



Rialtas na hÉireann
Government of Ireland

Online Safety and Media Regulation Bill

Summary of the virtual workshop on
the regulatory framework for online
safety, 18 June 2020

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1. Introduction

The General Scheme of the proposed Online Safety and Media Regulation Bill was approved by Government on 9 January 2020 and subsequently published. Among other things, the proposed Bill provides for the creation of a regulatory framework for online safety, which will be overseen by an Online Safety Commissioner as part of a wider Media Commission.

a. Stakeholder engagement

The General Scheme was drafted following a period of consultation and bilateral engagement. This included a public consultation that concluded on 15 April 2019. A total of 84 submissions were received in response, including from members of the public, commercial organisations and industry groups, public bodies, and NGOs. Further to this, the Department published a thematic analysis of the consultation responses, identifying key themes and issues, on 27 July 2019.

Following this, the Department engaged in an intensive period of legal and policy analysis, exploring options for regulation. This produced the General Scheme of the proposed Bill, which was submitted to Government in late December 2019 and approved in early January 2020.

Throughout this period and thereafter, the Department continued to engage with relevant stakeholders on a bilateral basis and with stakeholder groups.

Due to the emergency measures necessary in response to the Covid-19 pandemic, a planned stakeholder workshop on the regulatory framework for online safety due to be held in March 2020 was postponed. This workshop, which this document summarises, was subsequently held virtually on 18 June 2020.

b. Aim of the regulatory framework

The aim of the regulatory framework for online safety is to tackle the spread and amplification of certain defined categories of harmful online content by creating a system of effective oversight and, as appropriate, direction of the content delivery and moderation systems and processes operated by online services. This system will be implemented by an Online Safety Commissioner through online safety codes. The Commissioner will also have a number of robust compliance and enforcement powers, including the powers to require reporting, initiate investigations and audits, issue compliance and warning notices, and sanction non-compliant online services.

The purpose of this approach is to create a cycle of harm minimisation, wherein fewer persons are exposed to harmful online content over time.

The regulatory framework will incorporate the regulation of video sharing platform services required by the revised Audiovisual Media Services Directive.

2. Overview of the workshop

The virtual workshop on the regulatory framework for online safety was held on 18 June 2020. The workshop brought together roughly 60 participants from a wide range of backgrounds, including expert academics, representatives of commercial organisations, domestic and international NGOs, the European Commission, and public bodies.

The workshop consisted of:

- Opening remarks by Richard Bruton, TD, the then Minister for Communications, Climate Action and Environment,
- An introductory session by the moderator and Department officials, focusing on the key topics of harmful online content, codes and compliance, and services in scope of the regulatory framework,
- Discussions about these key topics among participants in various breakout rooms, and,
- A feedback session, with speakers from each breakout room conveying the issues brought up during their discussions, including questions to and responses from Department officials.

a. Key themes

A number of key issues for stakeholders arose through the discussions in the workshop, including the desire for:

- **Further clarity regarding the designation process for online services**, in particular why some perceived low-risk online services are in scope for potential designation and factors that inform a decision by the Online Safety Commissioner to designate online services.
- **Further clarity regarding the obligations that designated online services may be obliged to meet under Online Safety Codes**, in particular what these obligations may be and whether they are sufficient.
- A **consultative approach to regulation** to be further highlighted, involving regulated online services, NGOs and relevant experts.
- **Further guidance on the practical application of the categories of harmful online content**, particularly regarding their potential application in content moderation.

- **Further clarity as to what falls under the scope of the categories of harmful online content**, particularly relating to image based abuse and the cumulative tests regarding intent and harm present in the categories as presently defined.
- **Further clarity as to the role of the Online Safety Commissioner**, in particular relating to other regulatory authorities and relevant bodies such as An Garda Síochána and in relation to complaints regarding individual pieces of content.

A number of specific issues raised under these more general themes are detailed in the next section, along with responses from the Department. These responses do not constitute legal advice.

3. Workshop topics

The workshop focused on three key topics, these being:

- Harmful online content,
- Codes and compliance, and,
- Services in scope of the regulatory framework.

These three topics encompass most of the matters addressed by the General Scheme of the proposed Bill and the issues raised by stakeholders during the workshop.

a. Harmful Online Content

The main role of the Online Safety Commissioner, as a member of the Media Commission, will be to regulate the activities of online services through online safety codes to tackle the availability of harmful online content and to engage with existing authorities in Ireland and abroad to achieve this aim.

The powers to be given to the Online Safety Commissioner are robust and will enable them to begin a regulatory backed cycle of risk and harm reduction among online services. This will continuously improve the safety of people online even as new issues and online services emerge.

What is harmful online content?

The proposed Bill details four categories of what will be considered harmful online content, these being:

- Material which is illegal to distribute under Irish or EU law (such as child sexual abuse material),
- Material which intimidates, threatens, humiliates or persecutes a person (encompassing cyber-bullying material),
- Material which encourages or promotes eating disorders,
- Material which encourages or promotes self-harm or suicide or provides instructions on how to do so.

