



**Roinn Cumarsáide, Gníomhaithe  
ar son na hAeráide & Comhshaoil**  
Department of Communications,  
Climate Action & Environment

# **Thematic Analysis - Public Consultation on the Regulation of Harmful Online Content and the Transposition of the Audiovisual**

# Contents

Introduction .....	4
Chapter One – Introduction.....	5
Strand 1 - National Online Safety System .....	5
Strand 2 - Audiovisual Media Services Directive- Video Sharing Platforms .....	6
Strands 3 and 4 - Audiovisual Media Services Directive (On-demand Audiovisual Media Services and TV) .....	6
European & international context .....	7
Regulatory Structures and Powers .....	7
Chapter Two – Breakdown of Consultation Responses.....	8
Chapter Three – Emerging Themes.....	9
Key thematic issues: .....	9
1. Rights balancing (Strands 1 & 2).....	9
2. Approach to the regulation of harmful online content (Strand 1) .....	16
3. Services in scope (Strands 1 & 2) .....	23
4. Regulatory structures and functions (all Strands).....	29
5. Approach to funding (all Strands) .....	34
6. Approach to powers & sanctions (Strands 1 & 2).....	36
7. Approach to Audiovisual Media Services (Strands 3 & 4) .....	42

Appendix 1 .....	46
Questions – Public Consultation on the regulation of harmful online content and the implementation of the revised Audiovisual Media Services Directive.....	46
Strand 1 – National Legislative Proposal .....	46
Strand 2 – Video Sharing Platform Services .....	47
Strands 3 & 4 – Audiovisual Media Services.....	47
Strands 1 & 2 – European & International Context .....	48
Strands 1-4 – Regulatory Structures .....	48
Strands 1 & 2 –Sanctions/Powers .....	49
Appendix 2 -Audiovisual Media Services Directive .....	50
Background.....	50
Video Sharing Platform Services .....	50
On-demand Audiovisual Media Services .....	51
Television Broadcasting Services .....	51
Appendix 3 - List – respondents.....	52

## **Introduction**

On 4 March 2019 Minister Bruton launched a public consultation on the regulation of harmful online content and the implementation of the revised Audiovisual Media Services Directive. The consultation closed on 15 April 2019

A total of 84 submissions were received in response, and these were published on the Department's website on 27 June 2019. The Department wishes to acknowledge the high quality and detailed consideration of issues set out in the submissions.

This document provides a high level summary of the issues raised, and draws together the range of views expressed in respect of the many complex issues set out in the submissions. It identifies a number of emerging themes under the 4 proposed Strands of regulation.

The submissions will provide an important input into the ongoing development of an Online Safety and Media Regulation Bill.

## Chapter One – Introduction

The purpose of this consultation was to gather the views of all relevant stakeholders, from members of the public, non-Governmental organisations (NGOs), commercial organisations and industry groups and public bodies, on key issues to inform the development of an **Online Safety & Media Regulation Bill**.

**The questions posed in the consultation can be found at Appendix 1.**

Broadly speaking, this Bill will introduce a new system for the regulation of “harmful online content” in Ireland. It will also update the existing regulatory systems for Television Broadcasting Services and On-demand Audiovisual Media Services such as the RTÉ Player or Apple’s film & TV store.

Parts of these new and updated systems will come from our implementation of the recently agreed revised Audiovisual Media Services Directive. This is a European Union law which sets minimum rules and standards across the EU for Audiovisual Media Services, including Video Sharing Platform Services (**VSPS**) such as YouTube, Television Broadcasting Services (**TV**) and On-demand Audiovisual Media Services (**ODAVMS**). **Further explanation of the Directive can be found at Appendix 2.**

This consultation asked 16 questions on key issues about which stakeholder views and suggestions are important to the development of the Bill. For clarity, these questions were asked under **4 Strands** which represent the different services and regulatory systems to be established or updated.

### Strand 1 - National Online Safety System

*Consultation Questions 1, 2, 3, 4*

The **first strand** of the consultation is about what national regulatory measures to improve online safety should be put in place.

The questions here focused on what oversight systems could be put in place to ensure that online platforms improve how they deal with and remove “harmful online content”, what kinds of material should be considered “harmful online content” and what kinds of online services should be covered by this system.

## **Strand 2 - Audiovisual Media Services Directive- Video Sharing Platforms**

*Consultation Questions 5, 6, 7*

The **second strand** of the consultation is about how Ireland should implement the new EU rules for Video Sharing Platform Services (VSPS) located in Ireland.

The questions here focused on what the limits of the definition of a VSPS should be, the kind of regulatory relationship needed to implement the principles and oversight approach to regulation in the Directive and how oversight of the measures taken by VSPSs to meet the requirements of the Directive could work on a practical level.

## **Strands 3 and 4 - Audiovisual Media Services Directive (On-demand Audiovisual Media Services and TV)**

*Consultation Questions 7, 8*

The **third and fourth strands are** about how Ireland should implement the new EU rules for On-demand Audiovisual Media Services and TV services located in Ireland.

The questions here focused on what kind of content rules should apply to On-demand Audiovisual Media Services and should they be the same as the content rules that apply to Television Broadcasting Services, whether On-demand Audiovisual Media Services should have access to existing content production funds and whether these funds could be increased by levying On-demand Audiovisual Media Services or TV that target Irish audiences but are located elsewhere in the EU.

While the questions in the public consultation focused on On-demand Audiovisual Media Services, there are several aspects of the new EU rules that relate to Television Broadcasting Services. For example, there is increased flexibility regarding advertising time limits.

## **European & international context**

*Consultation Questions 10, 11*

The consultation also asked a number of questions about how the approaches taken under **Strands 1 & 2** could fit within existing fundamental rights and legal frameworks.

The questions here focused on how all fundamental rights, including the rights to safety and freedom of expression, could be balanced in regulating “harmful online content” and VSPS and how any legislation or regulation in this area would fit under the EU framework for the regulation of online services, particularly under the eCommerce Directive.

## **Regulatory Structures and Powers**

*Consultation Questions 12, 13, 14, 15, 16*

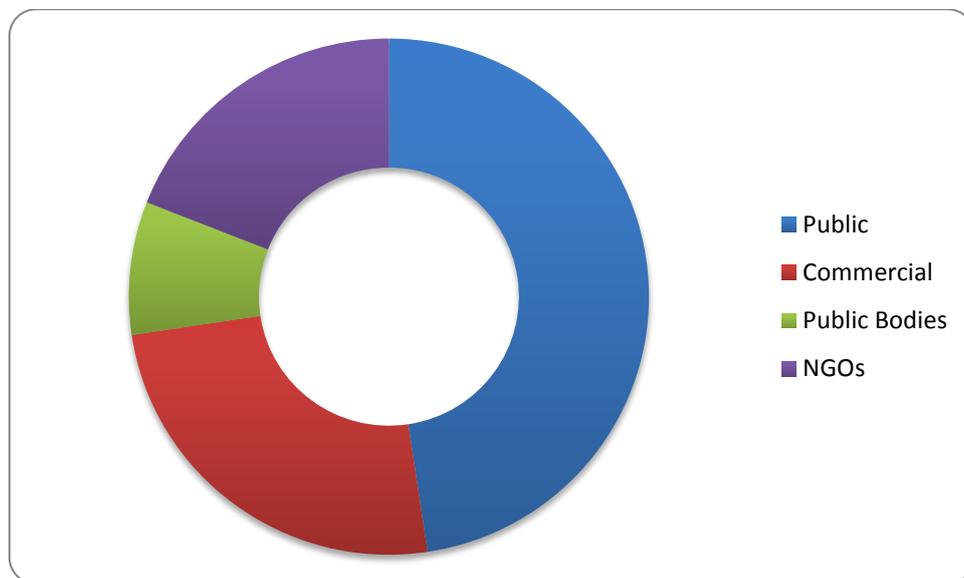
A number of questions were asked about what regulatory structures would work best to oversee the implementation of all **4 Strands** and what powers, including sanction powers, would be needed by a regulator.

