appreciate the government's intention to limit the scope of the national legislative initiative to companies in Ireland. We also note that only Irish residents would be able to avail themselves of the proposed framework.

Regulator

3.20. The consultation sets out two options for the creation of a regulator. Notwithstanding the concerns raised above about the scope and content of regulation, we believe any new body with oversight of internet services in Ireland should be wholly separate from the established broadcasting regulator, the BAI.

3.21. The broadcasting ecosystem remains distinct from online in a number of very important ways. It is a closed environment, over which broadcasters have end-to-end editorial and operational control. This has changed very little over time and broadcast regulation has evolved around this reality and accordingly demands high standards of compliance by providers of broadcast services. The online world, on the other hand, is an open and global ecosystem comprising myriad interconnected entities, cooperating and collaborating to develop and deliver services to end users. Crucially, end users themselves are not passive consumers but active participants in shaping the online environment through their individual content creation and interactions with each other. Control of this environment is dispersed and this makes the establishment and enforcement of standards of behaviour uniquely challenging.

3.22. The development and oversight of future policy for the online environment must be forward looking and without deference to its analogue antecedents. It must be informed by independent insights and embed an evidence-based approach. All bodies with a role in

policy-making or oversight must have a bias towards novel approaches and avoid aggregating ideas embedded within existing regulatory structures and challenge received wisdom. This is best achieved, in our view, by independence from legacy regulators. This separation would also serve as a worthy model overseas, where some governments have extended broadcast regulation to internet services with adverse effects on personal privacy and creative freedoms.

3.23. The national legislative approach should, wherever possible, leverage existing institutions established under the Action Plan for Online Safety rather than create new ones. This is important because legislation and take down of online content will never be a complete solution to the challenges government seeks to address. Managing user posts and fostering positive behaviour is multi-pronged and must be synchronised with initiatives in the Action Plan around user education.

3.24. Whatever institutional structure government chooses, it must have positive duties to promote innovation, to embrace diverse company approaches so that responsible practice is not crowded out of the market and to safeguard user rights including free expression. Given the nature of the work, care must be taken to ensure that oversight bodies have appropriately skilled and expert staff, with particular emphasis on international norms on user rights to ensure consistency between online and offline. There must be a robust transparency and accountability framework for public bodies with powers to influence or order take down of content.

4. Strand 2: Regulation of Video Sharing Platforms

4.1. Verizon Media does not provide a video sharing platform service (VSPS), whereby *“the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user generated videos or both to the general public, for which the video-sharing provider does not have editorial responsibility...”*.

4.2. However, we note that an overly broad interpretation of the VSPS definition could extend the scope of the Directive beyond the small number of services legislators intended to be covered by this definition. We therefore urge government to interpret the definition narrowly and actively engage with the European Commission to shape the guidelines provided for in Recital 5 accordingly. In particular, *“essential functionality”* should be interpreted primarily by reference to the design and primary purpose of the service rather than an arbitrary quantitative measure of video content.

4.3. For the reasons noted above, we believe that there should be a clear distinction between legacy broadcast regulation and the regulation of internet-based services, and that this would serve as a worthy model overseas. We therefore recommend the establishment of a new, independent regulatory body, separate from the BAI. Further, there should be a clear separation between the regulation of VSPSs under the AVMS Directive and any oversight tasks government may propose for this body within the scope of Strand 1.

4.4. Government should also put beyond doubt that video search is out of scope of the Directive.

4.5. We are troubled that page 5 of the consultation suggests that the requirements expected of VSPSs under the AVMS Directive (including age verification, parental controls and dispute

settlement procedures) should also apply to non-video UGC services within scope of Strand 1. In line with the thoughts set out above, we believe government should plan for a further period of consultation on the detail of Strand 1. We do not see a case for extending the requirements in AVMS Directive to other platforms services at this time and recommend above that government separate these two regulatory schemes in order to avoid inappropriate regulatory creep.

5. Strand 3: Regulation of on demand services

Interpretation of scope

- 5.1. We note that the modified definition in the revised Directive removes the distinction between long-form and short-form video content, deletes the “TV-like” test and replaces it with a new test of whether the video component of a service is a “dissociable element”. These changes significantly complicate the task of regulatory oversight. It is our view that it would be disproportionate to regulate short form content services in the same way as on demand TV services. We therefore favour a tiered approach..
- 5.2. A tiered approach should also be applied to the provisions on quotas and levies. We do not believe, for example, that services deemed to be AVMS but primarily comprising short-form content, should be subject to levies or quota requirements. We therefore recommend that government use its discretion under Recital 40 to omit such services. We feel it would be disproportionate.
- 5.3. The consultation invites comments on the interpretation of “dissociable”. It is our view that the implementing regulations must establish a significantly higher threshold than the mere non-existence of links to the provider’s main activity.

Online news services

- 5.4. The previous Directive provided an explicit exclusion for non-broadcast news. This recognised the unique historic reasons why broadcast news has been subject to statutory regulation, i.e.: mainly to promote plurality in a world of spectrum scarcity. The distinction between broadcast and non-broadcast news has not changed. It is therefore important that the regulator acts consistently with the spirit of this framework in interpreting the new AVMS rules.
- 5.5. Recital 3 (of the new Directive) clarifies the “principal purpose” test with a further test that an audiovisual offer has “*content and form*” which is “*dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated video*”. It goes on to say that “*a service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity such as providing news in written form*”.
- 5.6. Recital 6 provides further clarification that “*video clips embedded in the editorial content of electronic versions of newspapers and magazines*” are not covered by the Directive.
- 5.7. The nexus between the regulation of broadcast and non-broadcast news was a significant issue during the passage of the Directive. The consultation notes government’s

commitment to safeguard the fundamental freedoms of users but is silent on the freedom of the press. In order that providers of online news have the necessary legal certainty and predictability, we urge government to:

- 5.8.** Establish a presumption that non-broadcast news media are out of scope of the revised Directive;
- 5.9.** Set a high threshold for testing whether a stand alone audiovisual service is “dissociable” from a news service’s main news activity (see 6.3 above). This would avoid the arbitrary application of regulation and discrimination between competing news providers, and would be inconsistent with the spirit of Recital 6;
- 5.10.** Clarify that any regulator or other public body would have no role in determining accuracy or truth in non-broadcast news media nor impede the day-to-day operation of publishers’ editorial codes;
- 5.11.** Explicitly exclude any in-scope news media from quotas and levies as permitted by Recital 40. Such requirements would have a punitive effect on a sector that is experiencing multiple other challenges to its sustainability and plurality.

