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## **Consultation Document: Online Safety**

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**This document contains consultations on:**

- 1. A draft Online Safety Code**
  - 2. Draft Statutory Guidance Material**
  - 3. The proposed application of the Online Safety Code to the Category of Video-Sharing Platform Services**
  - 4. Supplementary Measures for Further Consideration**
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## **Legal Disclaimer**

The proposals contained in this consultation document should not be read as reflecting or stating the Commission's final position on any of the matters that are the subject of consultation. Please note that any views on the interpretation of legislation or the Commission's obligations are provisional and non-binding and should not be read as reflecting the Commission's final position. Please refer to the underlying legislative provisions for a statement of the law in this area.

# Coimisiún na Meán

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# Coimisiún na Meán

## Foreword

We all want a safer online world, especially for our children. I am delighted to publish this draft Online Safety Code as we move from an era of self-regulation to one of effective regulation. This draft Code is an important step towards a safer online experience.

Since our establishment in March this year, developing an Online Safety Code has been a key priority for Coimisiún na Meán. Many of you have helped us in this process. We received hugely informative responses to our call for inputs over the summer. I have also had the privilege of meeting representative organisations who shared experiences of being harmed by content or behaviour online, including those representing children, parents, Irish Travellers, the LGBT+ community, women and migrants. I would also like to thank the organisations who shared their expertise relating to online harms such as content promoting suicide, self-harm, sexual assault, misogyny, eating/feeding disorders, cyber-bullying, incitement to hatred and violence, racism, child sex abuse material and non-consensual intimate image sharing.

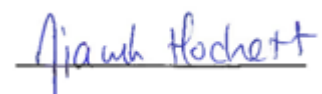
Alongside our consultation, we are publishing a report on online harms, which makes for sombre reading. Even more sobering have been the online harms I witnessed since I was appointed, which have spilled over into the real world, and underscore the need to act.

It is important to remember the benefits of being online - rich connection, education, entertainment and enabling work. We need to maintain the benefits of life online, while acting firmly to address the harms. Our draft Code proposes concrete steps platforms will take to build a safer space, such as preventing the sharing of illegal and harmful content, operating effective age verification systems, requiring effective content moderation and complaint handling and giving parents tools to guide what their children can do online and who can contact their children. We are also consulting on further measures to embed safety-by-design approaches in the platforms themselves and to address the amplification of harmful content.

When finalised, our Code will apply to video-sharing platform services. We are working to designate these services as I write and will make an announcement in the coming weeks.

Coimisiún na Meán is responsible for implementing Ireland's online safety framework, which this draft Code is an important part of. From February next year, we will oversee the EU Digital Services Act in Ireland and we also are a competent authority under the EU Terrorist Content Online Regulation. We take this responsibility very seriously and we are committed to building a safer online world. I look forward to receiving your responses to the consultation and moving to finalise the Code in the first half of next year.

We all play a part in making the online world a safer space so that we can enjoy a more positive experience in real life. Let's do better. To do otherwise is no longer an option.



Niamh Hodnett  
Online Safety Commissioner  
December 2023

## 1. Introduction

Coimisiún na Meán is Ireland's regulator for broadcasting, video-on-demand, online safety and media development. Coimisiún na Meán was established in March 2023, further to the Broadcasting Act 2009 as amended by the Online Safety and Media Regulation Act 2022 (the "2009 Act as amended" or the "Act"). Coimisiún na Meán has a range of responsibilities, including setting standards, rules, and codes for the different types of media services and relevant online services under the jurisdiction of Ireland.

This consultation document deals with four topics: a Draft Online Safety Code; Draft Statutory Guidance Materials; the application of the Online Safety Code to video-sharing platform services and providers ("VSPS" and "VSPS providers"); and proposed supplementary measures for consideration in a future iteration of the Online Safety Code and Guidance Materials. This consultation document explains the background and legislative context for the consultation on the four topics, including the specific provisions of the draft Code, the content of the Guidance Materials and the application of the Online Safety Codes to VSPS and VSPS providers.

### 1.1 Draft Online Safety Code

One of Coimisiún na Meán's key duties under the 2009 Act as amended is to develop online safety codes for video-sharing platform services and providers of those services. A VSPS is a type of online service where users can share videos and engage with a wide range of content and social features.

In accordance with its statutory powers and with due regard to its statutory duties, Coimisiún na Meán has prepared a draft Online Safety Code (the "draft Code"). The Code is intended to ensure that VSPS providers take appropriate measures to protect children from harmful content, including illegal content and age-inappropriate content. It is also intended to protect the general public from content which amounts to incitement to violence or hatred, provocation to commit a terrorist offence, dissemination of child sex abuse material, offences concerning racism or xenophobia as well as certain commercial communications. This Code will operate in tandem with other measures to protect users from harm, including the EU Digital Services Act Regulation ("DSA") and the Terrorism Content Online Regulation (known as "TCOR").

The draft Code is attached at **Appendix 1**. In accordance with Section 139N of the Act, Coimisiún na Meán is seeking views on the contents of the draft Code. This consultation constitutes the Commission's consultation with the public before making an online safety code for the purposes of Section 139N(1)(a)(ii) of the Act.

### 1.2 Draft Statutory Guidance Materials

Coimisiún na Meán proposes to adopt statutory guidance in order to offer VSPS providers an indication of how Coimisiún na Meán conceives certain obligations working in practice, and in some cases of features that it suggests providers take into account, or existing resources it wishes to draw to providers' attention. A draft of the Guidance Materials is attached at **Appendix 2**. In accordance with Section 139Z(2) of the Act, Coimisiún na Meán is seeking views on the contents of the draft Guidance Materials.

## 1.3 Proposed application of the Draft Code to Video-Sharing Platform Services

On 14 August 2023, Coimisiún na Meán designated under section 139G(1) of the Act video-sharing platform services the providers of which are under the jurisdiction of the State as a category of services under section 139E to which online safety codes may be applied. Coimisiún na Meán proposes that the Code should apply to services that fall within that category. In accordance with section 139L(4)(b) of the Act, Coimisiún na Meán is seeking views on this proposal.

Under section 139L(4)(a) and (b) of the Act, the Commission is required, before making or revoking a determination under Section 139L(1) on the application of the Code to a service or designated category of services to consult:

- where the designation is of a named service, the provider of the service,
- where the designation is of a category of services an organisation representative of providers of services falling within the category, if there is such an organisation, and the providers of those services, so far as the Commission is able to consult them.

The Commission is required under Section 139G(2) of the Act to designate as a named service under Section 139E any relevant online service that appears to the Commission to be a video-sharing platform service the provider of which is under the jurisdiction of the State. That process of designating named service providers under is taking place at present in parallel to the consultation on this Code.

In that context, in this consultation, the Commission is, for the purpose of consultation under Section 139L(4)(b), affording all service providers that may potentially fall within the scope of video-sharing platform services as a category of services an opportunity to make submissions on the making of the Code, and on the determination of its applicability to video-sharing platform services as a category of services.

The Commission also invites all service providers that have engaged or are engaging with the Commission in the process of designation as a named service under s.139G(2) of the Act to make submissions on the making of the Code, and on the determination of its applicability to that named service, in the event that it is designated as a named service. Should the named service subsequently be designated as a named service, the Commission will further consult with the provider of that service for the purpose of s. 139L(4)(a) of the Act.

## 1.4 Proposed Supplementary Measures and Related Guidance

Coimisiún na Meán wishes to separately consult on further matters that have been raised by stakeholders in the development of the Online Safety Code, and which it is considering for inclusion in a future iteration of the Online Safety Code and Guidance Materials. These proposed supplementary measures are designed to provide additional protections under Article 28b of the Audiovisual Media Services Directive (“AVMS Directive”). The proposed supplementary measures and related guidance are provided at **Appendix 3**. It is not intended to include these measures in the first Code.

## 1.5 Structure of the Consultation Document

The remaining chapters of this document describe the main provisions of the draft Code, statutory guidance and the proposed determination to apply the Code to the category of VSPS. They also set out the main reasons why Coimisiún na Meán has formed the preliminary view that these provisions should be adopted.

Coimisiún na Meán is now seeking views on these topics (as well as on the proposed supplementary measures and related guidance) from the public, organisations representing the public interest, including the interests of children, VSPS providers, regulators (at national, European and international level) and other key stakeholders. As well as inviting views from these stakeholders, Coimisiún na Meán will consult with the Youth Advisory Committee that it has established further to Section 19 of the Act. Details about how to submit views and comments to Coimisiún na Meán are also provided and the consultation document includes a series of questions about the issues. We would like you to respond to the questions set out in this document.

The deadline for responses is **19 January 2024**.

Respondents to the consultation are expected to adhere to the deadline specified above, and the deadline will not be extended, save in exceptional circumstances as the Commission may at its sole discretion determine.



## 2. Steps taken to prepare the draft Code and draft Guidance

The below (non-exhaustive) list provides detail on steps taken by Coimisiún na Meán in preparing the draft Code and draft Guidance on which it now consults.

### 2.1 Development of e-Commerce Compliance Strategy

Pursuant to section 139ZF of the Act, Coimisiún na Meán published its e-Commerce Compliance Strategy on 6 October 2023, relating to online safety codes, online safety guidance materials, and advisory notices: see <https://www.cnam.ie/wp-content/uploads/2023/10/eCommerce-Compliance-Strategy.pdf>. This sets out Coimisiún na Meán's approach to ensuring that online safety codes, *inter alia*, are consistent with Regulations 16-18 of the European Communities (Directive 2000/31/EC) Regulations 2003, and with Article 15 of the E-Commerce Directive (soon to be replaced following the introduction in 2024 by law enacting the Digital Services Act). It was adopted following a public consultation on the draft strategy.

### 2.2 Call for Inputs

Coimisiún na Meán's call for inputs launched on 11 July 2023 and sought responses by 4 September 2023.<sup>1</sup> Coimisiún na Meán received 55 written submissions from a range of respondents. We would like to thank all respondents for their considered responses to the call for inputs, which has facilitated the development of the draft Online Safety Code and draft Guidance.

The call for inputs document set out a number of issues and asked 23 related questions, covering priorities and objectives for the first online safety code, the types of harms to be identified, the extent to which the code should be detailed, synergies with the Digital Services Act, the types of content to be addressed, the types of online safety features to be mandated as part of the code, the types of measures to be mandated in relation to service terms and conditions, content moderation, and complaints, as well as compliance, alongside other matters. In developing the draft Code and the draft Guidance, on each of which it is now consulting, Coimisiún na Meán has had regard to these submissions.

A summary of the responses to the call for inputs has been independently prepared by CommSol and is available [here](#). A copy of the submissions received may be found [here](#). Readers are advised that the summary of the response prepared by CommSol and some of the individual submissions contain content and references to topics that some may find upsetting or distressing; reader discretion is advised.

### 2.3 VSPS Online Harms Evidence Review

Coimisiún na Meán appointed PA Consulting to undertake a literature review of available evidence pertaining to online harms on VSPS. This was provided to Coimisiún na Meán as independent, expert advice so as to inform Coimisiún na Meán's approach to VSPS regulation. The report is a meta-study that distils and analyses findings from multiple Irish, European, and international studies and publications, aiming to offer a balanced assessment while recognising the limitations of available data on some aspects of online harms.

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<sup>1</sup> See [https://www.cnam.ie/wp-content/uploads/2023/07/CallForInputs\\_vFinal.pdf](https://www.cnam.ie/wp-content/uploads/2023/07/CallForInputs_vFinal.pdf)

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The report includes a set of “harms profiles”, which summarise the available evidence about each of the harms in scope of the Act and of the AVMSD. These harms profiles include the following:

- Cyberbullying;
- Eating/Feeding disorders;
- Suicide or self-harm;
- Impairment of the physical, mental, or moral development of children;
- Incitement to violence or hatred;
- Identification of victims, suspects, or vulnerable people;
- Terrorism;
- Child sexual abuse;
- Harassment, with a particular focus on non-consensual image sharing; and
- Audiovisual commercial communications.

The report also includes a summary of research specific to the various considerations in the preparation of online safety codes by Coimisiún na Meán, provided for in Section 139M of the Act. The report is available for stakeholders to consider.<sup>2</sup> Readers are advised that the report contains content, details of experiences, and references to topics that some may find upsetting or distressing; reader discretion is advised.

## 2.4 ERGA Workshop

Coimisiún na Meán attended a workshop on the call for inputs and Article 28b of the AVMS Directive and the approach to developing the draft online safety Code with the European Commission, DG CNECT and the European Regulators Group for Audiovisual Media Services (“ERGA”) on 19 September 2023. This comprised representatives from media regulators across the EU. The workshop discussed the measures and online safety features that VSPS providers are required to design and implement in line with the AVMS Directive, the development of effective mechanisms to assess the appropriateness of the measures taken by VSPS providers, cross-border cooperation with other EU media regulators in the implementation of the Code, and procedural solutions for effective handling of complaints concerning matters with a potential interplay of AVMS Directive/DSA features.

## 2.5 Surveys

In order to gather further information about the views of the public on the regulation of video-sharing platform services, Coimisiún na Meán appointed IPSOS B&A to undertake two surveys on its behalf. The first survey focused on usage by the public of websites and apps that provide video. Questions addressed, amongst other matters, the frequency of use of websites and apps and frequency of watching, sharing or uploading videos. The second survey was focused more on the potential harms caused by video content and regulatory responses to these potential harms. The impact of potential harms on certain groups in society was explored and respondents were also asked for their opinion on who should be responsible for protection. Interviews were conducted via computer aided telephone interviewing using IPSOS B&A’s Omnipoll survey. The Omnipoll is a telephone omnibus that accesses a fresh nationally representative sample of 1,000 adults aged 15+ every two weeks. These two surveys targeted those aged 18 years and above. Copies of the survey responses may be found [here](#) and [here](#)

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<sup>2</sup> See [https://www.cnam.ie/wp-content/uploads/2023/12/PAConsulting\\_Online-Harms-Evidence-Review\\_vFinal.pdf](https://www.cnam.ie/wp-content/uploads/2023/12/PAConsulting_Online-Harms-Evidence-Review_vFinal.pdf)

## 3. Consultation on Draft Online Safety Code

This section of the consultation document focuses on the provisions of the Draft Online Safety Code.

### 3.1 Overview

A draft of the first Online Safety Code is provided at **Appendix 1**. Coimisiún na Meán is undertaking this consultation under section 139N(1) of the Act.

This section provides a broad overview of the structure of the draft Code, explains the main policy considerations that have led Coimisiún na Meán to its proposed approach, and sets out the questions on which Coimisiún na Meán seeks your views. More detail on how to respond to these questions is in Section 7 of this document. You do not have to respond to all questions in your submission, but Coimisiún na Meán would encourage you to respond to all the questions that you consider relevant to you or your stakeholders. In some cases, the consultation questions for multiple sections are grouped together. Where you wish to answer a question, please give reasons for your answer.

Summaries of each section of the draft Code are below. The summaries of the draft Code provisions are not as precisely worded as the draft provisions themselves. If you wish to understand the provisions in detail or to provide detailed comments on the way they are drafted, you will need to read the provisions of the draft Code in the Appendix alongside the relevant legislation.

### 3.2 Draft Code: Introductory Sections

#### Section 1: Introduction

This section explains that Coimisiún na Meán has prepared the Code in accordance with its statutory duties and obligations.

#### Section 2: Scope and Jurisdiction

This section explains that the Code gives effect to Article 28b of the AVMS Directive and specifies the online services to which the Code applies. It states that the Code does not impose any obligation contrary to Article 15 of the e-Commerce Directive or Article 8 of the DSA. This is in line with Coimisiún na Meán's e-Commerce Compliance Strategy.

#### Section 3: Purpose, Preparation and Application of Code

This section states the purpose of the Code, which reflects section 139K of the Act. It lists the matters at section 139M of the Act to which Coimisiún na Meán has in particular had regard in preparing the Code. This section also confirms that the Code has been prepared in accordance with the procedures at section 139N of the Act. This section further states, as specified in section 139L of the Act, when an online safety code applies to a designated online service, factors to which Coimisiún na Meán must have regard when making or revoking a determination in relation to a named service or a category of services, and the consultation that is required ahead of any determination.

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## Section 4: Regulatory Principles Relevant to the Code

This section states the principles that apply to Coimisiún na Meán's behaviour and decision-making. It notes various rights, objectives and statutory functions in accordance with which Coimisiún na Meán must act, as well as the specific objectives of the Code. It notes the principles by which Coimisiún na Meán will be guided in its interpretation, application and enforcement of the Code.

## Section 5: e-Commerce Compliance Strategy Statement

This section sets out the requirements of section 139ZF(7) of the Act that Coimisiún na Meán prepare an e-Commerce Compliance Strategy, and confirms that the Code does not contain any obligations contrary to Article 15 of the e-Commerce Directive or Article 8 of the DSA.

## Section 6: Statutory Guidance

This section notes that the Code is accompanied by statutory guidance in accordance with section 139Z of the Act. Coimisiún na Meán is posing consultation questions elsewhere in relation to this draft Guidance: see section 4 of this consultation document.

## Section 7: Severability

This section states that if any provision of the Code is found unlawful, invalid or unenforceable, that will not affect the lawfulness, validity or enforceability of any other provision of the Code.

## Section 8: Waiver

This section states that where Coimisiún na Meán does not respond to or comment on anything submitted to it by a VSPS provider that will not be deemed to be an acceptance or approval of the material that has been submitted and will not constitute a waiver of any of Coimisiún na Meán powers or rights.

## Section 9: Compliance

This section states that, when Coimisiún na Meán is making assessments as to compliance, it will have regard to whether it has been satisfied that a specific obligation would not be practicable or proportionate in its application to the VSPS.

### **Consultation Question:**

1. Do you have any comments on sections 1 - 9 of the draft Code?

## **3.3 Definitions**

Section 10 defines various terms used in the draft Code. Most of the definitions are derived from relevant national and EU legislation. The most important definitions are those which define the scope of content covered by the Code. These are contained in the definitions of:

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- Content.
- Audiovisual commercial communications harmful to children.
- Audiovisual commercial communications harmful to the general public.
- Illegal content harmful to children.
- Illegal content harmful to the general public.
- Regulated content harmful to children.
- Regulated content harmful to the general public.

The proposed definitions are designed so that the Online Safety Code requires VSPS providers to take appropriate measures to provide the protections from the range of harms identified in the AVMS Directive.

