Rialtas na hÉireann
Government of Ireland

Online Safety and Media Regulation Bill

Annex to the Regulatory Impact Analysis

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Media Commission Structures and Functions: Paper 1

1. Purpose

This paper aims to outline the rationale for the multiperson media commission structure and discuss pertinent issues around the implementation of such a structure. The Minister has already decided that the AVMS provisions and national online safety proposals should be addressed by one organisation. A summary of the options previously presented to the Minister regarding the regulatory remit of the Commission is attached at **Appendix A**. A summary of stakeholder views regarding the preferred regulatory structure is outlined in **Appendix B**.

2. Decisions sought

A table of the issues for Ministerial decision is set out below. A summary list of the issues which require further legal analysis is attached is also set out below.

	Issue	**Recommendation**
1.	Term of appointment	It is recommended that members be appointed for 5 years with the possibility of reappointment for a further 5 years. This is in line with standard practice.
2.	Government or Ministerial appointment of Commissioners	There is no strong view either way on this matter. It is noted that the majority of appointments made under the Broadcasting Act 2009 are made by the Government.
3.	Expertise requirements for appointees	Given that the nature of the skills and experience required may vary somewhat between Commissioners (e.g. Online Safety vs Broadcasting), it is considered appropriate that a range of expertise requirements are set out in the legislation.
4.	Removal of Commissioners	It is recommended that standard provisions in relation to removal should be included in the draft Bill. For the purposes of protecting the independence of the Commission, it is recommended that the Minister shall be required to inform the Oireachtas in writing of the reasons for removal. Furthermore, it is recommended that a provision to give the

		Oireachtas the power to annul the removal of a Commissioner in order to further enhance the independence of the Commission.
5.	Number of Commissioners	In the interests of future proofing and flexibility, provision should be made for a maximum of 6 members to be appointed to the Commission. This is in line with the model used by the CCPC. It is envisaged that three Commissioners and an executive chair will be appointed initially.
6.	Appointment of acting commissioners	It appears to be prudent to include such a provision in the legislation.
7.	Transition Arrangements for Chief Executive of BAI	The current CEO of the BAI would be appointed as Commissioner with responsibility for television and radio broadcasting until the expiry of their existing contract.
8.	Advisory Committees	It would appear to be preferable to set up ad hoc advisory committees on a non-statutory footing in the interests of flexibility and simplicity. This will allow the Commission to establish committees to address any issues which require additional expertise or assistance while preserving the Commission's ability to make timely decisions.
9.	Additional functions	In the interests of future proofing, provision should be made for the Minister to assign additional functions to the Media Commission. This would be subject to legal advice on the feasibility of such a provision.
10.	Role of Online Safety Commissioner	It is recommended that legal advice be sought on how the Online Safety Commissioner will operate within the overall Commission structure.
11.	Statutory review of legislation	In line with the provisions of the CCP Act 2014, provision should be made for a review of the legislation or any other statutory provisions relating to audiovisual media or online safety.
12.	Proposed objectives	The Minister is asked to consider the proposed objectives of the Commission.
13.	Proposed functions	The Minister is asked to consider the proposed functions of the Commission.

Issues for legal analysis

Appointment of BAI CEO to Commission	Legal advice required to ensure no unintended additional obligations or rights are created
Additional functions	Legal advice required regarding the feasibility of conferring additional functions on the Commission through secondary legislation
Online Safety Commissioner	Legal advice required on how individual Commissioners, and in particular the Online Safety Commissioner, will operate within the overall Commission structure in terms of decision making. What powers or decisions should be reserved to the Commission as a whole and how should any delegation of powers operate
Transfer of existing regulatory functions	Legal advice is needed on the most efficient solution for transferring regulatory functions to the new Commission.

2. Rationale for a Multiperson Commission Structure

An effective regulator requires governance arrangements that ensure its efficient functioning, preserve its regulatory integrity and deliver the regulatory objectives of its mandate.

Types of regulatory structures

The OECD notes that there are three main governance structures employed for independent regulators:

1. Governance board model – the board is primarily responsible for the oversight, strategic guidance and operational policy of the regulator, with regulatory decision making powers assigned to the chief executive officer (CEO) and staff.