Brexit

- 5.12.** Thinking ahead to the UK’s exit from the EU, it will be important that government provides legal certainty to Irish-established companies providing AVMS to users in the UK which would initially be regulated in the UK by virtue of the establishment rules set out in Article 2(3)b. After the UK leaves the EU, the regulation of such services would default to Ireland under these rules but the UK could also seek to regulate the same services under separate domestic rules. Providers of such services could therefore find services subject to both UK and EU jurisdiction.
- 5.13.** We strongly urge the government to consult with relevant stakeholders on the options for these services in good time before the UK’s exit.

Regulator

- 5.14.** The consultation invites views about the structure and operation of regulatory oversight of on-demand services. We believe the regulation of on-demand services should be separate from linear broadcasting. The proposed pillar structure would ensure appropriate separation of these two types of services and facilitate differentiated regulation. We believe that further differentiation within the scope of on-demand services would be appropriate to separate on-demand TV services from short-form services deemed to be AVMS.



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Department of Communications, Climate Action & Environment
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To whom it may concern,

Please find enclosed Virgin Media's submission to the public consultation on the regulation of harmful content on online platforms and the implementation of the Revised Audiovisual Media Services Directive (AVMSD).

Please note Virgin Media's comments relate to the latter part of this consultation, namely questions raised in Strands 3 & 4 and also, other revisions we believe merit the department's consideration when updating provisions in the current Broadcasting Act 2009 which would ensure that broadcasting legislation is fit for purpose for the years ahead.

Virgin Media is available to the department should it have any questions arising from this submission or require further clarification on any point raised in the paper.

Yours sincerely

Kate O'Sullivan
VP Corporate Affairs
Virgin Media



Introduction

- 1.1. Virgin Media welcomes the opportunity to respond to the public consultation on the regulation of harmful content on online platforms and the implementation of the EU's revised Audiovisual Media Services Directive ('AVMSD'). With respect to the various issues raised in the consultation, Virgin Media has provided views on Strands 3 and 4 as these touch on matters of direct relevance to Virgin Media and in particular, Virgin Media Television ('VMTV').
- 1.2. On a more general note, the transposition of AVMSD into Irish law requires the Department of Communications Climate Action and Energy ('DCCAE') to revise and/or introduce new provisions to the Broadcasting Act 2009 ('the Act'). Given the department will have to re-open the Act for this purpose, Virgin Media believes the transposition of AVMSD presents an opportunity to review other Sections of the Act that might benefit from updating and/or amending to ensure that legislation remains fit for purpose for the years ahead. In this regard, Virgin Media has highlighted a number of Sections in the Act that we believe are no longer fit for purpose and/or require updating to bring legislation in line with market realities. Virgin Media has set out its views on this and questions raised in the consultation paper in the sections that follow.

A. Virgin Media's views on the future of broadcasting services in Ireland

- 1.3. In any democracy, plurality is essential. Diversity is strength. Extreme cases aside, even partial withering of robust diversity diminishes the vitality and range of the public conversation. VMTV is part of the Irish broadcasting fabric and with our three free-to-air channels (Virgin Media One, Virgin Media Two, Virgin Media Three) and VMTV Player we are a key contributor in providing public and commercial broadcasting services to Irish audiences.
- 1.4. In Ireland, conversations on the broadcasting sector remain channelled in furrows ploughed by policy made decades ago. There is a real need, and an exciting opportunity to engage in deep and innovative conversation on our collective aspirations for the future of broadcasting and in particular, how the legislative and policy framework might be amended to ensure the continued viability of this sector and one that matches society's expectations.
- 1.5. At a basic level, the state has an imperative interest in ensuring authoritative public service broadcasting (PSB) services that are trusted sources of news and information, that promote investigative journalism and which reflects our culture, and our way of life including the Irish language.
- 1.6. As the state broadcaster, RTÉ, has the highest number of PSB obligations. In return, it receives the lion's share of the TV licence fee (c.€180M per annum, equating to 84% of TV licence fee revenues). The Act provides that RTÉ can supplement this public income through the advertising and sponsorship (providing RTÉ with an additional c.€150M of income).¹ Despite this, RTÉ had losses of €6.4 million in 2017 down from €19.4m in 2016.