### 3.3.1 User-generated Content Indissociable from User-generated Videos

The proposed definition of “content” includes both user-generated videos and other user-generated content that is indissociable from user-generated videos. This could include, for instance, descriptions of a video, or comments on it from the uploader or other users.

Industry respondents to the call for inputs suggested that the Code should not cover user-generated content apart from videos themselves. This position was not supported by civil society organisations and other respondents. Coimisiún na Meán considers that harm caused by a user-generated video includes harm generated by other user-generated content that is indissociable from the video. For instance, a video depicting a famous member of an ethnic minority might not be harmful in itself but would indirectly lead to harm if it attracted comments that incited to hatred or violence.

Therefore, the draft Code requires VSPS providers to take measures that protect against harm caused by user-generated content that is indissociable from user-generated videos, as well as to harm directly caused by user-generated videos themselves.

### 3.3.2 Content Harmful to Children

The AVMS Directive requires children to be protected from harm to their physical, mental or moral development.

Coimisiún na Meán considers that the Code should be specific about the types of content that are considered to pose a risk of such harm. By providing a more specific definition, stakeholders have greater clarity about the scope of protection that the Code gives and VSPS providers have greater certainty about the scope of their legally binding obligations.

The Code therefore contains definitions of “illegal content harmful to children” and “regulated content harmful to children”.

The definition of “illegal content harmful to children” comprises the relevant categories of offence-based harmful online content defined in the Act. This includes various types of content involved in sexual offences involving children, as well as illegal threats, harassment and grossly offensive communications where the victim is a child, or the content is likely to be seen by a child.

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The definition of “regulated content harmful to children” includes age-inappropriate content such as pornography, and content depicting gross and gratuitous violence. It also includes dangerous challenges and covers a range of content that is included if it poses a risk to the life, physical health, mental health and/or safety of a child: cyber-bullying, encouraging eating or feeding disorders, encouragement of self-harm or suicide, and information about methods of self-harm or suicide.

The definition also allows the scope of regulated content harmful to children to be expanded if, following the appropriate statutory procedure, the definition of harmful online content contained in the Act is broadened.

All the categories included in the proposed definition of regulated content harmful to children were highlighted by many respondents to the call for inputs. Particular emphasis was placed on the dangers of pornography being viewed by children and on content involved in sexual offences against children. The PA Harms Report published at the same time as this consultation contains further evidence about these harms.

Other types of content harmful to children were raised by a few respondents to the call for inputs. These include content that encourages the consumption of alcohol or illegal drugs, and exposure to extremist content. Audiovisual commercial communications for alcohol that is aimed specifically at children is prohibited by the draft Code as harmful to children. Incitement to hatred and violence is covered as regulated content harmful to the general public and extreme or gratuitous violence is covered by the definition of regulated content harmful to children in the draft Code.

### 3.3.3 Content Harmful to the General Public

The Code contains definitions of “illegal content harmful to the general public” and “regulated content harmful to the general public”.

The definitions of illegal and regulated content harmful to the general public include content which is a provocation to commit terrorist offences, content which constitutes a criminal offence relating to child pornography, racism or xenophobia, and content that incites violence or hatred against an individual or group based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation. The definitions are drawn from the AVMS Directive and the Act.

In response to the call for inputs, some respondents considered that Coimisiún na Meán should include a wider range of harms than those set out in the AVMS Directive. Examples of wider harms proposed by respondents included promotion of misogyny and attitudes that lead to gender-based violence, and encouragement of racist and other discriminatory attitudes.

The draft Code focuses on the harms covered by the AVMS Directive, including incitement of violence or hatred. Coimisiún na Meán will also consider the potential relevance of the DSA in relation to content that promotes discriminatory attitudes in collaboration with the European Commission and its counterparts in other Member States.

### 3.3.4 Harmful Audiovisual Commercial Communications

The Code contains definitions of “audiovisual commercial communications harmful to the general public” and “audiovisual commercial communications harmful to children”. The definitions of audiovisual commercial communications harmful to the general public and harmful to children closely reflect the terms of the AVMS Directive.

“Audiovisual commercial communications harmful to the general public” include communications promoting tobacco products and electronic cigarettes, and prescription-only medicines and medicinal products.

“Audiovisual commercial communications harmful to children” include communications for alcohol specifically aimed at children and commercial communications in contravention of Irish and European law on the promotion of infant and follow-on formula.

In response to the call for inputs, some stakeholders proposed that the Code should also restrict the promotion of breast milk substitutes and of high fat, salt and sugar foods. Coimisiún na Meán considers that these proposals merit further consideration as part of its wider work updating other media codes for the AVMS Directive.

#### **Consultation Questions:**

2. What is your view on the proposal to include user-generated content that is indissociable from user-generated videos in the definition of content to be covered by the Code?
3. What is your view on the definitions of “illegal content harmful to children” and “regulated content harmful to children”?
4. What is your view on the other definitions of illegal content and regulated content?
5. Do you have any comments on any other definitions in the draft Code?

## **3.4 Obligations relating to Content**

### 3.4.1 Terms and Conditions restricting Upload of Content

The terms and conditions adopted by VSPS providers that restrict the uploading of certain categories of content are a key tool in protecting members of the general public and children from harm.

In considering what restrictions should be mandatory, Coimisiún na Meán has been particularly conscious of its statutory duty under the Act to uphold rightful freedom of expression as well as its duty to protect the general public and especially children from harm caused by relevant content on video-sharing platforms.



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In particular, Coimisiún na Meán aims to achieve effective protection for children with as little impact as possible on adults who wish to upload, share or consume lawful content. This involves balancing the degree of potential harm caused to children from particular types of content, with the public interest in minimising interference with adults wishing to upload, share or consume that content.

Coimisiún na Meán considers that content which poses a risk to the life, safety or physical or mental health of a child and which may pose similar risks to adults would justify the most stringent measures to protect children, even if the measures interfere in a material way with the ability of adults to share or consume that content. In contrast, content which contributes to civic discourse should be restricted as little as possible, consistent with protecting children from harm.

Taking account of responses to the call for inputs about different harms, as well as the PA Harms report published at the same time as this consultation, Coimisiún na Meán considers that all VSPS providers should be required to prohibit the uploading of:

- content harmful to the general public, such as criminal content related to terrorism and child sex abuse material, and content that incites violence or hatred on the basis of a protected characteristic; and
- content that poses a danger to the life or health of children, such as dangerous challenges, cyberbullying, the promotion of eating or feeding disorders, encouragement of self-harm or suicide, or providing knowledge of methods of self-harm or suicide.

Coimisiún na Meán considers that where the principal purpose of a service or a dissociable section of the service is the sharing of pornography, the VSPS provider can only be permitted to allow the uploading of pornography as long as the VSPS uses a robust form of age verification and appropriate terms and conditions to ensure the service (or section) is not used by children.

Where other VSPS providers permit the uploading of pornography, they must require uploaders to identify such content, and they must use effective age verification so that the content cannot normally be viewed by children.

Coimisiún na Meán considers that similar restrictions should apply to the uploading of content depicting gross or gratuitous violence. However, mindful that such content can sometimes be uploaded as part of a contribution to civic discourse (e.g., about war or terrorism), VSPS providers can be permitted to use content warnings to protect children from content that depicts violence where the uploader declares that their intention is to contribute to civic discourse.

### 3.4.2 Reporting and Flagging

All respondents to the call for inputs were agreed on the need for user-friendly flagging mechanisms. Several civil society respondents highlighted dissatisfaction with the timeliness of decision-making following user reports, and with the nature of the decisions made.



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Civil society respondents highlighted that the speed of decision-making should depend on the nature of the harm being reported and the speed with which content was viewed on different platforms. In some cases, this would require decisions to be taken within minutes or hours, rather than days.

Industry respondents argued that the time taken to make a moderation decision should not be rigidly prescribed, because it depended on factors such as the completeness of the information provided by the person reporting the content, the complexity of the case, the language of the content, and whether third parties needed to be consulted.

All respondents agreed that it would be desirable for the flagging and reporting mechanisms to be integrated with those for reporting under the DSA and for wider breaches of terms and conditions.

Coimisiún na Meán considers it would be premature to specify rigid targets for timeliness and accuracy of decision-making following user reports. Instead, it proposes to oblige VSPS to set and publish targets, and to measure and report performance against those targets. If targets or performance are unsatisfactory and do not improve, Coimisiún na Meán may revisit this issue in a future update of the Code.

### 3.4.3 Age Verification Techniques

Coimisiún na Meán considers that the Code should refer to the effectiveness of age verification, rather than specify the particular techniques that must be used. This gives VSPS providers some flexibility to design techniques that are appropriate for their particular service, and to change them as technology develops.

For instance, a VSPS that permits the uploading of pornography and gross or gratuitous violence can use an age verification technique appropriate for identifying children who are too young to use the service, or to identify adults who can be shown certain types of audiovisual commercial communications.

Coimisiún na Meán considers that providers must be transparent about the techniques they use and about their targets for the proportion of children of different ages who are incorrectly assessed to be adults. This will enable Coimisiún na Meán and users to judge whether a VSPS is using a sufficiently effective age verification technique to provide the appropriate degree of protection. Mere self-declaration of age is not regarded as an effective age verification technique.

In the separate statutory guidance, Coimisiún na Meán sets out its views on some available age verification techniques, such as:

- document-based age verification, accompanied by a live selfie to verify the identity of the user;
- a live selfie together with biometric age estimation; and
- self-declaration together with age estimation based on service usage patterns and the nature of content created by the user.

The statutory guidance is elaborated in Section 4 of the consultation document.

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## 3.4.4 Draft Code Provisions

**Section 11** of the draft Code gives effect to the policy considerations outlined above, as well as to other requirements of the AVMS Directive. It is organised into themes:

- *Terms and Conditions:* VSPS providers are required to prohibit certain matters in their terms and conditions, to which anyone opening an account on a VSPS is asked to agree. It also requires VSPS providers to make provision in their terms and conditions in relation to the suspension and termination of accounts, and to suspend or terminate accounts in certain circumstances.
- *Reporting and Flagging:* VSPS providers are required to establish and operate reporting and flagging mechanisms and make certain information available to users. They must also set targets with respect to reporting and flagging mechanisms, and regularly evaluate and report to Coimisiún na Meán on performance against those targets.
- *Age Verification:* VSPS providers are required to take effective age verification or estimation measures and establish a mechanism for evaluating their effectiveness. Robust age verification (and an equivalent mechanism for evaluating its effectiveness) is required in certain cases. Providers are required to report on the effectiveness of the mechanisms adopted.
- *Content Rating:* VSPS providers are required to establish and operate easy-to-use rating systems allowing users to rate content and promote compliance with that system.
- *Parental Controls:* VSPS providers are required to provide for parental control systems, which must have certain options available for parents or guardians to select and must be clearly explained and offered as an option when a new account is created.
- *Complaints:* VSPS providers are required to establish and operate procedures for the handling and resolution of complaints in relation to reporting and flagging, age verification, content rating and parental controls, and to handle complaints effectively and diligently.

### **Consultation Questions:**

6. What is your view on the obligations in the draft Code that relate to what a VSPS provider must include in its terms and conditions?
7. What is your view on the requirement in the draft Code for a VSPS provider to suspend or terminate an account in certain circumstances?
8. What is your view on the requirements in the draft Code in relation to reporting and flagging of content?

9. What is your view on the requirements in the draft Code in relation to age verification?
10. What is your view on the requirements in the draft Code in relation to content rating?
11. What is your view on the requirements in the draft Code in relation to parental controls?
12. What is your view on the requirements in the draft Code in relation to complaints?
13. Do you have any other comments on the requirements in section 11 of the draft Code?

## 3.5 Audiovisual commercial communications

Coimisiún na Meán considers that children can be adequately protected from audiovisual commercial communications that are harmful to them if VSPS providers ensure that such content is shown only to adult users identified using a sufficiently effective age verification technique.

It is important that users know when they are viewing an audiovisual commercial communication. This has been a particular issue with paid influencers who do not always disclose that they have been paid, or do not disclose this in a consistent fashion. This issue was highlighted by a number of respondents to the call for inputs. While there was consensus that users should be effectively made aware when they are viewing an audiovisual commercial communication, there were different views about how prescriptive the Code should be about how this was to be achieved.

Mindful that this is an issue affecting both VSPS and other online services, Coimisiún na Meán considers that the Code should not be specific about precisely how audiovisual commercial communications are identified to users. Rather this is a matter which, for the time being, Coimisiún na Meán proposes to deal with by way of statutory guidance.

### 3.5.1 Draft Code Provisions

**Section 12** of the draft Code contains obligations that relate to audiovisual commercial communications, of which advertising, sponsorship and product placement are all examples. In line with distinctions made in the AVMS Directive and the Act, the draft Code sets out certain obligations in relation to commercial communications that are directly marketed, sold and arranged by a VSPS, and different obligations for those which are included in content uploaded but which are not marketed, sold or arranged by a VSPS.

*Where the VSPS provider does not market, sell or arrange the audiovisual commercial communication:* VSPS providers are required to include and apply in the terms and conditions of the service a requirement to ensure that audiovisual commercial communications are readily recognisable.

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Those terms must prohibit audiovisual commercial communications that are surreptitious or use subliminal techniques, or that are harmful to the general public or to children. Users must be required by the VSPS terms to declare any user-generated content that contains audiovisual commercial communications, and VSPS providers must suspend or terminate accounts in certain circumstances.

*Where the VSPS provider markets, sells or arranges the audiovisual commercial communication:* VSPS providers are required to ensure the audiovisual commercial communications are readily recognisable as such, are not surreptitious, do not use subliminal techniques, and are not harmful to the general public or children.

*User-generated video:* VSPS providers are required to put in place a functionality for users who upload user-generated video to declare whether it contains audiovisual commercial communications. Where a user makes such a declaration, the VSPS provider must inform users of this in a transparent manner.

## **Consultation Questions:**

14. What is your view on the requirements in the draft Code in relation to audiovisual commercial communications which are not marketed, sold or arranged by the VSPS provider?
15. What is your view on the requirements in the draft Code in relation to audiovisual commercial communications which are marketed, sold or arranged by the VSPS provider?
16. What is your view on the requirements in the draft Code in relation to user declarations that user-generated content contains an audiovisual commercial communication?
17. Do you have any other comments on the requirements in section 12 of the draft Code in relation to audiovisual commercial communications?

## **3.6 Other obligations**

### **3.6.1 Media Literacy**

Many respondents to the call for inputs highlighted the importance of media literacy and shared their perspectives on best practice in this area. Responses recognised the role of VSPS providers in promoting media literacy and many respondents also provided a wider perspective.

Coimisiún na Meán considers that there is a wide range of possible ways in which VSPS providers could promote media literacy. It would not be appropriate at this stage to be prescriptive. Instead, the Code should contain high-level obligations, elaborated by statutory guidance materials, and there should be a requirement to be transparent about the actions taken and their impact.

Coimisiún na Meán will also consider the very helpful wider inputs on media literacy when further developing its own programmes to support the development of media literacy in Ireland.

### 3.6.2 Children's Personal Data

Complying with the Code may require the collection of children's personal data for the purposes of implementing age verification and parental controls. In line with the provisions of the AVMS Directive, the Code prohibits the processing of such data for commercial purposes.

Coimisiún na Meán notes that the provisions of the General Data Protection Regulation ("GDPR") and the Data Protection Act 2018 will also apply to such personal data.

### 3.6.3 Draft Code Provisions

**Section 13** of the draft Code requires VSPS providers to provide effective media literacy measures and tools, raise awareness of those tools, publish an action plan, and report regularly on the impact of these measures. It requires VSPS providers to ensure that the personal data of children is not processed for commercial purposes. It also sets a requirement in relation to complaints reporting.

#### **Consultation Questions:**

18. What is your view on the requirements in the draft Code in relation to media literacy measures?
19. What is your view on the requirements in the draft Code in relation to ensuring the personal data of children is not processed for commercial purposes?
20. What is your view on the requirements in the draft Code in relation to reporting in relation to complaints?
21. Do you have any other comments on the requirements in section 13 of the draft Code?

## 3.7 **Supervision and Enforcement**

**Section 14** of the Draft Code contains a summary of the enforcement procedures in respect of the Code.

#### **Consultation Question:**

22. Do you have any comments on this section of the Draft Code?

## **3.8 Annex to the Code**

This contains two tables, which set out offence-specific categories referred to in the definition of “illegal content harmful to children”, and offence-specific categories referred to in the definition of “illegal content harmful to the general public”. These are provided for ease of reference. Coimisiún na Meán asks that substantive comments on these definitions be made in response to Questions 3 and 4 above.

### **Consultation Questions:**

- 23.** Do you have any comments on the Annex?
  
- 24.** Do you have any other comments on any section or aspect of the draft Code, including with reference to section 139M of the Act in relation to the matters Coimisiún na Meán is required to consider in developing an online safety code?

## 4. Consultation on Draft Statutory Guidance

Draft Guidance prepared by Coimisiún na Meán in relation to the first draft Online Safety Code is provided at **Appendix 2**. This section consults on that draft Guidance under section 139Z(2) of the Act. A summary of each section of the draft Guidance is below, and a question posed for response.

### 4.1 Sections of Draft Guidance and Consultation Question

#### 4.1.1 General Guidance

This identifies certain characteristics that Coimisiún na Meán considers indicative that an online safety mechanism will achieve its objective. It gives examples of what Coimisiún na Meán means by those characteristics.

#### 4.1.2 Combining Measures

Included under the general guidance, this reminds providers they are not prohibited from combining online safety measures with other kinds of features on services provided.

#### 4.1.3 Protections

This notes that VSPS providers choosing to extend the protections required by the Code to a wider range of content types or range of users are not required to establish separate mechanisms limited to the content and users as required by the Code.

#### 4.1.4 Terms and Conditions (content)

This advises that users be directed to best practice guidelines on avoiding exposure to certain content. It also advises providers to reduce the risk in relation to content that could reasonably be expected to encourage a child to engage in behaviour dangerous to their physical safety.

#### 4.1.5 Reporting and Flagging

This indicates how the “user-friendly” requirement of a reporting and flagging mechanism might be achieved in practice. It also contains high level guidance on the considerations that Coimisiún na Meán believes should inform good content moderation decisions and indicates how VSPS providers might design moderation mechanisms so that they comply with relevant provisions of the Code as well as the DSA.