2. Multi person commission model – members of the commission make most of the substantive regulatory decisions

3. Single member commission – an individual is appointed as regulator and makes most substantive regulatory decisions and delegates other decisions to its staff.

Current regulatory structure

Given the significantly expanded remit of the proposed Media Commission, the part time board model currently similar to that used to under the existing Broadcasting Act would simply not have the capacity to make decisions within the timescales demanded in a rapidly changing environment. It is therefore desirable to have a structure in place that incorporates maximum flexibility to take account of the inevitable increasing pace of change in the regulatory landscape going forward and one in which decisions can be made in a timely fashion.

Commission Structure

Single commissioner and multi-person commissions can use specialist knowledge and experience to ensure speed and agility in decision-making and to be more responsive to sectoral developments, particularly in fast changing environments where innovation is the norm. A further advantage of a commissioner-led structure may be one of greater public visibility and public perception of a "champion" in the matters under regulation. In addition this model is the predominant one that has been used to establish regulatory bodies in recent years, for example in the Data Protection Commission, the Competition and Consumer Protection Commission and the soon to be established Corporate Enforcement Agency.

Decision making model – advantages of a multi member commission

Factors identified in considering the potential value of a multi-member commission compared with a single-member decision-making model are summarised below.

These factors include:

- Potential commercial/safety/social/environmental consequences of regulatory decisions, taking account of the degree of impact of a risk event and the probability of its occurrence – a group of decision makers is less likely to be "captured" than an individual and a group will bring differing perspectives to decisions;

- Diversity of wisdom, experience and perceptions required for informed decision making because of the degree of judgement required (for example, where regulation is principles-based or particularly complex) – collective decision making provides better balancing of judgement factors and minimises the risks of varying judgements;

- Degree of strategic guidance and oversight of delegated regulatory decisions required to achieve regulatory objectives – where the regulator requires significant strategic guidance and oversight to achieve its regulatory objectives, such as in developing compliance or enforcement policies or resource allocation, these functions are better located in a body separate from its day-to-day operations. A multi-member body provides collegiate support for such strategic decision making;

- Difficulty and importance of maintaining regulatory consistency over time – where regulatory decisions require a high degree of judgement, a multi-member decision-making body provides more "corporate memory" over time; and

- Importance of decision-making independence of the regulator – a Commission will be less susceptible to regulatory capture than a single decision maker.

Based on the above criteria, it would be prudent to opt for a multi member commission model, given the diverse range of complex issues likely to fall under the Commission's regulatory remit. The OECD's *Making Reform Happen: Lessons from OECD countrie*s (OECD, 2010) notes that the great majority of independent regulators in OECD countries have a multi member board or commission structure, and that this model is considered more reliable for decision making as collegiality is expected to ensure a greater level of independence and integrity.

Furthermore, given the focus on establishing an Online Safety Commissioner, it appears to be more appropriate that this function would be vested in a separate commissioner within the organisation.

<u>Role of Chairperson</u>

In addition to having commissioners responsible for their relevant areas, it is proposed that an executive chair would be appointed to oversee the activities of the Commission.

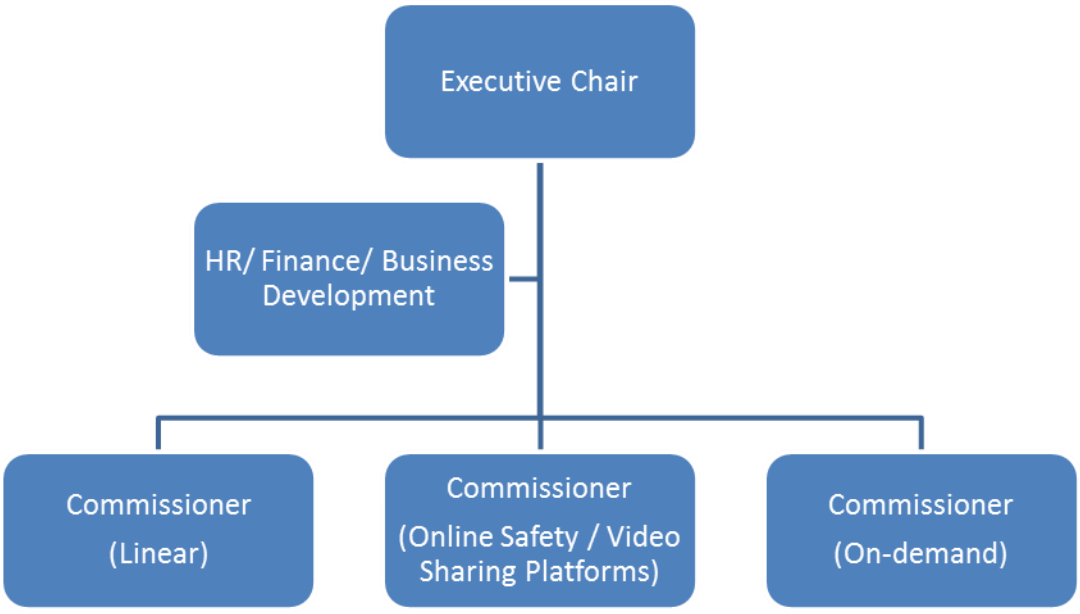
Precedent legislation suggests two approaches to the appointment of a chair: either one member of a commission is designated by the Minister for a fixed period of time (usually not exceeding 3 years); or a person is appointed to the position of chair for the full duration of their appointment. For the purposes of clarity and consistency of the governance of the organisation, it is proposed that the