¹ RTE Annual Report 2017

- 1.7. It is important to note however that RTÉ is not the sole provider of public service broadcasting in Ireland. It is over fifty years since RTÉ television was established, and nearly forty years since a second radio and TV channel were added. The world has changed utterly since. What was essential to create a national broadcasting platform then, is still important to ensure a credible source of news and information.. What RTÉ cannot do of itself is provide the plurality and diversity on-air that are essential facets to any modern understanding of public service broadcasting.
- 1.8. As the Section 70 licensee, VMTV is the only is the only entity – other than RTÉ and TG4 that has firm PSB commitments. Moreover, in the three years since Virgin Media's acquisition of VMTV, it has exceeded these PSB targets and has also greatly enhanced media plurality through our investments in new programming in news and current affairs (e.g. the Tonight Show, an additional news service at 8 o'clock on Virgin Media One). More generally, VMTV has made substantive investments in programming which has supported the indigenous independent production sector and produced programming that reflects Irish society (e.g. Red Rock, Blood, True Lives, Ireland's Got Talent). From a PSB standpoint, VMTV offers a very credible alternative to RTÉ and contributes hugely in the provision of these services - without any state subsidy - to Irish TV viewers.
- 1.9. As a cable operator, Virgin Media has also extended the reach and availability of PSBs into Irish homes. We have strong partnerships with all the free-to-air broadcasters and Irish production companies as well as carrying our VMTV channels. We also carry the various TV Player services which extends the reach and commercial potential of each broadcaster. Virgin Media was the first to launch Oireachtas TV in 2011 (which we carry at no charge to the Exchequer) and we carry the Dublin and Cork Community Channels.
- 1.10. Notwithstanding this, the continued availability of PSB cannot be sustainably based on a mid-twentieth century model of solely state owned national broadcasting, which predates every technological, commercial and cultural development since. The future of electronic media, and its supporting platforms, is evolving in a context where the historical role of print is declining, and its commercial model is under real strain. Plurality on-air is now essential if there is to be real plurality at all for the future.
- 1.11. Virgin Media has always held the view that every society needs a strong, financially independent state broadcaster that offers public services within a clearly defined public service remit. In this context, Virgin Media believes the current consultation presents the department with an opportunity to review and update provisions for public service broadcasting so as to ensure that media plurality is protected for the decades to come and that RTÉ can be put on a sustainable financial footing.
- 1.12. Virgin Media wants RTÉ to be successful. We have sought to work co-operatively wherever feasible with RTÉ. We are open to partnering with RTÉ within the broadcasting sector to create economies and efficiencies and to enhance the quality of output and value for money by the sector to the Irish viewing public.
- 1.13. To this end, Virgin Media calls for a structured, national conversation that plans ahead for the future and takes fully into account the decades of change that have passed. In particular, we believe it is essential to have a discussion around a number of key themes such as :

a) “What is Public Service Broadcasting?”

On a general note, Virgin Media believes the Act should be revised so that all services that have PSB content obligations are considered 'in the round'. In this regard, there should be a level playing field between RTÉ, TG4 and any other PSB services including those offered by VMTV. As currently drafted, the Act affords RTÉ separate protections and/or rights beyond those that are offered to other PSB services (see Virgin Media's comments on Sections 70 & 71 of the Act).

Virgin Media believes there needs to be a national discourse as to the types of services that constitute PSB and recognition that PSB services are delivered by a range of organisations, not just RTÉ. Beyond this, there has to be clear understanding and an agreed set of criteria as to the types of services that can be funded from the TV licence fee. Also, there has to be an acceptance that the number of

PSB services currently on offer by RTÉ has to match the level of public funding available. RTÉ cannot nor should not be allowed run a multi-annual financial deficit (See comments below on Section 105 of the Act).

The Act therefore needs to provide a clear definition as to what constitutes PSB. In 2014, prior to being acquired by Virgin Media, UTV was designated by the Minister as being a service with public character. In reaching his decision, the Minister identified four criteria that are necessary for any service to satisfy a public were integral to determining whether a services has a character of public service. These included: range and variety; contribution to democratic and public engagement; support for local production; investment in local talent; and overall contribution to the sector. This list is a useful starting point for a national discourse in coming up with definition for PSB, but it is just that. A clearer, narrower definition is required for RTÉ and any PSB service that is funded by the taxpayer.

In Virgin Media's view, public funding has to be spent on content that reflects Ireland's culture and identify. It should also be used to commission content that would otherwise not get an airing. RTÉ in particular should be a platform that produces and commissions content that is aimed at, or made by, groups that may be on the margins of Irish society or those that might struggle to have regular representation in broadcasting services.

Public monies should not be used to acquire international formats or international sports rights (e.g. Dancing with the Stars; Champions' League, Soccer World Cup) the rights of which are expensive to acquire and can incur considerable operational costs. In addition, spending state money in acquiring this type content can have the effect of inflating the cost of these rights for other commercial (PSB) providers who do have benefit from accessing the public purse.

To be clear, Virgin Media does not take issue with RTÉ engaging in commercial activities, but these activities have to be funded from income RTÉ gets through commercial activity (e.g. sale of advertising). Further, any commercial activities that RTÉ offers should not distort the market or create an unfair competitive advantage versus other players in the market.

In the UK, Ofcom has set out strict requirements that the BBC have to follow in respect of commercial activities it engages in. In February 2019, it revised these guidelines and introduced new reporting requirements aimed at providing even greater transparency between income and expenditure associated with the BBC's public and commercial activates. The approach taken by Ofcom may be helpful to the department or indeed, the BAI in identifying an appropriate definition of public service and in the regulatory oversight of same.

In summary, there must be clarity, transparency and effective legal definition of what is public service and what is commercial service, and importantly, how each of these activities are funded. Public money for PSB is a scarce resource. Emerging needs to provide strong, credible and relevant PSBs are not best served by dated statutory architecture that continue a status quo, and does not address a completely changed context on-air and online. Legislation must be re-examined imaginatively for the future. A diffusion of public money on output far beyond even a generous definition of PSB, means the essential public interest in providing that money is being undermined. A powerful refocus of public money on PSB output in the context of a new statutory architecture is both a pressing need, and an exciting opportunity.

b) "How can the Act be amended to ensure greater transparency and accountability in the use of public monies by RTÉ?"

Consideration should be given to crafting legislation to effectively and transparently track and ensure appropriate accounting controls are in place where public money is used by PSBs. This would ensure that the public interest is upheld and that commercial competition between different broadcasters is not cross subsidised unfairly and at a cost to the quality of PSB output.

c) “In a changed and more diversified broadcasting landscape how is public money targeted to deliver defined and better public service broadcasting?”

