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Department of Communications,
Climate Action & Environment

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

Context

On Monday 4th March 2019, Minister Bruton made a key note speech at St. Brigid's GNS, Glasnevin, in which he said that he would introduce a new law to regulate harmful online content.

The Minister stated that *“Digital technology is transforming the world in which we work and live and learn. This provides huge opportunities for us all. It has been central to our economic and social development as a country for three decades. However, the digital world also presents new risks which did not exist previously.”*

“The situation at present where online and social media companies are not subject to any oversight or regulation by the state for the content which is shared on their platforms is no longer sustainable. I believe that the era of self regulation in this area is over and a new Online Safety Act is necessary.”

“I will bring forward an Online Safety Act which sets out how we can ensure children are safe online. This will involve, for the first time, setting a clear expectation for service providers to take reasonable steps to ensure the safety of the users of their service. A Regulator, an Online Safety Commissioner, would oversee the new system.”

“Today I am putting forward a number of options for how a new Online Safety Commissioner can do this important work.”

1. Purpose of the Consultation

The consultation aims to seek the views of citizens and stakeholders as to an achievable, proportionate and effective approach to regulating harmful content, particularly online, following the speech made by Minister Bruton where he outlined that he intended to introduce new regulation in this area. Countries such as New Zealand and Australia provide international examples of how this has been approached in other jurisdictions (see Appendix 1).

A detailed list of questions is set out in an accompanying document.

The Minister said that the new law would focus on the introduction of new regulation in four key strands:

- Strand 1: New online safety laws to apply to Irish residents
- Strand 2: Regulation of Video Sharing Platforms (e.g. YouTube)

- Strand 3: Regulation of on demand services (e.g. RTE Player, Virgin Media player, iTunes)
- Strand 4: Minor changes to Regulation of Traditional TV

The **first strand** of this consultation relates to what national level regulatory measures in respect of online safety should be put in place.

In addition to this proposed national legislative measure, there have been a number of legislative measures agreed at an EU level which have an impact on the safety of citizens online. These include the General Data Protection Regulations (GDPR) and the revisions to the Audiovisual Media Services Directive (**AVMSD**).

The revised AVMSD requires significant changes to the way in which Ireland regulates audiovisual content, both offline and online. Ireland is obliged to implement these changes and primary legislation will be required to do so. The deadline for the implementation of the provisions of the Directive is 19 September 2020.

As a result of the revisions to the AVMSD, Ireland is required to do the following:

- 1) A new system of regulation for user-generated audiovisual content, on Video Sharing Platform Services, e.g. YouTube (Strand 2)
- 2) A revised system of regulation for on-demand audiovisual services, e.g. RTÉ Player, Virgin Media Player, iTunes Store (Strand 3)
- 3) Updates required to the regulation of linear audiovisual services, i.e. traditional TV including our Public Service Broadcasters (Strand 4)

Ireland will implement and regulate these services on an EU wide basis, for entities based here, as a result of the “Country of Origin” principle of the single market. For example, Ireland will regulate YouTube, and as a result YouTube can provide its services in all EU Member States without the need for further regulation in those Member States.

The Department of Communications, Climate Action and Environment is seeking the views of the public and all stakeholders on how Ireland should introduce legislation for the regulation of harmful online content at a national level (strand 1) and the implementation of the revised AVMSD (Strands 2-4).

2. Strand 1- National Legislative Proposals

Minister Bruton has said that he believes that new regulation in this area is required to ensure that harmful content can be removed from the internet. The Minister's intention is to give a regulator the powers necessary to ensure that the content which is most harmful can be removed quickly from online platforms. In doing that, we must take care in defining what is "harmful content" and putting in place the right structures to ensure that "harmful content" is removed.

Some of the proposals to date have not defined "harmful content". In not providing a clear definition, there is a risk that legitimate freedom of speech and freedom of expression online could be curtailed. The Minister believes that there are a number of ways in which we could define harmful content. The following are examples of the types of material that could be included in a definition of "harmful content":

- 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

It is important to note that online platforms are already required to remove content which is a criminal offence under Irish and EU law to disseminate when they are notified of it, 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.

A number of Private Members' motions have also been introduced in the Dáil and the Seanad, including the Digital Safety Commissioner Bill 2017 and the Childrens Digital Protection Bill 2018. The Childrens Digital Protection Bill 2018 proposed including material which promotes self-harm or suicide, and material designed to encourage prolonged nutritional deprivation in a definition of harmful content.