The proposed Bill contains definitions of these categories. These definitions are nuanced and include tests of likelihood and intention to decide if material falls within their scope. Harmful online content will not include material which is already dealt with by other areas of law and existing regulatory bodies, for example data protection and privacy law and the Data Protection Commission. The proposed Bill mandates cooperation between regulatory bodies

to address any issues of overlap between the roles of the Online Safety Commissioner and other regulatory bodies.

The categories of harmful online content may be added to in the future. Proposals for new categories may be made by the Online Safety Commissioner following consultations with stakeholders and proposed to the relevant Minister. Proposed new categories must be approved by the Oireachtas before coming into effect. If a new category of harmful online content comes into effect then the Online Safety Commissioner can use it to inform the creation or revision of online safety codes.

How will harmful online content be regulated?

The focus of the proposed regulatory framework for online safety is to regulate online services rather than the behaviour of individuals. Where an instance of harmful online content is criminal in nature, it will continue to be a matter for An Garda Síochána to investigate such instances. The role of the Online Safety Commissioner will be to ensure that online services are taking appropriate steps to prevent the spread and amplification of harmful online content.

Harmful online content will be regulated through online safety codes. The definitions above will feed into the creation of such codes, which will address matters such as:

- The steps to be taken by providers to minimise the availability of harmful online content on their services,
- User complaint and issue handling systems operated by online services,
- Risk and impact assessments to be carried out by online services in relation to the availability of harmful online content on their services, and,
- The reporting obligations of online services.

What is age-inappropriate online content?

The categories of harmful online content, as outlined above, relate to the protection of both children and adults. However, in using these categories to inform the making of online safety codes the Online Safety Commissioner will be able to differentiate between appropriate measures to protect minors and adults from exposure to such material.

In addition to this, special provision is made in the legislation for a definition of age-inappropriate online content to allow the Online Safety Commissioner to test new and innovative approaches to protecting children online through online safety guidance materials. Since online safety guidance materials don't contain any legal obligations they are a far

more flexible test-bed or “regulatory sandbox” for new and innovative approaches to protecting minors.

This may lead to new regulatory approaches to protecting children migrating from online safety guidance materials to online safety codes i.e. non-binding approaches that have proved successful would then become legally binding . It will also inform the Online Safety Commissioner in proposing the addition of new categories of harmful online content that relate to the protection of children.

(i) Issues raised & Department’s response

1. Image based abuse

Issue

Whether image-based abuse, in particular the distribution of intimate images without consent, should be included as a category of harmful online content in the proposed Bill.

Department’s response

The proposed Bill does not seek to create new criminal offences, nor does it seek to create civil regulatory versions of existing or proposed offences. However, one of the categories of harmful online content in the proposed Bill is about material which it is a criminal offence to disseminate. This means that the Bill takes a future-proofed approach by providing that as new criminal offences regarding the dissemination of material are enacted, they automatically come within the scope of this legislation.

The distribution of intimate images without consent will be made a criminal offence by the Harassment, Harmful Communications and Related Offences Bill 2017, the enactment of which is committed to by the Programme for Government. This legislation is being progressed by the Department of Justice which has the responsibility and expertise in dealing with criminal legislation.

Therefore, once the HHCRO Bill is enacted, the distribution of intimate images without consent will be automatically included in this category of harmful online content.

2. Categories of harmful online content - Intent and likelihood tests

Issue

Whether the tests of likely intent and likely harm, which are contained within the categories of harmful online content in the proposed Bill, are intended to be cumulative or not, i.e. whether both tests need to be met before a piece of content can fall within the category in question.

Department's response

This is a matter which warrants further consideration during detailed drafting.

At present, the tests are cumulative. This is to ensure an increased degree of legal robustness, particularly in relation to the categories of harmful online content which relate to material which is legal yet potentially harmful.

While this approach could have implications for the practical application of the categories with regard to individual cases of content moderation, the primary purpose of these categories are to inform the creation of online safety codes, which will then lead to appropriate measures being taken by designated online services to comply with those codes.

The regulatory framework does not require individual content moderators to make decontextualized decisions on the basis of the categories of harmful online content as the appropriate application of measures to comply with online safety codes informed by those categories inherently necessitates that supports and guidance are provided to the moderators to make those decisions.

3. Overlap between categories of harmful online content

Issue

Whether there is overlap between the categories of harmful online content.

Department's response

The Department acknowledges that there may be overlap between the categories of harmful online content and that a particular piece of content may fall within multiple categories. This overlap arises as a result of the fact that communications, even in discrete instances, often cannot be neatly sorted into clearly delineated boxes.

Communications between persons, whether public or private, are most often made up of a number of constituent elements, some of which may be instances of clear or potential harm to a degree where the communication, or content, in question may be deemed harmful or, in certain instances, criminal.

Therefore, it is possible that a single piece of content may be considered as falling within multiple categories of harmful online content. For example, a piece of material may both constitute criminal harassment and cyberbullying.

4. Harmful online content about a person

Issue

That the categories of harmful online content in the proposed Bill should be framed as including material which is about a person rather than just material which is directed at a person.

Department's response

The Department agrees that this non-directional framing is appropriate and notes that such an approach is presently reflected in the categories of harmful online content in the General Scheme of the proposed Bill. For example, the category of cyberbullying is defined in head 49A as follows:

“material which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to which it pertains and which a reasonable person would conclude was the intention of its dissemination”

This framing reflects the reality of online abuse, where a micro-culture of intimidation, threatening behaviour and fear can be fostered against an individual without the majority of the material necessarily being directed at the individual in question.