There has to be better accountability and transparency around how public monies are spent. Virgin Media believes the way which the Sound & Vision fund is managed and public monies dispensed through this framework could provide a useful starting point for a new framework for PSB.

d) “What is the conditionality that informs and delivers a thought-through future-proofed model of public service broadcasting across the entire sector including RTÉ?”

At a minimum, RTÉ cannot be allowed run a multi-annual financial deficit. RTÉ should be required to reduce the number of services it offers and/or any other measures that will allow it to run a financially sustainable organisation.

Also, the provision of high quality PSB requires focus and definition. It does not require dozens of different services and channels which stretch the organisation beyond its capabilities and swallow up the licence fee, saddling as they do a weakening financial base, with a range of services which have little to do with PSB and only serve to increase the organisation’s operational costs. Virgin Media finds it incredible that RTÉ recently extended the services it offers (i.e. additional broadcast hours for RTÉ 1+1, and a new Network 2+1 service) while at the same time actively lobbied for further subvention to fund existing inefficiencies.

RTÉ has to be able to operate within its financial means and if it can’t it has to cut costs (and services) where appropriate. There must be a refocus on PSB, and effective transparency and regulatory oversight around the use of different income streams for different purposes that is credible and meets the standards that for example, good journalism would routinely visit on other organisations it investigates in the public interest.

e) “In a completely changed broadcasting context, how do we move on to resolve the conflict of interest and inherent structural failure in RTÉ’s requirement to fulfil its public service mandate AND maximise commercial revenues?”

RTÉ is statutorily bound in a matrix that is over fifty years old and irrelevant today. It is not simply that policy now would not start from where we are, it is that future policy for the decades ahead must start from the premise that the state’s interest in PSBs, and RTÉ is in having a publicly owned platform for quality PSB going forward. Much of what in the past RTÉ could only provide, can now be readily accessed on a range of other platforms on-air and online. Re-imagining the matrix and radically changing the focus of RTÉ will ensure much higher standards of PSBs across the board both from that organisation, and from those who compete with it. A smart agenda for the twenty first century is about strengthening the provision of PSB. The status quo is delivering the slow seeping of capacity out of a vastly over-extended RTÉ. Critically this is to the detriment of the quality of PSB in RTÉ and across the board on-air.

B. Provisions in the Act that should be updated/amended

1.14. Virgin Media believes the Act contains a number of Sections that should be updated and/or amended to take account of the changed broadcasting landscape that have occurred since enactment.

1.15.

1.16. Sections 70 and 71:

The Authority should have the capacity, on the recommendation of the Contract Awards Committee, to enter into a contract with a platform including, RTÉ.

Currently all PSBs must apply for a Section 70 or 71 licence through the Contract Awards Committee including variances of the channels such as +1 or otherwise. We understand it is RTÉ's position that they are not currently subject to this process and are free to launch new channels and enforce the must carry obligations to ensure carriage of same. It is our position that all PSB channels should be subject to the same criteria for licence applications and extensions.

The current legislative framework provides that an entity such as VMTV has to apply for a Section 70 licence (with the accompanying PSB obligations), while there is no similar licensing requirement on RTÉ. This raises questions over the "transparency" of licensing in the broadcasting sector. While it is clear what PSB obligations a Section 70 licensee has to meet, it is unclear whether the same obligations apply to a RTE.

Under the current framework VMTV's Section 70 licences have a term of 10 years, renewable for a further 5 years. Virgin Media requests that the terms of Section 70 licences are reviewed. In other sectors (e.g. mobile spectrum licences), licence terms are longer (e.g. 15 years and sometimes longer). The broadcasting sector is capital intensive, both in terms of network investment and acquisition/commissioning of content. A 5 year renewable term does not act as an incentive to licence holders to invest and reduces a broadcaster's ability to get an appropriate return on any investment made.

1.17. Section 77(4) Must Carry

In accordance with this Section, Virgin Media must ensure that RTÉ's free-to-air transmissions are re-transmitted when RTÉ requests such carriage. The "must carry" obligation under this section is not subject to any limitations, or a proportionality test. This is despite the fact that the directive from which the legislation is transposed made it clear that a proportionality test should apply.² It would appear therefore that RTÉ is unconstrained and can require "appropriate networks" such as Virgin Media to carry any of its free-to air television services. This provides RTÉ with considerable power to enforce its rights under this Section.

1.18. Section 77(7)

In this Section, "an appropriate network" like Virgin Media is constrained from passing "must carry" charges onto customers. This fails to take regard of any costs that "an appropriate network" incurs when adding new services to its network. It should be noted that the Act is silent on any guidance with regards these "must carry" provisions whether for the "appropriate network", or any regulatory agency or other third party (for example, the role of the BAI is limited to resolving disputes between platforms and free to air channels concerning placement on the EPG).

More generally, the definition of an "appropriate network" as defined under Section 77 is out of date and not reflective of the market place today where there are a variety of platforms offering broadcasting services to end users.

² Council Directive 89/552/EEC 3 October 1989 as amended by Directive 97/36/EC and Directive 2007/65/EC)

The definition of “appropriate network” should be broadened to ensure it captures all forms of existing distribution platforms. For example the Act today differentiates between an “appropriate network” and a “satellite television service”. Section 77(12) places an obligation on RTÉ to offer its services to the satellite television service. There is no obligation on the satellite television service “to carry” (whereas such obligation is placed under section 77(4) on the “appropriate network”). This distinction places an unfair burden on “appropriate networks” who “must carry” free of charge, with no regard for costs that are incurred.

In addition, Virgin Media would request that any proposed amendment to this Section should be drafted in such a way so as to ensure that it captures any new distribution platforms that may emerge in the future. This will ensure a level playing field exists for all platform providers that offer these services.