#### 4.1.6 Age Verification

This provides guidance on the use of age verification, age estimation and other mechanisms for identifying the age of users of a VSPS.

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## 4.1.7 Content Rating

This advises that VSPS providers facilitate users to rate content based on the national ratings system in effect in their location in the European Union.

## 4.1.8 Parental Controls

This identifies certain features that Coimisiún na Meán considers to be effective controls, and other considerations Coimisiún na Meán suggests that VSPS providers have regard to.

## 4.1.9 Complaints

This provides guidance on certain types of information Coimisiún na Meán considers should be made available to users and refers providers to best practice and child-centric guidance.

## 4.1.10 Commercial Communications

This indicates Coimisiún na Meán's plans in relation to developing additional requirements and advises providers to have regard to certain of its Commercial Codes. Providers are strongly encouraged to engage with existing non-statutory regulatory measures in respect of certain commercial communications. Regarding terms and conditions relating to commercial communications, the guidance advises providers to use easy-to-understand language in explaining requirements, and to ensure that age-inappropriate commercial communications are displayed to a user only where certain requirements are met.

## 4.1.11 Declaration of Audiovisual Commercial Communications

This guidance indicates Coimisiún na Meán preference for a consistent labelling system for these communications to support transparency and directs providers to existing guidance.

## 4.1.12 Media literacy – Measures and Tools

This indicates some qualities that Coimisiún na Meán considers characteristic of effective measures to promote media literacy, along with some suggested underlying aims for these measures, that it encourages providers to consider.

## 4.1.13 Personal Data – Children

This refers providers to Data Protection Commission guidance on child-centric data processing.

### **Consultation Question:**

25. Do you have any comments on this draft Guidance, including in relation to the matters required to be considered by Coimisiún na Meán at section 139ZA of the Act?



## 5. Consultation on the application of the draft Code to the category of video-sharing platform services

This section consults on the Commission's proposal to apply the draft Code to the category of video-sharing platform services.

The Commission was required by section 139G(1) of the Act to designate VSPS as a category of services under section 139E to which an online safety code may be applied. This category was designated effective 11 September 2023.<sup>3</sup> It is the Commission's intention that the Online Safety Code, once finalised, be applied to the category of video-sharing platform services. Respondents to the consultation are requested to provide their views on the application of the Code to the category of video-sharing platform services below.

As set out in the introduction to this consultation paper, under section 139L(1) of the Act, an online safety code applies to a designated online service where the Commission has determined that the code is to apply to the service or to a designated category of service and given the requisite notice. Where the Code is to apply to a designated category of services, consultation is required under section 139L(4)(b) of the Act. This is the provision under which the Commission is currently consulting.

Please note that, where the Commission proposes to determine that a code will apply to a named service, it must also consult with the provider of that service under section 139L(3). The Commission is required to designate as named services those services which appear to be a VSPS the provider of which is under the jurisdiction of the State. That designation process is taking place in parallel, and the Commission will separately consult with providers designated on the application of this draft Code to specific named services in due course.

The Commission requests service providers who are engaging with the process of designation as a named service under s.139G(2) to respond to the consultation having regard to the position of the service provider as a member of the category of video-sharing platform services to whom the Code applies, and potentially as a designated named service to whom the Code may apply, with a view to consideration by the Commission of all submissions on the Code at the earliest possible date.

### Consultation Question:

26. Do you have any comments on the proposed application of this draft Code to the category of video-sharing platform services?
27. Do you have any comments on the proposed application of this draft Code to named individual video-sharing platform services?

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<sup>3</sup> See <https://www.cnam.ie/designation-notices/>

## 6. Future Supplementary Measures and Related Guidance

### 6.1 Overview

Coimisiún na Meán wishes to separately consult on three further matters that have been raised by stakeholders in the development of the Online Safety Code. These matters are under consideration by Coimisiún na Meán with a view to providing additional protections under Article 28b of the AVMS Directive, including potentially more detailed or stricter measures than those contained in Article 28b(3).

It is not intended to include these measures in the first Code. These matters are at an earlier stage of consideration and may, subject to consultation and in adherence with any appropriate Irish and EU approval procedures, form the basis of later updates to the Code and related guidance materials. Nevertheless, Coimisiún na Meán considers it important to address these supplementary matters and seek further specific views from stakeholders at this time.

A draft of the proposed supplementary measures and related draft guidance are set out in **Appendix 3**. This section provides a broad overview of the structure of the proposed supplementary provisions, explains the main policy considerations that have led Coimisiún na Meán to its proposed approach, and sets out the question on which Coimisiún na Meán seeks your views.

### 6.2 Safety by Design

In responding to the call for inputs, many stakeholders from civil society, academia and public bodies in Ireland and overseas stressed the importance of techniques such as safety by design, child-centred design, safety impact assessments and children's rights impact assessments. Some stakeholders shared details of the way in which these techniques should be applied.

Industry stakeholders drew attention to the risk assessment provisions for VLOPs (Very Large Online Platforms) in the DSA and expressed concern that requirements for safety by design in an online safety code could result in multiple requirements for risk assessments.

Coimisiún na Meán considers that it is important that all VSPS providers take a safety by design approach, and in particular that their service development process should include preparation of safety impact assessments.

Coimisiún na Meán considers that safety impact assessments will operate at a more detailed level than the assessments of systemic risk required by the DSA; indeed, including safety impact assessments in the service design process would be likely to be a mitigation measure to address some the systemic risks identified in those assessments. However, to the extent that the design of individual services is reviewed in detail in the systemic risk assessment, there would be no need for the analysis to be repeated.

There are many different methodologies for implementing safety by design and the appropriate methodology will depend on the nature of the service. Therefore, Coimisiún na Meán proposes to require VSPS providers to conduct safety impact assessments that are effective in identifying and mitigating safety issues, especially those that affect children, and to provide statutory guidance on this.

VSPS providers should be transparent about the details of the methodology they use, including how they have applied safety by design principles.

## 6.3 Online Safety Supports

Coimisiún na Meán considers that the protection of users from harm should include providing support for users who are affected by illegal or harmful content. Coimisiún na Meán is aware that different VSPS providers work with a range of NGOs and other bodies to make such support available. In Coimisiún na Meán's view, it would be useful for there to be transparency about such support, so that best practices can be identified and VSPS providers can be held to account for the choices they make about the support they provide.

## 6.4 Recommender System Safety

Respondents to the call for inputs highlighted the critical role that recommender systems play in causing harm to users. Respondents highlighted several types of harm that can be caused by recommender systems, including:

- the amplification of illegal or harmful content;
- recommendations of age-inappropriate content to minors;
- facilitating online relationships between adults and children, which can be used by adults for exploitative purposes;
- encouragement of users – especially minors – to spend an unhealthy amount of time on the service; and
- feeds that become dominated by a particular type of content, such as “negative” content that can be harmful to those with mental health difficulties, or fitness and beauty content that places users at risk of developing body dysmorphia and hence eating or feeding disorders, or negative content such as misogynist, racist, homophobic or otherwise discriminatory content that can lead to incitement to hatred or violence against others on the grounds of Article 21 of the Charter.

Respondents had several suggestions as to how these harms could be mitigated, including:

- recommender algorithms should create feeds with a variety of content rather than being dominated by one type of content – in particular positive and supportive content should always be included in a feed;
- users who are concerned their feeds have become toxic should be able to reset the algorithm so that it discarded all profiling information;
- potentially harmful content should be identified before the recommender system allows it to go viral;
- recommendations for children should not be based on data that included adult usage of the service;
- content posted by children should not be recommended to adults, and adults should not be able to view children's accounts unless invited;
- recommender algorithms based on profiling should be turned off by default;

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- recommender algorithms that engage explicitly or implicitly with special category data such as political views, sexuality, religion, ethnicity or health should have these aspects turned off by default;
- mechanisms for withdrawing consent should be regularly presented to users in ways that are as high-profile and easy to use as the mechanism for granting consent; and
- users should be able to choose to have an expertly curated feed based on their interests as an alternative to an algorithmically generated feed.

Industry respondents highlighted the measures they have taken to improve recommender system safety and drew attention to relevant provisions of the DSA, including:

- the obligation on all platforms to provide transparency about how recommender systems operate and to make it easy for users to modify their choices when they have more than one option; and
- the obligations on VLOPs to assess and mitigate risks caused by the way their recommender systems operate, and to provide users with at least one option that is not based on profiling.

Industry participants were opposed to the Code including any provisions on recommender system safety.

Coimisiún na Meán considers that there are particular risks from recommender systems that recommend video content given the greater impact that video content has on users compared to other formats. In addition, it notes that some respondents highlighted the availability of content such as methods of suicide on smaller platforms and the risks that arise when this content is recommended to users, especially to children.

Coimisiún na Meán therefore considers it appropriate that supplementary measures to the Code should require VSPS providers to prepare, publish and implement a recommender system safety plan that includes effective measures to mitigate the main risks and, at a minimum, explains the choices that have been made about whether and how they have implemented a number of specified measures.

VLOPs that have addressed these issues in the context of preparing systemic risk assessments and mitigation plans under the DSA would be able to fulfil this obligation by extracting and publishing the relevant part of their risk assessment and mitigation measures.

## 6.5 Guidance

Coimisiún na Meán's proposals on statutory guidance to accompany the proposed supplementary measures are set out in **Appendix 3**. They cover:

*Guidance on safety by design:* This describes what is meant by “safety by design” and refers providers to further information. It indicates a minimum series of steps that would reflect a safety by design approach.

*Guidance on online safety supports:* This encourages providers to consider what steps they can take to support people where they have engaged with harmful and age-inappropriate content, given the detrimental outcome this can have for users.

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*Guidance on recommender system safety:* This advises providers to take measures to reduce the risk of harms being caused by how recommender feeds aggregate and deliver content to users, and the risk that may arise from recommender feeds which contain harmful content.

**Consultation Question:**

28. Is there anything you consider Coimisiún na Meán needs to be aware of in relation to the draft supplementary measures and draft supplementary guidance as it further develops its thinking in these areas and seeks to effectively fulfil its mandate in relation to online safety?

## 7. Responding to this Consultation

At the outset, respondents may wish to refer to Coimisiún na Meán's Consultation Guidelines, which can be accessed at [https://www.cnam.ie/wp-content/uploads/2023/06/ConsultationGuidelines\\_June-2023-1.pdf](https://www.cnam.ie/wp-content/uploads/2023/06/ConsultationGuidelines_June-2023-1.pdf).

Coimisiún na Meán seeks views, information, and evidence in relation to each of three matters for consultation: (1) the draft Online Safety Code, (2) the draft Statutory Guidance, and (3) the proposal to apply the draft Code to the category of video-sharing platform services. Coimisiún na Meán also seeks views on supplementary measures and related guidance, both to be considered for application at a future point.

Sections 3-6 of this consultation document set out 28 questions for direct response. These are also listed for convenience in **Appendix 4**. You do not have to respond to all questions in your submission to the consultation.

When preparing your response, please:

- refer to the full text of the draft Code, draft Guidance and other documents provided in the appendixes rather than the summaries provided in this consultation paper, which are indicative only;
- clearly identify the specific section(s) or proposal(s) of the draft Code or draft Guidance addressed in the response;
- give reasons for your answer; and
- be concise.

Detailed examples of online harm are not required; if respondents wish to provide any, a brief written description of the online harm in question will be sufficient.

Respondents can make their submission in writing by email or by post/hand to one of the following:

**Email:** [vspsregulation@cnam.ie](mailto:vspsregulation@cnam.ie)

**Contact person:** Caroline Keville

**Post:** Coimisiún na Meán, One Shelbourne Building, Shelbourne Road, Dublin 4.

### **Timeframe for responses**

All responses to this consultation must be submitted to Coimisiún na Meán **at the latest on 19 January 2024**.

If you require any assistance with making a response, please contact Coimisiún na Meán by email at [vspsregulation@cnam.ie](mailto:vspsregulation@cnam.ie) or by phone on 01 644 1200.

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## **Use of information**

### *Personal data*

Coimisiún na Meán shall comply with its obligations under the General Data Protection Regulation (“GDPR”), the Data Protection Act 2018 and any other applicable data privacy laws and regulations. Coimisiún na Meán is obligated and committed to protecting all personal data submitted. Coimisiún na Meán has an appointed Data Protection Officer who is registered with the Data Protection Commission. You can find out more on how Coimisiún na Meán processes personal information in Coimisiún na Meán’s published policy.<sup>4</sup>

For this process, Coimisiún na Meán 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, Coimisiún na Meán will not make publicly available your contact details, such as your address, phone number or email. The information collected will be used only for the purposes of this review and for no other purpose.

### *Confidential information*

It is Coimisiún na Meán’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. Coimisiún na Meán will treat confidential information in accordance with its [Consultation Guidelines](#).

## **Freedom of Information**

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

## **Registration**

If you are interested in keeping up to date with the work of Coimisiún na Meán, you are invited to contact Coimisiún na Meán, and to register at <https://www.cnam.ie/sign-up-to-newsletter/> to receive our news, updates, and publications.

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<sup>4</sup> See <https://www.bai.ie/en/about-us/data-protection-policy/>; references to BAI are references to Coimisiún na Meán.

**Appendix 1**  
**Draft Online Safety Code**



# Coimisiún na Meán

## Draft Online Safety Code

December 2023

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# Coimisiún na Meán

## 1. Introduction

- 1.1. Pursuant to Section 139K(1) of the Broadcasting Act 2009, as amended by the Online Safety and Media Regulation Act 2022 (the “Act”) Coimisiún na Meán (the “Commission”) may make codes (“online safety codes”) to be applied to designated online services in accordance with section 139L of the Act. In accordance with its statutory duties and obligations set out above, the Commission has prepared this online safety code (the “Code”).

## 2. Scope and Jurisdiction

- 2.1. The Code gives effect to Article 28b of Directive (EU) 2010/13 (as amended by Directive (EU) 2018/1808) (the “Audiovisual Media Services Directive”) in Ireland.
- 2.2. This Code applies to video-sharing platform services designated as a category of relevant online services and to named video-sharing platform services designated by the Commission in accordance with the Act.
- 2.3. This Code applies only to video-sharing platform services who are under the jurisdiction of the State within the meaning of section 2B of the Act.
- 2.4. The Code does not impose any ex ante control measures or upload-filtering of content which does not comply with the provisions of Article 15 of the e-Commerce Directive or Article 8 of the Digital Services Act.

## 3. Purpose, Preparation and Application of the Code

### Purpose

- 3.1. The purpose of the Code is to ensure, pursuant to Section 139K of the Act, that video-sharing platform service providers:
  - take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content;
  - take any other measures that are appropriate to protect users of their services from harmful online content;
  - take any other appropriate measures that are appropriate to provide the protections set out in Article 28b(1)(a), (b) and (c) of the Audiovisual Media Services Directive including appropriate measures referred to in Article 28b(3);
  - comply with the requirement set out in Article 9(1) of the Audiovisual Media Services Directive; and
  - take any measures in relation to commercial communications on their services that are appropriate to project the interests of users of their services, and in particular the interests of children.

## **Preparation of the Code**

- 3.2. In preparing this Code the Commission has, pursuant to Section 139M of the Act, had regard in particular to:
- the desirability of video-sharing platform service providers having transparent decision-making processes in relation to content delivery and content moderation;
  - the impact of automated decision-making on those processes;
  - the need for any provision of the Code to be proportionate having regard to the nature and the scale of the services to which the Code applies;
  - levels of availability of harmful online content on designated online services;
  - levels of risk of exposure to harmful online content when using designated online services;
  - levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it;
  - the rights of providers of designated online services and of users of those services; and
  - the e-Commerce compliance strategy prepared under Section 139ZF of the Act.
- 3.3. The Code has been prepared in accordance with the procedures set out in Section 139N of the Act.

## **Application of the Code to video-sharing platform services**

- 3.4. In accordance with Section 139L(1), an online safety code applies to a designated online service if –
- (a) the Commission has determined that the code is to apply to the service, or to a designated category of services that includes the service,
  - (b) the Commission has given notice of the determination, and the notice has taken effect, in accordance with subsection (2), and
  - (c) the determination has not been revoked.
- 3.5. Before making or revoking a determination under Section 139L(1) in relation to a named service or a category of services, Section 139L(3) requires the Commission to have regard in particular to—
- (a) the nature and the scale of the service, or of services within the category,
  - (b) levels of availability of harmful online content on the service, or on services within the category,
  - (c) levels of risk of exposure to harmful online content when using the service, or services within the category,

- (d) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it on the service, or on services within the category,
  - (e) the rights of the provider of the service, or providers of services within the category, and
  - (f) the rights of users of the service, or users of services within the category.
- 3.6. Before making or revoking a determination under subsection (1), section 139L(4) requires the Commission to consult—
- (a) where the designation is of a named service, the provider of the service,
  - (b) where the designation is of a category of services—
    - (i) an organisation representative of providers of services falling within the category, if there is such an organisation, and
    - (ii) the providers of those services, so far as the Commission is able to consult them,
  - (c) any advisory committee the Commission has established for that purpose under section 19, and
  - (d) any other person the Commission considers appropriate.
- 3.7. As this Code applies to video-sharing platform services, the Commission engaged in consultation for the purposes of Section 139L(4)(b) at the same time as engaging in consultation for the purposes of Section 139N(1) of the 2009 Act.

## 4. Regulatory Principles Relevant to the Code

- 4.1. In its interpretation, application and enforcement of this Code, the Commission must, in accordance with its public law duties, act lawfully, rationally and fairly.
- 4.2. More particularly, the Commission must act in accordance with:
- its general statutory objectives and functions under the Act;
  - the specific statutory objectives underpinning the Code;
  - the rights conferred by the Constitution, the Charter of Fundamental Rights of the European Union (**the “Charter”**), the European Convention on Human Rights (**the “ECHR”**) insofar as applicable under the European Convention on Human Rights Act 2003 and the EU Treaties; and
  - the principles deriving from these objectives, functions and rights.

### General Statutory Objectives and Functions

- 4.3. Section 7(2) of the Act provides that, in performing its functions, the Commission shall endeavour to ensure that the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld, and that the interests of the public, including the interests of children, are protected, with particular commitment to the safety of children.