5. Overlap with the criminal offence of assisting suicide

Issue

How will the category of harmful online content regarding the promotion of suicide and self-harm interact with the criminal offence of assisting suicide as provided by the Criminal Law (Suicide) Act, 1993?

Department's response

The category of harmful online content regarding the promotion of suicide and self-harm in the General Scheme of the proposed Bill reads as follows:

“material which is likely to encourage or promote [self-harm or suicide] or provides instructions on how to do so and which a reasonable person would conclude was: (i) the intention of its dissemination and (ii) that the intention of its dissemination was not to form part of philosophical, medical and political discourse.”

Whereas, s. 2(2) of the Criminal Law (Suicide) Act, 1993, reads as follows:

“(2) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”

There are a number of substantive differences between these two provisions. Chief among this is that category in the General Scheme of the proposed Bill is designed to set a standard to inform the operation of a civil regulatory regime, while the provision from the 1993 Act is designed to set a standard for criminal prosecution for individuals and doesn't necessarily concern content.

In addition to this, the category is non-directional, meaning that a person disseminating such material need not intend that any particular person be harmed by it rather simply that harm is caused, while the provision of the 1993 Act concerns, in this context, a person counselling another to attempt suicide.

Furthermore, the category concerns both suicide and self-harm, while the provision in the 1993 Act only relates to suicide. In addition, the category contains a number of explicit tests, including one of likelihood and two relating to intent. The latter of these tests is designed to ensure that legitimate discourse regarding euthanasia will not fall within the category.

As such, it can be seen that the category is broader than the provision of the 1993 Act, taking in a wider range of material into its scope than just material relating to suicide, and narrower, in that provides for explicit tests that must be met before content can be considered as falling within it. Therefore, while the criminal offence in s. 2(2) of the 1993 Act will be effectively transposed into the proposed Bill by the category of harmful online content relating to material which it is a criminal offence to disseminate, the category relating to suicide and self-harm can be seen as having a different, though related, application.

Ultimately, the category is designed to inform decision-making regarding the appropriateness and effectiveness of measures taken to minimise the spread and amplification of such material at scale under a civil regulatory system and not, as is the case with the provision of the 1993 Act, criminal prosecution.

6. Age-inappropriate online content and other vulnerable users

Issue

Whether the definition of age-inappropriate online content in the proposed Bill should be expanded to include vulnerable users that aren't minors.

Department's response

There is a lack of legal and policy precedent in this regard in terms of defining non-minor vulnerable users in a content regulation context. While there are a number of methods by which the age of user can be ascertained or inferred, including a wide and growing range of behavioural indicators, the Department is not aware of a distinct body of such methods in

relation to other vulnerable users, particularly given the wide range of persons that may fall under that description.

In other words, it is not clear to the Department how a designated online service could know that a person using their service is vulnerable, the nature of that vulnerability and the additional protections that would be appropriate in a particular instance.

7. Practical guidance for designated online services

Issue

Whether the Online Safety Commissioner should provide guidance to designated online services about how to apply the categories of harmful online content in practice, particularly in relation to content moderation.

Department's response

This possibility is implicit within the proposed regulatory framework. However, the Department will examine the possibility of making it more explicit during detailed drafting.

The purpose of the categories of harmful online content in the proposed Bill is to set out the types of material that will be dealt with under the regulatory framework and to inform the creation of online safety codes and online safety guidance materials, including in relation to content moderation, by the Online Safety Commissioner.

Online safety codes may be relatively high-level or detailed, as appropriate, and the level of detail may shift over time as best practices emerge. Designated online services will be obliged to take appropriate measures to comply with the codes that apply to them regardless of whether the codes are high-level or detailed. In addition to the binding online safety codes, online safety guidance materials may provide further non-binding guidance on matters addressed in online safety codes or on matters that the Online Safety Commissioner has not yet addressed through online safety codes.

b. Codes and compliance

A key function of the Online Safety Commissioner will be to make online safety codes to be observed by regulated online services, to ensure compliance with those codes and to take enforcement action where contraventions are identified.

How will the online safety codes work?

The Online Safety Commissioner will have the power to identify an online service, or a class of such services, as a “designated online service”. Online safety codes will apply to designated online services. These codes will address:

- Measures to be taken to minimise the availability of harmful online content,
- Issues relating to user complaints or issue handling mechanisms,
- Risk and impact assessments in relation to the availability of harmful online content,
- Commercial communications, and
- Reporting obligations.

When making online safety codes the Online Safety Commissioner will take into account a number of matters including EU law, the nature and scale of services, transparency and fundamental rights. When preparing online safety codes the Online Safety Commissioner may consult with relevant stakeholders including members of any advisory committees established by the Online Safety Commissioner.

What are online safety guidance materials?

The Online Safety Commissioner will have the power to make online safety guidance materials on the same range of issues about which they can make online safety codes. Unlike online safety codes, online safety guidance materials will be non-binding and will allow the Commissioner to elaborate on matters addressed through codes and to test regulatory approaches prior to making them binding through codes.