In conclusion, Virgin Media would request this Section is amended to:

- Allow an “appropriate network” to pass “must carry” charges onto customers (as is currently provided under the ‘must offer’ provisions in the Act)
- Introduce provisions that would provide for oversight or guidance from a regulatory body (e.g. the BAI) in the event of any dispute arising under provisions in this Section
- Introduce FRAND obligations on RTÉ for must carry provisions

1.19. Section 77(11) Must Offer

In this Section, “must offer” services include all free to air service from RTÉ, TG4 and Virgin Media. Currently the Act does not allow for oversight by the regulator or any other third party.

By way of example, the “must offer” regime in the UK is overseen by Ofcom rather than leaving it for the parties to invoke. The “must offer” licence conditions made under Section 272 of the Communications Act 2003 in the UK and part of the contract with Ofcom also prohibits any charge by public service broadcasters that is attributable (directly or indirectly) to the conferring of an entitlement to receive their services via a cable network.

In the event of a repeal Section 103, the UK Government are relatively satisfied that there will be a zero net fee position however the situation in Ireland is not the same as the “must offer” regime does not offer this clarity or oversight.

1.20. Section 105

For the past number of years, RTÉ has run a financial deficit which would seem at odds with the provisions in Section 105. Virgin Media notes that reviews of RTÉ in how it meets its obligations are at the discretion of the Minister. Virgin Media suggests amending this Section so that in pursuit of its objects at Section 114(j), RTÉ is not permitted to run at a financial deficit and any future occurrence generates an automatic review by the Minister.

C. Proposed repeal of Section 103 of the Copyright and Regulated Rights Act 2000 (CRRA 2000)

- 1.21. While outside the scope of this particular consultation, Virgin Media understands the government still intends to repeal Section 103 of the CRRA 2000. At present, the repeal of this Section is included in the Broadcasting Amendment Bill 2011 which is still in preparation. .

Virgin Media has previously provided the department with its views on this matter and has cautioned against the repeal of this Section in its entirety without providing for certain protections to ensure that companies such as Virgin Media will not be unduly exposed – whether commercially or legally. As the department will be aware, up to now, this Section has provided Virgin Media and others with a copyright infringement defence for the

retransmission of broadcast content over our cable network. Section 103 provides clarity that a copyright exemption for cable networks whereby broadcasts originating within the state (e.g. RTÉ, TG4 and VMTV) can be transmitted on cable networks without concerns that additional copyright/carriage fees might be imposed by the broadcaster – in a legislative framework where the Broadcasting Act specifically prohibits networks from passing on such fees to their customers, in the event they were to arise.

Virgin Media would refer the Department to comments made before the Joint Oireachtas Committee on October 3, 2017 on this very issue.

This matter remains a very real concern to Virgin Media. It is worth noting that in the UK where a similar provision has already been repealed. The government indicated that it did not expect the repeal to give rise to any new (copyright retransmission) fees for cable operators.³ The government also committed to undertake a regulatory impact assessment to fully understand the impact the repeal of this provision might have on network providers. Finally, the UK government undertook to review the legislative framework in the event that the repeal of this Section gave rise to the introduction of new fees.

In a similar vein, Virgin Media would call on the Irish government to ensure a regulatory impact assessment is undertaken on the proposed repeal of Section 103 before any repeal takes effect. In the context of the *current* consultation, Virgin Media would therefore request that the legislative framework provides for a dispute resolution process in the event of a dispute arising between parties as a result of a repeal of the Section. Virgin Media would request the department ensures that it be made clear in the 2009 Act that the BAI or another regulator has the power to adjudicate any dispute.

In this regard, Virgin Media proposes that the wording of Section 26 of the 2009 Act is amended to include disputes under Section 77(4) and Section 77(11), and also, any disputes that may arise under Section 103 of the CRRA.

D. Virgin Media views on Strand 3 & 4 in the public consultation

Q. 8 – The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services? [Section 4 of the explanatory note]

Virgin Media believes there should be a variance to the rules and requirements that apply to traditional (linear) broadcasting services, non-linear broadcasting services (e.g. Virgin Media Player), and other on-demand media services whether offered as a stand-alone service or as part of a subscription package (e.g. Netflix, Virgin Media's on-demand content).

The regulatory framework around advertising needs to be flexible and reflect the role and purpose of the service. The application of requirements should operate on a 'sliding scale' whereby they are at their highest for publicly funded linear PSB services and lighten progressively as you move past commercial PSB services and onto commercial non-linear services.

In accordance with the BAI's Code on Commercial Communications ('the Code'), VMTV has to follow strict guidelines in respect of any advertising or sponsorship campaigns that are included in our free-to-air channels. In addition, VMTV has to comply with specific minutage requirements on advertising. There is a degree of commercial freedom that broadcasters have in decide when to 'load' advertising onto a programme schedule. It is important in any revised framework that this commercial freedom is maintained so that broadcasters can maximise the audience flow from one programme to another and determine when and where - if at all - to use their minutage entitlement (e.g. in the past VMTV has decided not to place any advertising between coverage of the Six Nations and Ireland's Got Talent). Further, Virgin Media would advocate that in a world

³Section 101 of the UK Copyright Act 2000

where advertising revenues are in decline and under sustained pressure, there should be a relaxing of the minutage rules particularly for those that are solely dependent on this source of income.

The current regulatory framework does not apply to online services and Virgin Media does not believe this should change. In the online world, advertising is placed around specific content assets. Content providers have to balance the ad-load they implement to ensure they meet viewer's expectations that they can access the content quickly. In addition, the commercial freedom for an online provider is dependent on a variety of factors include the viewing time of the content, rights holder restrictions, and ad campaign performance metrics.

Finally, in the event that the department introduces new provisions that propose changing the current regulatory framework, Virgin Media believes this should only happen once the BAI has consulted with industry players and undertaken an appropriate regulatory impact assessment.

