

Consultation Document

Coimisiún na Meán e-Commerce Compliance Strategy

Relating to Online Safety Codes, Online Safety Guidance Materials & Advisory Notices

Publication Date: 11th July 2023

1. Overview

Coimisiún na Meán (the “**Commission**”) has both the power and obligation under the Broadcasting Act 2009 as amended by the Online Safety and Media Regulation Act 2022 (the “**2009 Act**”) to adopt online safety codes which may be applied as binding on video-sharing platform services (“**VSPS**”) and other online services, both as a category of service and on named service providers, when the provider is under the jurisdiction of the Irish State.

Prior to the adoption of an online safety code, the Commission must consult on and prepare its e-Commerce Compliance Strategy. In accordance with its statutory powers and having had regard to its statutory duties, the Commission is now consulting on a draft e-Commerce Compliance Strategy.

This consultation document explains the background and legislative context to the e-Commerce Compliance Strategy, our proposal, the consultation process and how you can submit your views and comments to the Commission. Appendix 1 details the relevant statutory provisions in the 2009 Act that require the Commission to formulate and consult on its e-Commerce Compliance Strategy. Appendix 2 contains a draft e-Commerce Compliance Strategy. It is recommended that you review both Appendices prior to providing a response.

2. Background and Legislative Context

The Commission was established on 15 March 2023 in accordance with the provisions of the 2009 Act. The Act establishes a new regulatory framework for online safety and transposes into Irish law the revised Audio-Visual Media Services Directive (the “**AVMSD**”) ¹ applicable to broadcasting services, on-demand audiovisual media services and VSPS established in the State on an EU-wide basis. The AVMSD requires Member States to ensure VSPS providers take appropriate measures to protect young people from potentially harmful content (which may impair their physical, mental or moral development) and to protect the general public from incitement to violence or hatred and illegal content (such as public provocation to commit terrorist offences, child sexual exploitation and abuse, and racism or xenophobia). It also requires Member States to ensure that VSPS providers comply with requirements and standards around advertising on the services. ²

The 2009 Act provides that online safety codes adopted under Section 139K may be applied to designated online services and *shall* be applied to VSPS (both as a category of service and on individual providers) to reduce harmful content online and to ensure that service providers take appropriate measures to provide the protections referred to in Article 28 of the AVMSD. ³

When preparing an online safety code to include appropriate measures with which VSPS providers must comply, the Commission must have particular regard (amongst other matters) to its e-Commerce Compliance Strategy. Similarly in preparing guidance materials or advisory notices the Commission shall have particular regard (amongst other matters) to the e-Commerce compliance strategy. ⁴ The e-

¹ Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018.

² Article 28b(1) of the AVMSD.

³ Section 139K of the 2009 Act.

⁴ Section 139ZA of the 2009 Act.

Commerce Compliance Strategy is therefore an important *aide* to the Commission in developing an online safety code.

3. Why are we consulting on our e-Commerce Compliance Strategy?

Before preparing the e-Commerce compliance strategy, the Commission is required to consult with any advisory committee it has established for that purpose and any other person that the Commission thinks appropriate.⁵

In accordance with the statutory consultation procedure the Commission now invites comments and observations from any interested party, including members of the public, representative organisations of providers of VSPS, individual providers of VSPS themselves and any other interested party. The Commission has not, at this time, established any advisory committee for this purpose under section 19 of the 2009 Act.

The Commission will take account of submissions made in response to this consultation and make a decision regarding the e-Commerce Compliance Strategy.

The Commission's workplan can be found [here](#).

4. Question for Consideration and Response

Having regard to above background, the legislative context in Appendix 1 and the Draft e-Commerce Compliance Strategy in Appendix 2, we invite you to submit your response, along with the reasons for your response, to the following question:

- Please provide any comments on, suggested additions or amendments to our Draft e-Commerce Compliance Strategy at Appendix 2.

5. How can I respond?

Your response should be submitted in writing by email or by post/hand to one of the following addresses:

Email: Submit your response by email to VSPSregulation@cnam.ie

Post: Submit your response in writing to: e-Commerce Compliance Strategy, Coimisiún na Meán, 2-5 Warrington Place, D02XP29

Contact Person: Caroline Keville

Please note the following in preparing your response:

- Submissions should be set out clearly and relate to the issues for consideration and response at section 4 above. Responses outside the material scope of these issues will not be considered.
- Responses submitted in electronic format should have read/write access.

⁵ Section 139ZF(2) of the 2009 Act.