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- 4.4. In addition, the Commission must endeavour to ensure that its regulatory arrangements (i) address programme material, user-generated content, and other content, which are harmful or illegal; (ii) take account of technological and societal change; and (iii) operate proportionately, consistently and fairly.
- 4.5. Section 7(3) provides that, in addition, the Commission shall, *inter alia*:
- promote and encourage environmental sustainability in the policies and practices of providers of broadcasting services, audiovisual on-demand media services, and relevant online services;
  - encourage research, promote or endorse educational and training initiatives and activities, including in media literacy, and co-operate for that purpose with educational and training bodies, sporting bodies and community, local and representative bodies, and otherwise promote public awareness, knowledge and understanding, in relation to matters connected to its functions;
  - engage in evidence-based decision-making in the exercise of its functions, and promote evidence-based decision-making by those with which it consults; and
  - encourage compliance with the provisions of the Act, and the provisions of any code, rule or other statutory instrument made under it, in any manner the Commission considers appropriate, including by the publication of guidance as to how those provisions may be complied with.
- 4.6. Pursuant to Section 7(4) of the Act, in performing its functions, the Commission shall have regard to: the safety of children, and published policies of the Minister for Children, Equality, Disability, Integration and Youth in respect of that matter; the regulation of gambling, and published policies of the Minister for Justice in respect of that matter; climate change and environmental sustainability, and published policies of the Minister for the Environment, Climate and Communications in respect of that matter; and published policies of the Government in respect of any of those matters.

## **Specific Statutory Objectives**

- 4.7. Sections 4.8 to 4.12 set out the specific statutory objectives underpinning the Code.

### **Objective 1**

- 4.8. Pursuant to **Section 139K(3)** of the Act and **Article 28b(1)** of the Audiovisual Media Services Directive, it is an objective of the Code to ensure that video-sharing platform service providers under the jurisdiction of the State, in respect of the services they provide throughout the EEA:
- Take appropriate measures to protect children from harmful online content (as defined in this Code) in audiovisual programmes, user-generated videos and in audiovisual commercial communications which may impair their physical, mental or moral development.

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- Take appropriate measures to protect the general public from audiovisual programmes, user-generated videos, and audiovisual commercial communications that contain incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter.
- Take appropriate measures to protect the general public from audiovisual programmes, user-generated videos and audiovisual commercial communications that contain content the dissemination of which constitutes an activity which is a criminal offence under European Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography<sup>5</sup> within the meaning given to the term in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council, and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA.

## **Objective 2**

- 4.9. Pursuant to Section **139K(3)** of the Act and **Article 28b(2)** of the Audiovisual Media Services Directive, it is an objective of the Code to ensure that video-sharing platform service providers under the jurisdiction of the State in respect of the services they provide throughout the EEA:
- Comply with the requirements set out in Article 9(1) of the Audiovisual Media Services Directive with respect to audiovisual commercial communications that are marketed, sold or arranged by those video-sharing platform providers.
  - Take appropriate measures to comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers, taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications.
  - Clearly inform users where user-generated videos contain audiovisual commercial communications, provided that such communications are declared to be commercial communications, or the provider has knowledge of that fact.

## **Objective 3**

- 4.10. Pursuant to **Section 139K(3)** of the Act and **Article 6(a)** of the Audiovisual Media Services Directive, it is an objective of the Code to ensure that video-sharing platform service providers under the jurisdiction of the State, in respect of the services they provide throughout the EEA, take appropriate measures to ensure that audiovisual programmes, user-generated videos and audiovisual commercial communications which may impair the physical, mental or moral development of children are only made available in such a way as to ensure that children will not normally hear or see them. They will be proportionate to the potential harm of the content. The most harmful online content such as gratuitous violence and pornography will be subject to the strictest measures.

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<sup>5</sup> The Commission considers the term “child sex abuse material” more appropriate.



## **Objective 4**

- 4.11. Pursuant to **Section 139K(3)** of the Act and **Article 28b(3)** of the Audiovisual Media Services Directive, it is an objective of the Code that the appropriate measures to be taken by a video-sharing platform service shall be determined by the Commission in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest.

## **Objective 5**

- 4.12. Pursuant to **Section 139K(3)** of the Act and **Article 28b(3)** of the Audiovisual Media Services Directive, it is an objective of the Code that the measures applied in this Code will be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided. These measures will not lead to any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC (the “**e-Commerce Directive**”) or Article 8 of Regulation (EU) 2022/2065 (the “**Digital Services Act**”).

## **Rights under the Constitution, Charter, ECHR and EU Treaties**

- 4.13. The Commission is required to act in accordance with the Constitution, the Charter and the ECHR.
- 4.14. The rights that will be of greatest relevance for the Commission’s functions are: the right to freedom of expression; the right to privacy; the rights to freedom of thought, conscience and religion; non-discrimination; the right to freedom of assembly and association; the right to earn a livelihood; the freedom to conduct a business; the free movement of services; and the rights of the child and of those with protected characteristics.

## **Principles**

- 4.15. Derived from these statutory purposes, functions and obligations, the Commission will be guided by a number of well-established principles in its interpretation, application and enforcement of this Code.
- 4.16. Pursuant to the principle of **proportionality**, the Commission will endeavour to ensure that the means it adopts in its interpretation, application and enforcement of this Code seek to achieve an identifiable objective(s), are rationally related to the objective(s), and go no further than necessary to achieve such objective(s).

The proportionality of the required measures will be assessed by taking account of a range of factors including:

- the nature of the content in question;
- the harm the content may cause;

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- the characteristics of the category of persons to be protected, and in particular, whether those protected are children;
  - the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content; and
  - the public interest.
- 4.17. Pursuant to the principle of **effectiveness**, the Commission will endeavour to ensure that the measures required by the Code are suitable and practicable for achieving their intended purpose. The Commission will have regard to the risk of measures being circumvented through technical or other means or abused to cause harm and undermine how the provider addresses harmful online content. The Commission will expect providers to be aware of the impact of automated decision-making and updates in technology on their activities.
- 4.18. Pursuant to the principle of **practicability**, the Commission will have due regard, when applying this Code, to factors including the size of the video sharing platform service and the nature of the service that is provided, industry standards relating to the measures required by this Code, the cost of implementation of measures required by this Code, and to the risk to users from harmful online content on a service when assessing whether measures under this Code are practicable.
- 4.19. Pursuant to the principle of **transparency**, the Commission will endeavour to ensure that its decision-making processes in relation to the interpretation, application and enforcement of this Code are transparent and accessible.
- 4.20. Pursuant to the principle of **fairness**, the Commission will endeavour to treat service providers and the public impartially, and with fair procedures.
- 4.21. Pursuant to the principle of **independence**, the Commission will act independently in its interpretation, application and enforcement of the Code, and will not be subject to inappropriate external influence.
- 4.22. Pursuant to the principle of **consistency**, the Commission will endeavour to treat equivalently-placed providers equivalently. This shall not mean that all providers will be treated exactly the same; rather, the Commission will endeavour to ensure that differences between providers are recognised to the extent relevant. For the avoidance of doubt, the principle of consistency shall not impose an obligation on the Commission to enforce all breaches by providers of the Code at the same time. The Commission shall have discretion in the determination of its enforcement priorities.

## 5. E-Commerce Compliance Strategy Statement

- 5.1. Section 139ZF of the Act 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 to 18 of the e-Commerce Regulations 2003<sup>6</sup> and Article 15 of the e-Commerce Directive. 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.
- 5.2. In accordance with its statutory powers and having had regard to its statutory duties, the Commission published its e-Commerce Compliance Strategy on 6 October 2023. A copy of the Strategy is available on the Commission's website – <https://www.cnam.ie>.
- 5.3. No provision of this Code necessitates, or shall be construed to necessitate, general monitoring of information transmitted or stored by providers or generally taking active steps to seek facts or circumstances indicating illegal activity contrary to Article 15 of the eCommerce Directive or Article 8 of the Digital Services Act.

## 6. Statutory Guidance

This Code is accompanied by statutory guidance issued by the Commission in accordance with and following the procedures set out in section 139Z of the Act.

## 7. Severability

- 7.1. If any provision of this Code is found to be unlawful, invalid, prohibited, unenforceable or inapplicable (either generally or with respect to a particular video-sharing platform service provider(s)) in any respect, on the basis of any law (including the Constitution and European law), such finding shall not affect the lawfulness, validity, enforceability or applicability of any other provision of this Code or part thereof, unless the finding is declared to be applicable to such other provision or part thereof, or the same is the subject of the relief granted by a court. Without prejudice to the foregoing, all of the other provisions and/or parts of this Code shall remain fully effective, applicable and enforceable. To the extent necessary any provision or part of the Code, found to be unlawful, invalid, prohibited, unenforceable or inapplicable, shall be severed from the Code.

## 8. Waiver

- 8.1. The fact that the Commission does not respond to or comment upon any submission, assessment, proposal, report, compatibility statement or any analogous document submitted to it by a video-sharing platform service designated by the Commission in accordance with the Act shall not be deemed to be an acceptance or approval of the contents of any part of the same and shall not imply that the video-sharing platform service provider has complied with its obligations under the Act and/or the Code.

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<sup>6</sup> European Communities (Directive 2000/31/EC) Regulations 2003.

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Without prejudice to the foregoing, the fact that the Commission does not respond or comment on any such document shall not create an estoppel against, or constitute a waiver by, the Commission of any of its powers or rights pursuant to the Act and/or the Code.

## 9. Compliance

- 9.1. When considering whether or not a video-sharing platform service provider is in compliance with a provision of the Code, within the meaning of Section 139Q of the Act, the Commission shall have regard to whether it has been demonstrated to the satisfaction of the Commission that a specific obligation under this Code would not be practicable or proportionate in its application to the video-sharing platform service, taking into account the size of the video-sharing platform service and the nature of the service that is provided.

## 10. Definitions

**“audiovisual commercial communication”** means a commercial communication consisting of images with or without sound.

**“audiovisual programme”** means a set of moving images with or without sound which, in the case of an audiovisual media service, constitutes an individual item, irrespective of its length, within a programme schedule or a catalogue.

**“child”** means a person under the age of 18 years.

**“commercial communication”** means images or sound or both:

- designed to promote, directly or indirectly, the goods, services or image of a person pursuing an economic activity, and
- included in or accompanying a programme or user-generated content in return for payment or for similar consideration or for self-promotional purposes.

**“content”** refers to:

- user-generated content, consisting of:
  - (a) user-generated video, or
  - (b) user-generated content comprising any text, symbol, or caption accompanying any user-generated video, provided such text, symbol, or caption is indissociable from the user-generated video,
- any audiovisual commercial communication,
- any audiovisual programme.

**“audiovisual commercial communications harmful to the general public”** means:

- audiovisual commercial communications which prejudice respect for human dignity;
- audiovisual commercial communications which include or promote any discrimination based on: sex, racial or ethnic origin, nationality, religion or belief, disability, age, sexual orientation;
- audiovisual commercial communications which encourage behaviour prejudicial to health or safety;
- audiovisual commercial communications which encourage behaviour grossly prejudicial to the protection of the environment;
- audiovisual commercial communications for cigarettes and other tobacco products, as well as for electronic cigarettes and refill containers;
- audiovisual commercial communications for infant and follow-on formula which contravene the European Union (Food Intended for Infants and Young Children, Food for Special Medical Purposes, and Total Diet Replacement for Weight Control) Regulations 2019 and 2022, Commission Delegated Regulation (EU) 2016/127 of 25 September 2015 and/or Regulation (EU) No 609/2013;
- audiovisual commercial communications which encourage immoderate consumption of alcoholic beverages; and
- audiovisual commercial communications for medicinal products and medical treatment available only on prescription in the State.

**“audiovisual commercial communications harmful to children”** means:

- audiovisual commercial communications that directly exhort children to buy or hire a product or service by exploiting their inexperience or credulity;
- audiovisual commercial communications that directly encourage children to persuade their parents or others to purchase the goods or services being advertised;
- audiovisual commercial communications which exploit the special trust children place in parents, teachers or other persons;
- audiovisual commercial communications which or unreasonably show children in dangerous situations; and
- audiovisual commercial communications for alcohol aimed specifically at children.

“illegal content harmful to children” means:

- content consisting of the offence-specific categories of harmful online content defined by section 139A(1)(a) and Schedule 3 of the Act at
  - point 15,
  - point 18,
  - point 32,
  - point 33,

listed in **Table A–1** of the **Annex**.

- content consisting of offence-specific categories of harmful online content defined by s. 139A(1)(a) and Schedule 3 of the Act at
  - point 11,
  - point 11A,
  - point 12,
  - point 13,
  - point 35,
  - point 36,
  - point 38,
  - point 39,
  - point 40,

listed in **Table A–2** of the **Annex** where the victim of the offence is a **child** or the content is viewed or likely to be viewed by a **child**.

“illegal content harmful to the general public” means:

- content the dissemination of which constitutes an activity which is a criminal offence under Irish legislation transposing European Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography<sup>7</sup> within the meaning given to the term in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA, namely:
  - content consisting of the offence-specific categories of harmful online content defined by section 139A(1)(a) and Schedule 3 of the Act at
    - point 4,
    - point 5,

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<sup>7</sup> The Commission considers the term “child sex abuse material” more appropriate.

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- point 14,
- point 20,

listed in **Table B** of the **Annex**.

**“live-streaming” is a form of user-generated content and** refers to the uploading by a user of user-generated content to a video-sharing platform service for real time transmission to other users of the service or real time two way communication by the user with other users of the service.

**“media literacy”** means public understanding of material published in print, broadcast, online or other media, including understanding of:

- the nature and characteristics of published material,
- how material is selected, or made available, for publication,
- how individuals and communities can create and publish material, and
- how access to published material is or can be regulated.

**“regulated content harmful to children”** means:

content which may impair the physical, mental and moral development of children, namely:

- content consisting of pornography.
- content consisting of realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty.
- content consisting of dangerous challenges that give rise to a risk to life or risk of significant harm to physical health or safety of a **child**.
- content consisting of the other categories of harmful online content defined by section 139A(1)(b) and (3) of the Act, namely:
  - (a) content by which a person bullies or humiliates another person,
  - (b) content by which a person promotes or encourages behaviour that characterises a feeding or eating disorder,
  - (c) content by which a person promotes or encourages self-harm or suicide,
  - (d) content by which a person makes available knowledge of methods of self-harm or suicide,
  - (e) any content specified by order under section 139B,

where such content meets the risk test under section 139(4) for the purposes of section 139(1)(b)(ii) and where the person to whom the risk relates is a **child**.

**“regulated content harmful to the general public”** means:

- content containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union, namely sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation.

**“risk test”** refers the definition under section 139A(4) of the Act which provides that content meets the risk test for the purposes of subsection 139A(1)(b)(ii) if it gives rise to:

- (a) any risk to a person’s life, or
- (b) a risk of significant harm to a person’s physical or mental health, where the harm is reasonably foreseeable.

**“user-generated content”** means content created by a user of a service and uploaded to the service by that or another user, where the service is a video-sharing platform service.

**“user-generated video”** means user-generated content consisting of a set of moving images with or without sound.

**“video-sharing platform service”** means a service, within the meaning of Articles 56 and 57 of the Treaty on the Functioning of the European Union, where:

- the principal purpose of the service is devoted to,
- the principal purpose of a dissociable section of the service is devoted to, or
- an essential functionality of the service is devoted to,

providing audiovisual programmes or user-generated videos, or both, by electronic communications networks, to the general public, in order to inform, entertain or educate, but only if the provider of the service,

- does not have effective control over the selection of the programmes and videos referred to in that subsection, but
- determines their organisation, by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.

## 11. Obligations of Video-sharing Platform Services - Content

### Terms and Conditions and Related Obligations – Content

11.1. Video-sharing platform service providers shall include in their terms and conditions of the service a prohibition on the uploading or sharing of:

- illegal content harmful to the general public,



- regulated content harmful to the general public,
  - illegal content harmful to children.
- 11.2. Video-sharing platform service providers shall include in their terms and conditions a prohibition on the uploading or sharing of regulated content harmful to children, save to the extent permitted in accordance with sections 11.3 – 11.8.
- 11.3. Video-sharing platform services of which the principal purpose of the service or a dissociable section thereof is providing access for adults to content consisting of **pornography** shall not be required to prohibit the uploading or sharing of that content, provided that the service provider shall implement effective measures to ensure that the service (or the dissociable section thereof as the case may be) cannot be used by children. The measures must include:
- 11.3.1. a prohibition in its terms and conditions on the use of the service (or dissociable section thereof as the case may be) by children.
  - 11.3.2. an obligation in its terms and conditions for adult users to ensure that their accounts on the service are not used by children.
  - 11.3.3. **robust age verification** measures in accordance with section 11.19 below.
- 11.4. Video-sharing platform services of which the principal purpose of the service or a dissociable section thereof is providing access for adults to content consisting of **realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty** shall not be required to prohibit the uploading or sharing of that content, provided that the service provider shall implement effective measures to ensure that the service (or the dissociable section thereof as the case may be) cannot be used by children. The measures must include:
- 11.4.1. a prohibition in its terms and conditions on the use of the service (or dissociable section thereof as the case may be) by children.
  - 11.4.2. an obligation in its terms and conditions for adult users to ensure that their accounts on the service are not used by children.
  - 11.4.3. **robust age verification** measures in accordance with section 11.19 below.
- 11.5. Video-sharing platform service providers to which sections 11.3 or 11.4 apply shall include in their terms and conditions a requirement that users comply with and do not attempt to circumvent, in particular, the measures relating to robust age verification that service providers are obliged to implement under section 11.19 below.
- 11.6. Video-sharing platform services of which neither the principal purpose of the service nor of a dissociable section thereof is providing access for adults to content consisting of **pornography** shall not be required to prohibit the uploading or sharing of that content, provided that the service provider shall implement effective measures to ensure that such content is not normally viewed by children.