Q. 9 – Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund? [Section 4 of the explanatory note]

The Sound & Vision fund ('the fund') is a financial support mechanism for independent production and is designed to support investment in high quality programmes on Irish culture, heritage and experience as well as programmes to improve adult literacy.

The fund has contributed hugely to ensuring this type of programming content is commissioned and has by extension, facilitated to the sustainability of the independent production sector in Ireland. Virgin Media is very supportive of the fund and the manner in which it is administered because it provides for complete transparency as to the type of content that can apply for funding and also, the destination of any allocated funds. Virgin Media firmly believes programming content that is sponsored by this fund contributes greatly to media plurality and investment public service programming. Given this, we believe the value of the fund should be doubled, at a minimum.

If the value of the fund was increased, Virgin Media would have no issue with non-linear services applying for financial support (subject to these services adhering to the principals of the fund and investing in Irish programming). In any event, Virgin Media would advocate that the existing level of 7% of TV licence fee revenues should be maintained for traditional broadcast services.

Virgin Media does not agree that Ireland should introduce levies for services that are based outside the state.

Strands 1-4 – Regulatory Structures

Q. 12 – Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:

- **Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands,**
- **Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.**

Is one of these options most appropriate, or is there another option which should be considered? [Section 5 of the explanatory note]

Virgin Media believes there should be two regulatory bodies, one to regulate 'traditional' broadcasting services, (whether that content is distributed in a linear or non-linear manner), and a separate regulatory agency that should oversee the regulation of video sharing platform services (VSPS) that 'host' and distribute non-linear content and user generated content. (See additional commentary provided in response to Q.13)

Q. 13 – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated? [Section 5 of the explanatory note]

Strands 1 & 2 –Sanctions/Powers

Virgin Media believes the BAI should continue to regulate ‘traditional’ broadcasting services whether these are delivered via linear or non-linear means. Virgin Media believes there is clear distinction between linear and non-linear content that is offered by broadcasters such as RTÉ and VMTV and on-demand services that are distributed by VSPS, in particular those services that are primarily contain user generated content.

‘Traditional’ broadcasters are regulated by the BAI and their programme schedules have to meet strict regulatory requirements. Aside from PSB or other licensing requirements, the target audience for these broadcasters is primarily local and/or national, and this is reflected in the programming schedules.

For the reasons set out above, Virgin Media does not believe it should fall to the BAI to regulate these services. Virgin Media does not have firm views on how VSPS should be regulated nor indeed how any agency that has regulatory oversight for this sector should be funded. Based on the current funding regime for the BAI, it would seem appropriate that VSPS should fund the creation of any new regulatory agency, whether based on a percentage of revenues generated in the state or otherwise. Regardless of whether regulatory responsibility for VSPS resides with a new agency or is given to the BAI, broadcasters should not be adversely impacted (through an increase in broadcasting levies).

April 17, 2019

Topic Department of Communications, Climate Action and Environment Consultation - Proposed Vodafone position on certain aspects of the newly revised Audiovisual Media Services Directive

Date [REDACTED]

Vodafone is one of Europe's largest converged pay-tv operators. We provide pay-TV services to 13.6 million TV households, across seven European markets¹. We are keen to ensure that the newly revised Audiovisual media Services Directive (AVMS-D)² is implemented in a way that delivers the best outcomes for consumers and market players alike.

The updating of the Audiovisual media Services Directive (AVMS-D) has coincided with tectonic shifts in the audiovisual sector, brought about by digitisation and the rising popularity of powerful OTT platforms with deep pockets, global scale, and content ambitions (including video sharing platforms). In this context, the levelling up of certain rules in relation to on-demand content service providers is a timely development, both for viewers, who should be better protected from harmful content, and market players, for whom a level playing field is a prerequisite to sustainable competition.

In this paper, we set out our views on how we think the new rules on the promotion of EU works, the promotion of content of general interest and on signal integrity should be implemented.

1. Promotion of EU works

Under the newly revised directive, providers of on-demand audiovisual media services will have to promote the production and distribution of European works by ensuring that their catalogues contain a minimum 30% share of European works and that those are given enough prominence³. Vodafone strongly supports the preservation of cultural diversity in Europe, which underpins this requirement.

The European Commission is currently preparing guidelines on the way in which the 30% share of EU works in on-demand catalogues must be calculated (as well as on how the notions of low audience and low turnover ought to be defined). The Commission has sought views from the AVMS Contact Committee and market players on this. Vodafone has made joint-representations to the Commission, with Cable Europe, on this aspect of the directive:

- **Qualifying a work as a "European work":**

Distributors of third party content, like Vodafone, are not in a position to determine whether the programmes they distribute qualify as European works because they are not directly involved in the production of such programmes. It is therefore essential that licensors of on-demand content declare where the works they are licencing originate from, in their licence agreements and in any programme metadata, as distributors rely on this information in order to be able to calculate the share of European works in their catalogues.

During the negotiation process, which led to the adoption of the revised directive, we highlighted the importance of establishing an obligation for licensors of on-demand content to identify the origins of the content they are licensing in the programme metadata itself, using the criteria set out in the AVMS-D. Whilst the directive, in its final form, falls short of imposing such a requirement on licensors, it does encourage them to do so (in recital 35).

¹ Germany, Netherlands, Spain, Portugal, Italy, Greece, and Ireland.

² [Directive EU 2018/1808 of 14 November 2018](#)

³ See Article 13 of the AVMS-D.

We would like to see the Commission reflect and, to the extent possible, strengthen this provision in its forthcoming guidelines, as a mere encouragement to provide the requisite information may not be sufficient to resolve this issue. In addition, we hope that Member States will take heed of such guidance.