role of chairperson would be a dedicated post and not one in which members of the commission are appointed to on a rotating basis. This is similar to the model used by the CCPC. The Department met with officials from the Department of Business Enterprise and Innovation to discuss the advantages of the CCPC model.

It is considered desirable to have an executive chairperson for the following reasons:

- One figurehead for the organisation who would serve as the face and public spokesperson for the organisation;
- One person who is ultimately responsible for the general management and control of the activities of the Commission;
- Clarity of accountability to the PAC and the public;
- Contact point for the Minister and Department;
- Oversight of the diverse range of activities undertaken by Commission;
- A chairperson can have a casting vote in the event of a tied decision, thus breaking deadlocks and resulting in a more efficient decision making process.

Indicative organisation chart of proposed Commission



The above organogram shows the high level structure of the proposed organisation. Further detail on the organisation structure and resources will be included in in a future policy paper.

4. Establishment of the Commission structure and related matters

Based on the rationale set out above it is intended that heads of bill will be drafted to give effect to a multi person commission structure with an executive chair. The following sections will discuss the structure and related issues in more detail and reference the necessary legislative changes required as appropriate. For the purposes of this section, any references to "comparative legislation" refer to the Competition and Consumer Protection Act 2014 (CCP Act), Data Protection Act 2018 (DPC Act), Corporate Enforcement Agency Bill 2019 (CEA Bill), Electricity Regulation Act 1999 (ERA 1999), Communications Regulation Act 2002 (CR Act 2002) and the Broadcasting Act 2009.

1. Repeal of BAI Authority and Statutory Committees

In order to establish a Commission, the relevant sections of the Broadcasting Act must be repealed. In line with precedent legislation, the Authority and Statutory Committees established under the Broadcasting Act 2009 will become defunct on the establishment day of the new Commission. Members of the Authority and Statutory Committees will cease to have any right to remuneration on the establishment day. A transitional provision will be drafted to set this out clearly.

2. Appointment and terms of Members

It is proposed that members of the Commission will be full time, appointed for a period of up to 5 years and the possibility to be re-appointed for one further term, also up to 5 years. This is in line with legislation for existing regulators.

On review of comparative legislation, the members of other regulatory bodies can be appointed by either the Government or by a Minister. Members of CRU, ComReg and CCPC are appointed by a Minister, while members of the DPC and BAI Authority are appointed by the Government.

In either case, it is proposed that persons would be recommended by the Public Appointments Commission after an open recruitment process. Standard exclusions from membership of the Commission such as interests or employment in regulated entitles will also be included.

Recommendation:

- It is recommended that members be appointed for 5 years with the possibility of reappointment for a further 5 years. This is in line with standard practice.
- No preference is expressed as to whether Commissioners should be appointed by the Government or the Minister.

3. Appointment of Chairperson

The rationale for the appointment of an executive chairperson is set out in section 3. The appointment process for this role would be the same to that of the other Commissioners.

A provision similar to section 14 of the CCP Act is suggested for inclusion to give effect to an executive chair structure:

"The chairperson shall carry on and manage, and control generally the staff, administration and business of the Commission."