The measures must include:

- 11.6.1 a requirement in the service's terms and conditions that users who upload such content rate it as adult content not suitable for viewing by children;
  - 11.6.2 transparent and user-friendly mechanisms for users of the service to flag to the video-sharing platform service provider content that has been incorrectly rated or has not been rated as adult content; and
  - 11.6.3 **effective age verification** measures in accordance with sections 11.16 and 11.17.
- 11.7 Video-sharing platform services of which neither the principal purpose of the service nor of a dissociable section thereof is providing access for adults to content consisting of **realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty** shall not be required to prohibit the uploading or sharing of that content, provided that the service provider shall implement effective measures to ensure that such content is not normally viewed by children. The measures must include:
- 11.7.1 a requirement in the service's terms and conditions that users who upload such content rate it as adult content not suitable for viewing by children;
  - 11.7.2 transparent and user-friendly mechanisms for users of the service to flag to the video-sharing platform service provider content that has been incorrectly rated or has not been rated as adult content; and
  - 11.7.3 **effective age verification** measures in accordance with sections 11.16 and 11.17.
- 11.8 Sections 11.2, 11.4 and 11.7 shall not be read as prohibiting the uploading or sharing of content that contains violent or distressing imagery where such content has been uploaded or shared as a contribution to civic discourse on a matter of public interest, provided it is rated as not suitable for viewing by children in accordance with section 11.22.
- 11.9 Video-sharing platform service providers shall provide in their terms and conditions that service providers shall, where appropriate and following fair procedures, suspend or terminate accounts which they have determined to have repeatedly infringed terms and conditions of the service relating to:
- illegal content harmful to the general public,
  - regulated content harmful to the general public,
  - illegal content harmful to children,
  - regulated content harmful to children,

that video-sharing platform service providers are obliged to apply and implement under this Code.

## **Suspension and termination of accounts**

11.10 Video-sharing platform service providers shall, where appropriate and following fair procedures, suspend or terminate accounts which they have determined to have repeatedly infringed terms and conditions of the service relating to:

- illegal content harmful to the general public,
- regulated content harmful to the general public,
- illegal content harmful to children,
- regulated content harmful to children,

that video-sharing platform service providers are obliged to apply and implement under this Code.

## **Reporting and Flagging**

11.11 Video-sharing platform service providers shall establish and operate transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform service provider:

- illegal content harmful to the general public,
- regulated content harmful to the general public,
- illegal content harmful to children,
- regulated content harmful to children.

11.12 Video-sharing platform service providers shall establish and operate systems by which providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging of:

- illegal content harmful to the general public,
- regulated content harmful to the general public,
- illegal content harmful to children,
- regulated content harmful to children,

using the reporting and flagging mechanisms referred to in section 11.11 above.

11.13 When informing a notifier of its decision about content reported or flagged, a video-sharing platform service provider shall inform the notifier that they can use the complaint handling procedures established by the service provider in accordance with section 11.29 if they are dissatisfied with the decision and shall provide clear and transparent information to users.

11.14 Video-sharing platform service providers shall set targets with respect to the timelines and accuracy of reporting and flagging mechanisms under this part of the Code and shall publish these targets.

11.15 Video-sharing platform service providers shall evaluate and report to the Commission every three months from 1 January each year on their performance against the targets established in section 11.14, in the manner specified by the Commission from time to time, and shall publish a report annually on the website of the service.

## **Age Verification**

11.16 Where a video-sharing platform service provider has a minimum age for account opening, it must implement effective measures to detect under-age users and close their accounts. Such measures may be applied at account opening or subsequently and can be achieved using age estimation, or age verification, as appropriate, or by other technical measures. Self-declaration of age by users of the service shall not on its own be an effective measure for the purposes of this section.

11.17 Video-sharing platform service providers shall implement effective measures to ensure that content rated as not suitable for children cannot normally be seen by children. Such measures shall be applied either on account sign-up for the service or on each occasion such content is accessed, and can be achieved using age estimation, or age verification, as appropriate, or by other technical measures. Self-declaration of age by users of the service shall not on its own be an effective measure for the purposes of this section. Where content containing violent or distressing imagery has been uploaded or shared as a contribution to civic discourse on a matter of public interest, placing the content behind a content warning would be an effective measure for the purposes of this section.

11.18 Video-sharing platform service providers shall establish a mechanism to (i) describe the age verification, age estimation or other technical measures used; (ii) describe the way in which the measures are used to restrict access to the service(s); (iii) set targets for the number of children (in different age ranges determined by the service provider) who are wrongly identified as adults through the service provider's age verification, age estimation or other technical measures; (iv) evaluate the accuracy and the effectiveness of their age estimation systems, age verification systems, or other technical measures, including whether the mechanisms used have enabled the service provider to reach the targets set under (iii); and (v) using surveys or other means, estimate the number of users who are children using their service.

11.19 Video-sharing platform services of which the principal purpose of the service or a dissociable section thereof is providing access for adults to:

- content consisting of pornography, or
- content consisting of realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty,

shall use **robust age verification** either for (i) account sign-up for the service or for accessing the dissociable section of the service providing access to such content; or (ii) on each occasion such content is accessed.

11.20 Video-sharing platform service providers to whom section 11.19 applies shall establish a mechanism to (i) describe the robust age verification used; (ii) describe the way in which the measures are used to restrict access to the service(s); (iii) set targets for the number of children (in different age ranges determined by the service provider) who are wrongly identified as adults through the service provider's age verification mechanisms; and (iv) evaluate the accuracy and effectiveness of the robust age verification systems they implement in compliance with that section, including whether the mechanisms used have enabled the service provider to reach the targets set under (iii).

11.21 Video-sharing platform service providers shall provide a report on the accuracy and effectiveness of age estimation mechanisms, age verification mechanisms or other technical measures arising from the evaluation undertaken under sections 11.18 and 11.20 to the Commission every three months from 1 January each year, in the manner specified by the Commission from time to time.

## **Content Rating**

11.22 Video-sharing platform service providers shall establish and operate easy-to-use content rating systems allowing users of video-sharing platforms to rate content on their services. The content rating system shall enable users to rate whether the content is appropriate for children and shall enable users to suggest the age(s) of children for whom the content is appropriate, or inappropriate, as the case may be.

11.23 Video-sharing platform service providers, when adopting content rating systems under section 11.22, shall ensure that the system adopted is objective and shall promote users' compliance with that system by appropriate means.

## **Parental Controls**

11.24 Video-sharing platform service providers shall provide for parental control systems that are under the control of the end-user with respect to illegal content harmful to children and regulated content harmful to children.

11.25 Video-sharing platform service providers that allow live-streaming shall ensure that parental control systems provide for the option for a parent or guardian to prevent a child from live-streaming content to other users of the service using the livestreaming functionality of the service without the prior approval or consent of a parent or guardian of the child.

11.26 Video-sharing platform service providers that allow live-streaming shall ensure that parental control systems provide for the option for a parent or guardian to prevent a child from viewing content live-streaming by other users of the service using the live streaming functionality of the service without the prior approval or consent of a parent or guardian of the child.

11.27 Video-sharing platform service providers shall explain to users how parental control systems operate and shall draw users' attention to them by appropriate means.

11.28 Video-sharing platform service providers shall ensure that parental control systems are offered as an option to new users on account sign-up for the service.

## **Complaints**

11.29 Video-sharing platform service providers shall establish and operate transparent, easy-to-use and effective procedures for the handling and resolution of complaints made by users to the video-sharing platform service provider in relation to the implementation of obligations relating to reporting and flagging, age verification, content rating and parental controls.

11.30 Video-sharing platform service providers shall handle complaints in a diligent, timely, non-discriminatory, and effective manner.

11.31 Pursuant to Section 139ZD of the Act, video-sharing platform service providers and users of their services are encouraged to use mediation by an independent mediator to resolve any disputes arising from user complaints about a video-sharing platform service provider taking or not taking any action in response to this Code, guidance materials published or advisory notices issued under Section 139Z. This does not deprive the user of the legal protection afforded by Irish law. For the avoidance of doubt, nothing in this Code shall affect the rights of users to assert their rights before a court in relation to a video-sharing platform or platforms.

## **12 Obligations of Video-sharing Platform Service Providers – Audiovisual Commercial Communications**

### **Terms and Conditions**

#### **Audiovisual commercial communications that are not marketed, sold or arranged by the video-sharing platform service**

12.1 Video-sharing platform service providers shall, in the case of audiovisual commercial communications not marketed, sold, or arranged by them, include and apply in the terms and conditions of the service a requirement to ensure that that audiovisual commercial communications are readily recognisable as such.

12.2 Video-sharing platform service providers shall in the case of audiovisual commercial communications not marketed, sold, or arranged by them, include and apply in the terms and conditions of the service a prohibition on audiovisual commercial communications that are surreptitious or that use subliminal techniques.

12.3 Video-sharing platform service providers shall, in the case of audiovisual commercial communications not marketed, sold, or arranged by them, include and apply in the terms and conditions of the service a prohibition on audiovisual commercial communications harmful to the general public as defined in this Code and audiovisual commercial communications harmful to children as defined in this Code.

- 12.4 Video-sharing platform service providers shall include in the terms and conditions of the service an obligation for users to declare when they are uploading user-generated video that contains audiovisual commercial communications as far as they know or can be reasonably expected to know.
- 12.5 Video-sharing platform service providers shall, where appropriate and following fair procedures, suspend or terminate accounts which they have determined to have repeatedly infringed terms and conditions relating to audiovisual commercial communications that the video-sharing platform service are obliged to apply and implement under this Code.

### **Audiovisual commercial communications that are marketed, sold or arranged by the video-sharing platform service**

- 12.6 Video-sharing platform service providers shall, in the case of audiovisual commercial communications that are marketed, sold or arranged by those video-sharing platform providers, ensure that audiovisual commercial communications are readily recognisable as such.
- 12.7 Video-sharing platform service providers shall not market, sell or arrange audiovisual commercial communications that are surreptitious or that use subliminal techniques.
- 12.8 Video sharing platform service providers shall not market, sell or arrange audiovisual commercial communications harmful to the general public or audiovisual commercial communications harmful to children.
- 12.9 Video-sharing platform service providers shall not be restricted from marketing, selling or arranging, and (in the case of audiovisual commercial communications not marketed, sold, or arranged by them) shall not be required to prohibit, audiovisual commercial communications for alcohol provided that the service provider shall implement effective measures to ensure that such content is not normally viewed by children. The measures must include:
- 12.9.1 a requirement in the service's terms and conditions that users who upload such content rate it as adult content not suitable for viewing by children;
- 12.9.2 transparent and user-friendly mechanisms for users of the service to flag to the video-sharing platform service provider content that has been incorrectly rated or has not been rated as adult content; and
- 12.9.3 effective age verification measures in accordance with sections 11.16 and 11.17.

### **Declaration of audiovisual commercial communications for user-generated video**

- 12.10 Video-sharing platform services providers shall put in place a functionality for users who upload user-generated video or an audiovisual programme to declare whether such user-generated video or such audiovisual programme contains audiovisual commercial communications as far as they know or can be reasonably expected to know.

- 12.11 Where a user has declared that a user-generated video or an audiovisual programme contains audiovisual commercial communications or where the video-sharing platform service has knowledge of that fact, the video-sharing platform service shall ensure users of the service are clearly informed of the declaration or fact that the user-generated video or the audiovisual programme contains audiovisual commercial communications in a manner that is transparent for users of the service.

## **13 Obligations of Video-sharing Platform Service Providers - General**

### **Media Literacy – Measures and Tools**

- 13.1 Video-sharing platform service providers shall provide effective media literacy measures and tools and shall take steps to raise users' awareness of those measures and tools.
- 13.2 Each video-sharing platform service provider shall publish an action plan specifying the measures it will take to promote media literacy. The plan shall be updated annually, and video-sharing platform service providers shall report to the Commission on the impact of measures taken in a manner specified by the Commission.

### **Personal data – Children**

- 13.3 Video-sharing platform service providers shall ensure that personal data of children collected or otherwise generated by them when implementing obligations in this Code relating to age verification and parental controls is not processed for commercial purposes, such as direct marketing, profiling and behavioural targeted advertising.

### **Reporting**

- 13.4 Pursuant to section 139K(6) of the Act, each video-sharing platform service provider shall provide a report to the Commission, in the manner specified by the Commission from time to time, on the provider's handling of communications from users raising complaints or other matters every three months from 1 January each year.

## **14 Supervision and Enforcement of the Code**

- 14.1 For convenience, this section provides a summary of the enforcement procedure in respect of the Code. This summary is not intended to replace, limit or vary any provision of the Act nor is this summary intended to act as guidance or rules with respect to the operation of any investigation.
- 14.2 Under section 139O of the Act, the Commission may by notice in writing require the provider of a designated online service to provide the Commission with information relating to the provider's compliance with an online safety code over any period, and may require such information to be provided periodically for a succession of periods.
- 14.3 It is an offence for a provider to fail without reasonable excuse to comply with such an information notice or, in purported compliance with such an information notice, to provide false information, knowing that it is false or being reckless as to whether it is false.



14.4 Under section 139P of the Act, the Commission may appoint a person to carry out an audit:

- to enable the Commission to assess compliance by the provider with provisions of the Code that relate to the handling of communications by which users raise complaints or other matters relating to designated online services with the providers of those services; and
- to provide the Commission with information to identify any trends in complaints or other matters raised by such communications that may be relevant to the Commission's functions.

The Commission may by notice in writing require the provider of a designated online service to co-operate with any person appointed to carry out such an audit. It is an offence for a provider to fail without reasonable excuse to comply with such a notice.

14.5 Under section 139Q of the Act, a failure by a video-sharing platform service provider to comply with the provision of this Code shall be a contravention for the purposes of Part 8B of the Act.

14.6 Where there is reason to suspect a contravention of this Code, an investigation will be carried out on notice to the video-sharing platform service provider and a report will be produced by an authorised officer which is provided to the Commission.

14.7 The video-sharing platform service provider will be afforded an opportunity to make submissions on the draft report prior to its finalisation and submission to the Commission.

14.8 After receiving the report, the Commission will give the provider an opportunity to make submissions in such manner as it considers appropriate.

14.9 The Commission will thereafter make a decision whether, on the balance of probabilities, the video-sharing platform service provider has committed a contravention of this Code and, if so, whether or not to impose an administrative financial sanction.

14.10 A written notice of the decision and the reasons for it will be given to the video-sharing platform service provider. If the Commission has decided that an administrative financial sanction should apply, the notice shall *inter alia* invite submissions in relation to the amount of the sanction.

14.11 The amount of an administrative financial sanction shall not exceed:

- in the case of an individual, €20,000,000, or
- in the case of a video-sharing platform service provider that is not an individual, €20,000,000 or, if greater, 10 per cent of its relevant turnover in the financial year preceding the date of the decision.

14.12 In determining the amount of administrative financial sanction to be applied, the Commission shall have regard to the factors as set out in the Act.

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- 14.13 A video-sharing platform service provider may appeal the decision to a court on the grounds set out in the Act and the Commission's decision shall not take effect unless it is confirmed on appeal or on summary application to the Circuit Court.
- 14.14 If the Commission is of the view that the contravention is continuing, the Commission may issue a notice to end contravention. A video-sharing platform service provider who without reasonable excuse fails to comply with a notice shall be guilty of an offence under the Act.
- 14.15 If, during the course of an investigation or otherwise, it appears to the Commission that content available on a designated online service is harmful online content, the Commission may issue a content limitation notice to a video-sharing platform service provider.

## ANNEX

### Part 10 – Definitions

For the purposes of clarity and ease of reference, the offence-specific categories of harmful online content referred to in the definitions “illegal content harmful to children” and “illegal content harmful to the general public” are listed in **Table A** and **Table B** below.

**TABLE A**

#### **Illegal content harmful to children**

**A–1 Content consisting of the offence-specific categories of harmful online content defined by s. 139A(1)(a) and Schedule 3 of the Act at points 15, 18, 32, and 33**

**No. Description of content**

15. Online content by which a person publishes, distributes, transmits or disseminates an advertisement, contrary to section 5 (1)(e) of the Child Trafficking and Pornography Act 1998 (advertisement of sale etc. of child pornography).
18. Online content by which a person encourages unlawful activity involving a child, contrary to section 249 of the Children Act 2001 (person with custody, charge or care of a child encouraging sexual offences on the child etc.).
32. Online content by which a person communicates with another person for the purpose of facilitating the sexual exploitation of a child, contrary to section 8 (1) of the Criminal Law (Sexual Offences) Act 2017.
33. Online content by which a person sends sexually explicit material to a child, contrary to section 8(2) of the Criminal Law (Sexual Offences) Act 2017.

**A–2 Content consisting of the offence-specific categories of harmful online content defined by s. 139A(1)(a) and Schedule 3 of the Act at points 11, 11A, 12, 13, 35, 36, 38, 39, 40 and listed in Table A–2 of the Annex where the victim of the offence is a child or the content is viewed or likely to be viewed by a child.**

11. Online content by which a person applies force to the body of another, or causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to such force, contrary to section 2 of the Non-Fatal Offences against the Person Act 1997.
- 11A. Online content by which a person without lawful excuse, intentionally or recklessly, causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to suffocation or strangulation, contrary to section 3A(1)(b) of the Non-Fatal Offences against the Person Act 1997.
12. Online content by which a person makes a threat, contrary to section 5(1) of the Non-Fatal Offences against the Person Act 1997 (threat to kill or cause serious harm to a person).

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13. Online content by which a person harasses another contrary to section 10(1), stalks another contrary to section 10(2), or breaches an order made under section 10(4), of the Non-Fatal Offences against the Person Act 1997.
35. Online content by which a person exposes his or her genitals intending to cause fear, distress or alarm to another person contrary to section 45(1) of the Criminal Law (Sexual Offences) Act 2017.
36. Online content by which a person intentionally engages in offensive conduct of a sexual nature contrary to section 45(3) of the Criminal Law (Sexual Offences) Act 2017.
38. Online content by which a person distributes or publishes or threatens to distribute or publish an intimate image, contrary to section 2(1) of the Harassment, Harmful Communications and Related Offences Act 2020 (distribution etc. of image without consent and with intent to cause harm etc.).
39. Online content by which a person distributes or publishes an intimate image, contrary to section 3(1) of the Harassment, Harmful Communications and Related Offences Act 2020 (distribution etc. of image without consent and so as seriously to interfere with peace and privacy or to cause alarm, distress or harm).
40. Online content by which a person—
  - (a) distributes or publishes a threatening or grossly offensive communication about another person, or
  - (b) sends a threatening or grossly offensive communication to another person, contrary to section 4 (1) of the Harassment, Harmful Communications and Related Offences Act 2020 (distribution etc. of communication with intent to cause harm).

## TABLE B

### Illegal content harmful to the general public

- B. Content consisting of the offence-specific categories of harmful online content defined by s. 139A(1)(a) and Schedule 3 of the Act at points 4, 5, 14 and 20.**

**No. Description of content**

4. Online content by which a person publishes or distributes written material, or a recording of visual images or sounds, contrary to section 2(1) of the Prohibition of Incitement to Hatred Act 1989 (material, images or sounds which are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred).