This may lead to new regulatory approaches migrating from online safety guidance materials to online safety codes i.e. non-binding approaches that have proved successful would then become legally binding . It will also inform the Online Safety Commissioner in proposing the addition of new categories of harmful online content.

What is a compliance notice?

A compliance notice is a communication which may be issued by the Online Safety Commissioner to a designated online service where the Commission is of the view that the designated online service is not complying with its obligations. A compliance notice will outline the Commission's views and how it formed those views.

If following the issue of a compliance notice the designated online service does not provide a reasonable explanation to the Online Safety Commissioner for its non-compliance or it does not provide a satisfactory plan to bring itself into compliance the Commission may issue a warning notice.

What is a warning notice?

A warning notice represents an escalation of intervention by the Online Safety Commissioner regarding non-compliance by a designated online service. A warning notice

will outline the steps which the Commissioner deems necessary for the designated online service to take to bring itself into compliance, provide a time scale in which those actions must be taken, and outline the actions which will be taken if the designated online service does not bring itself into compliance.

What happens if a designated online service does not taken the necessary actions?

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

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

All of these sanction powers are subject to court confirmation.

How will an administrative financial sanction be imposed?

In deciding whether to impose an administrative financial sanction or the amount of such a sanction the Commission must consider a number of factors including: whether the sanction is appropriate and proportionate to the wrongdoing, whether the sanction will act as a sufficient incentive to ensure future compliance, the seriousness of the wrongdoing, and whether the designated online service can provide any excuse or explanation for the wrongdoing.

As the imposition of an administrative financial sanction may constitute the administration of justice, the Media Commission will not have the power to make a final determination to impose such sanctions unless the regulated entity asks the Commission to do so.

A designated online service may appeal a decision to impose an administrative financial sanction or the amount of that sanction to either the Circuit Court or the High Court, depending on the amount of the sanction. If a designated online service does not pursue an appeal or ask the Media Commission to impose the sanction then the Commission may apply to the Circuit Court to confirm the decision.

The upper amount of the administrative financial sanctions that the Online Safety Commissioner may seek to impose on a non-compliant designated online service will be decided in the coming months.

(i) Issues raised & Department's response

1. Proactive regulation

Issue

That the regulatory framework for online safety should be proactive, focusing on making substantive changes to how online services operate, rather than reactively focusing on the issues as they arise.

Department's response

The regulatory framework for online safety in the proposed Bill is designed to be proactive. The Online Safety Commissioner will be required to, among other things:

- Designate, and categorise as needed, online services for regulation,
- Draw up online safety codes aimed at minimising the spread and amplification of harmful online content, including through measures to be taken by designated online services in relation to content delivery and moderation and requirements for risk and impact assessments,
- Determine which online safety codes apply to which designated online services, having regard to risk and proportionality, ensuring that the regulatory approach taken is not a one-size-fits-all approach,
- Assess the compliance of designated online services with online safety codes on an ongoing basis through reporting requirements, investigations and audits, and,
- Ensure the compliance of designated online services through compliance and warning notices and sanctions as warranted, including compelling a service to take certain specified actions.

The purpose of the regulatory framework is to create an ongoing cycle of harm minimisation, wherein the number of persons exposed to harmful online content is significantly reduced over time.

2. Obligatory codes

Issue

That it should be obligatory for designated online services to comply with online safety codes.

Department's response

The General Scheme of the proposed Bill presently provides that designated online services are obliged to comply with the online safety codes that apply to them.

Head 50A:

(1) The Media Commission shall prepare, and from time to time revise, online safety codes governing standards and practices that shall be observed by designated online services or categories thereof.

Head 56:

(11) in designating relevant online services or categories thereof the Media Commission shall specify any online safety codes, prepared by the Commission in accordance with Head 50A, that the designated online service or category of designated online services shall abide by, having regard to the matters specified in subsection (2).

In addition to binding online safety codes, the Online Safety Commissioner may also make non-binding online safety guidance materials, enabling the Commissioner to elaborate on matters addressed through codes and to test regulatory approaches prior to making them binding through codes.

3. Senior management liability

Issue

That consideration should be given to introducing a form of senior management liability in cases of non-compliance by a designated online service.

Department's response

The Department is aware of this potential option for what would essentially be a form of sanction for non-compliance. The Department is examining the complex legal issues that arise, including those explored in the 2018 Law Reform Commission Report on Regulatory Powers and Corporate Offences and its recommendations, with regard to this matter.

4. Individual complaints mechanism

Issue

That the regulatory framework for online safety in the proposed Bill should include a mechanism for individual persons to complain to the Online Safety Commissioner about an individual piece of content.