The questions here focused on whether a Media Commission responsible for all 4 Strands of regulation or two separate regulators, one for editorial content (Strands 3-4) and one for non-editorial content (Strands 1-2), would work best, how regulation would be funded and what powers, including sanction powers, would a regulator need.

## Chapter Two – Breakdown of Consultation Responses

The public consultation on the regulation of harmful online content and the transposition of the Audiovisual Media Services Directive was launched on 4 March 2019. The consultation remained open for submissions for six weeks, closing on 15 April 2019.

In total, 84 submissions were received from a wide range of stakeholders, including members of the public, commercial organisations and industry groups, public bodies, and NGOs. Of these responses, 40 were from members of the public, 21 were from commercial organisations and industry groups, 7 were from public bodies and 16 were from NGOs.



A full list of the respondents to the public consultation is available at Appendix 3.

## **Chapter Three – Emerging Themes**

### **Key thematic issues:**

In considering the issues and suggestions raised in the submissions made to the public consultation, a number of key themes have emerged

Running through these key themes are overarching issues regarding the need for consistency in legislation and regulation, that legislation and regulation should be future-proof to the greatest extent possible and that legal safeguards are needed in legislation to prevent unintended consequences and to avoid imbalances in the consideration of rights.

#### **1. Rights balancing (Strands 1 & 2)**

This key thematic issue is about how the development of legislation will take into account the need to balance the right of safety with other rights, such as freedom of expression, freedom of religion, freedom of the press, the right to privacy, and the right to conduct a business and to innovate.

Principal aspects of this issue include how appropriate safeguards can be provided in legislation, for example access to appeals processes or to the Courts for those who believe their rights have been infringed, avoiding creating skewed incentives for online platforms that might lead to the excessive removal of content, and that different kinds of harmful online content will need different rights balancing exercises, for example content promoting terrorism versus material relating to self-harm.

##### **a. Fundamental rights considerations**

A large number of respondents stressed that any approach to the regulation of harmful online content should be developed in the context of a number of fundamental rights rather than simply the right to be protected from harm, including:

- The right to freedom of expression,
- The right to freedom of religion,
- The right to freedom of the press,
- The right to privacy, and,

- The right to conduct a business.

As pursuing the further regulation of harmful online content may restrict or otherwise impact these rights a number of respondents stressed that it is vital that any further regulation conform to the well-established tests of legality, necessity and proportionality. In this regard, these respondents emphasised that any further regulation of harmful online content must, to the extent appropriate, be prescribed by law, pursue a legitimate aim and be necessary in pursuit of that aim.

The respondents also emphasised that consideration of issues relating to fundamental rights does not stop when legislation is developed but that systematic consideration of these issues will need to be undertaken by the regulator in its day to day activities, especially if the regulator is to have a direct role in the removal of harmful online content rather than an oversight role.

Respondents stressed that the least intrusive way of implementing further regulation of harmful online content should be the method pursued. In the same vein, a number of respondents emphasised the role of many online services as quasi-public spaces and stressed that any regulatory intervention into these spaces must take account of the benefits and value of these spaces rather than simply treat them as a channel by which harmful online content may be spread.

Specific fundamental rights related considerations raised by the respondents included:

- That a strong degree of transparency is required of a system for the regulation of harmful online content in order to ensure that fundamental rights are not being unnecessarily restricted.
- That the removal of harmful online content could be “gamed” by “bad actors” in order to censor expression that they disagree with.
- That blanket monitoring of online content or communications for the purposes of determining if it is harmful would not meet the tests of legality, necessity and proportionality.
- That any system developed to remove harmful online content will need to account for errors, both human and machine errors, and that not doing so will leave the system open to legitimate challenge. This means that the system and its safeguards will need

to factor in that content will be removed or left up in error and not be designed to presume perfect efficiency.

- That legal sanctions or consequences on persons, legal or natural, must be proportionate to the nature of the undesirable behaviour in question and that criminal sanctions would not be proportionate to a wide range of undesirable behaviour.
- That in relation to content removal either by an online service or the regulator it is necessary to provide a right of reply for users whose content may be removed in the form of counter-notices and a right of appeal, including access to the courts.
- That the right to freedom of expression does not only apply to expression which is considered positive by a majority but also to expression which is provocative, challenging, offensive and even potentially distressing.
- That, in addition to the right to be protected from harm, children have the same range of fundamental rights as adults, including freedom of expression and the right to access information.

Overall, the respondents did not take the view that balancing the right to safety against other fundamental rights would prevent the further regulation of harmful online content. Instead, they considered that accounting for these balancing exercises would impact on the form and nature of a regulatory system.

In relation to the development of an Online Safety & Media Regulation Bill, many respondents raised specific rights related issues and made suggestions for how they could be addressed. These included:

- That any definition or definitions of harmful online content should be clear and evidence based.
- That transparency of decision making, both of a regulator and online services, should be a core feature of any regulatory system implementing Strands 1 and 2.
- That a regulatory system should not be designed on the presumption that all online services within its scope are well funded or operated by commercial organisations as many are operated by a single individual.

- That if online services act in good faith in accordance with the regulatory system they should not be penalised when errors or incidents occur. A few respondents suggested that this could be achieved by limiting the liability of online services in respect of harmful online content except in cases of non-compliance with the regulatory system or a direction of the regulator.
- That the content removal guidelines, either those of a regulator if it has a direct role in the removal of harmful online content or an online service, should be publically available.
- That a regulator should develop a body of guidance to better ensure consistency, transparency and predictability in the application of the legislation.

## **b. Context**

A number of respondents raised the issue of context with regard to the removal of harmful online content. These respondents pointed out that the potential harm of many kinds of online content is often dependent on its context, personal and societal, rather than simply its substance and stressed that the removal of content cannot take place without considering the context.

These respondents pointed out that different balancing of rights exercises are required for different kinds of online content, for example, criminal online content versus potential cyberbullying material. They stressed that the legislation and subsequent regulatory system must take account of these different tests.

In relation to individual pieces of content, several respondents considered that content removal in the absence of contextual considerations could lead to the censoring of debates or information sharing about difficult or contentious topics. For example, a piece of material related to self-harm could be used to both promote or work against self-harm and that simply removing the material without consideration of its use would not be appropriate.

A few respondents also pointed out that content which may be considered harmful or even illegal in one context may not be in another, for example in comedic, satirical or academic works, and that clear exceptions must be made for these kinds of uses.

### **c. Public figures**

A few respondents made the point that online content removal in relation to public figures should be subject to a different balance of rights than content removal in relation to private individuals. These respondents pointed out the additional need for accountability of public figures and different expectations of privacy and civility.

These respondents considered that, while the same rights might be at play in relation to both public and private persons, how these rights are balanced in terms of content removal should differ with a higher threshold for removal applied to public figures.

### **d. Safeguards**

A majority of the respondents stressed that significant safeguards, both legal and practical, would need to be put in place under any approach to the regulation of harmful online content to ensure an appropriate balance of rights. These respondents highlighted a number of potential safeguards, including:

- Processes to ensure that directions given and sanctions pursued by a regulator towards an online service are proportionate.
- Providing for a right of reply for users whose content may be removed in the form of counter-notices and a right of appeal, including access to the courts. This was highlighted by many respondents as a crucial safeguard in cases where content is legal but may be harmful.
- Providing that service providers can appeal a direction to remove content from the regulator to a court.
- Putting in place checks to prevent “bad actors” from abusing any content removal systems for their own gain, whether this is to censor views they disagree with or simply remove content they don’t like.
- That requests to remove individual pieces of content can only be made by the person or persons to whom that content relates.

- That no liability for individuals or organisations should be established in relation to the removal of individual pieces of content and specifically that service providers should not be subject to sanctions for acting in good faith when assessing content.
- Providing that errors, false positives or negatives, in relation to content removal, whether by a service provider or the regulator, can be swiftly rectified.
- That service providers and the regulator should be required to be transparent in relation to measures they put in place, both complaints based and systematic.
- Providing that service providers and the regulator take into account nuance and cultural and interpersonal context when assessing content so that discussions about difficult topics are not shut down by overzealous moderation.
- Providing that measures are in place to care for the mental health of human content reviewers, whether they be employed by a service provider or the regulator.
- Providing that obligations are proportionate to the scale and nature of individual services or categories of services.