4. Expertise requirement

A review of comparison legislation suggests that it is commonplace to set out requirements in terms of experience and expertise for the appointment of commissioners in regulatory bodies. For example, it is noted that the scheme of the Corporate Enforcement Agency Bill contains the following provision:

"In recommending a candidate for appointment as Member, the Public Appointments Service shall have regard to the need for him or her to possess sufficient expertise or qualifications in, or experience of, one or more of the following areas, namely law, public administration, investigation, or enforcement generally"

Section 12(8) of the Competition and Consumer Protection Act 2014 (CCP Act 2014) also contains a similar provision to this.

Section 15(7) of the Data Protection Act takes a slightly different approach by putting the onus on the Public Appointments Service to determine appropriate criteria for selection:

"The Public Appointments Service shall ensure that a person is recommended under subsection (5) for appointment only if it is satisfied that the person has the qualifications, experience and skills necessary to enable the Commission to effectively perform its functions."

Recommendation:

Given the pace of change in the relevant sectors, it would be prudent to allow the Public Appointments Service (PAS) determine appropriate criteria for the selection of Commissioners. The Department would have an input on the expertise requirements for Commissioners as it is standard practice for PAS to consult with Departments on competition booklets.

5. **Removal of Commissioners:**

It will be important that any provisions do not impinge on the Commission's independence as required under the AVMSD. Article 30 of the AVMSD stipulates that dismissal decision shall be duly justified, subject to prior notification and made available to the public.

Accordingly, it is proposed that standard provisions around removal due to grounds of ill health etc. be included in line with legislation for other regulatory bodies, for example section 12 of the CCP Act 2014. Section 12 also states that the Minister shall lay before each House of the Oireachtas a statement in writing of the reasons for such removal.

It is noted from the Broadcasting Act 2009 that resolutions must be passed by the each House of the Oireachtas to remove a member of the Commission. It would likely enhance the independence of the Commission to include such a provision.

Recommendations:

- It is recommended that standard provisions in relation to removal should be included in the draft Bill.
- For the purposes of protecting the independence of the Commission, it is recommended that the Minister shall be required to inform the Oireachtas in writing of the reasons for removal.
- Furthermore, it is recommended that a provision to give the Oireachtas the power to annul the removal of a Commissioner in order to further enhance the independence of the Commission.

6. **Number of Commissioners**

It is proposed that the Government/Minister should have the ability to appoint between 2 and 6 members. Given the rapidly changing media and online landscape, it is considered prudent to make provision for additional Commissioners in the legislation. This will give the regulator more flexibility as the policy environment evolves.

There is variation across regulatory bodies in terms of the maximum number of commissioners. While a maximum of 3 members can be appointed in ComReg, CRU and the Data Protection Commission, it is noted that up to 6 members can be appointed to the CCPC. Section 12(3)(a) of the CCP Act 2014 provides the legislative basis for the maximum of 6 members.

Recommendation:

- In the interests of future proofing and flexibility, provision should be made for a maximum of 6 members to be appointed to the Commission. It is envisaged that three Commissioners and an executive chair will be appointed initially.

7. Acting Commissioners

It is proposed that provision be made for the Government/Minister to appoint acting commissioners in the event that any current commissioner is rendered incapable of discharging the duties of their role. This provision would ensure the continued functioning of the organisation in the event of any unanticipated scenario where there are there not enough members to carry on the business on the commission, for example where the terms of a number of members expire simultaneously. It is noted that the current Broadcasting Act does not make provision for acting appointments.

It is proposed that a provision similar to section 18 of the Data Protection Act 2018 would be included.

Recommendation:

It appears to be prudent to include such a provision in the legislation. The inclusion of such a provision would mitigate the risks outlined above.

8. Transition Arrangements for the Chief Executive of BAI

The current Chief Executive of the BAI has a contract of employment that expires in September 2022. It may be prudent to make provision for transitional arrangements in respect of the Chief Executive for the period up to September 2022. Accordingly, in order to head off any potential legal issues, it is proposed that provision be made for the Chief Executive to be made a member of the Commission until the expiry of his contract. It is proposed that he would be assigned responsibility for television and radio broadcasting. Careful legal consideration would have to be given to this provision in order to ensure that no additional rights or obligations are created.