Further detail on these and other proposals to provide for the regulation of harmful content in Ireland, are set out at Appendices 1 and 2.

Areas where we are looking for input include:

- *How can we ensure that there is an appropriate system in place to require the removal of harmful content from online platforms? Should this involve the*

regulatory oversight of the notice and take down systems which services themselves have in place, or 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?

- *The views of stakeholders are sought both as to the content that should be considered “harmful content” and the nature of services that should be in scope.*
- *In relation to defining “harmful content”, for example, is the list which is set out above sufficient and appropriate. If not, what changes would you propose?*

3. Strands 2-4: The revision of the Audiovisual Media Services Directive

The previous version of the AVMSD was agreed in 2008 and contained rules and requirements that form the minimum standards that Television Broadcasting Services and On-demand Audiovisual Media Services, e.g. RTÉ Player, Netflix, 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. One part of the proposal was new rules and requirements for Video-Sharing Platform Services (VSPS), e.g. YouTube, Dailymotion.

The final text of the revised Directive has now been published and Ireland must implement its provisions by 19 September 2020.

a) Strand 2 - Video Sharing Platform Services (VSPS)

Rules and requirements for VSPS (YouTube for example) are not included in the previous Audio Visual Media Service Directive. 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 requires that VSPS take appropriate measures to:

- Protect minors from potentially harmful content;,
- Protect the general public from content containing incitement to violence or hatred; and
- Protect the general public from content, the distribution of which constitutes a criminal offence under European Union law, including content containing public

provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia.

The revised AVMSD lists measures for a VSPS to take to meet these requirements, including:

- Reflecting the requirements in their terms and conditions for users uploading content.
- Having transparent and easy to use systems in place so that users can flag content that they believe breaches the requirements and be informed of any outcomes as a result of the flagging.
- Operating user-led content rating systems.
- Providing age verification and parental control systems to users.
- Operating dispute resolution procedures to resolve disputes between the VSPS and its users that may arise as a result of these measures.

This system of regulation only applies to the user-generated **audiovisual** content which is hosted on Video Sharing Platform Services, i.e. it does not include photos, comments or other material which is not audiovisual in nature.

However, it is proposed that these requirements will also apply to platforms in respect of other user generated content for Irish residents (under strand 1).

The Directive also requires that VSPS follow certain rules for Audiovisual Commercial Communications (**AVCC**) (e.g. advertisements) which are under their control. They must include in their terms and conditions similar requirements for AVCC which are under the control of their users.

Rather than being prescriptive in terms of the content which is not permissible, the Directive establishes Principles (protection of minors; incitement to hate speech or violence; criminal content), and requires that a National Regulatory Authority ensures that the services have appropriate measures in place in order to meet those principles.

This consultation seeks the views of stakeholders and the general public as to how Ireland should approach the implementation of this aspect of the revised Directive, for example:

- *What type of regulatory relationship should exist between a VSPS established in Ireland and the Regulator?*

- *How should the Regulator determine whether the methods put in place by the VSPS are sufficient to meet the principles set out in the Directive?*
- *On what basis should the Regulator monitor and review the measures which the VSPS have in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?*

b) Strands 3 & 4 - Changes in the regulation of linear and non-linear audiovisual media services

The Directive requires a number of other changes in the regulation of linear services (i.e. traditional TV) and non-linear services (i.e. on-demand services – e.g. RTÉ Player, Virgin Media Player, iTunes, etc.).

Some of these changes are:

- The revised Directive further aligns the rules and requirements for Television Broadcasting Services and On-demand Audiovisual Media Services.
- The revised Directive requires a 30% quota of European Works on On-demand Audiovisual Media Services.
- The revised Directive allows an EU country to levy revenues a Television Broadcasting Service or an On-demand Audiovisual Media Service makes in that country even if it is based in another EU country.

The most significant change from an Irish perspective (apart from the provisions which apply to VSPS) is the requirement to more closely monitor the activities of on demand services.

This consultation seeks the views of stakeholders and the general public as to how Ireland should approach the implementation of this aspect of the revised Directive. For example:

- *What type of regulatory relationship should exist between an on-demand service established in Ireland and the Regulator?*
- *Should the same content rules apply to both linear and on-demand services?*
- *Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to include non-linear services as well as applying levies to services which are regulated in another EU Member State but target Ireland?*

4. National & European Context

In putting in place a new national regulatory structure for dealing with the removal of harmful online content, we must respect the various National, EU and global legislative frameworks which are already in place.