## **Key messages**

It is clear from the responses that there is a strong recognition that the development of an Online Safety and Media Regulation Bill must take place within a clear rights based framework and that rights balancing exercises will be an integral part of any regulatory system, especially in relation to the regulation of harmful online content.

On this basis, there are a number of key messages to take away, including:

- That the right to be protected from harm, including harmful online content, is not absolute and must be balanced, in both the interest of the public and of private individuals, against a number of other fundamental rights, including the rights to freedom of expression, religion and privacy.
- That any action taken by the State against harmful online content must meet the three part test of legality, necessity and proportionality in order to provide a framework for the appropriate balancing of rights.

- That many online services often act and are seen as quasi-public spaces and any regulatory action taken must take account of the value of these spaces rather than simply their potential to be a channel for harmful online content.
- That there a number of specific fundamental rights related considerations to be taken into account, including:
  - That any regulatory system should be transparent, both on the part of a regulator and online services, particularly in relation to content removal.
  - That any regulatory system must take into account the potential for abuse by “bad actors”, errors in content removal and that the right to freedom of expression is not limited to “positive” content.
  - That blanket monitoring of communications would not be ethically or legally permissible in pursuing the regulation of harmful online content.
  - That any definition of harmful online content should be clear and evidence based.
  - That the regulatory system should not be designed with the presumptions that all online services are run by large, well-funded organisations;
  - That there should not be a presumption that services are acting in bad faith if errors or incidents occur.
- That whether or not online content is harmful is often dependent on context and that the legislation and subsequent regulatory system must take account of this reality.
- That a different balance of rights applies in relation to the removal of harmful online content directed at a public figures, leading to a higher threshold for removal.
- That a number of robust legal and practical safeguards will need to be put in place in any approach to the regulation of harmful online content. These include:
  - Access to courts for service providers and users, both complainants and uploaders of content.

- Procedures to prevent or rectify mistaken content removal, including counter-notices by uploaders.
- Processes to ensure that content removal does not occur in a vacuum devoid of cultural and interpersonal context.

## **2. Approach to the regulation of harmful online content (Strand 1)**

This key thematic issue is about what approach to harmful online content should be taken in developing the national online safety system. This includes many important matters that will need to be scoped out in detail, including what should be considered harmful online content and how this should be expressed in legislation.

Another central part of this issue is what method of regulatory oversight would be most appropriate and effective in improving online safety. Options here include a reactive (complaints based) method, a systemic (principles, measures and reviews) method, or a mixture of both.

### **a. What should be considered harmful content?**

Overall the respondents agreed with the options put forward in the consultation that the following kinds of material, in addition to criminal content such as child sex abuse materials, should be considered harmful online content:

- Serious cyber bullying of a child, meaning content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating,
- 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.

A number of the respondents highlighted that any approach to harmful online content should take great care to avoid conflating criminal content such as child sex abuse materials, which are objectively harmful, with content that might be harmful such as potential cyberbullying material, which is less straightforward and more subjective.

A number of the respondents suggested that the cyberbullying element could be expanded to include all persons and not just children. A number reasons were given for this, including that not doing so would leave adults subject to cyberbullying without a means of recourse.

However, other respondents suggested that all of these elements could be limited to children. There were a number of reasons given for this suggestion, including issues of scale and the balance of rights where children are directly involved is weighted more towards safety than in cases directly involving adults.

Other suggestions for materials that should be considered harmful online content include:

- Material designed to encourage nutritional overconsumption,
- Material which promotes eating disorders and related behaviours,
- Homophobic or transphobic bullying,
- Material promoting practices harmful to individual or public health, for example anti-vaccination materials,
- Material promoting anti-scientific views, for example flat earth beliefs,
- Defamatory statements,
- Alcohol marketing, and,
- Material that promotes disinformation or threats to electoral integrity.

Several respondents suggested that harmful online behaviour, instead of or rather than just content, should be considered in developing new rules. For example “catfishing”, this refers to the act of pretending to be another person, either existing or fictional, for the purposes of entering into an intimate relationship with them. A few respondents suggested that focusing on harmful online behaviour rather than harmful online content would be more useful in improving online safety.

While many of the respondents emphasised the need for a broad definition or list of harmful online content in legislation, others pointed out the difficulties, both legally and practically, in defining in legislation what could be considered by some to be harmful given the level of subjectivity involved. Consequently, some respondents suggested that a definition should be limited only to illegal content such as material promoting terrorism, incitement to hatred or violence.

In the same vein, several respondents noted that different kinds of materials will need to be treated differently, both in legislation and in practice, as the balance of competing rights and of objectivity vs subjectivity are different for each kind of material. Others stressed that the inclusion of any material in a definition of harmful online content needs to be evidence based and that for many kinds of materials any potential harm is most likely based in the context, personal or societal, around the material rather than on the material itself.

#### **b. How should the regulation of harmful online content be approached?**

While the majority of respondents agreed that harmful online content requires a regulatory response, a number of respondents disagreed with the premise that non-illegal harmful online content requires regulation. These respondents emphasised concerns around State interference with freedom of expression, transparency and the subjectivity of deciding what is and isn't harmful. Further to this, a number of respondents also considered that regulation would be ineffective in dealing with what they consider to be interpersonal problems couched in wider societal issues, for example cyberbullying.

Further to this, several respondents highlighted that an approach to the regulation of harmful online content which includes criminal content such as child sex abuse materials will need to be consistent with and avoid disrupting existing responses to criminal content led by An Garda Síochána in conjunction with bodies such as Hotline.ie and international organisations such as INTERPOL and INHOPE.

### **c. Should a complaints based or systemic approach be adopted?**

A number of respondents pointed out that if a complaints based approach, one where the regulator receives and acts on individual complaints, is taken to the regulation of harmful online content that there will be a need to put in place methods to deal with the scale of the potentially harmful material that the regulator will be required to adjudicate on. These respondents also pointed out the need for safeguards in relation to content removal, for example a right of reply by the user who uploaded the content.

A common suggestion among the respondents is that complainants must first bring their issue to the attention of the service and go through the service's complaints process, including any internal appeals process, before they can escalate a complaint to the regulator. Other suggestions include a statutory test where a certain level of seriousness or lack of engagement by the service in question is a necessary condition for an appeal to be made to the regulator by a complainant.

Several respondents suggested variations on a complaints-based approach where complaints could be received by the regulator but where these would not be individual complaints by users about individual pieces of content. Instead, respondents suggested a number of alternatives, including:

- That the regulator would have the discretion to group complaints, either ones that it receives directly or through oversight of service providers' complaints processes, for review if it considers that these complaints suggest that there may be a systematic issue within a service.
- That only certain designated bodies, for example NGOs with expertise regarding certain kinds of harmful online content, may bring complaints about what they consider to be systematic issues with a service provider to the regulator. This approach has been dubbed the "super-complaints" procedure.
- That only designated "trusted flaggers" could bring individual pieces of content to the regulator's attention or that these flaggers would have access to priority complaints channels within service providers.

These variations on a complaints based approach tend to take a systemic view of complaints rather than an individual view. This is in line with an overall systemic approach which was suggested by a large number of respondents as being preferable to a system based primarily on individual complaints.

These respondents suggested that service providers should be obliged to abide by certain principles or principle based Codes in the design and operation of their services, with such Codes or Principles being set out by the regulator. The regulator would also have oversight over the measures and targets that the service providers would be required to meet to discharge these obligations. This could include processes and targets for handling user complaints. . These respondents considered that an approach based on principles, measures by service providers and oversight of compliance by the regulator would be more effective in improving online safety in a holistic way than an approach which focused on individual complaints.

This approach is broadly in line with the approach adopted in the revised Audiovisual Media Services Directive for Video Sharing Platforms, which involves obliging service providers to abide by certain principles and to take measures or to draw up codes to meet these principles. The measures taken or codes put in place by the services providers would then be assessed by the regulator on a periodic basis.

A number of respondents suggested the approach proposed by the UK to apply a “duty of care” to services as a potential option. Although the UK has not refined the detail of this proposal as of yet, this approach would appear to involve the regulator drawing up a code or codes based upon this duty of care and assessing service providers’ compliance against these.