Department's response

This is a matter that the Department has examined in detail

The proposed regulatory framework for online safety is systemic in nature and, as such, it does not contain a mechanism solely designed for an individual person to report individual pieces of potentially harmful online content to the Online Safety Commissioner for assessment and potential action. There are a number of reasons for this, including:

- That, as a result of the implementation of the revised Audiovisual Media Services Directive, in many cases the Media Commission will be regulating many popular online services on a pan-EU basis, for over 400 million people;
- That the scale of material online that a person may find objectionable would require disproportionate resourcing of the Media Commission to handle;
- That the necessary legal requirements and fair procedures for all parties required for the operation of an individual complaint mechanism in relation to speech based content would mitigate against a fast decision-making process, which is the primary redress most complainants would seek, and, in many cases, there will be complex rights balancing exercises required between freedom of expression, other fundamental rights as the case gives rise to, and protection from harmful online content;
- That individual action in relation to category of harmful online content that is criminal in nature is more appropriately a matter for An Garda Síochána; and,
- That the categories of harmful online content that relate to legal yet potentially harmful material are at the edge of what is legally possible in Ireland when it comes to systemic regulation and may become impermissible when applied in relation to an individual complaints mechanism.

Taking these issues together, the Department does not consider it feasible to introduce an effective mechanism for individual complaints.

However, there are multiple ways in which the proposed regulatory framework for online safety aims to vindicate the rights of individuals at scale and ensure recourse for individuals affected by exposure to harmful online content, including:

- That the Online Safety Commissioner can make online safety codes about how designated online services handle complaints and issues and assess the compliance of those services against those codes,

- That any person or body can bring information to the Commissioner's attention that may trigger an investigation or audit of the designated online service in question by the Commissioner, including in relation to user complaints,
- That the Commissioner can initiate audits of the complaints and issues handling mechanisms operated by designated online services,
- That nominated bodies may bring systemic issues with designated and relevant online services to the attention of the Commissioner through the systemic complaints scheme, including in relation to complaints and issues handling, and,
- That a compliance notice issued by the Commissioner on foot of an investigation or audit may concern the removal or restoration of individual pieces of content and that affected users, for example the uploader and the complainant, can be given the opportunity to make submissions to the Commissioner.

5. Reducing exposure to harmful online content

Issue

That online safety codes should not simply focus on requiring measures from designated online services that lead to the removal of harmful online content but also measures that reduce exposure to such content, particularly in relation to legal yet potentially harmful content.

Department's response

The Department agrees that measures taken by designated online services to comply with online safety codes should not be limited to content removal. It may be seen that many of the most effective measures taken to minimise the spread and amplification of harmful online content under the proposed regulatory regime will relate to the automated systems that online services use to deliver content to their users. In this regard, the Online Safety Commissioner is required to take into account the impact of automated decision making when designating online services and when making online safety codes.

The regulatory framework for online safety aims at the minimisation of the spread and amplification of harmful online content and, therefore, the exposure of persons to such content. On the content moderation side, there are a wide range of measures, some well-tested and others innovative, that can help to achieve this aim. This includes content removal, content warning gates - e.g. graphic content warnings - the provision of contextual information around the content, among others. On the content delivery side, this includes the prevention of saving of content and the forwarding of content, among others.

The appropriateness of the measures taken by a designated online service will depend on a range of factors, including the nature and scale of the service, its user base and the nature of the content in question. The Online Safety Commissioner will assess the appropriateness of the measures on these and other grounds and their effectiveness in achieving the aim of minimising the spread and amplification of harmful online content.

6. Good faith actions

Issue

That designated online services should not be held liable for good faith actions taken to comply with the online safety codes that apply to them that later turn out to be ineffective or where their effectiveness shifts over time.

Department's response

The Department recognises that not all measures taken to achieve compliance may be effective in practice and that this may take time to ascertain. Further to this, the appropriate and effective measures today may not be the appropriate and effective measures tomorrow as technology evolves and user behaviour shifts.

The purpose of the regulatory framework for online safety is to create a cycle of harm minimisation, wherein the number of persons exposed to harmful online content is significantly reduced over time through measures taken to reduce the spread and amplification of such content. The role of the Online Safety Commissioner will be to oversee this cycle and assess the effectiveness of the measures taken on an ongoing basis.

A designated online service which fails to engage with the Commissioner in this process, which fails to take measures or which engages in reckless behaviour in pursuit of the implementation or management of measures may be found to be non-compliant by the Commissioner. This will not prevent designated online services from taking measures in good faith to achieve compliance.

7. Default removal of flagged content

Issue

That material flagged as harmful online content should be required to be removed as a default prior to any assessment of whether or not it falls within the categories of harmful online content.

Department's response

While this may be possible with respect to material which it is a criminal offence to disseminate, a requirement for the removal of content which is legal yet potentially harmful prior to an assessment by a designated online service of the potential harm in question is unlikely to be legally sound as it would be difficult to justify from a rights balancing perspective.

Therefore, it is unlikely that the Online Safety Commissioner would be able to require such a measure through online safety codes. This would not prevent a designated online service implementing such a measure on its own initiative.

8. Industry codes

Issue

That, similar to the General Data Protection Regulation, there should be a provision for industry groups to submit guidelines, codes of conduct and other such agreements to the Online Safety Commissioner for potential adoption by the Commissioner.

Department's response

The Department will consider this matter further during detailed drafting.

Given that online safety codes are legally binding on the designated online services they apply to, it may not be appropriate to provide for a direct route where an industry agreement can be adopted as an online safety code by the Online Safety Commissioner. However, it may be appropriate to provide that the Commissioner can adopt such agreements as online safety guidance materials.

c. Services in scope of the regulatory framework

The Online Safety Commissioner will be tasked with regulating the activities of online services through online safety codes to tackle the availability of harmful online content and to engage with existing authorities in Ireland and abroad to achieve this aim.