This is complex for a number of reasons, including:

- The number of existing legislative and regulatory measures in place in relation to specific content (for example in the area of Data Protection, Terrorist Content, Child Sexual Abuse Material or other criminal content);
- The role of An Garda Síochána in relation to illegal content such as child sexual abuse material and terrorist related content.
- The legislative framework established by European Union law under the eCommerce Directive that governs the liability of hosting service providers. This Directive provides that online services which host content are not liable for hosting illegal content of which they are not aware. If they are made aware of the illegal content, they are required to act expeditiously to ensure its removal from their service.
- The need to balance the fundamental rights of all users (for example the right to freedom of expression as set out in The Charter of Fundamental Rights of the European Union and in the United Nations Universal Declaration of Human Rights) including those affected by potentially harmful content, and the users who upload the content in the first place.

5. Regulatory Structures

In order to ensure that each of the four streams of regulation identified above is effectively and efficiently implemented, one of the first issues which must be addressed is to choose an appropriate regulatory structure.

For clarity, it is not intended that the proposed regulator would have a role in relation to the prosecution of individuals for disseminating illegal content, which is a matter for An Garda Síochána. Rather the regulator's role would be in relation to the removal of harmful content, which may include content the dissemination of which is a criminal offence.

The Consultation seeks the views of stakeholders and the general public on what type of regulatory structure would be most appropriate, given the four strands which will require regulation.

At present the BAI is the National Regulatory Authority under the AVMSD for traditional or linear television including the publicly funded broadcasters (RTÉ and TG4) and commercial television broadcasters such as Virgin Media Television. The BAI also regulates the traditional (linear) radio broadcasters who are established in Ireland. There is no regulatory framework for content regulation of linear radio broadcasters at an EU level.

The Board of the BAI is called the Authority. The Authority is the main decision maker in the organisation and also provides strategic direction. The BAI has committees for different areas of work. The Compliance Committee and the Contract Awards Committee make decisions with regard to their relevant areas, including complaints and operations respectively. The Authority, the Contract Awards Committee and the Compliance Committee work on a part time basis.

Among the options that could be considered in this context are:

- *Restructuring and Reforming the Broadcasting Authority of Ireland as a Media Commission and assigning all four regulatory strands to this regulator. This could involve restructuring the BAI into a multi-person Commission, using the Competition and Consumer Protection Commission as a potential model. This could provide for a Commissioner for television and radio broadcasting; a Commissioner for on demand services and other functions; and a Digital Safety Commissioner with responsibility for both the European and national regulatory functions in relation to online safety.*
- *Two regulatory bodies, one of which would involve restructuring the BAI and assigning it responsibility for content which is subject to editorial control (traditional television and radio broadcasting and on-demand services). The second regulator would be a new body responsible for online content that is not subject to editorial controls (both national and European strands related to online safety).*

In your view, what is the most appropriate regulatory structure?

6. What regulatory approach should Ireland take in relation to Harmful Content on Online Platforms (Strands 1 & 2)?

a) Strand 2 (VSPS)

Under the revised AVMSD, it is envisaged that a National Regulatory Authority will be appointed, who will ensure that VSPS have sufficient measures (examples of which are given in the Directive and include parental controls and age-verification) in place to ensure that the principles set out in the Directive are achieved.

These principles are to:

- Protect minors from potentially harmful content,
- Protect the general public from content containing incitement to violence or hatred, and,
- Protect the general public from content, the distribution of which constitutes a criminal offence under European Union law, including content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia.

A requirement of the Directive is that the VSPS have a complaints mechanism in place where a user can make a complaint regarding content which is hosted on the service.

The Regulator will certify that the measures which a service has in place are sufficient, and review the efficacy of the measures on an on-going basis. This could involve, for example, conducting audits of the measures which the services have in place or a more direct review of a company's content moderation teams as they are operating.

b) Strand 1 (National Legislative Proposal)

It is envisaged that a similar approach could be taken under the National Legislative Proposal with certain specific differences:

- The regulation would apply to a broader category of services (not just video sharing platform services) and to all user-generated content (not just audiovisual, including photos and user comments).
- While it would appear that any harmful behaviour or content could fall within the scope of the AVMS principles, the principles which would apply under this scheme could make specific reference to:
 - serious cyberbullying material
 - Material which promotes self-harm or suicide

7. What sanctions/powers should the regulator have in relation to Online Content (Strands 1 & 2)?

The issue of sanctions and powers requires careful consideration. In order to be effective, a regulator must have the necessary tools to assess compliance and to require redress, as well

as the ability to impose a range of sanctions on a service provider. These may include civil sanctions, criminal sanctions or both.