Several respondents suggested that a mixed reactive and systemic approach would be suitable. Some suggested a mixture of the regulator dealing with individual complaints and assessing measures taken by service providers to meet principles or codes, while others suggested that a “super-complaints” or “trusted flaggers” approach combined with oversight and compliance assessments by the regulator would work best.

#### **d. What safeguards are needed?**

A majority of the respondents stressed that significant safeguards, both legal and practical, would need to be put in place under any approach to the regulation of harmful online content to ensure an appropriate balance of rights. These respondents highlighted a number of potential safeguards which are set out in detail in Part 1 of this Chapter (Rights Balancing).

Overall, respondents who stressed safeguards emphasised that any approach to the regulation of harmful online content should avoid creating skewed incentives leading to excessive self-censorship and over-removal of content, which may lead to legal challenges by users and service providers on the basis of a lack of fair procedures and rights balancing.

#### **Key messages**

It is clear from the responses that there is a strong desire for clarity, consistency, accountability and transparency in any approach to the regulation of harmful online content. Many respondents also highlighted the need to futureproof the approach taken.

With these in mind, there are a number of key messages to take away, including:

- That defining harmful online content in legislation in a clear and conclusive manner will be difficult given the many different kinds of content that can be considered harmful and the subjectivity of many the issues at hand. For example, content which is experienced as harmful by one individual may not be seen as harmful by another person or in a different context. This may impact on our ability to put in place a very clear and legally robust definition.
- That it will be important to future-proof the legislation to the extent that this is possible, as categories of content which may be viewed as harmful will change over time. There is also a balance to be struck between the specificity of the definition of harmful content and the capacity of the legislation to address future harms.
- That different kinds of potentially harmful online content require different responses and that they will need to be treated differently, both in legislation and in practice, as the balance of competing rights and of objectivity vs subjectivity are different for each kind of material.

- That great care should be taken to avoid conflating criminal online content such as child sex abuse materials with non-criminal but potentially harmful online content such as potential cyberbullying material. Further to this, that existing responses to criminal online content, such as the work of An Garda Síochána and INTERPOL, should not be disrupted.
- That it is important to take into account context when assessing content. Content which may be distressing may not always be harmful.
- That the right to free expression encompasses the right to express views that are factually incorrect or scientifically inaccurate. This right must be balanced against the risk to public health or safety.
- That, while many respondents favour a complaints based approach to the regulation of harmful online content, there are alternative mechanisms of incorporating a complaints procedure into the regulatory system such as “super-complaints” or “trusted flaggers”. Moreover, that these alternatives are potentially compatible with a systemic approach to the regulation of harmful online content which emphasises online safety duties or principles, measures taken by service providers to meet those duties or principles and oversight by the regulator of these measures, including compliance assessments.
- That a number of robust legal and practical safeguards will need to be put in place in any approach to the regulation of harmful online content. These include:
  - Access to courts for service providers and users, both complainants and uploaders of content.
  - Procedures to prevent or rectify mistaken content removal, including counter-notices by uploaders.
  - Processes to ensure that content removal does not occur in a vacuum devoid of cultural and interpersonal context.

### **3. Services in scope (Strands 1 & 2)**

This key thematic issue is about what online platforms should be subject to the national online safety system and the implementation of the VSPS provisions of the revised Directive.

There are a number of fundamental parts to this issue, including whether services should be tiered by categories under the national online safety system, how a broad baseline definition of the services in scope could be expressed in legislation and are there online platforms or services that should be excluded in the first instance, for example online news platforms and private and encrypted communications platforms.

#### **a. Closed vs. open definition (Strand 1)**

There was a lack of consensus among the respondents as to whether the definition of services to be covered by the national online safety system under Strand 1 should be open or closed. A closed definition would include an explicit list of the categories of online services covered while an open definition would apply a broader “baseline” category under which many categories could potentially fall. Those respondents that favoured a closed definition pointed out the need for clarity as to who the new rules would apply to, while those who favoured an open definition stressed the need to futureproof the system in the face of rapid technological change.

Several respondents who favoured an open definition emphasised the wide range of services through which harmful online content can be distributed or accessed and the need for a relatively technologically neutral approach to capturing these services. They also pointed out that including a broad range of services would not prevent taking a risk-based approach to regulation, including tiering categories of services with varying levels of reporting and other obligations depending on scale and other factors, or tailoring obligations for categories of services.

However, a number of respondents who favoured a closed definition stressed the need for consistency with Irish and European law and the value of legal certainty & predictability to both companies and the regulator.

## **b. Potential categories of services (Strand 1)**

There was great variety among the respondents as to the kinds of services that should be covered by the national online safety system. The suggestions broadly fit into three groups, specific kinds of services, conceptual categories that include a wide variety of different services and baseline definitions or criteria.

Specific kinds of services suggested by the respondents included:

- Private messaging services, both encrypted and non-encrypted,
- On-demand Audiovisual Media Services,
- Television Broadcasting Services
- Online forums and boards,
- Online gaming platforms,
- Search engines,
- Social media pages of newspapers, and,
- Pornography services.

Conceptual categories suggested by the respondents included:

- Social media platforms,
- Video Sharing Platform Services,
- Information sites, e.g. Wikipedia, and,
- Online news services.

Baseline definitions or criteria suggested by the respondents included:

- Online services where users can create accounts and profiles and interact with each other,

- Online services where users can share or find user-generated content or interact with each other,
- Online services that collect and earn revenue from the use of user data, and,
- Online content sharing platforms.

A number of the specific kinds of services suggested by respondents will be subject to an updated regulatory framework under Strands 3 & 4. For example, On-demand Audiovisual Media Services. As such, it is unnecessary for them to be also covered by the national online safety system.

It is clear that there is a strong desire among the respondents that both a wide range of online services and specific kinds of online services are covered by the national online safety system. In this vein, a number of respondents suggested baseline definitions or criteria that they considered would capture a broad range of online services, including specific kinds of services like online gaming platforms, rather than attempting to list every kind of online service.

However, these respondents also suggested that certain kinds of online services which may be captured by a baseline definition or set of criteria be explicitly excluded from the national online safety system. The respondents' suggested that certain online services be excluded because including them would be disproportionate or unnecessary. Online services that the respondents suggested for exclusion included:

- Search engines,
- Online news services, including or excluding non-professional services,
- Online services that act as “mere conduits”, for example internet service providers (ISPs) or telecommunications service providers.
- Caching services, which temporarily store information for the sole purpose of onward transmission and are essential to the infrastructure of the internet,
- Private stored content or cloud services,
- Online services provided from Ireland but not targeted at Irish persons, and,
- Private messaging services, both encrypted and non-encrypted.

### **c. Tiered/risk-based approach (Strand 1)**

A number of respondents suggested that a tiered or risk-based approach be taken to the online services to be covered by the national online safety system. These suggestions centred on obliging a wide range of services to abide by certain limited obligations and obliging certain categories of online services or designated online services abide by more detailed or stricter obligations.

These respondents emphasised that the national online safety system should not be designed around the capabilities of large multinational companies and that taking a tiered approach would allow the system to both capture a wide range of online services and tailor regulation to the nature and scale of those services.

In this same vein, a number of respondents made the point that the national online safety system should not be based on assumptions that are based on the capabilities of large companies, given that some online services are operated by very small entities or by individual persons.

These respondents stressed that regulation that did not take into account the nature and scale of online services would have significant impacts on fundamental rights, such as the rights to freedom of expression and religion, and would likely hamper innovation, entrenching the market power of existing large online services to the detriment of internet users.

### **d. Extra-territorial issues (Strand 1)**

Several respondents raised the issue of online services based outside of Ireland with Irish userbases. However, there were different approaches as to how this issue should be addressed.

A number of these respondents stressed that all online services with Irish users should be subject to the national online safety system regardless of whether an online service has a legal presence in the State. These respondents noted that there are a number of popular online services with large Irish userbases which have no legal presence in the State or in the European Union.

However, other respondents emphasised the substantial legal and practical difficulties with attempting to apply national regulation on an extraterritorial basis.