Recommendation:

The current CEO of the BAI would be appointed as a member of Commissioner with responsibility for television and radio broadcasting.

9. Online Safety Commissioner role

It is expected that the Online Safety Commissioner (OSC) will play a prominent role in the Media Commission given the public focus on online safety issues. Careful consideration has to be given to how the OSC will operate within the structure of the Commission when drafting the legislation. Some potential issues identified include:

1. Position in legislation – Consideration needs to be given to whether the position of OSC can be clearly delineated from other members of the Commission in the legislation. If this is not

legally possible, it may suffice to include a provision that one member of the Commission shall be designated to have primary responsibility for functions assigned to the Commission regarding online safety. There is precedent in legislation for this - section 10(6) of the CCP Act 2014 states:

"The Commission may delegate the performance of any of its functions to any member of the Commission or to any member of its staff duly authorised in that behalf by the Commission."

A similar provision is noted in section 13 of the Data Protection Act 2018.

2. Decision making – Legal advice will be required to clarify the extent to which the OSC – and other Commissioners - can make decisions unilaterally or if all decisions need the approval of the Commission as a whole. It could be the case that decisions of a greater significance require the approval of the whole Commission while less significant decisions can be delegated to a Commissioner. It is noted that section 10(7) of CCP Act 2014 that certain functions are reserved for the Commission as a whole and may not be delegated to individual members or staff of the Commission.

Recommendation:

It would be prudent to seek external legal advice on the issues identified above.

10. Advisory Committees/Boards

Advisory committees/boards may be used to provide insights from industry participants or the community on strategies to influence behaviour, or early warnings on developments that may warrant a change in the compliance approach of the regulator. Community or industry engagement may also be useful to inform the development of plans and strategies. It is noted that section 17 of the Broadcasting Act gives the BAI the power to create non statutory advisory committees to assist it in the performance of its functions.

For clarity it should be noted that an advisory committee does not have the same legal status as a statutory committee/board. The table below highlights the differences between statutory and non-statutory advisory committees:

Type	**Statutory Board/Committee**	**Non-Statutory Board/Committee**
Remit and functions	Remit and functions must be clearly set out in legislation.	Regulator can decide appropriate remit/functions based on needs at the time and

		specific topic under consideration.
Appointments and expertise	Department must carry engage in full PAS recruitment process for members with Government/Ministerial appointment. Timescale for appointment under this process is typically 6 months.	Regulator can directly identify and appoint relevant experts at short notice.
Term	Fixed term (typically 5 years) for members.	Regulator can convene committees for specific issues and disband when no longer necessary.
Cost	Remuneration payable to members.	Remuneration is optional depending on specific circumstances and expertise required.

In its response to the public consultation, the BAI noted the following in relation to advisory committees:

"Part-time boards bring a breadth of experience and a wider range of perspectives that are often vital in making determinations on issues that are frequently complex, and in situations where the rights and protections to be afforded to citizens need to be finely balanced with public policy objectives (e.g. on issues concerning freedom of expression). To leverage such value in a Commissioner-led governance model, there may be benefit, at a minimum, in availing of structured support through the inclusion of a statutory advisory board in the design of the legislative scheme."

A review of recently established regulatory structures in Ireland suggests that the inclusion of a statutory advisory committee alongside a commission is a novel and untested approach. If a committee were to be established on a statutory basis, this would entail a selection and appointment process similar to the one in place currently for the BAI Authority and its Statutory Committees. Furthermore, if advisory committee consultation is required on all significant decisions taken by the Commission, this could hinder the speed at which the Commission can make decisions.

Given the range of issues the Commission will have to address under its remit, it may be preferable for the Commission to set up non-statutory advisory committees on an ad hoc basis. This would be less administratively burdensome for both the Commission and the parent Department than a statutory approach.

It is therefore proposed that provision be made for the Media Commission to establish advisory committees to assist it in the performance of its functions. Existing non-statutory advisory

committees such as the National Advisory Council for Online Safety could also be designated to assist the Media Commission as appropriate. Advisory committees could have a role in providing input from stakeholders in respect, for example, of consultations, educational and guidance material, and the development of rules and codes.