The AVMSD does not contain any provisions in relation to the powers or sanctions which the Member State should assign to the regulator for Strands 2-4. The obligation is on the Member State to ensure that the services established in their territory comply with the provisions of the Directive, and that the Member State is in a position to provide information which is required (details of services, quota of European Works, etc.) to the Commission.

It is therefore a matter for Ireland to decide what powers and sanctions are appropriate and required by the regulator in order to ensure that Ireland meets its obligations. Similarly, in relation to the National Legislative Proposal, it is a matter for the Government and Oireachtas to decide what powers and sanctions are appropriate and required by the regulator in order to ensure that the policy goal is met.

In the case of both the AVMSD and the National Legislative Proposal, the powers and sanctions of the regulator will only apply to those services established in Ireland. In the case of the AVMSD, the system will apply on an EU wide basis. In the case of the National Legislative Proposal, only persons resident in Ireland will be able to avail of the system.

Further to this, in order for the powers and sanctions available to the regulator to be effective and proportionate, the obligations on services, e.g. timescales for the removal of notified content, and the basis of these obligations, e.g. a definition of harmful content or principles around harmful content, must be clear.

Among the powers which could be assigned to the regulator and the sanctions which it could impose are:

- A requirement that the services operate an Online Safety Code and must demonstrate their proposed approach to implement their obligations to the regulator, and that the regulator can certify that the approach is sufficient to a) meet the requirements of the AVMSD and b) meet the policy goal under the national legislative proposal, i.e. that the regulator will be certifying that the proposed approach is “fit for purpose”
- That the regulator can require amendments to the proposed approach of the services before it certifies them as being sufficient or “fit for purpose”.
- Summons powers including the power to require regular reports from the services on the operation of particular aspects of the service – i.e. content moderation, review, adjudication of appeals etc.

- The power to assess whether the measures which a service has in place are sufficient in practice, by conducting audits of the measures which the services have in place or a more direct review of a company's content moderation teams as they are operating.
- The power to issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator.
- The power to impose administrative fines in relation to failures of compliance.
- The power to publish the fact that a service has failed to comply or cooperate with the regulator.
- The power to require a service to remove an individual piece of content (i.e. direct involvement in a notice and take down system) within a set timeframe, depending on the nature of the content, on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider.
- Where an offence is created of a service provider not cooperating with the regulator, e.g. by failing to put measures in place, by failing to provide information to the regulator, that the regulator would have the power to seek that criminal proceedings be brought against the service provider. Where an activity can give rise to criminal proceedings/prosecution – this activity must be clearly defined in law.

Views are sought as to which powers and sanctions or combination of powers and sanctions will be most effective.

8. What type of appeals system should be in place for the removal of content? (Strands 1 & 2)

a) Strand 2 (VSPS)

The AVMSD does not envisage that the regulator will adjudicate on individual complaints. However Ireland is required to put a mechanism in place for the impartial settlement of disputes between users and VSPS (which will have no impact on the rights of a user to legal protection and to the Courts for redress). This could be an independent mediation service.

As this system will be in place on an EU-wide basis, the issues of scale will be especially challenging. Criteria may be appropriate to reduce the regulatory burden to the most serious cases where an individual is being harmed and a statutory test has been met. Ireland is engaging with the European Commission to establish what the Commission's expectation in relation to this provision is.

b) Strand 1 (National Legislative Proposal)

The most efficient system for handling complaints about content is one where the first contact is made with the service provider. Once a user has made a complaint to a service provider and is unhappy with the response they have received, should they have the option to appeal to an external body, either the envisaged regulator or an independent mediator or organisation? What time limits should be put in place? Should a statutory test have to be met before a complaint can be made to the regulator i.e. should the user have exhausted the complaints mechanism which the service provider has put in place (keeping in mind that the regulator will have had to already certify that the complaints mechanism is sufficient for each service provider) and serious harm is being caused to the individual by the content not being removed?

9. What are the next steps?

Once the public consultation has concluded, the Minister for Communications, Climate Action and Environment will review submissions and finalise a proposal. The Minister will then bring draft heads of bill to government for approval and publication.