## **e. Video Sharing Platform Services (Strand 2)**

The European Commission has committed to providing guidance on the interpretation of the definition of Video Sharing Platform Services from the revised Audiovisual Media Services Directive by December 2019. The need for this guidance arises as the meaning of the criterion of “essential functionality” in the definition is unclear, potentially creating uncertainty in how the VSPS provisions can be implemented in Irish law. In the absence of available guidance, the consultation asked for views on how the definition could be interpreted in the Irish context.

A number of respondents suggested that any interpretation of this definition should be based solely on the forthcoming guidance by the European Commission. These respondents stressed the need to ensure consistency in the implementation of the Directive across the EU and that a fragmented approach to regulation may undermine the goals of the revised Directive in ensuring a safer environment for users of VSPS.

Several respondents stressed that any interpretation should avoid determining whether an “essential functionality” of a service is a VSPS based on arbitrary criteria, particularly technologically specific criteria, which may lead to the undesired exclusion of certain services, or vague criteria, which may lead to the undesired inclusion of certain services. A few respondents provided suggestions for how any such criteria could be interpreted, including:

- That the application of any criteria should apply differently depending on the scale, popularity and reach of an online service,
- That user-generated video content is being monetised by an online service, or
- That the application of any criteria should depend on the design and primary purpose of an online service.

As noted above, a few respondents suggested combining Strands 1 & 2 by including VSPS as a category of online service within the national online safety system under Strand 1 as a way of ensuring consistency and clarity.

## **f. EU framework**

The EU framework for the regulation of “information society services” is laid down by the eCommerce Directive. Both Video Sharing Platform Services and any online services likely to be in scope of a national online safety system are subsets of this wider category. This means that any rules put in place for the online services under Strands 1 & 3 must be compatible with this wider framework.

There are a number of key elements of the framework, the basis of which is that online services which are “mere conduits”, that provide “caching” services, and which provide “hosting services” are not liable for information on their services. In respect of hosting services, if these services do not have actual knowledge of illegal activity or information and if they remove or disable access to illegal information when it’s brought to their attention, then they are not liable for hosting it. Moreover, the framework prohibits EU Member States from imposing general obligations on these online services to monitor the information on their services for illegal activity.

### **Key messages**

It is clear from the responses that there is a strong desire to include a broad range of online services within the scope of the national online safety system under Strand 1 and to ensure clarity of the range of services that can be considered Video Sharing Platform Services under Strand 2.

There are a number of key messages to take away, including:

- That there are advantages and disadvantages to both closed and open definitions of the range of services that may fall under the national online safety system and that a tiered or risk-based approach may be able to take on the advantages of both approaches.
- That there is a strong desire among the respondents that both a wide range of online services and specific kinds of online services are covered by the national online safety system and that a baseline definition or set of criteria may be appropriate in meeting this expectation. However, there is also an expectation that certain online services, for example services that provide online infrastructure such as ISPs and caching services, would be explicitly excluded from the scope of the national online safety system regardless of the approach to definitions.

- That a tiered or risk-based approach would be based on obliging a wide range of services to abide by certain limited obligations and obliging certain categories of online services or designated online services abide by more detailed or stricter obligations.
- That a tiered or risk-based approach would allow for proportionate regulation tailored to the nature and scale of online services or categories of online services and that such an approach would mitigate potential impacts on fundamental rights, such as the rights to expression, religion and privacy.
- That there are concerns about whether and how the national online safety system could apply to online services with no legal presence in the State but with an Irish userbase. There are significant legal and practical limitations about how the national online safety system could take into account these services. For example, Article 29.8 of the Irish Constitution provides that Ireland may only exercise extraterritorial jurisdiction in accordance with “generally recognised principles of international law”.
- That there is a desire for clarity in terms of the range of services that may be considered Video Sharing Platform Services under Strand 2 and that it may be desirable to combine Strands 1 & 2 by including VSPS as a category of online service within the national online safety system.
- That any rules put in place in respect of the services in scope of Strands 1 & 2 will need to respect the EU legal framework for “information society services” laid down by the eCommerce Directive.

#### **4. Regulatory structures and functions (all Strands)**

This key thematic issue is about what the core functions and structure of the regulator or regulators assigned responsibility for all 4 Strands of regulation should be.

A central part of this issue is whether a Media Commission responsible for all 4 Strands of regulation or two separate regulators, one for editorial content (Strands 3-4) and one for non-editorial content (Strands 1-2), would be most appropriate. In addition to this, matters that need to be examined include how any complementary functions, for example education and awareness, could be squared with existing initiatives, for example Webwise, and how the legislation can ensure that there is no unnecessary overlap between the new regulatory structures and existing bodies, for example the Data Protection Commission.

## **a. Regulatory structures**

Overall, the respondents favoured the establishment of a Media Commission, incorporating the existing Broadcasting Authority of Ireland, which would be responsible for all 4 Strands of regulation. As noted in the explanatory note to the public consultation, under this approach at least one of the commissioners would be designated as an Online Safety Commissioner.

The respondents who favoured the establishment of a Media Commission stated that the ongoing convergence of media platforms, operational efficiencies for services, the public and the State and public expectation support this approach. In relation to the ongoing convergence of media platforms, many respondents stressed the growing trend for a single platform to act as more than one kind of service. For example, a platform could act as a Television Broadcasting Service, an On-demand Audiovisual Media Service, as a Video Sharing Platform Service and as a wide variety of other services through a single site, app or portal. These respondents also emphasised the possibility of knowledge sharing and some streamlined or complementary processes under a single regulatory structure.

A few respondents suggested that stakeholder or wider expertise could be brought into a Media Commission structure through statutory forums or boards.

Several respondents disagreed with this approach and favoured assigning the regulation of On-demand Audiovisual Media Services to the Broadcasting Authority of Ireland and establishing a new regulatory body to regulate Video Sharing Platform Services under Strand 2 and operate the national online safety system under Strand 1. These respondents emphasised that different skillsets and expertise are needed to regulate editorial and non-editorial services and the risk of importing an editorial regulatory mind-set into a non-editorial environment.

Regardless of the regulatory structure they favoured, the respondents stressed that a regulator or regulators would need to be sufficiently resourced, including being staffed with appropriately skilled persons and funded to the degree necessary to comfortably carry out its functions.

## **b. Core Regulatory functions**

The respondents noted that the regulator or regulators would have functions in relation to the four Strands of regulations, these being:

1. Strand 1: Overseeing the operation of the national online safety system,
2. Strand 2: Regulating Video Sharing Platform Services,
3. Strand 3: The regulation of On-demand Audiovisual Media Services, and,
4. Strand 4: The regulation of Television Broadcasting Services.

How these functions will be expressed in legislation will depend on the approaches taken to the regulation of harmful online content, the services within scope of Strands 1 & 2 and the approach taken to the regulation of audiovisual media services under Strands 3 & 4. These are examined in parts 2, 3 and 7 of this chapter respectively.

In relation to Strands 1 & 2, the respondents primarily focused on what powers could be afforded to a regulator to carry out its general functions of overseeing the operation of the national online safety system and the regulation of Video Sharing Platform Services. These contributions are looked at in part 6 of this chapter. Overall, these contributions focused on the powers associated with either a system of oversight of measures to improve the safety of online services or a system based on the direct involvement of a regulator in the removal of harmful online content, depending on whether a systemic or complaints based approach to the regulation of harmful online content was favoured by the respondent.

In relation to Strand 3, the respondents agreed that the changes required to the regulation of On-demand Audiovisual Media Services by the revised AVMSD mean that a system of direct regulation is needed, perhaps based on an obligation for ODAVMS operating in Ireland to register with a regulator and abide by codes similar to those for Television Broadcasting Services.

On balance, the respondents considered that no substantial changes should be made to the regulation of Television Broadcasting Services and that the functions and accompanying powers of a regulator in this area should be carried over from those present in the Broadcasting Authority of Ireland.