- Submissions are subject to a 20 page limit.
- Please see section 7 below in relation to confidentiality.

6. Timeframe for Responses

All responses to this public consultation must be submitted to the Commission by 16 August 2023.

If you require any assistance with making the response, please contact the Commission by email VSPSregulation@cnam.ie or by phone on 01 644 1200.

7. Use of Information

Personal data

The Commission shall comply with its obligations under the General Data Protection Regulation (“GDPR”), Data Protection Act 2018 and any other applicable data privacy laws and regulations.

The Commission is obligated and committed to protecting all personal data submitted. The Commission has an appointed Data Protection Officer who is registered with the Data Protection Commission.

Applicants can find out more on how the Commission processes personal information in the Commission’s published policy at: <https://www.bai.ie/en/about-us/data-protection-policy/>

For this process, the Commission will collect the name, email address and any other personal information that is included in your response. The name of the respondent to the consultation and the response provided will be made publicly available. However, the Commission will not make publicly available your contact details, such as your address, phone number or email.

Confidential information

It is the Commission's intention to publish submissions received in response to this consultation.

Please provide your response as a non-confidential document, with confidential information contained in a separate annex, or submit a redacted non-confidential version together with your response.

The Commission will treat confidential information in line with its [Consultation Guidelines](#) published on 28 June 2023.

8. Freedom of Information

Information held by the Commission is subject to its obligations under law, including under the Freedom of Information Act 2014. The Commission will consult you about information you mark as confidential before making a decision on any Freedom of Information request received.

Appendix 1

Statutory powers and duties relating to the e-Commerce Compliance Strategy

1. The requirement for an e-Commerce compliance strategy is set out in Section 139ZF of the 2009 Act.

Section 139ZF of the 2009 Act states:

(1) The Commission shall prepare, and may revise, an e-Commerce compliance strategy setting out its approach to ensuring that—

(a) no requirements that are inconsistent with the limitations placed on the liability of intermediary service providers by regulations 16 to 18 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S. I. No. 68 of 2003), and

(b) no general obligation on providers, when providing the services covered by regulations 16 to 18 of those Regulations, to monitor the information which they transmit or store, and no general obligation actively to seek facts or circumstances indicating illegal activity, contrary to Article 15 of the E-Commerce Directive,

are imposed, by virtue of online safety codes or online safety guidance materials or advisory notices.

The 2009 Act defines the e-Commerce Directive as:

'E-Commerce Directive' means Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

2. The Consultation requirements in respect of the e-Commerce compliance strategy are set out in S139ZF (2) of the 2009 Act.

Section 139ZF(2) of the 2009 Act states:

(2) Before preparing an e-Commerce compliance strategy the Commission shall consult—

(a) any advisory committee it has established for that purpose under section 19, and

(b) any other person the Commission thinks appropriate.

(3) The Commission shall publish an e-Commerce compliance strategy prepared or revised under this section on a website maintained by it.

3. The Purpose of an e-Commerce Compliance Strategy

Pursuant to Section 139M of the 2009 Act, when preparing an online safety code the Commission shall have particular regard (amongst other matters) to the e-Commerce compliance strategy prepared under section 139ZF.

Online safety codes: matters to be considered

139M. — When preparing an online safety code the Commission shall have regard in particular to—

- a) the desirability of services having transparent decision-making processes in relation to content delivery and content moderation,
- b) the impact of automated decision-making on those processes,
- c) the need for any provision to be proportionate having regard to the nature and the scale of the services to which a code applies,
- d) levels of availability of harmful online content on designated online services,
- e) levels of risk of exposure to harmful online content when using designated online services,
- f) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it,
- g) the rights of providers of designated online services and of users of those services, and
- h) the e-Commerce compliance strategy prepared under section 139ZF.**

Pursuant to Section 139ZA of the 2009 Act, in preparing guidance materials or advisory notices under section 139Z, the Commission shall have particular regard (amongst other matters) to the e-Commerce compliance strategy prepared under section 139ZF.

