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Ireland's Online Safety and Media Regulation Act 2022

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Introduction

Ireland's Online Safety and Media Regulation Act (OSMR) was signed into law on 10 December 2022. This long-awaited piece of legislation brings together the regulation of broadcasting legislation – transposing the EU Audiovisual Media Services Directive (AVMSD) into national legislation – with a proposed new regulatory framework for online safety, in the form of an Online Safety Commissioner. As such, Ireland becomes one of the first EU Member States to adopt systemic regulation of online platforms in line with the EU Digital Services Act (DSA).

The key features of this legislation are of relevance to policy frameworks for the children and the digital environment. This policy brief focuses on the online safety aspects of the Act insofar as these will be relevant to a European context.

Why is this important?

The Online Safety and Media Regulation Act is important as it oversees the creation of a central regulatory function and a system-wide approach to regulation for online platforms, placing Ireland among a select group of countries internationally to take this step.¹

Through this legislation, Ireland takes on responsibility for regulating many of the major social media companies on behalf of all EU member states in a similar fashion to the role of

the Irish Data Protection Commission in respect of cross-border processing of personal data.

The Act also introduces new standards for the regulation of video sharing platform services such as YouTube and TikTok and mandates Ireland to regulate video sharing platform services established in Ireland along the lines of these new standards for the whole of the European Union.

Main provisions

The three main features of the Act are as follows:

- The Act establishes a new multi-person **Media Commission** to regulate broadcasting and online services. This replaces the existing regulator, the Broadcasting Authority of Ireland.
- The Act updates the law on how broadcasting services and **video-on-demand services** are regulated.
- The Act creates a new **regulatory framework for online safety** to tackle the spread of harmful online content. This will be overseen by an Online Safety Commissioner as part of the wider Media Commission.

The Media Commission will be funded through the introduction of industry levies including

¹ In November 2022, a Global Online Safety Regulators Network was established by online safety regulators from Australia, Fiji, Ireland and the United Kingdom to share information and expertise.

The CO:RE Project is a Coordination and Support Action within the Horizon 2020 framework, which aims to build an international knowledge base on the impact of technological transformations on children and youth. Part of the knowledge base is a series of policy briefs on timely topics. This part is coordinated by Brian O'Neill (TU Dublin). For all reports, updates, insights, as well as full details of all CO:RE consortium members and CO:RE national partners throughout Europe and beyond, please visit core-evidence.eu.



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broadcast services, social media companies and video sharing platforms.

The Media Commission also has a range of sanctions that can be applied to non-compliant services. The upper threshold for administrative financial sanctions is set at €20m or 10 per cent of turnover, whichever is higher, a threshold that is in line with the Data Protection Act 2018.

The Online Safety Framework

A distinctive feature of the new regulatory framework for online safety is its **systemic nature**, providing oversight of processes that online services use to deliver and moderate content.

For the purposes of regulation, the Online Safety Commissioner will operate a system whereby it can designate any online service that allow users to share, spread or access content that other users have made available as being within the scope of the legislation. These can include social media services, public boards and forums, online gaming platforms, online storage services, search engine, ISPs and so on.

To implement AVMSD, the Act provides that video sharing platform services are a category of **designated online services** (e.g., YouTube or TikTok) which the Online Safety Commissioner will regulate **for the whole of the EU**. The regulation of other online services is applied on **an Ireland-only basis**.

Under the legislation, the Online Safety Commissioner is able to:

- Designate online services and categories of online services for regulation,
- Create online safety codes and decide which codes apply to which online services,
- Assess the compliance of online services with online safety codes,
- Audit any complaint or issues handling processes that online services operate,
- Operate a “super complaints” scheme for nominated bodies such as expert charities to bring issues with online services to the Commissioner’s attention,
- Direct online services to make changes to their systems, processes, policies and design, and,
- Apply sanctions, including financial sanctions, against online services which aren’t complying.

Harmful Online Content

The regulatory framework for online safety will provide for oversight over how online services deliver and moderate user-generated content. The goal of this approach is to provide a structure for tackling the spread and amplification of certain defined categories of harmful online content.

The legislation does not give a single definition of harmful online content but rather sets out categories that may be considered in scope for the purposes of regulation. These include:

- Material which is **illegal** and is a criminal offence to disseminate,
- Serious **cyberbullying material**,
- Material encouraging or **promoting eating disorders**, and,
- Material encouraging or **promoting self-harm** and suicide.

With a basis in the revised AVMSD (Directive 2018/1808/EU), the Bill includes not only content that is currently illegal but also material that may “*impair the physical, mental or moral development of minors*” (Article 28b(1)(a) as well as related categories of incitement to violence or hatred (subparagraph (b)).