### **c. Regulatory relationship – Video Sharing Platform Services**

Overall, the respondents considered that the relationship between the regulator and Video Sharing Platform Services should be based on a systemic oversight approach. Under this approach, the regulator would have oversight over measures that Video Sharing Platform Services take to meet the principles in the revised AVMSD. These principles are, in summary, to protect minors against potentially harmful content and all users from content containing incitement to hatred and certain criminal content.

A number of respondents suggested that these principles could be reflected in a code or codes drawn up by the regulator that Video Sharing Platform Services could use as a reference point when developing measures to improve online safety. The regulator could also assess the measures taken by individual Video Sharing Platform Services against any code or codes. A few respondents emphasised that any codes or accompanying guidance documents should be continuously updated to take into account the rapid nature of technological change and changes to user behaviour.

The revised AVMSD details a number of potential measures, including:

- Providing users of Video Sharing Platform Services with the ability to report potentially harmful content and to know what is the outcome of their report.
- Providing users of Video Sharing Platforms with parental control systems.
- Creating avenues for users of Video Sharing Platforms to make complaints about the measures taken by the service.

Additionally, a number of the respondents stressed that this approach should be aligned as much as possible with the approach taken to the national online safety system under Strand 1.

The respondents' contributions regarding the mediation aspect of the regulation of Video Sharing Platform Services is examined in part 6 of this Chapter.

#### **d. Additional or complementary regulatory functions**

A number of respondents suggested that a regulator or regulators have additional or complementary regulatory functions to the core functions described above. These suggestions included:

- Education and awareness raising functions, particularly in relation to Strands 1 & 2,
- Media literacy functions, for example support for the Media Literacy Ireland network,
- Research functions, especially with regard to establishing evidence bases to inform regulation and further policy making, and,
- External engagement functions, for example cooperation with similar bodies across the EU and stakeholder engagement functions, perhaps through statutory forums.

Some of these functions, for example the education and awareness raising functions, are carried out by existing bodies, for example Webwise. Among other things, Webwise provides a range of free primary and secondary school teaching resources addressing a range of topics including cyberbullying, image-sharing, social media and other issues. If any of these functions are provided to the regulator, they will need to be aligned with the work of existing bodies and existing initiatives.

#### **e. Addressing overlap**

A number of respondents pointed out that there is likely to be overlap, both actual and perceived overlap, between the role of a regulator or regulators and the roles of existing regulators and bodies. For example, the Data Protection Commission with respect to issues regarding data protection and privacy online and An Garda Síochána and INTERPOL with respect to criminal online content.

These respondents stressed that a regulator or regulators will need to maintain strong cooperative links with these bodies to avoid any unnecessary duplication of work and confusion for service providers and the public. They also highlighted the possibility that these bodies may end up working at cross purposes if strong links are not established and maintained.

## **Key messages**

There are a number of key messages to take away, including:

- That there is preference for a single regulatory structure, a Media Commission, with responsibility for all four strands of regulation.
- That a regulator or regulators will need to be appropriately resourced and staffed in order to carry out its functions.
- That the core functions of a regulator will relate to the four Strands of regulation and that how these functions will be expressed in legislation will depend on the approaches taken to the regulation of harmful online content, the services within scope of Strands 1 & 2 and the approach taken to the regulation of audiovisual media services under Strands 3 & 4.
- That there are a number of additional or complementary functions that could be provided to a regulator, including education and awareness raising functions and external engagement functions.
- That provision will need to be made to, in the first instance, minimise any overlap between the role of a regulator and the roles of existing bodies and, in the second instance, to foster and maintain strong cooperative links between a regulator and these bodies.

## **5. Approach to funding (all Strands)**

This key thematic issue is about how the regulator or regulators will be funded. The main part of this issue is whether the funding will be directly from the State, on the basis of levies of the services regulated, or a mixture of both.

If industry levies are pursued there a few things that will need to be taken into account, including who each levy will apply to and how would it be calculated and collected. Affecting these considerations is the overall question of what level of funding and resourcing will be needed for the regulator or regulators to effectively carry out their functions.

### **a. Source of funding**

There were two sources of regulatory funding identified by the majority of the respondents, direct funding by the State and funding through levies on the services to be regulated.

Those respondents who favoured the first option considered that it would help to ensure a regulator's independence from industry and those who favoured the second option pointed out that the principle of "polluter pays" is a well-established part of Irish regulatory culture and that levies would help to ensure a regulator's independence from Government. Further to this, a number of respondents favoured a mixed approach of industry levies and direct funding by the State.

### **b. Industry levies**

In terms of industry levies, the respondents identified that separate levies would be required across the four Strands of regulation and that the existing Broadcasting Levy could be maintained to fund the regulation of Television Broadcasting Services under Strand 4.

In terms of applying industry levies in respect of On-demand Audiovisual Media Services (Strand 3), the respondents identified that the nature of any levy would depend on the approach taken to the regulation of these services. For example, if a tiered or risk-based approach is taken to the regulation of these services, then any levy drawn up by a regulator would need to take this into account. The respondents' contributions regarding the regulation of On-demand Audiovisual Media Services are examined in part 7 of this Chapter.

The respondents similarly identified that the structure of any levies put in place to fund the national online safety system (Strand 1) and the regulation of Video Sharing Platform Services (Strand 2) will depend, in the first instance, on the services in scope of these Strands. The respondents' contributions in this regard are detailed in part 3 of this Chapter.

In the second instance, a number of the respondents identified potential indicators that could be used to determine whether an online service is subject to a levy and to what degree, including:

- The service's revenues in the State, or the EU in respect of Video Sharing Platform Services, and,
- The number of users or subscribers that the service has in the State, or the EU in respect of Video Sharing Platform Services.

Several respondents also stressed that the design of any levies should be both transparent and proportionate, both to service providers and to the public.

### **c. Level of funding**

While the majority of the respondents did not identify any particular level of funding that would be appropriate, many respondents stressed that a regulator or regulators would need to be sufficiently resourced, including being staffed with appropriately skilled persons and funded to the degree necessary to comfortably carry out its functions.

### **Key messages**

There are a number of key messages to take away, including:

- That the two main options for funding a regulator or regulators is direct funding from the State or industry levies.
- That, if industry levies are pursued, separate levies would be required across the four Strands of regulation and that the existing Broadcasting Levy could be maintained to fund the regulation of Television Broadcasting Services under Strand 4.
- That some services may be subject to levies across more than one Strand, and that the design of the levies should take account of this to avoid over-complexity or red tape
- That the structure of any industry levies will depend on the approach taken to the regulation of services under each Strand.
- That a regulator or regulators will need to be appropriately resourced and staffed in order to carry out its functions

## **6. Approach to powers & sanctions (Strands 1 & 2)**

This key thematic issue is about what powers, including sanction powers, will be needed by the regulator or regulators to carry out their functions under Strands 1 and 2. In developing an appropriate range of powers strong consideration will need to be given to proportionality, futureproofing, consistency and rights balancing.

An important part of this issue includes how appropriate safeguards and processes can be best expressed in legislation to prevent unintended consequences and to avoid creating skewed incentives for online platforms to remove content excessively or act as censors. Such safeguards may include providing for a clear role for the Courts in relation to administrative financial sanctions.

### **a. Regulatory powers**

The majority of the respondents considered that a regulator would require a range of compliance and sanction powers in order to implement and maintain the national online safety system under Strand 1 and the regulation of Video Sharing Platform Services under Strand 2.

A number of respondents emphasised that a similar range of powers could be provided to the regulator in respect of both Strands 1 & 2, depending on how aligned the approaches to the regulation of harmful online content are under the two Strands. These respondents stressed the importance of consistency in this area.

A number of respondents also stressed that the application of certain compliance powers or sanction powers by the regulator will need to take into account the scale and nature of the online service in question in accordance with the principle of proportionality. For example, if an online service is operated by a single individual and used by a very small number of persons, then the regulator will need to take this into account when, for example, requiring reporting by that online service. The respondents' contributions regarding the online services to be covered by Strand 1 & 2 are detailed in part 3 of this Chapter.

The majority of the potential powers suggested by the respondents related a systemic oversight approach rather than an approach in which the regulator would have a direct role in the removal of harmful online content.