Who will the online safety commissioner regulate?

The Online Safety Commissioner will have the power to designate online services to be subject to robust regulation. The Commissioner can designate any online service or categories of online services that allow users to share, spread or access content that other users have made available. This may lead to a wide range of different kinds of services being designated, including:

- Video sharing platform services,
- Social media services,

- Public boards and forums,
- Online gaming services
- E-commerce services,
- Private communication services,*
- Private online storage services*,
- Online search engines, and,
- Internet service providers.

** In relation to private communications and storage services, the Online Safety Commissioner will only be able to require that they abide by online safety codes that relate to the category of harmful online content which deals with material that it is a criminal offence to disseminate. This is because of the different consideration of fundamental rights for these kinds of online services and public facing online services.*

What factors will be considered by the Online Safety Commissioner when designating online services?

When designating an online service the Commissioner will take into account matters such as:

- The nature and scale of online services,
- The impact of automated decision making in relation to content delivery and content moderation,
- The likely prevalence of harmful online content on online services,
- The protection of minors and the general public from harmful online content
- The risk posed by harmful online content to users of online services,
- The likelihood of users of the service being unintentionally exposed to harmful online content,
- The legal limits of liability, and,
- Issues of fundamental rights.

Furthermore, the Commissioner can categorise online services it designates as it sees fit and can designate whole categories of online services, for example internet service providers. Given that the nature of online services varies considerably, the Commissioner

will decide which online safety codes apply to particular online services, including to whole categories.

Will the Online Safety Commissioner take a wide or narrow approach to designation?

The Online Safety Commissioner is not required to designate all online services that are within scope such as those listed in the previous subsection. Instead, the Commissioner will focus on large or risky services where the likelihood of people being exposed to harmful online content is greatest.

In order to implement the revised Audiovisual Media Services Directive the proposed Bill provides that video sharing platform services are a category of designated online services that the Commissioner will regulate.

What does designation mean for online services?

Designated online services will be obliged to take measures to comply with online safety codes made by the Online Safety Commissioner. When the Commissioner designates an online service they will then determine which online safety codes apply to the service, having regard to risk and proportionality, ensuring that the regulatory approach taken is not a one-size-fits-all approach. This is because not all online safety codes will be relevant to every designated online service depending on their nature, scale and risk profile. The Commissioner is required to take into account a range of matters designed to ensure that it makes appropriate and proportionate decisions in this regard.

(i) Issues raised & Department's response

1. Private communications and storage services

Issue

That there should be more clarity regarding the nature of the obligations that may be placed on private communications and storage services.

Department's response

The regulatory framework for online safety provides that any online service that falls within the definition of a "relevant online service" may be considered by the Online Safety Commissioner for designation. This includes private communications services, whether one to one or one to many and whether the service is encrypted or not, and private online storage services.

No online service will be subject to obligations simply as a result of falling within the definition of a relevant online service.¹ An online service will, therefore, only be subject to obligations once designated by the Online Safety Commissioner. The process for designation requires the Commissioner to engage with the service or services they are considering designating and provides for a range of matters that the Commissioner must consider to ensure that its decisions regarding designation are risk-based and proportionate.

Once an online service is designated, the Commissioner is required to determine which online safety codes apply to that service. This determination must also be risk-based and proportionate to that the regulatory approach taken is not a one-size-fits-all one. In relation to private communications services and private online storage services, the Commissioner cannot require such services to abide by online safety codes that relate to legal yet potentially harmful content. As such, the online safety codes that can apply to such services can only relate to material which it is a criminal offence to disseminate. This particular distinction is necessary due to the different balance of fundamental rights at play regarding private services.

As noted above, the the appropriateness of the measures taken by a designated online service to comply with the online safety codes that apply to them will depend on a range of factors, including the nature and scale of the service, its user base and the nature of the content in question. In relation to private communications services, this may include whether or not the service is encrypted and the nature of the encryption in question. The Online Safety Commissioner will determine whether measures taken by a designated online service that is a private communications service to comply with the online safety codes that apply to them are appropriate and effective, having regard to the nature of the service in question.

2. The operation of multiple services through a single interface

Issue

That there should be further clarity regarding how service providers operating multiple services through a single or interlinked user interface may be designated by the Online Safety Commissioner.

¹ This is excepting video sharing platform services which are required to be regulated by the revised Audiovisual Media Services Directive. This will not vacate the requirement for the Online Safety Commissioner to engage with VSPS regarding the appropriate application of online safety codes to them. This is particularly important if the OSC simultaneously or subsequently determines that a VSPS should be designated in respect of all forms of content on its service, not simply audiovisual content. Given the complexity of the definition of a VSPS, some online services will require significant analysis before it can be determined if they are a VSPS and this is provided for through the typical designation steps.

Department's response

At present, many online service providers operate multiple online services, often through single or interlinked user interfaces, creating an ecosystem of services that users or other outside observers may view as a single service. For example, an online service may provide both a social media offering and a space to facilitate commercial transactions, buying and selling, through the same interface.