Content that is defamatory, violates privacy or data protection, or other aspects of consumer protection or copyright law are not currently included as they are covered by other laws.

The changing nature of harmful online content is recognised through the power of the Media Commission to designate further categories as required. Such designation can happen only through a consultative process designed to be robust and respect the fundamental rights of users and operators of online services.

The Act also includes a definition of “age inappropriate online content” (Head 49c) which may not necessarily be harmful but are likely to be inappropriate for minors to see. This includes material containing gross or gratuitous violence, cruelty towards animals or humans, or pornography. This definition draws substantially on wording from Articles 28b(1) and 6(1) of the revised AVMSD and will form the basis on which the Online Commissioner may issue guidance in relation to content rating and age-gating.

Online Safety Codes

Online safety codes are a key element of the intended approach to regulating for online safety. Such codes may contain the following:

- Measures for online services to take to tackle the availability of harmful online content on their services,
- Measures which online services may take regarding commercial communications (advertising) on their services,
- User complaint and/or issues handling mechanisms operated by online services, and,
- Risk and impact assessments for online services in relation to the availability of harmful online content on their services.

Given the large range of different kinds of services that the Online Safety Commissioner will be regulating, the Online Safety Commissioner will not apply all online safety codes or all aspects of every code to every online service it regulates. Instead, the Online Safety Commissioner will decide which codes apply to which services it regulates. The intention is to allow the Media Commission to tailor its regulation for online services of all sizes and business models. The provision also requires the drafting of online safety codes with due regard to European Union law, proportionality, risk assessment and consideration of fundamental rights of users and operators.

Compliance Assessments

Through the legislation, the Online Safety Commissioner will have the following powers that can be used to assess the compliance of online services:

- The power to request information for online services,
- The power to investigate the compliance of online services, including through the appointment of authorised officers, and,
- The power to audit any complaint or issues handling processes that online services operate, including through the appointment of authorised officers.

In this way, the Online Safety Commissioner will first assess the compliance in regard to high

level principle-based codes and their application to governing standards and practices.

The Commission can then assess through information requests, investigations and audits if online services are compliant with online safety codes and that such measures work in practice. At the end of this process, compliance and warning notices, and ultimately sanctions may be issued.

It is also envisaged that the Media Commission will issue guidance materials in matters relevant to harmful online content and age-inappropriate online content.

Complaints Handling

An area of compliance that is of particular interest is the power of the Online Safety Commissioner to audit user complaints and/or issues handling mechanisms operated by designated online services. In this way, the Media Commission does not itself act as an Ombudsperson but rather assesses the extent to which online services have satisfactory processes in place.

Under the Act, the Online Safety Commissioner will be able to create a scheme for nominated bodies such as expert NGOs or charities to bring forward issues with online services to the Commissioner's attention. This is considered an important and innovative means of ensuring that there is a mechanism for the regulator to tap into the insights of those who work closely with children and adults impacted by harmful online content. This process of complaints handling is a central element of the systemic approach to regulation whereby issues of a systemic nature related to online services from nominated bodies (so-called 'super complaints') may be submitted and considered. Nominated bodies may include NGOs or members of the European Regulators Group for Audiovisual Media Services (ERGA).

The Online Safety and Media Regulation Act also provides for an individual complaints mechanism whereby members of the public could bring forward complaints regarding user-generated content on social media platforms. A working group to assess the feasibility for such a mechanism recommended its inclusion subject to certain conditions on a phased basis.²

² Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media (2022). [Report of the Expert Group on an Individual Complaints Mechanism](#).

Mediation is also identified as a mechanism whereby disputes between an online service and a user or group of users.

Responses to the OSMR

Development of legislation was prolonged given its inherent complexity and innovative nature. Pre-Legislative Scrutiny of the General Scheme of the Bill undertaken over the course of 2021 included submissions from industry and civil society organisations. 15 oral hearings were also held.

Key elements relevant to the online safety aspects of the Bill which the Committee focused on included:

- Complaints handling mechanisms, including the systemic complaints approach and the exclusion of individual complaints handling
- Regulation of illegal and regulation of harmful online content
- Advertising targeted at minors
- The interface between OSMR and the Digital Services Act and the Digital Markets Act.

Complaints Mechanisms

The lack of an individual complaints handling mechanism was in the draft legislation highlighted as a significant weakness, in particular by civil society organisations. Arguments put forward included that this was contrary to European Convention rights and Irish law to provide children with proper remedies.

Submissions from industry bodies argued against an individual complaints handling mechanism arguing that the volume of complaints – especially if it were to be the first or primary point of contact – would be such as to make it ineffective and administratively unworkable.