Several respondents noted that, in addition to the range of compliance and sanction powers provided to it, the regulator will require a number of incidental and complementary powers in order to carry out its functions. For example, this includes the power to report and publish information on its own activities as it deems appropriate or on a periodic basis, including in relation to its use of its compliance and sanction powers.

## **b. Compliance powers**

Overall, the respondents considered that a wide range of compliance powers should be available to the regulator. The majority of the compliance powers suggested by the respondents focused on providing the regulator with the powers necessary to have systemic oversight over the activities of online services for the purposes of improving online safety.

The respondents suggested a number of compliance powers that could be provided to the regulator, including:

- The power to give notice to an online service to remove an instance or instances of harmful online content, whether on receipt of an appeal by an individual user or through other mechanisms. The application of this power will depend on the approach to the regulation of harmful online content taken under Strand 1. The respondents' contributions on this issue are examined in part 2 of this Chapter.
- The power to seek information on an ad-hoc basis from online services and to require reporting from an online service or categories of online services on an ad-hoc or periodic basis.
- The power to publish guidance materials for online services.
- The power to certify that codes, activities or compliance plans of online services are "fit for purpose".
- The power to audit, inspect or investigate the activities of an online service in relation to obligations that the service in question may have under Strands 1 or 2.
- The power to direct an online service to take specified actions or activities to improve, rectify or prevent issues.
- The power to make settlement agreements with online services.
- The power to issue notices or warnings to online services in relation to potential non-compliance with the legislation or a direction of the regulator.
- The power to seek a court order to enforce compliance by an online service either with the legislation or a direction of the regulator.
- The power to operate or support an independent mediation or dispute resolution system between Video Sharing Platform Services and users under Strand 2.

### **c. Sanction powers**

A number of respondents stressed that the purpose the regulatory systems under Strands 1 & 2 should be to incentivise and, where necessary, compel good behaviour by online services and that, as such, the use of sanctions powers by a regulator should be seen as a last resort in cases of systemic failure and non-compliance. As such, they emphasised that the use of sanction powers should not create a system of skewed incentives for online services, where to avoid potential or perceived punishment they systematically censor their users.

These respondents also noted the potential for a punitive sanction regime to act as a barrier to entry for new online services and that the nature and scale of an online service should play an important part in any consideration of whether to apply a sanction power.

The respondents suggested a number of compliance powers that could be provided to the regulator, including:

- The power to publish the fact that an online service is not compliant with the legislation, any consequent obligations or with a direction of the regulator.
- The power to apply administrative financial sanctions to non-compliant online services, subject to confirmation by a court. This refers to the power of a regulator to impose fines.
- The power to bring criminal charges or seek that charges be brought against a non-compliant online service. The regulator would have the power to bring less serious, summary, criminal charges against a non-compliant online service. More serious criminal charges, known as indictable offences, will need to be referred to the Director of Public Prosecutions first.
- The power to seek that natural persons involved in the operation of an online service be held criminally liable for non-compliance.
- The power to seek a court order to disrupt the sources of funding for an online service.
- The power to seek a court order to compel Internet Service Providers and other “gateways” to online services, for example app stores, to block access to a non-compliant service in the State.

#### **d. Safeguards**

A number of respondents stressed that the powers of the regulator, especially its sanction powers, should be limited by certain legal and practical safeguards. Examples of suggested safeguards include court confirmation of administrative financial sanctions and appeal rights for online services in respect of sanctions in general.

The respondent's contributions regarding safeguards are examined in more detail in parts 1 & 2 of this Chapter.

#### **e. Mediation – Video Sharing Platform Services**

The revised AVMSD provides that there should be a mediation service put in place in respect of complaints regarding Video Sharing Platforms. A majority of respondents suggested that thresholds should apply to the mediation system given the EU-wide scale of the regulation of VSPS, the volume and variety of potential issues that could be brought to the system from across the Union, and the potential cost of dealing with issues under this system on an unfiltered basis.

A few respondents suggested other mechanisms by which the mediation requirement of the revised AVMSD could be fulfilled. For example, one suggestion was for statutory provision for independent and impartial decision makers to be located in VSPS who would act as a “second stage” for the internal complaints mechanisms within VSPS. These decision makers would have number of statutory functions and protections and maintain a relationship with the regulator, which would also have the power to inspect and audit their work. The cost of these decision makers would be borne by the VSPS in which they were located.

#### **Key messages**

There are a number of key messages to take away, including:

- That there is a need for consistency between the ranges of powers provided to the regulator in respect of Strands 1 & 2.
- That the application of powers by the regulator will need to take account of the nature and scale of online services in accordance with the principle of proportionality.

- That the majority of the compliance powers suggested by the respondents focused on providing the regulator with the powers necessary to have systemic oversight over the activities of online services for the purposes of improving online safety, including:
  - The power to seek information on an ad-hoc basis from online services and to require reporting from an online service or categories of online services on an ad-hoc or periodic basis
  - The power to audit, inspect or investigate the activities of an online service in relation to obligations that the service in question may have under Strands 1 or 2.
  - The power to seek a court order to enforce compliance by an online service either with the legislation or a direction of the regulator.
- That the use of sanction powers should not create skewed incentives for online services that would incentivise them to act inappropriately as censors.
- That potential sanction powers that could be provided to the regulator include:
  - The power to apply administrative financial sanctions to non-compliant online services, subject to confirmation by a court.
  - The power to seek that a criminal proceeding is brought against a non-compliant online service.
- That thresholds or an alternative mechanism such as impartial decision makers should be used to implement the mediation provisions of the revised AVMSD for VSPS.

## **7. Approach to Audiovisual Media Services (Strands 3 & 4)**

This key thematic issue is about how the updated rules and regulations for TV and on-demand audio visual media services (ODAVMS) from the revised Directive can be implemented in Ireland.

There are a number of important aspects to this issue, including whether the regulation of ODAVMS should be registration or authorisation/licensing based and how the ODAVMS rules will take into account the different kinds of ODAVMS, for example subscription services (e.g. monthly subscription) or transaction video style service (online purchase/rental of individual videos).

### **a. The regulation of on-demand audiovisual media services**

On balance, the respondents considered that there should be a direct regulatory relationship between On-demand Audiovisual Media Services in the State and the regulator and that similar content rules as those that apply to Television Broadcasting Services should apply to these services. The respondents considered that the direct regulatory relationship could be based on an obligation in legislation for any On-demand Audiovisual Media Service based in the State to register with the regulator. On this basis, the regulator could draw up content codes, akin to those that already apply to Television Broadcasting Services, to apply to the registered services. This system would be funded by contributions from registered On-demand Audiovisual Media Services.

A few respondents considered that the existing regulatory system works well and should be updated and maintained. This regulatory framework is based on the work of a voluntary industry led forum which draws up a code based on the rules from the AVMSD, which is subsequently approved by the Broadcasting Authority of Ireland. These respondents also cautioned against simply using the same rules for ODAVMS as apply to Television Broadcasting Services, making the point that there are fundamental differences between the services, including that the user chooses what content is shown at what time on ODAVMS.

A number of respondents stressed that any regulatory approach should take into account the wide variety of different business models that On-demand Audiovisual Media Services operate, for example a subscription ODAVMS, a transaction based ODAVMS, vs a large YouTube channel. They emphasised that the approach should avoid disrupting services by applying one size fits all rules to these different business models.

## **b. Access to content funds**

Overall, the respondents considered that On-demand Audiovisual Media Services should have access to an updated content fund administered by the regulator for Audiovisual Media Services. The current version of this fund, the Sound & Vision Fund, is administered by the Broadcasting Authority of Ireland and funded by 7% of TV licence receipts. The respondents stressed that that the fund would need to be reviewed and updated, including in relation to possible new sources of funding and eligibility criteria, before ODAVMS could be given access to it.

## **c. Content levies**

A number of respondents supported the introduction of levies on Audiovisual Media Services which target Ireland but are based in other Member States to support the production of Irish content. However, these respondents noted that there are a number of issues to take into account in providing for and designing such levies, including:

- Whether such a levy would be required to also be applied to Audiovisual Media Services based in Ireland to satisfy the legal principle of non-discrimination.
- Whether the implementation and ongoing maintenance of such levies would require ongoing cooperation with the regulatory bodies of the Member States in which the AVMS in question are based.
- On what basis would an Audiovisual Media Service be levied and on what basis would these levies be calculated.