Guidance materials and advisory notices: matters to be considered

139ZA. —In preparing guidance materials or advisory notices under section 139Z, the Commission shall have regard in particular to—

- (a) Article 28b of the Directive,
- (b) the desirability of services having transparent decision-making processes in relation to content delivery and content moderation,
- (c) the impact of automated decision-making on those processes,
- (d) the need for any provision to be proportionate having regard to the nature and the scale of the services concerned,
- (e) levels of availability of any online content, and of age-inappropriate online content, on relevant online services,
- (f) levels of risk of exposure to harmful online content, or of exposure of children to age-inappropriate online content, when using relevant online services,
- (g) levels of risk of harm, and in particular harm to children, from the availability of such content or exposure to it,
- (h) the rights of providers of relevant online services and of users of those services, and
- (i) the e-Commerce compliance strategy prepared under section 139ZF.**

Appendix 2

Draft e-Commerce Compliance Strategy

A. Background

The E-Commerce Directive⁶ was transposed into Irish law by S.I. No. 68 of 2003 - European Communities (Directive 2000/31/EC) Regulations 2003 (the “**2003 Regulations**”). Regulations 16 to 18 of the 2003 Regulations⁷ exempt intermediary service providers from liability for unlawful content transmitted or uploaded by a user. There are some conditions attached to this, such as that the provider must not have actual knowledge of the unlawful nature of the content and must remove it expeditiously if it becomes aware of the unlawful activity.

Article 15 of the E-Commerce Directive⁸ provides that Member States must not impose a general obligation on intermediary service providers to monitor the information which they transmit or store, nor may Member States impose a general obligation actively to seek facts or circumstances indicating illegal activity.

Under the Broadcasting Act 2009, as amended, Coimisiún na Meán (the “**Commission**”) may adopt online safety codes⁹ and apply them to designated online services.¹⁰ The Commission may also prepare online safety guidance materials and advisory notices.¹¹

Providers of designated online services are entitled to benefit from the exemptions of liability under Regulations 16 to 18 of the 2003 Regulations, and from the prohibition on Member States imposing obligations covered by Article 15 of the E-Commerce Directive.

Section 139ZF¹² of the Broadcasting Act 2009, as amended requires the Commission to prepare an e-Commerce Compliance Strategy setting out its approach to ensuring that online safety codes, online safety guidance materials and advisory notices are consistent with Regulations 16-18 of the 2003 Regulations and Article 15 of the E-Commerce Directive.

This e-Commerce Compliance Strategy sets out the Commission’s approach, as required by S139ZF. It does not contain the specific text of provisions that might be included in online safety codes, online safety guidance or advisory notices: specific text will be developed and, where appropriate, consulted on in the context of each online safety code, safety materials or advisory notice.

With effect from 17 February 2024, the relevant articles of the E-Commerce Directive will be replaced by Articles 4, 5, 6 and 8 of the Digital Services Act.¹³ There is no material change in the provisions.

⁶ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁷ See Appendix for the full text of Regulations 16-18.

⁸ See Appendix for the full text of Article 15.

⁹ S 139K.

¹⁰ S 139L.

¹¹ S 139Z.

¹² See Appendix for the full text of S139ZF.

¹³ Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC.

This e-Commerce Compliance Strategy therefore also sets out the Commission's approach to ensuring that online safety codes, online safety guidance materials and advisory notices are consistent with Articles 4, 5, 6 and 8 of the Digital Services Act.

B. Approach to consistency with exemptions from liability

1. Failure to comply with an online safety code is a contravention which can result in a designated service provider becoming liable to an administrative financial sanction. However, failures to comply with online safety guidance materials or advisory notices do not, in themselves, amount to contraventions.
2. Online safety codes will therefore not contain any provision which makes it a contravention for a designated service provider to transmit or host unlawful content, as long as the provider complies with the conditions in Regulations 16 to 18 of the 2003 Regulations (or the corresponding conditions in Article 4, 5 and 6 of the Digital Services Act).
3. In order to remove any doubt, each online safety code will contain a provision to the effect that, notwithstanding any other provision of the online safety code, a designated service provider shall not be guilty of a contravention by reason only of the presence on its service of unlawful content when it had no actual knowledge of the unlawful nature of the content.
4. However, online safety codes may contain provisions that make it a contravention not to remove unlawful content expeditiously once the provider becomes aware of the unlawful nature of the content, and may further specify what would be regarded as expeditious in particular cases.
5. Online safety codes may contain provisions that require providers to take measures that reduce the risk of unlawful content on their services. Failure to implement those measures may amount to a contravention.

C. Approach to consistency with Article 15 of the e-Commerce Directive / Article 8 of the Digital Services Act

6. The Commission will not include any provision in an online safety code, online safety guidance materials or an advisory notice ("**Relevant Provision**") that necessitates general monitoring of content or generally taking active steps to seek facts or circumstances indicating illegal activity.
7. The Commission may adopt a Relevant Provision which can be complied with either by general monitoring or in other ways.
8. The Commission may adopt a Relevant Provision that necessitates limited monitoring that does not amount to a general monitoring obligation.
9. The Commission may adopt a Relevant Provision that specifies particular circumstances in which designated service providers must take active steps to seek facts or circumstances indicating illegal activity.