International evidence cited includes the existence of an individual complaints handling mechanism under Australia’s Online Safety Act mandating the eSafety Commissioner to act as a “safety net” for platforms who fail to provide effectively for individual complaints.

Accordingly, the Joint Committee has recommended amendment of the legislative proposals to allow for an individual complaints scheme within OSMR.

Illegal and Harmful Content

A second area of discussion related to the categories of illegal and harmful content encompassed by the Act.

OSMR makes specific reference to three categories of online harmful content that fall within its remit, allowing for the inclusion of further categories subject to effective definitions of online harm.

Recommendations from the pre-legislative scrutiny process include that the Bill be amended to remove previous exclusions of other illegal content such as defamatory content, violations of data protection, privacy, consumer protection and copyright law on the basis that the Online Safety Commissioner’s remit should be comprehensive.

It was further recommended that disinformation be included as a category of harmful online content, once the Digital Services Act is in place. It was also recommended that financial harm, e.g., gambling content, be included as a category of harmful online content.

OSMR also provides a definition of age-inappropriate online content in order to facilitate the issuing of online safety guidance materials on the part of the regulator. Age inappropriate content is considered to include material that may not necessarily be harmful, but that are likely inappropriate for a minor.

In the course of pre-legislative scrutiny, it was observed that “age-inappropriate online content” may be too subjective for the purposes of legislation and would require a more specific definition. In this instance, the Committee recommended that the legislation should be amended to include “a minimum age for a child to be permitted to create an account with designated online services” (p.29).

Advertising Standards

The updating of standards in relation to online advertising content is also included within OSMR. It was argued during hearings that children have a right to protection from material that is potentially harmful to their wellbeing and that there was a need for codes of practice on advertising standards within the Act. The additional risks arising from online advertising were also highlighted, namely, risks arising from profiling or targeted advertising. It was noted that General Comment No, 25 of the UN Committee on the Rights of the Child includes the specific requirement that:

“States parties should prohibit by law the profiling or targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity”³

In response, the Joint Committee recommended as follows:

- Bans on advertising to children that exist in the broadcast domain be extended to the online domain
- The prohibition of any form of profiling or tracking of children’s data
- That the regulator should retain direct oversight of advertising content without reference to self-regulation or other non-statutory mechanisms.

Overlap with EU Legislation including DSA

The potential for overlap of OSMR with EU legislation in the form of the Digital Services Act (DSA) and the Digital Markets Act was also highlighted by a number of commentators, notably Facebook in its submission to the hearings.

Measures included within the DSA such as content moderation systems; effective safeguards for users; transparency measures; risk-based assessment; and oversight structures all have relevance for the regulatory measures contained within OSMR.

It was argued that legal provisions for online safety contained within the OSMR Bill are likely to be subsumed and outdated given legal and regulatory developments on the scale of the European Union. The drafting of online safety codes and proposed sanctions regime are two examples of specific potential conflict. It was further noted that where DSA provides a legal basis for regulating illegal content, it does not include harmful online content. Harmful online content is covered by provisions of AVMSD where the focus is on its methods of distribution and display, rather than on its removal.

The response of the Joint Committee was to recommend that *“a full review is conducted of*

the potential areas for overlap between the Online Safety and Media Regulation Bill and the Digital Services Act, including, but not limited to: terminology, complaints mechanisms, and affected services” (p.62) the timeline of which will be determined by the pace legislative progress both at the national and European level.

Conclusion

The Online Safety and Media Regulation Act is a highly significant piece of legislation with immense scope. The responsibilities attached to role of the Online Commissioner in regulating video sharing platforms across the whole of the EU are particularly significant in establishing a Europe-wide framework for protecting young people online from harmful online content. The additional inclusion of new categories of harmful online content also breaks new ground. The systemic approach to regulation is also innovative if, as yet, untested.

As noted by the Minister on its signing into law: *“[OSMR] modernises the regulation of the media ecosystem in Ireland and lays the foundations for the new regulatory frontier of online safety which will be of great importance to protecting children online”*.⁴

³ United Nations. (2021). *General Comment No. 25 (2021) on Children’s Rights in Relation to the Digital Environment*. Geneva, Switzerland: Office of the United Nations High Commissioner for Human Rights. Available from: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx>

⁴ Press Release, ‘President Higgins Signs Crucial Online Safety and Media Legislation into Law’. <https://www.gov.ie/en/press-release/120ff-president-higgins-signs-crucial-online-safety-and-media-legislation-into-law/>

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About the author(s)



Brian O'Neill, PhD is Emeritus Professor at TU Dublin. His research focuses on young people's use of digital technologies,

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