However, the fact of the matter is that it is that these are separate services, though they may often be dependent on each other from a business or user perspective. As such, the Online Safety Commissioner will assess whether such services should be designated on a case by case basis. This will not prevent the Commissioner taking into account the network effects of such ecosystems where appropriate, both in the designation process and in the making and oversight of online safety codes.

3. Online services not established in Ireland

Issue

Whether the Online Safety Commissioner is able to designate online services that are not established in Ireland

Department's response

Due to constitutional restrictions, the Online Safety Commissioner will only be able to designate an online service for regulation if that online service is established in Ireland, having regard to the relevant European Union rules for determining the jurisdiction of establishment for online services set down by the eCommerce Directive (2000/31/EC).

However, with respect to video sharing platform services established in Ireland the effect of regulation by the Online Safety Commissioner will be on a pan-EU basis in accordance with the country of origin principle established by the revised Audiovisual Media Services Directive. This is also the case for video sharing platform services established elsewhere in the EU and, as such, they will not be subject to the regulatory framework. The revised Directive provides for information sharing and cooperation mechanisms between national EU regulators to address any cross-border issues that may arise.

Further to this, the General Scheme of the proposed Bill provides for a voluntary scheme whereby online services available in Ireland but based outside the EU can opt-in to the regulatory framework through a negotiated arrangement with the Online Safety Commissioner.

4. Monetary and user-base size thresholds

Issue

Whether there should be thresholds of monetary or user base scale that would need to be exceeded by an online service before it could be designated by the Online Safety Commissioner.

Department's response

The Department considers that the range of factors that the Online Safety Commissioner must consider prior to designating an online service provide sufficient safeguards against spurious or disproportionate actions by the Commissioner. These factors include:

- The nature and scale of online services,
- The impact of automated decision making in relation to content delivery and content moderation,
- The likely prevalence of harmful online content on online services,
- The protection of minors and the general public from harmful online content
- The risk posed by harmful online content to users of online services,
- The likelihood of users of the service being unintentionally exposed to harmful online content,
- The legal limits of liability, and,
- Issues of fundamental rights.

These factors, taken together, provide that the Online Safety Commissioner should take a proportionate and risk-based approach to designation.

Further to this, while it could be said that, on average, the risk posed by an online service grows as its size and user base grows, size is not a necessary precondition for the existence of risk and harm. As such, it will be the responsibility of the Commissioner to assess the usefulness of designation in accordance with the factors listed above in order to take proportionate and risk-based decisions.

d. Other relevant issues

The participants in the workshop also raised a number of issues in their discussions that don't fall neatly into the three topics addressed by the workshop.

1. Cooperation with other regulatory and public bodies

Issue

Whether there will be cooperation with other regulatory and public bodies active in the online space, for example the Data Protection Commission.

Department's response

The Media Commission, including the Online Safety Commissioner, will engage with and cooperate closely with other regulatory and public bodies, both in Ireland and internationally, including through Memoranda of Understanding.

At a national level, this will include the Data Protection Commission, the Office for the Ombudsman of Children, An Garda Síochána, the proposed Electoral Commission, the proposed Gambling regulator, the Competition and Consumer Protection Commission, amongst others.

2. Norwich Pharmacal orders

Issue

Whether the proposed Bill should provide a legislative footing for Norwich Pharmacal orders to require online services to provide any information they may hold on a particular user.

Department's response

Although the effective anonymity of users of online services can have implications on the aspects of online content regulation that will be addressed by the proposed Bill, this is an issue that has broader implications.

In relation to criminal material and criminal behaviour, An Garda Síochána already has the power seek the provision of such information. In relation to civil proceedings, it is possible for a plaintiff to make a case before a Court for the provision of such material.

As the proposed regulatory framework for online safety will be a systems-focused and civil regime, it would not be appropriate to provide the Media Commission with a specific legislative footing for such a power, nor to provide for a new general footing.

3. Interaction between individual commissioners

Issue

How the individual commissioners of the Media Commission would interact with each other.

Department's response

The General Scheme of the proposed Bill provides for a multi-person Media Commission partially modelled off the structure of the Competition and Consumer Protection Commission and for the appointment of three commissioners and an executive chairperson. These

positions will be filled through public competitions overseen by the Public Appointments Service who will draw up the appropriate criteria for selection with input from the Department.

It's intended that, of the three commissioners, one will fill the role of an Online Safety Commissioner, one will fill the role of a Broadcasting commissioner, responsible for the majority of the present functions of the Broadcasting Authority of Ireland, and one will be responsible for the regulation of On-demand Audiovisual Media Services, for example Apple TV. The relevant functions will be delegated to each commissioner from the Media Commission as a whole. The power to seek the imposition of sanctions will be reserved for exercise by the Media Commission as a whole.

The approach of providing for delegation of powers within the Media Commission to individual commissioners rather than providing for named commissioners with specified functions is to improve the adaptability of the regulatory structure to future changes, to allow for the smooth appointment of additional commissioners – up to 6 – to move functions between commissioners as necessary, for example if a commissioner was to become indisposed due to illness, and to foster collegiality among the members of the Commission.

The executive chairperson will be responsible for the day to day functioning of the Media Commission, including financial management, human resources and corporate governance. The executive chair will also be responsible for reporting to the Oireachtas Public Accounts Committee as required.