D. Procedural matters

10. In developing Relevant Provisions, the Commission will satisfy itself that the proposed provisions are consistent with the approach outlined in paragraphs 2 to 9 above.
11. When consulting on a draft of an online safety code, online safety materials or advisory notices, the Commission will invite respondents' views on whether they contain provisions that are inconsistent with liability exemptions in Regulations 16 to 18 of the 2003 Regulations (or Articles 4, 5 or 6 of the Digital Services Act) or inconsistent with Article 15 of the E-Commerce Directive (or Article 8 of the Digital Services Act).
12. Respondents will be invited to clearly demonstrate how, in their opinion, a provision imposes any such obligation on them. The Commission will consider all responses received in respect of the question and may, if it considers appropriate, update the Relevant Provision of the draft online safety code and guidance material accordingly, to account for the respondents' views.
13. In its response to any consultation accompanying a final version of an online safety code, online safety materials or advisory notices, the Commission will explicitly confirm that it is satisfied that the final version:
 - a. does not contain any provision which makes it a contravention for a designated service provider to transmit or host unlawful content, as long as they comply with the conditions in Regulations 16 to 18 of the 2003 Regulations (or the corresponding conditions in Article 4, 5 and 6 of the Digital Services Act); and
 - b. does not contain any provision that necessitates general monitoring of content or generally taking active steps to seek facts or circumstances indicating illegal activity.

Appendix

This Appendix contains the key legislative provisions that are relevant in the context of the Commission’s e-Commerce Compliance Strategy

A. Regulations 16 to 18 of the 2003 Regulations

Regulation 16

Liability of intermediary service providers - “mere conduit.”

(1) An intermediary service provider shall not be liable for information transmitted by him or her in a communication network if —

(a) the information has been provided to him or her by a recipient of a relevant service provided by him or her (being a service consisting of the transmission in a communication network of that information), or

(b) a relevant service provided by him or her consists of the provision of access to a communication network,

and, in either case, the following conditions are complied with —

(i) the intermediary service provider did not initiate the transmission,

(ii) the intermediary service provider did not select the receiver of the transmission, and

(iii) the intermediary service provider did not select or modify the information contained in the transmission.

(2) References in paragraph (1) to an act of transmission and of provision of access include references to the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communications network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

Regulation 17

Caching.

(1) An intermediary service provider shall not be liable for the automatic intermediate and temporary storage of information which is performed for the sole purpose of making more efficient that information’s onward transmission to other users of the service upon their request, if —

(a) that storage is done in the context of the provision of a relevant service by the relevant service provider consisting of the transmission in a communication network of information provided by a recipient of that service,

and

(b) the following conditions are complied with —

(i) the intermediary service provider does not modify the information,

- (ii) the intermediary service provider complies with conditions relating to access to the information,
- (iii) the intermediary service provider complies with any rules regarding the updating of the information that have been specified in a manner widely recognised and used by industry,
- (iv) the intermediary service provider does not interfere with the lawful use of technology, widely recognised and used by industry to obtain data on the use of the information, and
- (v) the intermediary service provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(2) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

Regulation 18

Hosting.

(1) An intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service shall not be liable for the information stored at the request of that recipient if —

- (a) the intermediary service provider does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or
- (b) the intermediary service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph (1) shall not apply where the recipient of the service is acting under the authority or the control of the intermediary service provider referred to in that paragraph.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

B. Article 15 of the E-Commerce Directive

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

C. The Digital Services Act

CHAPTER II of Regulation 2022/2065 -LIABILITY OF PROVIDERS OF INTERMEDIARY SERVICES

Article 4

'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the service provider shall not be liable for the information transmitted or accessed, on condition that the provider:

- a) does not initiate the transmission;
- b) does not select the receiver of the transmission; and
- c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 shall include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

Article 5

'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient or more secure the information's onward transmission to other recipients of the service upon their request, on condition that the provider:

- a) does not modify the information;
- b) complies with conditions on access to the information;
- c) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- e) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a judicial or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

Article 6

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider:
 - a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
 - b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.
2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.
3. Paragraph 1 shall not apply with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.
4. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

Article 7

Voluntary own-initiative investigations and legal compliance

Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 4, 5 and 6 solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in compliance with Union law, including the requirements set out in this Regulation.

Article 8

No general monitoring or active fact-finding obligations

No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.