A number of other respondents cautioned against the introduction of content levies. They noted the potential for unintended consequences and questioned the efficiency of content levies in supporting indigenous content and innovation. The concerns they raised included:

- That smaller AVMS may choose not to target Ireland, which would negatively affect the ability of Irish people to access a wide range of audiovisual content.
- That content levies can distort markets and reduce innovation while solidifying the dominance of existing producers who can navigate the funding system.

#### **d. Further considerations**

The respondents raised a number of issues and made further suggestions in relation to the approach to regulating audiovisual media services, including:

- That the editorial independence of the public service broadcasters should be further strengthened in legislation.
- That there needs to be a clear definition of public service broadcasting/media in any revised legislation.
- That the “must-carry”/”must-offer” provisions of the Broadcasting Act 2009 should be updated to allow for consideration of cost.
- That any rules regarding “signal integrity” should not affect the ability of users to overlay services, for example with programme guides or subtitles, for their personal use.
- That the regulator should take into account the different business models used by ODAVMS when calculating the 30% European Works quota from the revised Directive and that the quota should be calculated with the nature of the service in question in mind.
- That the regulator should have a distinct role in ensuring the prominence of public service media on Audiovisual Media Services and in determining if any particular regulatory intervention is required.
- That online news services should be excluded from the scope of the definition of an ODAVMS or any interpretation of the “*dissociable*” criterion.
- That processes within the regulatory framework for Television Broadcasting Services should be simplified and streamlined.

## Key messages

There are a number of key messages to take away, including:

- That there should be a direct regulatory relationship between ODAVMS and the regulator, which could be based on an obligation for ODAVMS to register with the regulator. Moreover, that the regulator should draw up content codes for ODAVMS similar to those that exist for Television Broadcasting Services
- That any regulatory approach should take into account the wide variety of different business models that On-demand Audiovisual Media Services operate, for example a subscription ODAVMS, a transaction based ODAVMS, vs a large YouTube channel.
- That ODAVMS should have access to an updated content fund, including in relation to eligibility criteria and sources of funding, administered by the regulator.
- That there is disagreement as to whether to introduce levies on Audiovisual Media Services which target Ireland but are based in other Member States to support the production of Irish content.
- That there are a number of further issues raised and suggestions made by the respondents in relation to the regulation of Audiovisual Media Services, including:
  - The calculation of the 30% European Works quota for on-demand services should take into account the nature of the service and its business model.
  - That online news services should be excluded from the scope of the definition of an ODAVMS or any interpretation of the “*dissociable*” criterion.
  - That the processes within the regulatory framework for Television Broadcasting Services should be simplified and updated.

# Appendix 1

## Questions – Public Consultation on the regulation of harmful online content 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.

**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.

**Q.3** – Which online platforms, either individual services or categories of 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

## **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.

**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?

## **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?

**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?

## **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?

**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?

## **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?

**Q. 13** – How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated?

## **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.

**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.

**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?

## **Appendix 2**

### **Audiovisual Media Services Directive**

#### **Background**

The current version of the Audiovisual Media Services Directive was agreed in 2008 and contains rules and requirements that form the minimum standards that Television Broadcasting Services and On-demand Audiovisual Media Services, e.g. RTÉ Player, must follow in the EU.

In May 2016 the European Commission published a proposed revision of the AVMSD. The proposal was written to update the rules and requirements in the AVMSD to reflect the rapid changes that the video media market was and is experiencing.

The proposal was examined and amended by both the European Parliament and the Council of the European Union and an agreement on a final text of the revised Directive was reached in June 2018. The final text of the revised Directive was officially published in November 2018. Ireland has 21 months, the deadline being 19 September 2020, to implement the revised Directive in Irish law.

#### **Video Sharing Platform Services**

One of the key aspects of the revised Directive is the inclusion, for the first time, of specific rules and requirements for Video Sharing Platform Services, e.g. YouTube. The revised Directive does not extend the rules and requirements for Television Broadcasting Services and On-demand Audiovisual Media Services to VSPS. Instead the revised Directive takes a principles based approach and requires that VSPS take appropriate measures to protect minors from harmful content and all users from hate speech and certain criminal content.

A range of measures are listed in the Directive which VSPS could put in place to meet the requirements above, including age-verification, parental control systems and a complaints system so that users can request that content be removed from the service. Ireland will be required to assign a national regulatory authority to oversee the measures which the VSPS established here have in place, and ensure that they are sufficient to meet the requirements of the Directive.

## **On-demand Audiovisual Media Services**

Under the current AVMSD On-demand Audiovisual Media Services are subject to similar but less strict rules and requirements than Television Broadcasting Services. In the revised AVMSD these rules and requirements are mostly aligned. For example:

- The revised Directive requires a 30% quota for European Works on On-demand Audiovisual Media Services, subject to certain thematic or turnover exemptions. There is also a requirement that these works are given appropriate prominence.
- The revised Directive subjects On-demand Audiovisual Media Services to the same rules and requirements as Television Broadcasting Services when it comes to the protection of minors, including that certain content is “*only made available in such a way as to ensure that minors will not normally hear or see them*”.

The new rules and requirements for On-demand Audiovisual Media Services will need to be implemented in Irish law. The regulatory system for these services will also need to be updated to ensure that it is able to oversee these new rules and requirements.

## **Television Broadcasting Services**

The changes in the revised AVMSD for the rules and requirements for Television Broadcasting Services are relatively minor. Examples of these changes include:

- A change from the hourly limit on advertising of 20% to a limit of 20% across two daily periods from 06:00 to 18:00 and 18:00 to 24:00.
- A clarification that product placement is explicitly permitted subject to a number of consumer protection requirements.

These changes to the rules and requirements for Television Broadcasting Services will need to be implemented in Irish law.

## **Appendix 3**

### **List – respondents**

- Aconite Internet Solutions
- Adam Kelly
- Aidan O'Neill
- Alcohol Action Ireland
- Anthea Gombart
- Aoife Miller
- Apple Distribution International
- Arron Keegan
- ASAI
- Anonymous respondent
- Bodywhys
- Brian Cusack
- Brian Sweeney
- Broadcasting Authority Ireland
- Carnegie UK Trust
- Caroline Goldsmith
- Chris Prendergast
- Ciarán McMahon

- Colin Gregory
- Cybersafe Ireland
- Cybersmarties
- Data Protection Commission
- Deborah McMahon
- Deepak Saxena
- Department Justice and Equality
- Dublin Rape Crisis Centre
- Eamonn Colfer
- Éibhear Ó hAnluain
- Eoin Corcoran
- Facebook Ireland Limited
- GNPSB An Garda Síochána
- Google Ireland
- HSE National Office for Suicide Prevention
- Independent News and Media
- Irish Council for Civil Liberties
- Irish Heart Foundation
- Irish Music Rights Organisation
- ISPAI

- ISPCC
- Joint ISPCC, Cybersafe Ireland, Psychological Society of Ireland and SpunOut.ie
- James Conway
- Joint Managerial Board
- Laurence Mc Manus
- Luke Wonner
- Marina Doyle
- Match Group
- Matthew Kivlehan
- Michael Ahern
- Miranda O'Sullivan
- Morpheus Matthews
- ODAS Group
- Oisin Kinsella
- Ombudsman for Children's Office
- Pa O'Sullivan
- Patrick Guinness
- Patrick Moore
- Patrick Robinson
- Paul Taylor

- Pix Alert
- Press Ombudsman
- Rape Crisis Network Ireland
- RIAG
- Robert Power
- Roisin Ni hEilidhe
- Ronan Fallon
- RTÉ
- Samaritans Ireland
- Screen Ireland
- Screen Producers Ireland
- Shane Crowley
- Sharon Boyle
- Sky
- Spun Out.ie
- Stephen Foskin
- Susan Jones
- Technology Ireland IBEC
- TG4
- Three Ireland

- UCC Students
- Uplift
- Verizon Media
- Virgin Media Ireland
- Vodafone Final
- William Foley