The overall focus of the Media Commission will be on content regulation. This will enable important synergies between the work of each commissioner, including in relation to media and digital literacy, research projects, the role of the regulator in the media mergers process, and areas of regulatory overlap. These synergies will become increasingly important as the media and broader online ecosystems continue to converge.

4. Evidence-based decision-making

Issue

That a requirement for evidence-based decision making should be further highlighted in the proposed Bill.

Department's response

The Department will consider this issue further in detailed drafting.

At present, the General Scheme of the proposed Bill requires the Online Safety Commissioner to take proportionate and risk-based decisions in the exercise of all of their

major functions. However, it may be appropriate to introduce further wording regarding evidence-based decision-making to provide greater guidance to the Online Safety Commissioner in the exercise of their functions and further clarity for stakeholders in general.

5. Requirements for stakeholder consultation

Issue

That the Online Safety Commissioner should be required to consult with relevant stakeholders when exercising certain functions, in particular the making of online safety codes and guidance materials and the proposing of new categories of harmful online content to Government.

Department's response

The Department will consider this issue further in detailed drafting.

It is intended that the Online Safety Commissioner will be broadly consultative in the exercise of their functions. Despite this, it may be appropriate, on occasion, for the Online Safety Commissioner to act swiftly, subject to the constraints of the legislation, and in a manner which may make consultation impractical. As such, many of the relevant provisions are framed in the General Scheme of the proposed Bill as "may consult". The Department will examine the possibility of providing for consultation by default with provisions for extenuating circumstances.

6. The working conditions of content moderators

Issue

That the working conditions of persons employed by online services as content moderators can be highly stressful and potentially damaging to their health.

Department's response

The Department agrees that the working conditions of persons employed by online services as content moderators, as highlighted by a number of recent investigations by media organisations, is an issue worthy of further scrutiny. However, as working conditions are primarily an employment law matter, this is not a matter which will be addressed by the proposed Bill.

7. Fragmentation of regulation across the EU

Issue

Whether the proposed regulatory framework will contribute to the patchwork of different regulatory framework and expectations for online services across the EU.

Department's response

There are already significant regulatory and legal frameworks in place in relation to many online issues, including data protection and criminal justice responses to illegal activities online. Many of these frameworks operate on a pan-EU basis as a result of EU laws, for example the General Data Protection Regulation, that aim to minimise fragmentation of regulation and legal expectations across the Union.

However, there is a serious gap in the Irish, EU and international legal frameworks when it comes to the spread and amplification of harmful online content. While the revised Audiovisual Media Services Directive aims to provide a minimum level of common regulatory standards across the EU, the Directive only concerns video sharing platform services and audiovisual content. This distinction means that the revised Directive does not regulate image, sound or text based content even if they are present on the same page as audiovisual content on an online service considered a video sharing platform service.

Furthermore, as a minimum harmonisation Directive any additional regulatory measures that may become necessary or desirable to implement can only be introduced by the implementing Member States rather than the Union.

Ireland has opted to create a regulatory framework for online safety that does not contain this distinction between audiovisual and other forms of content and which seeks to regulate a wider range of online services. The regulatory framework provides that stricter regulatory measures, other available regulatory measures and any new and innovative measures can be required by the Online Safety Commissioner or used by designated online services to comply with the online safety codes that apply to them.

Therefore, Ireland has incorporated the regulation of video sharing platform services and audiovisual content on those services within a wider regulatory framework in the General Scheme of the proposed Bill that addresses a wider range of online services and all forms of content. This wider regulatory framework will only apply on a national level and the pan-EU effect of the regulation of video sharing platform services established in Ireland will only concern audiovisual content, as provided for by the Directive.

This regulatory framework for online safety will provide a greater level of protection from exposure to harmful online content to persons resident in Ireland than can be provide solely through the revised Directive. It remains open for the Union to adopt further harmonising instruments in this regard in the future.

4. Next steps

At present, responsibility for media and broadcasting policy, including the proposed Bill, is being assigned to the Minister for Media, Tourism, Arts, Culture, Sport and the Gaeltacht.

When this transfer is complete, the Minister will seek Government approval for the finalisation of General Scheme of the proposed Bill through the addition to the provisions relating to the funding of the Media Commission and the regulation of audiovisual media services. These additional provisions will then be forwarded to the Office of the Attorney General for addition as a basis for detailed drafting and to the relevant Joint Oireachtas Committee for pre-legislative scrutiny.

The finalised General Scheme will also be notified to the European Commission for a technical conformity (TRIS) assessment with relevant EU law regarding regulations on online services.

a. Pre-legislative scrutiny

Following approval of the General Scheme on 9 January 2020, the Government forwarded the General Scheme of the relevant Joint Oireachtas Committee for pre-legislative scrutiny. Due to the dissolution of the Dáil and Committees in January, pre-legislative scrutiny has not yet commenced. It is for the relevant newly formed Committee to determine whether and when to commence such scrutiny.

b. Detailed drafting

On 9 January 2020, the Government also approved the detailed drafting of the proposed Bill on the basis of the General Scheme by the Office of the Attorney General. The Department is continuing to engage with the AGO regarding detailed drafting of the proposed Bill.