Where licensors of on-demand content fail to provide the requisite information to their licensees, distributors should be permitted to (directly) self-certify the origins of the works they have licensed, by relying on other relevant information contained within the programme metadata (for example the country of production), or any other publicly available information. Distributors acting in good faith should not be held liable for any errors resulting from the lack of information available to them on the origins of a work.

- ***Calculation of the share of European works in on-demand catalogues***

Vodafone considers that the calculation of the share of “European Works” should be based on the number of European titles (for films) or episodes (for series or documentaries) available in a given Video-on-Demand (VOD) catalogue compared to the number of non-European titles or episodes available in the same catalogue.

Where a VOD provider offers multiple types of on-demand services (each with their respective catalogue), the share of “European works” should be calculated separately for each catalogue (e.g. TVOD, SVOD).

Furthermore, we would like to see the Commission clarify, in its forthcoming guidance, that where a stand-alone provider of on-demand services (like Netflix or Maxdome for example) distributes its service via a third-party platform, the requirement to comply with the AVMSD’s on-demand quota obligation lies with the stand-alone provider, not the third-party platform.

The Commission’s forthcoming guidance should also provide that stand-alone VOD providers are responsible for the reporting obligation relating to their own offerings.

Furthermore, reporting obligations should be proportionate to the aims pursued, and not create undue administrative burdens on providers. This can be inter alia achieved by keeping the frequency of reporting at national level to a minimum (for example once a year).

Finally, we will need a transitional period of at least six months to be able to implement new calculation systems and reporting requirements. We believe that Member States should provide for such a transitional period in their implementing laws.

- ***Providers with low turnover and low audience – exemption***

According to the AVMS-D, the quotas/prominence obligation will not apply to on-demand providers with a low turnover or a low audience. It is important that the Commission defines, in its guidelines, the notions of “low audience” and “low turnover”.

In order to determine the audience share of VOD providers, Vodafone considers that in case of SVOD, the criteria should be the number of subscribers and in case of TVOD, the criteria should be based on the number of rentals/transactions (not downloads).

Both audience and turnover should be calculated in relation to all VOD services with similar business models. For example, SVOD and TVOD are different types of services, and should therefore be calculated separately.

Furthermore, the total number of households with a broadband connection should not be used to determine the audience share, as the broadband market is completely independent from the content market, and VOD usage is also possible via mobile, satellite etc.

2. Promotion of content of general interest

According to recital 38 of the newly revised directive, the AVMS-D “is without prejudice to the ability of Member States to impose obligations to ensure discoverability and accessibility of content of general interest”.

In a world where digitisation and the increase in the number of new services has led to greater choice for viewers, Member States must approach any requests for regulated prominence with extreme caution.

Recital 38 provides some useful guidance in this respect: “Member States should in particular examine the need for regulatory intervention against the results of the outcome of market forces. Where Member States decide to impose discoverability rules, they should only impose proportionate obligations on undertakings, in the interest of legitimate public policy considerations”.

Any intervention that has the effect of protecting the market position of a specific category of content providers (i.e. providers of content of general interest) at the expense of all other providers must be carefully considered. An (unjustified) intervention supporting the prominence or discoverability of one form of content over another could have the adverse effect of reducing content diversity, and significantly constrain the ability for content distributors to respond to the demands of their viewers, for example through the provision of personalised TV services.

To guard against this risk, we suggest that Member States remove ex ante regulation in this area, where the market already delivers good outcomes for viewers (which is the case in many Member States). Failing this, Member States should ensure that any intervention is proportionate, pro-competitive and non-discriminatory.

3. Signal integrity

Recital 26 of the AVMS-D provides that “programmes and audiovisual media services should not be transmitted in a shortened form, altered or interrupted, or overlaid for commercial purposes, without the explicit consent of the media service provider.”

Whilst broadcasters’ signal integrity should, of course, be preserved, this should not come at the expense of consumers’ viewing experience, at a time when digitisation allows for the personalisation of TV services. In the same vein, distributors shouldn’t be prevented from deploying functionality that allows their customers to find the content that they are looking as quickly and easily as possible, for example through search recommendations.

An overly prescriptive approach to implementing recital 26 would put platform innovation and consumer’s viewing experience at risk, and must therefore be avoided. In this respect, Recital 26 of the AVMS-D clarifies that “overlays solely initiated or authorised by the recipient of the service for private use, such as overlays resulting from services for individual communications, do not require the consent of the media service provider.” We believe that the EU legislator’s intention here was to empower consumers, by allowing content distributors to provide functionality, which supports a personalised viewing experience, in response to consumer demand, without having to obtain broadcaster’s explicit consent for this. It would be beneficial to consumers if Member States implemented the directive in this way.

Page 2

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Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]**
In responding to this question appropriately, one must assume that the Video Sharing Platform Services (VSPS) has either, a. ignored the request for the removal of identified harmful content; b. responded but in the opinion of the regulator, is not effectively removing all content or, c. disagrees with the opinion of the regulator that the content is 'harmful', so the content has remained live on various VSPS. Criticism of any such process by all stakeholders is the length of time it takes for a decision to be made while the content remains 'live' (an issue highlighted in 'revenge porn' cases). This then leads to the question of whether content that has been highlighted as harmful and is due to be reviewed by the regulator should be temporarily removed or remain 'live'. We would recommend that it would be critical in order to inform best practice to review the processes and best practice in place for the "right to be forgotten" processes, which may provide lessons learnt to include here.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

In our opinion this question ties in and is related to the later question 16 (Country of Origin). To deal with the development of an appropriate statutory test which could be applied in this jurisdiction and across all member states regarding VSPS, consideration should be given to the development of an independent panel paid for by each of the services to act as a buffer between the regulator.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

Obligations should be limited to video sharing platform services, to ensure consistency of duty of care and preserve the existing intermediary liability regime enshrined in the eCommerce Directive.