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5. Online content by which a person broadcasts visual images or sounds, contrary to section 3 (1) of the Prohibition of Incitement to Hatred Act 1989 (threatening, abusive or insulting images or sounds whose broadcast is intended or, having regard to all the circumstances, is likely to stir up hatred).
14. Online content by which a person distributes, transmits, disseminates or publishes child pornography, contrary to section 5 (1)(b) of the Child Trafficking and Pornography Act 1998.
20. Online content by which a person engages in public provocation to commit a terrorist offence, contrary to section 6 (1)(a)(i) of the Criminal Justice (Terrorist Offences) Act 2005 (where a "terrorist-linked activity" includes public provocation to commit a terrorist offence, as defined by section 4A of that Act).

## Explanatory Note

Under section 139K(2)(c) and 139K(3)(a) of the Act, the Commission is required to exercise its powers to make online safety codes a view to ensuring that video sharing platform service providers take appropriate measures to provide the protections set out in Article 28b(1)(a), (b) and (c) of the Audiovisual Media Services Directive, including appropriate measures referred to in Article 28b(3) of that Directive.

Article 139K(2)(d) and 3(b) and (c) of the Act require the Commission to exercise its powers with a view to ensuring that service providers comply with Article 9(1) of the Audiovisual Media Services Directive with respect to audiovisual commercial communications.

The definitions of “**audiovisual commercial communications harmful to the general public**” and “**audiovisual commercial communications harmful to children**” address the requirements of Article 9(1) of the Audiovisual Media Services Directive.

The definition of “**illegal content harmful to children**” addresses Article 28b(1)(a) of the Audiovisual Media Services Directive by providing for the application of the Code to offence- specific categories of harmful online content defined by section 139A(1)(a) and Schedule 3 of the Act that are harmful to children, or would be harmful to children insofar as the victim of the offence is a child or the content is viewed or likely to be viewed by a child.

The definition of “**illegal content harmful to the general public**” addresses Article 28b(1)(c) of the Audiovisual Media Services Directive, by providing for the application of the Code to content to offence-specific categories of online defined in section 139A(1)(a) and Schedule 3 of the Act that concern offences under Irish law that transpose or correspond to the offences under EU law referred to in Article 28b(1)(c) of the Audiovisual Media Services Directive, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4) of Directive 2011/93/EU, and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA.

The definition of “**regulated content harmful to children**” further addresses Article 28b(1)(a) of the Audiovisual Media Services Directive by providing for the application of the Code to content expressly contemplated in Article 6a of the Audiovisual Media Services Directive to be harmful to children, that is, pornography and gratuitous violence; to challenges that give rise to a risk to life or risk of significant harm to physical health or safety of children; and to categories of harmful online content defined by section 139A(1)(b), (3), and (4) of the Act when harmful to children.

The definition of “**regulated content harmful to the general public**” addresses Article 28b(1)(b) of the Audiovisual Media Services Directive, by providing for the application of the Code to content containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union, namely sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation.

**Appendix 2**

**Draft Statutory Guidance Materials**

## Statutory Guidance Materials – Online Safety Code

### Introduction

Further to Section 139Z(1) of the Broadcasting Act 2009 as amended (the “Act”), the Commission has developed guidance material to accompany the Online Safety Code (“Code”) dated [●]. This guidance, set out below, relates to the application of the measures detailed in Sections 11 - 13 of the Code.<sup>8</sup> This guidance does not form part of the Code. Rather, it sets out the Commission’s expectations as to how video-sharing platform service providers can best implement the provisions contained within the Code as well as actions that they may wish to take to support that implementation.

Failure to follow relevant aspects of guidance is not in itself a contravention within the meaning of Section 139Q of the Act. However, failure to follow guidance may be taken into account, to the extent the Commission considers it appropriate, when deciding whether to open an investigation and/or whether or not there has been a contravention.

In preparing and providing the guidance, the Commission recalls that it is not intended that any video-sharing platform provider would undertake measures contrary to the Commission’s e-Commerce Compliance Strategy.

### General Guidance: Obligations of Video-Sharing Platform Services

The Commission considers that the online safety measures set out under sections 11-13 of the Code will achieve their objective if the mechanisms used to implement them are effective, user-friendly, prominent, transparent, safe and up to date. In this regard:

**Effective.** The Commission considers an online safety mechanism to be effective when it achieves its intended purpose. Reasonable, proportionate and effective steps are encouraged so as to avoid the mechanisms from being circumvented through technical or other means (where relevant) or abused to cause harm or undermine how the provider addresses illegal or harmful content.

**Easy-to-Use.** The Commission considers an online safety mechanism to be easy-to-use when it is simple and intuitive to use for its intended users given its purpose. This includes making the mechanism accessible to people with a disability including through meeting legal requirements in place, as appropriate.

**Prominent.** An online safety mechanism is considered by the Commission to be prominent when it is easy to discover and access on the service’s user-interface in light of its purpose and its intended users.

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<sup>8</sup> Guidance is not provided on Section 13.4 which relates to reporting to the Commission by video-sharing platform services. The Commission will specify the manner and form of reports and for this reason guidance is not considered necessary at this time.



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**Transparent.** An online safety mechanism is considered by the Commission to be transparent when the choices it presents are clear and when the consequences of using the feature are clear to users who are using it.

**Safe.** An online safety mechanism is considered by the Commission to be safe when it supports the protection of children and adults by following safety by design principles. This could include, for example, carrying out safety impact assessments prior to the introduction of a new function or prior to introducing substantial modifications to an existing function for user-generated videos, in order to assess whether the mechanisms in place provide adequate protection in particular to children.

**Up to Date.** The Commission considers an online safety mechanism to be up to date when it works on all live versions of the service provided to users and all iterations of the service on different devices or platforms or other services as appropriate.

## Combining Measures

**Nothing in this Code would prohibit a provider from combining online safety measures with other kinds of features on services provided. In these instances:**

- a) the online safety measures must be effective, easy-to-use, prominent, transparent and up-to-date and their provision not otherwise impaired;
- b) the provider can continue to provide clear and unambiguous information concerning the online safety measures to the Commission for compliance purposes.

## Protections

Video-sharing platform service providers which choose to extend the protections required by the Code to a wider range of content types or a wider range of users are not required to establish separate mechanisms limited to the content and users as required by the Code.

## **Guidance: Terms and Conditions – Content (Sections 11.1-11.9 of the Code)**

The Commission advises video-sharing platform service providers to direct users via their terms and conditions or other avenues, in particular users who upload content, to Irish and European best practice guidelines on how to avoid causing harm or the dissemination of harmful content when uploading or sharing content regulated by the Online Safety Code. Ideally, information in this respect will be prominent in the terms and conditions.

It will be a matter for providers to decide what constitutes best practice but, by way of assistance, the Commission may publish on its website samples of best practice guidelines.

The Commission advises video-sharing platform service providers to assist users to identify content that falls within the scope of the Code e.g. content that poses a risk to the physical, mental or moral development of minors such as pornography, extreme or gratuitous violence, cyber-bullying, content that promotes eating or feeding disorders, content that promotes or makes available knowledge or

methods of self-harm or suicide, incitement to violence or hatred, and illegal content such as child sex abuse material, terrorism, racism and xenophobia.

## Content Detrimental to the Safety of Children – Definition of regulated content harmful to children

Due to the credulity and maturity levels of children of different ages, video content uploaded on video-sharing platform services can impact on the behaviour of children including situations where children may copy or try behaviour that will endanger their physical health. In this context, the Commission advises video-sharing platform service providers to take measures to reduce the risk that may arise from the uploading of content that could reasonably be expected to encourage a child to engage in behaviour dangerous to their physical safety such as certain challenges.

### **Guidance: Reporting and Flagging (Sections 11.11-11.15 of the Code)**

Reporting and flagging mechanisms are an important tool for enabling users of video-sharing platform services to highlight instances of illegal or harmful content and/or harmful audiovisual commercial communications on a service. In this context, the guidance below sets out the Commission's views on how these requirements may be met in practical terms.

#### User-friendly Reporting and Flagging

**The Commission considers that in order to ensure that reporting and flagging mechanisms are user-friendly, they ideally have the following features which allow users to:**

- tailor their notification appropriately for different forms of harmful or illegal content and/or harmful audiovisual commercial communications;
- state the reasons they believe the content is harmful or illegal content and/or harmful audiovisual commercial communications;
- ensure that the mechanisms adhere to national and European requirements with respect to accessibility for people with a disability; and
- **include a range of default options for different kinds of harmful or illegal content and/or harmful audiovisual commercial communications on the service in question.**

The Commission advises video-sharing platform service providers, when making content moderation decisions on foot of the reporting or flagging of content to do so in an objective, accurate, fair, reasoned and timely manner insofar as is practicable. The Commission is of the view that:

- A content moderation decision may be considered to be **objective** when it is based on facts and evidence.

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- A content moderation decision may be considered **accurate** when video-sharing platform service providers,
  - correctly identify whether the harmful content is present;
  - choose a reasonable and proportionate course of action to take; and
  - successfully implement that course of action.
- A content moderation decision may be considered **fair** where:
  - reasonable avenues to appeal the objectivity, accuracy, timeliness, and reason given for content moderation decisions are available to affected users, including through an appropriate out-of-court redress process;
  - it is non-discriminatory and non-arbitrary.
- A content moderation decision may be considered **reasoned** where the video-sharing platform service provider explains its decision to affected parties in a way that is reasonable in all the circumstances, having particular regard to the impact of the course of action taken by the provider on affected users.
- A content moderation decision may be considered **timely** when it is made reasonably quickly in all the circumstances, having particular regard to the need to reduce harmful content and seriousness of the content in question, having regard to legal obligations in place for the handling of harmful or illegal content and the impact on the individual (in particular on a child) of the content not being addressed quickly.

When deciding a course of action to take in a content moderation decision, the video-sharing platform service provider should consider the need to address harmful content and balance this proportionately with other relevant factors as far as is practicable in the circumstances.

## Interplay with the DSA

The Commission notes that certain moderation decisions made on foot of flags about breaches of terms and conditions required by the Code may be covered by relevant DSA provisions relating to moderation decisions taken on foot of terms and conditions. Examples include Statement of Reasons (Article 17), Internal Complaint-Handling Mechanism (Article 20) and Out of Court Dispute Resolution (Article 21). The Commission encourages video-sharing platform service providers to design these mechanisms so that they comply with relevant provisions of the Code as well as the DSA.

## **Guidance: Age Verification (Sections 11.16-11.21 of the Code)**

Age verification covers a range of techniques for estimating or verifying the ages of children and users, including:

- technical design measures;

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- self-declaration;
- tokenised age checking using third parties;
- AI and biometric-based systems; and
- hard identifiers like passports.

It is not uncommon that video content may not be pornographic in itself but will direct viewers via links to such content, including paid content. In that context, the Commission advises video-sharing platform service providers to take measures via age verification, estimation or other mechanisms to restrict the promotion to children and access by children of content that is harmful to them, including pornography through the out-linking from a video on their platform to content on sites outside of the platform.

Age estimation is a technique which involves an account-holder user declaring that they are a particular age and verifying the declaration through examination of the way the account makes use of the service or through biometric analytics. Effective age estimation should meet any industry standards adopted and report on quality parameters achieved as well as complying with data protection and privacy requirements.

The Code requires age verification techniques to be **effective** in ensuring that children are not normally able to access services or sections thereof that are devoted to adult content, and to be effective in ensuring that children are not normally able to view adult content on other services.

No age verification technique will be 100% effective but providers should minimise the error rate when children are misidentified as adults. The harm will be greatest if an error is made in the case of a child in their early teens and less if an error is made in the case of a child who is close to adulthood.

**Robust age verification** can include document-based age verification at sign up and selfie or live likeness based age verification on a per video or per session viewing basis. The use of a document plus a live selfie at account sign-up would be regarded as robust age verification; that other methods such as live selfie plus biometrics when content is accessed could also qualify as robust, as long as it was demonstrated that they provided an equivalent level of protection.

Other techniques such as self-declaration plus estimation based on use of the service are unlikely to be good enough to restrict access to pornography and extreme violent content. These may, however, be sufficient for preventing under-age users. Targets for effectiveness would have to be sufficiently high and effectiveness would need to be demonstrated to have been achieved.

Tokenised age services may be considered. Self-declaration is not considered by the Commission to be an effective form of age verification.

## **Guidance: Content Rating (Sections 11.22-11.23 of the Code)**

It is the view of the Commission that an effective content rating mechanism is one that takes a consistent approach. To that end, the Commission may consider at a future date whether to introduce a consistent system to be used by providers coming within the scope of this Code, subject to further consultation.

Pending this, the Commission advises that video-sharing platform service providers, when giving effect to this content rating mechanism, facilitate users to rate content based on the national ratings system in effect in their location in the European Union such as IFCO in Ireland and NICAM in the Netherlands.

Content rating could distinguish between material posted as a contribution to civic discourse or for educational purposes as opposed to material that is intended to entertain, disgust or shock.

### **Guidance: Parental Controls (Sections 11.24-11.28 of the Code)**

The Commission considers that effective controls are necessary in order to allow parents or guardians to protect children from harmful or illegal content and/or harmful audiovisual commercial communications. In this respect, the Commission advises that video-sharing platform providers in developing and applying parental controls have regard to the following:

- The Commission advises that parental control may include the following features:
  - a feature allowing the limiting of a child's aggregate screen time per day or week to an amount determined by the parent or guardian;
  - allow for the restriction of a child's access to the service at any particular time of the day, such as disabling screentime over the sleep/night-time periods, including on a schedule;
  - allow for the blocking of access to any accounts or users the child may encounter that may expose them to videos that may impair their physical, mental or moral development;
  - allow for the restriction of access to any accounts or users which are unknown to a child (no contact by strangers);
  - facilitate a parent or guardian to disable and re-enable access to functions on the service where the child may be exposed to videos that may impair their physical, mental or moral development;
  - ensure that any auto-play functions are turned off by default;
  - allow for the blocking or re-enabling of access to categories of content in accordance with the service's content rating scheme;
  - include a feature that can restrict the child from distributing video content, including video content they have recorded;
  - default to privacy settings being turned on for a child;
  - default to geolocation settings being turned off for a child;

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- default to content which is universally suitable for children and do so also where the age of the user is unknown;
  - allow a minor to default to private rather than public sharing of any posts; and
  - raise notifications to the provider about prohibited user-behaviour on the child's behalf.
- Live-streaming is a functionality available on many video-sharing platforms. In practical terms, this functionality allows a user of a platform to stream a video in real time over the platform. This can create particular risks for the dissemination of harmful or illegal content or harmful audiovisual commercial communications which can be difficult to manage reactively. The Commission has set requirements in this respect under the measures dealing with parental controls. In addition, the Commission advises video-sharing platform service providers to take reasonable, proportionate and effective measures to reduce the risk of the dissemination by users of harmful or illegal content and/or harmful audiovisual commercial communications through the live-streaming functionality on their service as a whole.
  - The Commission considers that video-sharing platform service providers, when designing, implementing and maintaining parental controls, should have special regard to: -
    - the rights of children under Article 24 of the EU Charter and the UN Convention on the Rights of Children;
    - the rights of parents/guardian; and
    - data protection duties and obligations.
  - The Commission advises video-sharing platform service providers to take reasonable and proportionate steps to verify users have an appropriate relationship (that of parent or guardian) with the child before enabling access to this feature.
  - Parental controls are to be brought to the attention of users and be easy to find and use. The Commission may request information from platforms regarding the parental controls in place and the effectiveness of those measures.

## **Guidance: Complaints (Sections 11.29-11.31 of the Code)**

- The Commission considers that a video-sharing platform service provider should make available to users information on the manner in which it will handle complaints including clear and accessible information about where complaints may be made, the standard timeframes for the resolution of complaints, information on how it will prioritise complaints as well as information on any appeals processes in effect. Best practice guidance is available from the Office of the Ombudsman here: <https://www.ombudsman.ie/guidance-for-service-providers/model-complaints-system-a/model-complaints.pdf>.

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In the case of complaints made by children, video-sharing platform service providers are advised to have regard to the guidelines also published by the Ombudsman for Children, A Guide to Child-Centred Complaints Handling, which may be found here: <https://oco.ie/library/guide-child-centred-complaints-handling/>.

- The Commission advises video-sharing platform service providers to reasonably prioritise the notifications they receive about harmful content addressed by the Code from nominated bodies and trusted flaggers provided for in the Act and the DSA. The Commission advises video-sharing platform providers operating the mechanisms established for reporting/flagging content to integrate these with mechanisms provided for notifying content that is otherwise in breach of the terms and conditions of the service, and the mechanism for notifying content which is illegal under the DSA.

## **Guidance: Commercial Communications (Sections 12.1-12.11 of the Code)**

- Commercial communications include advertising, sponsorship, product placement, teleshopping and other forms of marketing. Commercial communications that are harmful to the general public and/or children can have negative impacts on individuals, groups in society and on business. The Commission will develop specific additional requirements as they relate to commercial communications, including those relating to the promotion of foods that are high in fat, salt and sugar and infant and follow-on formula and these will be applied to commercial communications on platforms falling under the jurisdiction of the Code. This will be done following consultation with the public and with video-sharing platform service providers. Prior to that, the Commission advises video-sharing platform providers to have due regard to the General and Children's Commercial Codes of Coimisiún na Meán as they relate to the matters addressed under Article 9(1) of the Audiovisual Media Services Directive.<sup>9</sup> The Commission also directs providers to the Code of Standards for Advertising and Marketing Communications in Ireland.
- On the matter of commercial communications for infant and follow-on formula, video-sharing platform service providers are reminded that legislation on such marketing must be adhered to. On the matter of commercial communications relating to foods high in fat, salt and sugar, the Commission strongly encourages providers to engage with existing non-statutory regulatory measures in place for the promotion of foods high in fat, salt and sugar.
- The Commission advises video-sharing platform service providers to explain the requirements with respect to audiovisual commercial communications under this part of the Code in easy-to-understand terms. Similarly, the Commission advises providers to explain in easy-to-understand terms the categories of audiovisual commercial communications that are prohibited or restricted by this Code.

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<sup>9</sup> Directive (EU) 2010/13 (as amended by Directive (EU) 2018/1808).