Recommendation:

It would appear to be preferable to set up ad hoc advisory committees on a non-statutory footing in the interests of flexibility and simplicity. This will allow the Commission to establish committees to address any issues which require additional expertise or assistance while preserving the Commission's ability to make timely decisions.

11. Future-proofing and review

In a rapidly changing technological environment, the risk of significant disruption and change to the existing online and media environment cannot be overstated. It is therefore likely that any regulatory system put in place has the potential to become outdated quickly if provision is not made for regular review and amendment. Therefore, in the interests of future proofing, consideration should be given for the Minister to assign additional functions to the Media Commission at a future date. This could potentially enable the Media Commission to quickly react to any unanticipated changes in the external environment.

Legal advice may be required as to whether such a provision would be permissible or whether particular parameters or checks would need to be provided.

Furthermore, it may also be prudent to include a "review clause" in the legislation to provide for the Commission to undertake a periodic statutory review of the legislation from time to time or as directed by the Government/Minister.

It is noted that section 17(2) of the CCP Act contains a similar provision:

The Commission shall—

(a) keep under review the relevant statutory provisions,

(b) submit, from time to time, to the Minister or such other Minister of the Government having responsibility for any other statutory provisions relating to, or which impact on, consumer protection and welfare or competition, or both, any proposals that it considers appropriate relating to any of the relevant statutory provisions or any other statutory provisions or for making or revoking any instruments under those provisions,

(c) undertake such reviews of the relevant statutory provisions as the Minister may direct, and

(d) assist in the preparation of such draft legislation as the Minister may direct.

Recommendation:

- In the interests of future proofing, provision should be made for the Minister to assign additional functions to the Media Commission. This would be subject to legal advice on the feasibility of such a provision.
- In line with the provisions of the CCP Act 2014, provision should be made for a review of the legislation or any other statutory provisions relating to audiovisual media or online safety.

12. Appeals Mechanism

A regulatory appeals process is important to ensure that the regulator does not stray from its mandate and that it remains accountable. Such a process influences and underscores the fairness and legitimacy of decisions. It is envisaged that appeals regarding decisions taken by the Media Commission would go to the Court system, either the High Court or Circuit Court depending on level of seriousness.

Further detailed consideration of this matter is included in the paper on regulatory powers.

5. Objectives and Functions of the Media Commission

Challenges

For a regulator to understand and fulfil its role effectively it is essential that its objectives and functions are clearly specified in the establishing legislation.

The challenge in this case is merging the policy aims of each of the 4 strands of regulation into one clear, coherent and consistent set of objectives and functions for the Media Commission. While the core functions of the Media Commission will be applicable across all strands of regulation, tailored provisions will be required for some strands where appropriate. The process of ensuring consistency between the strands is an iterative process and will be subject to legal advice. It is envisaged that a final review will be carried out towards the end of the drafting process to ensure consistency between the 4 strands.

Consideration must also be given to the rapidly changing landscape that the Media Commission will operate in. Therefore, objectives and functions should be drafted in such a way that ensures the Media Commission has scope to adapt to future developments in the online and media sectors.

Proposed objectives and functions

A review of comparison legislation shows that is it uncommon to include separate objectives and functions sections. Instead, objectives and functions are commonly combined in the same section. However, given the diversity of the Media Commission's regulatory remit, it is considered appropriate to clearly set out a number of high level objectives in the legislation.

A draft list of functions of the new Media Commission is set out below. The table below also highlights whether a function is drawn from an existing Act.

The following list is non-exhaustive and may expand as future policy papers on online safety and AVMS implementation are developed.