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- Material which promotes self-harm or suicide
- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

In considering this aspect, and for it to be addressed properly it would be recommended to review and consider the terms of services of the video sharing platform services, and to work with them directly to get across all service providers of what is meant explicitly and required.

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8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

In our view, where the identified content is found or made available will shape or influence the definition.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

it would be our recommendation that any regulator established in this instance should require self-declaration by the Video Sharing Platform Service, obligations should be limited to them, with spot checks then to be carried out to ensure compliance.

Page 5

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services

which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Obligations and any levies should be limited to the Video Sharing Platform Services.

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

Vodafone provide parental controls which enable parents to restrict access to over 18 content on their child's Vodafone mobile and fixed internet service. In addition, we provide age rating for Vodafone content and tools to restrict access to other over 18 Vodafone content, and finally Vodafone provide Acceptable Use Policies and Notice and Take Down processes on all our hosting (including cloud), content and social media services. Our position remains that our responsibility effectively stops past parental controls, and is therefore a parental choice. Vodafone is a member of the Internet Watch Foundation (IWF) and a founding signatory of the GSMA Mobile Alliance Against Child Sexual Abuse Content which commits to the removal of harmful online content. We apply the IWF block list on most of our networks worldwide. The block list consists of URLs that the IWF have identified as a link to online child sexual abuse material. In the IWF's view, each time an image is viewed, this is tantamount to another action of abuse being perpetrated and therefore the take down or blocking of content identified on the list protects the victim from additional suffering. We share that perspective. Some critics view the IWF block list as a form of censorship. There is therefore concern among some freedom of expression and privacy activists that the IWF block list sets a precedent for telecommunications operators to choose to block access to certain types of content without a lawful instruction to do so, either of their own volition (on a self-regulatory basis) or in response to political pressure. However, we would highlight that the criteria applied by the IWF when assessing whether or not material is considered to be child sexual abuse material are aligned with the legal definitions used by law enforcement agencies in the countries in which we operate.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

Our position would be to limit obligations to the video sharing platforms; ensuring consistency of approach on the duty of care and therefore preserving the existing

intermediary liability regime enshrined in the eCommerce Directive.

Page 2

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Page 3

4 Question 1:

- What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. **[Sections 2, 4, & 8 of the explanatory note]** This would clearly be a denial of free speech leading to Moscow style diktat. The law as it stands is perfectly adequate.

5 Question 2:

- If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate.

[Sections 2, 4 & 8 of the explanatory note]

Again trying to deny people their right to free speech.

6 Question 3:

- Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme?

[Sections 2, 5 & 6 of the explanatory note]

It should be strictly confined to bullying and abuse of minors

7 Question 4:

- How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered?

For example:

- Serious Cyber bullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)

- Material which promotes self-harm or suicide

- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health

[Sections 2, 4 & 6 of the explanatory note]

Only the bullying of minors the right to free expression even if of a minority view and even if it upsets the majority and elite must be maintained

Page 4

8 -Question 5:

The revised Directive introduces a definition of Video Sharing Platform Services. Where should the limits of this definition be, i.e. what services should and shouldn't be considered Video Sharing Platform Services? Please include your rationale and give examples.

[Section 3 of the explanatory note]

Facebook, You Tube, Twitter etc but the views of minorities must be allowed even if opposed to current laws

9 -Question 6:

The revised Directive takes a principles based approach to harmful online content and requires Video Sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designate a regulator to oversee the ongoing implementation of these measures.

Given this, what kind of regulatory relationship should there be between a Video Sharing Platform Service established in Ireland and the Regulator?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The key here is incitement to hatred. Who has the right to say what is incitement. This is the beginning of Orwellian totalitarianism. It's extraordinary how a party such as Fine Gael could be leading this Marxist reform.

10 Question 7:

- On what basis should the Irish regulator monitor and review the measures that a Video Sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?

[Section 3, 4, 5, 6 & 8 of the explanatory note]

The only reason should be the bullying or abuse of minors. There should be no other interference with free speech.

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11 Question 8:

- The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services?

[Section 4 of the explanatory note]

Yes

12 Question 9:

- Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear

services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund?

[Section 4 of the explanatory note]

Yes

Page 6

13 Question 10:

- The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users, e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?

[Section 2, 4, 5, 7, & 8 of the explanatory note]

By confining this to the abuse of minors nothing more. Freedom of expression must be maintained or we will descend into a Soviet style state.

14 Question 11:

- How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? **[Section 2, 4, 5, 6, 7, & 8 of the explanatory note]**

By keeping this law limited to a very narrow area

Page 7

15 Question 12:

- Potential options for regulatory structures to progress the regulation of the four strands are identified in the explanatory note accompanying these questions. These options include:

- Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands

- Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video Sharing Platform Services.

Is one of these options most appropriate, or is there another option which should be considered?

[Section 5 of the explanatory note]

Yes the less regulation the better apply the laws we have in place

16 Question 13:

- How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

[Section 5 of the explanatory note]

We don't need any new censors

Page 8

17Question 14:

- What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (some examples have been provided in Section 8 of the explanatory note)? In addition, should these functions and powers differ between regulation for Video Sharing Platform Services under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples.

[Section 2, 4, 5, 7, & 8 of the explanatory note]

None

18Question 15:

- What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include
 - The power to publish the fact that a service is not in compliance,
 - The power to issue administrative fines,
 - To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,
 - The power to apply criminal sanctions in the most serious cases.

Are there any other sanctions which should be considered? please provide your reasoning as to why the regulator should have recourse to a particular sanction.

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

None

19Question 16:

- Given that the revised Directive envisages that a Video Sharing Platform Service will be regulated in the country where it is established for the entirety of the EU it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video Sharing Platform Services. Given that such a system would be in place on an EU-wide basis should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?

[Sections 2, 4, 6, 7 & 8 of the explanatory note]

Only the bullying and abuse of minors. Anything else is totalitarian censorship.