Ends

Appendix 1: Approaches to harmful content

	Objective	Online Content Covered	System
Law Reform Commission Report on “Harmful Communications and Digital Safety” (2016)	<p>Proposed the establishment of an Office of a Digital Safety Commissioner of Ireland along with targeted reforms of criminal law in the area of online communication.</p> <p>Rapid removal of content affecting an individual citizen from online services to prevent its dissemination.</p>	Undefined – Strongly linked to criminal content, including the new offences proposed by the report.	<p>Operation of a notice and take-down system, based on individual complaints, for “harmful digital communications” of a criminal nature by the proposed Office of the Digital Safety Commissioner of Ireland.</p> <p>Creation of new criminal offences.</p>
PMB – Digital Safety Commissioner Bill 2017	<p>Proposes the establishment of an Office of a Digital Safety Commissioner of Ireland.</p> <p>Rapid removal of content affecting an individual citizen from online services to prevent its dissemination.</p>	Undefined “harmful digital communications”	Operation of a notice and take-down system, based on individual complaints, for “harmful digital communications” by the proposed Office of the Digital Safety Commissioner of Ireland.
PMB – Children’s Digital Protection Bill 2018	Proposes assigning oversight of a system of notice and take-	“Harmful materials”, including content containing	Operation of a notice and take-down system, based on individual

	down for services hosting “harmful” content to the Commission for Communications Regulation (Comreg).	“encouragement and incitement to suicide” and “encouragement of prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health”.	complaints, for services found to host “harmful” materials by Comreg.
PMB - Harassment, Harmful Communications and Related Offences Bill 2017	Proposes the creation of specific criminal offences relating to harassment by means of digital technologies.	Harassment and distribution of intimate images without consent.	Creation of new criminal offences.
Revised Audiovisual Media Services Directive (2018)	Introduces rules and requirements for Video Sharing Platform Services which host audiovisual user-generated content to protect minors from harmful content and all users from hate speech and criminal content.	Audiovisual user-generated content on Video Sharing Platform Services.	Regulatory oversight over a principles based system of measures, including internal notice and take-down systems and dispute resolution mechanisms.
Office of the eSafety Commissioner (Australia) (2015)	Established primarily to deal with complaints regarding “serious cyberbullying”.	Serious Cyberbullying content - defined as “content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating” Online Content Scheme – illegal materials.	Notice and take-down system.

<p>Netsafe (New Zealand) (2015)</p>	<p>NGO assigned responsibility to receive, assess and investigate complaints about online bullying, harassment and abuse.</p>	<p>Digital communications which may cause harm – based on ten principles set out in legislation</p>	<p>Operation of a complaints system for digital communications which may cause harm which interfaces with the New Zealand District Court system.</p>
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Appendix 2: Content Moderation Processes in Australia and New Zealand

Australia

The Australian Office of the eSafety Commissioner was established in 2015 primarily to deal with complaints regarding “serious cyberbullying” and to operate an online content scheme for the notification of suspected illegal or criminal content online.

“Serious cyberbullying” is defined in Australian legislation as content which would likely have the effect of “seriously threatening, seriously intimidating, seriously harassing or seriously humiliating” an Australian child and is likely to have been intended to have that effect. Complaints relating to cyberbullying must first be referred to the service hosting the material in question before it can be referred to the eSafety Commissioner. The Office has the power to require a service to remove material it considers to be “serious cyberbullying” and to fine services which do not comply.

The Office’s cyberbullying complaints scheme received 409 complaints between July 2017 and June 2018.

In the same period the Office finalised 13131 investigations under its online content scheme. In Ireland, a similar scheme is operated by Hotline.ie where child sex abuse materials found online can be notified. The Hotline.ie service works closely with An Garda Síochána, the authority in Ireland which deals with illegal online content.

New Zealand

In 2015 Netsafe, a charity organisation operating in New Zealand since 1998 to help New Zealand internet users stay safe online, was assigned responsibility for receiving, assessing and investigating complaints about online bullying, harassment and abuse under the Harmful Digital Communications Act 2015.

The Act defines 10 communication principles on which digital communications may be considered to cause harm, including digital communications which may be threatening, intimidating or menacing, or grossly offensive.

The complaints system operated by Netsafe interfaces with the District Court system in New Zealand and complainants must first engage with Netsafe, who will attempt to mediate between the complainant and the author, before they can avail of the Courts system. Netsafe itself may bring a complaint to the District Court on behalf of a complainant if, upon deeming a complaint valid, its engagement with the author through the service hosting the offending material is not satisfactory.