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- The Commission advises video-sharing platform service providers to ensure that commercial communications which are only suitable for adults are displayed only to logged-in accounts whose holders have been identified as adults through effective age estimation or age verification techniques as appropriate.

## Declaration of Audiovisual Commercial Communications (Sections 12.10-12.11 of the Code)

It is the Commission's view that it is in the interest of users that there is a consistent approach to the manner in which users declare the presence of audiovisual commercial communications when uploading content. This is to support transparency in this respect. The Commission considers that video-sharing platform service providers should adopt a consistent labelling system for audiovisual commercial communications uploaded by users.

The Commission will consider, over time, whether to specify a labelling system to be used across video-sharing platform services coming within the scope of the Code. Pending this, the Commission recommends that video-sharing platform service providers follow the guidance issued in 2023 by the Competition and Consumer Protection Commission and the Advertising Standards Authority of Ireland. This can be viewed here: - <https://www.ccpc.ie/business/help-for-business/guidelines-for-business/influencer-advertising-and-marketing/>.



## **Guidance: Media literacy – Measures and Tools (Sections 13.1-13.2 of the Code)**

When implementing the requirements under these sections of the Code, the Commission advises video-sharing platform service providers to have regard to the following guidance with respect to media literacy tools and measures.

- The Commission considers that effective measures to promote media literacy have some of the following qualities. They are:
  - **Relevant:** Media literacy measures taken by providers are tailored to address harmful content and prohibited user-behaviour that arises on their service in practice.
  - **Transparent:** Providers are clear with users and the general public about the objectives of the media literacy measures they take.
  - **Collaborative:** Providers collaborate with key stakeholders who can provide expertise, evaluation and other elements essential to ensuring the value of the media literacy measures.
  - **Objective:** Media literacy measures taken by providers are objective and driven primarily by the interests of users and the general public (as applicable).

The Commission advises video-sharing platform service providers to consider undertaking the following measures, as appropriate:

- providing media literacy features and materials for users;
  - promoting awareness and understanding of harmful content and their content moderation guidelines with the general public;
  - participating in and organising media-literacy focused events;
  - participating in forums and campaigns to promote media literacy;
  - supporting research into media literacy; and
  - any other measures that are appropriate to promote media literacy.
- The Commission advises that the measures providers take to develop media literacy skills of their users under this section are those that aim, among other things, to:
    - promote digital civility and respect and resilience online;
    - support users to access content on the service safely and effectively;
    - support users to upload, share and create content on the service responsibly and safely;

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- promote users' understanding of the service, including its functions and features, its content moderation guidelines and its online safety features, and in particular its content rating feature;
- promote users' awareness of the provider's responsibilities under the Code;
- equip users with critical thinking skills required to exercise judgment, analyse complex issues and recognise the difference between opinion and fact; and
- promote understanding of the difficulties that users with protected characteristics can face in online environments.

## **Guidance: Personal Data – Children (Section 13.3 of the Code)**

Video-sharing platforms are reminded of their obligations under data protection legislation and the particular impact that poor data protection measures may have on children. In addition to legislative provisions, providers are directed to the document produced by the Data Protection Commission - The Fundamentals for a Child-Oriented Approach to Data Processing.

This document may be accessed here: <https://dataprotection.ie/en/dpc-guidance/fundamentals-child-oriented-approach-data-processing>.

**Appendix 3**

**Draft Supplementary Measures and Guidance**

## **1. Draft Supplementary Measures for inclusion in the Online Safety Code**

### **1.1 Safety by Design**

Providers of video-sharing platform services shall prepare and publish their methodology for conducting safety impact assessments that are effective in identifying and mitigating safety issues relating to the physical, mental and moral development of minors, the protection of minors from sexual abuse, and the protection of the general public from racism, xenophobia and incitement to hatred or violence on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union, namely sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation.

The methodology shall have due regard to the principle of safety by design and shall specifically address the particular issues that arise in respect of the safety of children. In the case of Very Large Online Platforms (VLOPs), the methodology can take account of the risk assessment and mitigation measures required by Articles 34 and 35 of the DSA.

Prior to the introduction of a new function relating to user-generated videos or prior to introducing substantial modifications to an existing function for user-generated videos, video-sharing platform service providers shall undertake an online safety impact assessment. In the case of existing functions relating to user-generated videos, providers should complete safety impact assessments for existing services within one year of the adoption of the Code unless, in the case of VLOPs, these risks have already been equivalently addressed and mitigated through the risk assessment and mitigation requirements of the DSA.

Safety assessments shall detail how the video-sharing platform provider has addressed safety issues identified, including child safety issues in particular, and provide the basis for the choices it has made in light of the online safety impact assessment.

In undertaking online safety impact assessments, video-sharing platform service providers shall have due regard to the principle of safety by design.

Video-sharing platform service providers shall provide the Commission, upon request, with a copy of their online safety impact assessment.

### **1.2 Online Safety Supports**

Video-sharing platform service providers shall publish an online safety support plan containing appropriate and effective measures to support the welfare of users impacted by content covered by this Code.

In preparing this plan, video-sharing platform service providers shall consider the following measures to support users impacted by content covered by this Code, as appropriate:

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- providing users affected by content covered by this Code with contact information about organisations that can support their welfare;
- developing schemes and arrangements with organisations and institutions that can directly support affected users, for example schools, charities and NGOs;
- funding initiatives to support users affected by content covered by this Code;
- providing support materials to users directly impacted by content covered by this Code;
- contacting local authorities in circumstances where the provider considers there may be an imminent and serious risk to the life or health of a user; and
- any other measures that are appropriate to support users impacted by content covered by this Code.

## 1.3 Recommender System Safety

Video-sharing platform service providers shall, as far is practicable, take reasonable, proportionate and effective measures to reduce the risk of harm (in particular to children) caused by the manner in which recommender feeds aggregate and deliver content to users.

Video-sharing platform service providers must ensure that the operation of recommender systems does not result in a user being exposed to content which, in aggregate, causes harm.

Video-sharing platform service providers shall provide a report on actions taken in respect of recommender feeds to the Commission annually or at other intervals determined by the Commission and in the manner specified from time to time by the Commission.

Specifically, video-sharing platform service providers shall prepare, publish and implement a recommender system safety plan that includes effective measures to mitigate risks that their recommender systems may cause harm by:

- exposing users to relevant content which, in aggregate, causes harm;
- amplifying relevant content which is harmful to children or to the general public;
- exposing children to relevant content that is harmful to them;
- facilitating online relationships between children and adults who are unknown to them; and
- encouraging a child to spend an amount of time using the service that poses a risk to their physical, mental or moral development.

In preparing a recommender system safety plan, a video-sharing platform service provider must at a minimum consider the following measures and explain whether and how it has given effect to them:

- measures to ensure that a feed of content is not dominated by one type of content and contains a minimum amount of content that would be viewed positively by users;
- measures to allow a user to reset any profiling algorithm so that it functions as if the user was a new user;
- measures to ensure effective review of content before it is recommended to a large number of users;
- measures to ensure that recommendations for children are not based on data that includes adult usage of the service;
- measures to ensure that content posted by children is not recommended to adults, and that adults are not able to view children's accounts unless invited;

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- measures to ensure that recommender algorithms based on profiling are turned off by default;
- measures to ensure that algorithms that engage explicitly or implicitly with special category data such as political views, sexuality, religion, ethnicity or health should have these aspects turned off by default; and
- measures to ensure that mechanisms for withdrawing consent about the way profiling data is used are regularly presented to users in ways that are as high-profile and easy to use as the mechanism for granting consent

Video-sharing platform service providers may prepare a recommender system safety plan that covers risks covered by all types of content on their service.

Video-sharing platform service providers who are Very Large Online Platforms may meet their obligation to prepare and publish a recommender system safety plan by extracting and publishing sections related to recommender system risks from the systemic risk assessment and mitigation measures they have prepared pursuant to Articles 34 and 35 of the DSA, provided those sections at a minimum address the risks and measures referred to above.

## **2. Draft Guidance Materials to support the proposed Supplementary Measures**

### **2.1 Safety by Design**

Safety by design involves identifying safety risks in advance of developing a new product or service and considering how to mitigate those risks. Safety by Design is a well-established approach to product and service design and the principles of this type of approach have been in recent years been applied to social media platforms, including video-sharing platform services.

See here for more information on Safety by Design - <https://www.esafety.gov.au/industry/safety-by-design> and here - [5Rights | Design of Service \(5rightsfoundation.com\)](https://www.5rights.org/)

In the context of the online safety measures set out in the Code, the Commission considers that their effective implementation will be best achieved and best informed by the video-sharing platform service provider taking a Safety by Design approach. Steps to take in order to apply a safety by design approach by a provider will include, at a minimum, the following:

- Prior to the introduction of a new function relating to user-generated videos or prior to introducing substantial modifications to an existing function for user-generated videos, video-sharing platform service providers would undertake an online safety impact assessment in order to assess whether the mechanisms in place provide adequate protection to children in accordance with Article 24 of the EU Charter and the general public.
- In the case of existing functions relating to user-generated videos, providers would complete safety impact assessments for existing services within one year of the adoption of the Code unless, in the case of VLOPs, these risks have already been equivalently addressed and mitigated through the risk assessment and mitigation requirements of the DSA.

- Safety impact assessments would detail how the video-sharing platform provider has addressed safety issues identified, including child safety issues in particular, and provide the basis for the choices it has made in light of the online safety impact assessment.
- The outcomes of the assessment would be provided to the Commission on request.

## 2.2 Online Safety Supports

Engagement with harmful and age-inappropriate content can have detrimental outcomes for users. The Commission encourages video-sharing platform service providers to consider what steps they can take to support people in such circumstances. This could include a range of options, such as:

- providing users affected by harmful content with contact information about organisations that can support their welfare;
- developing schemes and arrangements with organisations and institutions that can directly support affected users, for example schools, charities and NGOs;
- funding initiatives to support users affected by harmful content;
- providing support materials to users directly impacted by harmful content; and
- contacting local authorities in circumstances where the provider considers there may be an imminent and serious risk to the life or health of a user.

## 2.3 Recommender Feeds

Recommender feeds draw on a range of data, including user data about preferences, prior actions and other related data, to identify content that may be of interest to users of video-sharing platform services. When they are badly designed, they can lead to negative outcomes for users, particularly vulnerable users such as children. This is because a user may choose to initially look at content that may be harmful and the recommender system then feeds the user with similar content; this can compound the harm and these feeds may become toxic. Examples are toxic beauty feeds which may lead to eating or feeding disorders, self-harm or suicide, radicalisation feeds which may lead to incitement to hatred or violence, self-esteem harming feeds which may lead to self-harm or suicide, and toxic misogyny feeds which may lead to incitement to hatred or violence.

Recommender systems may also amplify harmful content across platforms. For this reason, the Commission advises video-sharing platform service providers to take reasonable, proportionate and effective measures to reduce the risk of harm (in particular to children) being caused by how recommender feeds aggregate and deliver content to users and to take measures to reduce the risk that may arise from recommender feeds which contain harmful content, on their own or in aggregate. The Commission recommends that a safety impact assessment be conducted in relation to recommender algorithms and that safety should be prioritised before optimising user engagement.

This could include ensuring that feeds are appropriately varied. The Commission also encourages video-sharing service providers to include a feature allowing users to reset the data being used by an algorithm or an ability to reset an algorithm which may allow a user to escape from a toxic feed or that recommender algorithms based on profiling are turned off by default.

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Video-sharing platform providers are required to report to the Commission on measures being taken to address toxic feeds and measures being taken to address the amplification of harmful content online at least annually or at other intervals determined by the Commission and in the manner specified from time to time by the Commission. The Commission considers that content which is amplified and viewed in large numbers requires increased scrutiny regarding its safety.



## Appendix 4

### List of Consultation Questions

#### Consultation on Online Safety Code

1. Do you have any comments on sections 1 - 9 of the draft Code?
2. What is your view on the proposal to include user-generated content that is indissociable from user-generated videos in the definition of content to be covered by the Code?
3. What is your view on the definitions of “illegal content harmful to children” and “regulated content harmful to children”?
4. What is your view on the other definitions of illegal content and regulated content?
5. Do you have any comments on any other definitions provided in the draft Code?
6. What is your view on the obligations in the draft Code that relate to what a VSPS provider must include in its terms and conditions?
7. What is your view on the requirement in the draft Code for a VSPS provider to suspend or terminate an account in certain circumstances?
8. What is your view on the requirements in the draft Code in relation to reporting and flagging of content?
9. What is your view on the requirements in the draft Code in relation to age verification?
10. What is your view on the requirements in the draft Code in relation to content rating?
11. What is your view on the requirements in the draft Code in relation to parental controls?
12. What is your view on the requirements in the draft Code in relation to complaints?
13. Do you have any other comments on the requirements in section 11 of the draft Code?
14. What is your view on the requirements in the draft Code in relation to audiovisual commercial communications which are not marketed, sold or arranged by the VSPS provider?

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15. What is your view on the requirements in the draft Code in relation to audiovisual commercial communications which are marketed, sold or arranged by the VSPS provider?
16. What is your view on the requirements in the draft Code in relation to user declarations that user-generated content contains an audiovisual commercial communication?
17. Do you have any other comments on the requirements in section 12 of the draft Code in relation to audiovisual commercial communications?
18. What is your view on the requirements in the draft Code in relation to media literacy measures?
19. What is your view on the requirements in the draft Code in relation to ensuring the personal data of children is not processed for commercial purposes?
20. What is your view on the requirements in the draft Code in relation to reporting in relation to complaints?
21. Do you have any other comments on the requirements in section 13 of the draft Code?
22. Do you have any comments on this section of the Draft Code?
23. Do you have any comments on the Annex?
24. Do you have any other comments on any section or aspect of the draft Code, including with reference to section 139M of the Act in relation to the matters the Commission is required to consider in developing an online safety code?

## **Consultation on Statutory Guidance**

25. Do you have any comments on this draft Guidance, including in relation to the matters required to be considered by the Commission at section 139ZA of the Act?

## **Consultation on the application of the Code to the category of video-sharing platform services**

26. Do you have any comments on the proposed application of this draft Code to the category of video-sharing platform services?
27. Do you have any comments on the proposed application of this draft Code to named individual video-sharing platform services?

## **Proposed Supplementary Measures and Related Guidance**

28. Is there anything you consider the Commission needs to be aware of in relation to the draft supplementary measures and draft supplementary guidance as it further develops its thinking in these areas and seeks to effectively fulfil its mandate in relation to online safety?

## Appendix 5

### Legislative Background and Provisions

#### 1. Legislative Background

This section addresses the legislative context for the preparation of the Online Safety Code and indicates the legal basis for each of the separate elements of this consultation.

#### Audiovisual Media Services Directive (the “AVMS Directive”)

Member States are required to give effect to Directive (EU) 2010/13 (as amended by Directive (EU) 2018/1808). The draft Code is intended to give effect to the AVMS Directive in Ireland, in particular:

- to ensure that service providers take appropriate measures to provide the protections set out in Article 28b(1)(a), (b) and (c) of the AVMS Directive;
- to include measures referred to in Article 28(b)(3) of the AVMS Directive; and
- to ensure that service providers comply with Article 9(1) of the AVMS Directive.

#### Online Safety Codes

The Commission may make online safety codes to be applied to designated online services.<sup>10</sup> Under section 139K(2) of the Act, an online safety code may make provision with a view to ensuring that service providers:

- take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content;
- take any other measures that are appropriate to protect users of their services from harmful online content;
- take any other measures that are appropriate to provide the protections set out in Article 28b(1)(a), (b) and (c) of the AVMS directive; and
- take any measures in relation to commercial communications on their services that are appropriate to protect the interests of users of their services, and in particular the interests of children.

Specifically, in respect of VSPS providers, the Commission is **required** to exercise its powers to make online safety codes in a particular way: under section 139K(3), they must be exercised with a view to ensuring that VSPS providers:

- take appropriate measures to provide the protections referred to in Article 28b(1)(a), (b) and (c) of the AVMS Directive, including appropriate measures referred to in Article 28b(3) of the AVMS Directive;
- comply with the requirements set out in Article 9(1) of the AVMS Directive with respect to audiovisual commercial communications that are marketed, sold or arranged by them; and

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<sup>10</sup> See section 139K and section 139L of the Act.

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- take appropriate measures to comply with the requirements set out und Article 9(1) of the AVMS Directive with respect to audiovisual commercial communications that are not marketed, sold or arranged by them, taking into account the limited control they exercise over those communications.

The Act also contains a more general list of matters that an online safety code may consider, including:<sup>11</sup>

- standards that services must meet, practices that services must follow, or measures that service providers must take;
- in particular, standards, practices or measures relating to the moderation of content or to how content is delivered on services;
- the assessment by service providers of the availability of harmful online content on services, of the risk of it being available, and of the risk posed to users by harmful online content;
- the making of reports by service providers to the Commission;
- the handling by service providers of communications from users raising complaints or other matters.

The Commission is required to make, under section 139K(6), an online safety code to be applied to such designated online services as it considers appropriate, that requires service providers to report to the Commission in relation to complaints handling.

In preparing an online safety code, the Commission is required to have regard in particular to the matters set out at section 139M of the Act, and follow the procedure at section 139N of the Act.

## Guidance Materials

The Commission may issue guidance materials for providers of relevant online services on:

- identifying harmful online content, and in particular in relation to the risk test set out in section 139A(4) of the Act;
- on any other matter relating to the operation of [Part 8 in relation to online safety] of the Act; and
- otherwise for the protection of minors and the general public from harmful online content and age-inappropriate online content.

The Commission considers it is appropriate to issue guidance in light of its work to date in identifying and collecting information on online harms and on their effects.

In preparing any guidance materials, the Commission must have regard in particular to the matters at section 139ZA of the Act, and must consult under section 139Z(2) of the Act. This is a second separate element of the current consultation.

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<sup>11</sup> Section 139K(4) of the Act.

## Designating services to which codes apply

A designation that an online service is a “relevant online service”, to which an online safety code may apply, can be made either in relation to a named service or in relation to all services falling within a category of services.<sup>12</sup> A service may be designated both as an individual named service and as falling within a category of online services.

The Commission is required to designate VSPS, the provider of which is under the jurisdiction of the State, as a category of services to which an online safety code may be applied.<sup>13</sup> Notice of this designation was published on 14 August 2023 and the designation took effect on 11 September 2023.<sup>14</sup>

An online safety code applies to a designated service if the Commission has made a determination and given the requisite notice.<sup>15</sup> Before making such a determination, the Commission must have regard in particular to certain matters and consult appropriately.<sup>16</sup> This consultation seeks views on the application of the draft Code to the VSPS category of services, which is the third separate element of this consultation.

The Commission must also designate as a named service any relevant online service that appears to be a VSPS where the provider of the service is under the jurisdiction of the State.<sup>17</sup> The Commission is currently undertaking the process required to designate named individual VSPS providers. The Commission will separately consult on the application of the draft Code to named services, with the providers of those services.<sup>18</sup>

## 2. Legislative Provisions

The following is a **non-exhaustive** list of relevant domestic and EU legislative provisions.

### **Broadcasting Act 2009 (as amended) – Part 11: Online Safety**

#### **Harmful online content**

**139A.—** (1) For the purposes of this Act, online content is ‘harmful online content’ if it is one of the following 2 kinds:

- (a) content that falls within one of the offence specific categories of online content defined in subsection (2);
- (b) content that –
  - (i) falls within one of the other categories of online content defined in subsection (3), and
  - (ii) meets the risk test defined in subsection (4).

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<sup>12</sup> Section 139E(2) of the Act.

<sup>13</sup> Section 139G(1) of the Act.

<sup>14</sup> See <https://www.cnam.ie/designation-notice/>

<sup>15</sup> Section 139L(1) of the Act.

<sup>16</sup> Section 139L(3) and (4) of the Act.

<sup>17</sup> Section 139G(2) of the Act.

<sup>18</sup> Section 139L(4)(a) of the Act.

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(2) The offence-specific categories of online content are –

- (a) the categories listed in Schedule 3, and
- (b) any category specified for the purposes of this paragraph by order under section 139B.

(3) The other categories of online content are:

- (a) online content by which a person bullies or humiliates another person;
- (b) online content by which a person promotes or encourages behaviour that characterises a feeding or eating disorder;
- (c) online content by which a person promotes or encourages self-harm or suicide;
- (d) online content by which a person makes available knowledge of methods of self-harm or suicide;
- (e) any category specified for the purposes of this paragraph by order under section 139B.

(4) Online content meets the risk test for the purposes of subsection (1)(b) (ii) if it gives rise to –

- (a) any risk to a person's life, or
- (b) a risk of significant harm to a person's physical or mental health, where the harm is reasonably foreseeable.

(5) For the purposes of this Act, any question whether particular online content falls within a category under this section shall be determined on the balance of probabilities.

## **Age-inappropriate online content**

**139D.** — In this Part, 'age-inappropriate online content' means online content that is likely to be unsuitable for children (either generally or below a particular age), having regard to their capabilities, their development, and their rights and interests, including in particular content consisting of—

- (a) pornography, or
- (b) realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty.

## **Designation of online services**

**139E.** (1) The Commission may designate a relevant online service as a service to which online safety codes may be applied under Chapter 3.

(2) A designation under this section may be made in relation to a named service, or in relation to all services falling within a category of services described in the designation (and a service may be designated both as a named service and as falling within a category).

(3) Subject to section 139G the Commission, in deciding whether to designate a named service or a category of services, shall have regard in particular to—

- (a) the nature and the scale of the service or of services within the category,
- (b) provision made or that may be made by online safety codes that may be applied to the service or to services within the category,
- (c) other provisions of or made under this Act that apply to designated online services,
- (c) levels of availability of harmful online content on the service, or on services within the category,
- (d) levels of risk of exposure to harmful online content when using the service, or services within the category,

- (f) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it on the service, or on services within the category,
- (g) the rights of the provider of the service, or providers of services within the category, and
- (h) the rights of users of the service, or users of services within the category.

## Requirement to designate video-sharing platform services

**139G.** (1) The Commission shall designate as a category of services under section 139E the video-sharing platform services the provider of which is under the jurisdiction of the State.

(2) The Commission shall designate as a named service under section 139E any relevant online service that appears to the Commission to be a video-sharing platform service the provider of which is under the jurisdiction of the State.

(3) Where the Commission has reason to believe that a relevant online service may be a video-sharing platform service the provider of which is under the jurisdiction of the State, the Commission shall issue a notice under section 139F requiring the provision of any information that appears to the Commission to be relevant for the purpose of complying with subsection (2).

(4) For the purposes of subsections (2) and (3) the Commission shall have regard to any guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion in the definition of a video-sharing platform service in Article 1(1)(aa) of the Directive.

## Online safety codes

**139K.** — (1) The Commission may make codes ('online safety codes'), to be applied to designated online services in accordance with section 139L.

(2) An online safety code may make provision with a view to ensuring—

- (a) that service providers take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content,
- (b) that service providers take any other measures that are appropriate to protect users of their services from harmful online content,
- (c) that service providers take any other measures that are appropriate to provide the protections set out in Article 28b(1)(a), (b) and (c) of the Directive, and
- (d) that service providers take any measures in relation to commercial communications on their services that are appropriate to protect the interests of users of their services, and in particular the interests of children.

(3) In the case of video-sharing platform services, the Commission shall exercise its powers under this section with a view to ensuring (without prejudice to any other exercise of those powers in relation to video-sharing platform services) that service providers—

- (a) take appropriate measures to provide the protections referred to in subsection (2)(c), including appropriate measures referred to in Article 28b(3) of the Directive,
- (b) comply with the requirements set out in Article 9(1) of the Directive with respect to audiovisual commercial communications that are marketed, sold or arranged by them, and
- (c) take appropriate measures to comply with the requirements set out in Article 9(1) of the Directive with respect to audiovisual commercial communications that are not marketed, sold or arranged by them, taking into account the limited control they exercise over those communications.



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- (4) Without prejudice to subsection (2) an online safety code may provide for:
- (a) standards that services must meet, practices that service providers must follow, or measures that service providers must take;
  - (b) in particular, standards, practices or measures relating to the moderation of content or to how content is delivered on services;
  - (c) the assessment by service providers of the availability of harmful online content on services, of the risk of it being available, and of the risk posed to users by harmful online content;
  - (d) the making of reports by service providers to the Commission;
  - (e) the handling by service providers of communications from users raising complaints or other matters.
- (5) Without prejudice to subsection (2) or (4), an online safety code may prohibit or restrict, in accordance with law, the inclusion in programmes or user-generated content of commercial communications relating to foods or beverages considered by the Commission to be the subject of public concern in respect of the general public health interests of children, in particular infant formula, follow-on formula or foods or beverages which contain fat, trans-fatty acids, salts or sugars.
- (6) Without prejudice to subsection (4), the Commission shall make an online safety code, to be applied in accordance with section 139L to such designated online services as the Commission considers appropriate, requiring the service provider to report to the Commission at intervals, specified in the code, of not more than 3 months on the provider's handling of communications from users raising complaints or other matters.
- (7) In this section, 'service provider' means the provider of a designated online service.

## **Application of online safety codes**

**139L.** — (1) An online safety code applies to a designated online service if—

- (a) the Commission has determined that the code is to apply to the service, or to a designated category of services that includes the service,
  - (b) the Commission has given notice of the determination, and the notice has taken effect, in accordance with subsection (2), and
  - (c) the determination has not been revoked.
- (2) Notice under subsection (1)(b)—
- (a) in the case of a service designated as a named service, must be given to the provider of the service in writing, and takes effect when the notice is given to the provider, and
  - (b) in the case of a designated category of services, must be given by publication of notice of the determination on a website maintained by the Commission, and takes effect at the end of the period of 28 days after the date on which the notice is published on the website.
- (3) Before making or revoking a determination under subsection (1) in relation to a named service or a category of services, the Commission shall have regard in particular to —
- (a) the nature and the scale of the service, or of services within the category,
  - (b) levels of availability of harmful online content on the service, or on services within the category,
  - (c) levels of risk of exposure to harmful online content when using the service, or services within the category,
  - (d) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it on the service, or on services within the category,
  - (e) the rights of the provider of the service, or providers of services within the category, and
  - (f) the rights of users of the service, or users of services within the category.

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(4) Before making or revoking a determination under subsection (1), the Commission shall consult—

- (a) where the designation is of a named service, the provider of the service,
- (b) where the designation is of a category of services—
  - (i) an organisation representative of providers of services falling within the category, if there is such an organisation, and
  - (ii) the providers of those services, so far as the Commission is able to consult them,
- (c) any advisory committee the Commission has established for that purpose under section 19, and
- (d) any other person the Commission considers appropriate.

(5) An online safety code applying to an interpersonal communications service or a private online storage service applies to that service only in so far as it relates to content that falls within one of the offence-specific categories of online content defined in section 139A(2).

(6) In this section—

‘interpersonal communications service’ means a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information between a finite number of persons by means of electronic communications networks, where the persons initiating or participating in the communication determine its recipients, but it does not include services which enable interpersonal and interactive communication only as a minor ancillary feature that is intrinsically linked to another service;

‘private online storage service’ means any service providing online storage, other than—

- (a) local or temporary storage, or
- (b) storage provided for the purpose of enabling the provision of another service, or as a minor ancillary feature intrinsically linked to another service;

‘temporary storage’ means the automatic, intermediate and temporary storage of information for the sole purpose of making more efficient onward transmission of that information.

## **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.

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## **Online safety codes: procedure**

**139N.** — (1) Before making an online safety code, the Commission—

- (a) shall consult—
    - (i) any advisory committee it has established for that purpose under section 19, and
    - (ii) any other person the Commission thinks appropriate, and
  - (b) may consult a public health authority about any provision of an online safety code referred to in section 139K(2)(d) which it proposes to make.
- (2) As soon as practicable after making an online safety code, the Commission shall give a copy of the code to the Minister.
- (3) As soon as practicable after receiving a copy of an online safety code under subsection (2), the Minister shall lay copies of the code before each House of the Oireachtas.
- (4) The Commission may at any time amend or revoke an online safety code, or any provision of an online safety code, and subsections (1) to (3) apply to an amendment or revocation of an online safety code as they apply to an online safety code.
- (5) The Commission shall from time to time review the operation of any online safety code it makes.
- (6) If the Minister makes a request in writing to the Commission to review the operation of an online safety code, the Commission shall carry out the review and give the Minister a report on the review in writing within a reasonable time.
- (7) The Commission shall publish a report given to the Minister under subsection (6) on a website maintained by the Commission.

## **Compliance with online safety codes: information notices**

**139O.** — (1) The Commission may by notice in writing require the provider of a designated online service to provide the Commission with information relating to the provider's compliance with an online safety code over any period, and may require such information to be provided periodically for a succession of periods.

- (2) A notice must—
- (a) identify the information to be provided and the period or periods it must relate to, and
  - (b) state when the information is to be provided.
- (3) A notice may not require information to be provided before the end of the period of 7 days beginning on the date on which the notice is received by the provider.
- (4) The Commission may at any time by notice in writing extend the time within which information is to be provided.

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- (5) If within the period referred to in subsection (3) the provider requests the Commission to make an extension under subsection (4), the period beginning with the date on which the Commission receives the request and ending on the date notice of the Commission's decision on the request is received by the provider does not count towards the time within which the information is to be provided.
- (6) The provider of a designated online service is guilty of a category 1 offence if—
- (a) the provider fails without reasonable excuse to comply with a notice under subsection (1), or
  - (b) in purported compliance with a notice under subsection (1), the provider provides false information, knowing that it is false or being reckless as to whether it is false.
- (7) If the Commission is notified by a nominated body of a matter that appears to the Commission to be relevant to a provider's compliance with an online safety code, the Commission shall consider that matter for the purpose of deciding whether to exercise its functions under this section.

## **Audit of complaints and complaint handling**

**139P.** — (1) The Commission may appoint a person to carry out an audit under this section, and may by notice in writing require the provider of a designated online service to co-operate with any person appointed.

(2) A notice under subsection (1) may relate to audits to be undertaken periodically, at intervals specified in the notice.

(3) The purpose of an audit under this section is—

- (a) to enable the Commission to assess compliance by the provider with provisions of an online safety code that relate to the handling of communications by which users raise complaints or other matters relating to designated online services with the providers of those services, and
- (b) to provide the Commission with information to identify any trends in complaints or other matters raised by such communications that may be relevant to the Commission's functions under this Part.

(4) A person appointed to carry out an audit under this section—

- (a) must be independent of the provider, and
- (b) must not be a Commissioner, or a member of the staff of the Commission.

(5) A notice under this section must—

- (a) identify the person appointed to carry out the audit,
- (b) identify the provisions of the online safety code that the audit is to assess compliance with,
- (c) state when the audit is to commence,
- (d) specify the co-operation that may be requested by the person appointed, and
- (e) require the provider to provide that co-operation, subject to reasonable notice being given by the person appointed.

(6) The co-operation that may be specified under subsection (5)(d) may include the taking, on reasonable notice from the person carrying out the audit, of steps specified by that person that are reasonably required to assist the carrying out of an audit under this section.

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(7) A person who carries out an audit under this section shall provide the Commission with a report on the audit, setting out any information relevant to an assessment in accordance with subsection (3)(a), and any information relevant for the purposes of subsection (3)(b).

(8) The Commission shall provide a copy of the report—

- (a) to the provider concerned, and
- (b) to the Minister,

and shall give the provider an opportunity to make representations in writing to the Commission on the report within such period as the Commission specifies.

(9) After considering any representations made under subsection (8), the Commission shall publish the report on a website maintained by it, with any redactions the Commission considers necessary on grounds of the personal, confidential or commercially sensitive nature of any part of the report.

(10) If the Commission is notified by a nominated body of a matter that appears to the Commission to be relevant to compliance by a provider with a provision of the kind mentioned in subsection (3)(a), the Commission shall consider that matter for the purpose of deciding whether to exercise its functions under this section.

(11) A provider who fails without reasonable excuse to comply with a notice under subsection (1) shall be guilty of a category 1 offence.

## **Enforcement of online safety codes**

**139Q.** — A failure by a provider of a designated online service to comply with an online safety code that applies to the service shall be a contravention for the purposes of Part 8B.

## **Guidance materials and advisory notices**

**139Z.** — (1) The Commission may issue guidance materials for providers of relevant online services:

- (a) on identifying harmful online content, and in particular on the application of subsection (4) of section 139A,
- (b) on any other matter relating to the operation of [Part 8A of the Act which addresses online safety] or for which provision may be made by an online safety code, and
- (c) otherwise for the protection of minors and the general public from harmful online content and age-inappropriate online content.

(2) the Commission must consult (a) any advisory committee it has established for that purpose under section 19, and (b) any other person the Commission thinks appropriate before issuing guidance materials.

**139ZA.** — (1) 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;

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- (c) the impact of automated decision-making on these 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.

## **Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 - Audiovisual Media Services Directive**

### **Article 9(1)**

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

(a) audiovisual commercial communications shall be readily recognisable as such; surreptitious audiovisual commercial communication shall be prohibited;

(b) audiovisual commercial communications shall not use subliminal techniques;

(c) audiovisual commercial communications shall not:

(i) prejudice respect for human dignity;

(ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;

(iii) encourage behaviour prejudicial to health or safety;

(iv) encourage behaviour grossly prejudicial to the protection of the environment;

(d) all forms of audiovisual commercial communications for cigarettes and other tobacco products, as well as for electronic cigarettes and refill containers shall be prohibited;

(e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;

(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;

(g) audiovisual commercial communications shall not cause physical, mental or moral detriment to minors; therefore, they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

### **Article 28b**

1. Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect:

(a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1);

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(b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of ... a group based on any of the grounds referred to in Article 21 of the Charter;

(c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA.

2. Member States shall ensure that video-sharing platform providers under their jurisdiction comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are marketed, sold or arranged by those video-sharing platform providers.

Member States shall ensure that the video-sharing platform providers under their jurisdiction take appropriate measures to comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers, taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications.

Member States shall ensure that video-sharing platform providers clearly inform users where programmes and user-generated videos contain audiovisual commercial communications, provided that such communications are declared under point (c) of the third subparagraph of paragraph 3 or the provider has knowledge of that fact. Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) aiming at effectively reducing the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. Those codes shall aim to provide that such audiovisual commercial communications do not emphasise the positive quality of the nutritional aspects of such foods and beverages.

3. For the purposes of paragraphs 1 and 2, the appropriate measures shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest.

Member States shall ensure that all video-sharing platform providers under their jurisdiction apply such measures. Those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided. Those measures shall not lead to any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC. For the purposes of the protection of minors, provided for in point (a) of paragraph 1 of this Article, the most harmful content shall be subject to the strictest access control measures.



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Those measures shall consist of, as appropriate:

- (a) including and applying in the terms and conditions of the video-sharing platform services the requirements referred to in paragraph 1;
- (b) including and applying in the terms and conditions of the video-sharing platform services the requirements set out in Article 9(1) for audiovisual commercial communications that are not marketed, sold or arranged by the video-sharing platform providers;
- (c) having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know;
- (d) establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 provided on its platform;
- (e) establishing and operating systems through which video-sharing platform providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (d);
- (f) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;
- (g) establishing and operating easy-to-use systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;
- (h) providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors;
- (i) establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h); providing for effective media literacy measures and tools and raising users' awareness of those measures and tools.

Personal data of minors collected or otherwise generated by video-sharing platform providers pursuant to points (f) and (h) of the third subparagraph shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.

4. For the purposes of the implementation of the measures referred to in paragraphs 1 and 3 of this Article, Member States shall encourage the use of co-regulation as provided for in Article 4a(1).

5. Member States shall establish the necessary mechanisms to assess the appropriateness of the measures referred to in paragraph 3 taken by video-sharing platform providers. Member States shall entrust the assessment of those measures to the national regulatory authorities or bodies.

6. Member States may impose on video-sharing platform providers measures that are more detailed or stricter than the measures referred to in paragraph 3 of this Article. When adopting such measures, Member States shall comply with the requirements set out by applicable Union law, such as those set out in Articles 12 to 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU.

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7. Member States shall ensure that out-of-court redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers relating to the application of paragraphs 1 and 3. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law.

8. Member States shall ensure that users can assert their rights before a court in relation to video-sharing platform providers pursuant to paragraphs 1 and 3.

9. The Commission shall encourage video-sharing platform providers to exchange best practices on co-regulatory codes of conduct referred to in paragraph 4.

10. Member States and the Commission may foster self-regulation through Union codes of conduct referred to in Article 4a(2).