	Objectives	Commentary/Act Reference
1.	Ensure that democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression are upheld.	This objective is intended to reflect the key role of the regulator in ensuring the continued existence of a pluralistic media. In terms of online safety this objective is intended to ensure that there is an appropriate balance between measures taken to promote online safety and the right of the individual to freedom of expression. This function is drawn from s.25(b) Broadcasting Act 2009.
2.	Ensure that the number and categories of public service media made available in the State serve the needs of the people of the island of Ireland, having regard to the following: (a) linguistic, religious, ethical and cultural diversity (b) accessibility of services to people with disabilities [other items could be included here – for discussion]	This objective is intended to promote a diverse and pluralistic media that is accessible to people of all backgrounds. This function is drawn from s. 25(1)(a) and (25(2)(g) of the Broadcasting Act 2009.
3.	Subject to the provisions of this Act, ensure that appropriate regulatory arrangements and systems are in place to address, where appropriate, illegal and harmful online and audio-visual content.	This objective reflects the Minister's key policy objective for the new Commission.
4.	Protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation.	This objective is intended to highlight the particular need for appropriate measures to be taken to protection minors from harmful content and undue commercial exploitation. Drawn from s.25(2)(c) of Broadcasting Act 2009
5.	Provide a regulatory framework that takes account of the rapidly changing technological environment and that provides for rules to be applied in a proportionate, consistent and fair manner across all services regulated, having regard to the differing nature of those services.	This objective is intended to highlight to need for a flexible and proportionate regulatory framework across all regulated services. Drawn from s.25(3) of Broadcasting Act 2009

Functions		Commentary/Act Reference
1.	Ensure the provision of open and pluralistic broadcasting, audio and audio-visual media services	This function is intended to promote a diverse and pluralistic media that is accessible to people of all backgrounds. This wording covers 25 (c) of the Broadcasting Act 2009.
2.	Promote and protect the interests of the public in relation to audio-visual, audio and online content	The obligation to protect the public is a key function of the Commission. This function is drawn from s.10 of Competition and Consumer Protection Act 2014 (CCP Act 2014)
3.	Stimulate provision of high quality, diverse and innovative content from commercial, community and public service media providers and independent producers.	This function restates section s.25(2)(a) of Broadcasting Act 2009. The new Commission will have the power to take measures to stimulate the production of high quality content.
4.	Provide a regulatory environment that will sustain independent and impartial journalism	This function provides for the Commission to take measures to support independent and impartial journalism. This function is drawn from s.25(2)(d) of Broadcasting Act 2009.
5.	Prepare and submit proposals to the Minister for a scheme or schemes for the granting of funds to support the production of audio-visual content and sound broadcasting content	Linked to function 3, the Commission will have the power to establish funding schemes to support the production of content. While the current Sound and Vision scheme only covers linear content, it is envisaged that the scope of a new scheme under would be expanded to cover non-linear services. This function is drawn from s.154 of 2009 Act.
6.	Carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any suspected breach of the relevant statutory provisions	This is a standard regulatory function and is drawn from s.10 of CCP Act 2014.

7.	Enforce the relevant statutory provisions	This is a standard regulatory function and is drawn from s.10 of CCP Act 2014.
8.	Encourage compliance with the relevant statutory provisions, which may include the publication of notices containing practical guidance as to how those provisions may be complied with.	This function is drawn from s.10 of CCP Act 2014. It enables the Commission to formulate guidance notices to facilitate compliance by regulated entities.
9.	Prepare or make codes and rules to be observed by entities operating in the following categories: 1. Broadcasting 2. On demand services 3. Video sharing platform services 4. Online services [to be defined]	This function enables the Commission to prepare codes of practice setting out rules for each category of regulated services. Breaches of the codes would result in appropriate enforcement action being taken by the regulator.
10.	Establish or facilitate a complaints mechanism or mechanisms covering following categories: 1. Broadcasting 2. On demand services 3. Video sharing platform services 4. Online services [to be defined]	This function enables the Commission to establish complaints mechanisms to facilitate the submission of complaints by the relevant parties.
11.	Promote, where appropriate, the development of alternative dispute resolution procedures as a means of resolving complaints	This function enables the Commission to encourage complainants and service providers to resolve complaints without recourse to the regulator. This function is drawn from s.10(3)(c) of the CCP Act 2014
12.	Promote public awareness, encourage research and conduct public information campaigns for the purpose of educating and providing information to the public in relation to: (i) online safety; (ii) media literacy	This function is aligned with the Commission's function to promote and protect the public interest. This function is drawn from section 26(2) of Broadcasting Act 2009.
13.	Promote educational initiatives and activities relating to online safety and advise, when requested, the Minister or any other Minister of the Government, Departments of State or any public body whose activities are concerned with matters relating to any	This function is aligned with the Commission's function to promote and protect the public interest. This function is drawn from s.10 of CCP Act 2014.

	of the purposes of this Act, and any educational or training institution	
14.	Promote and stimulate the development of Irish language content	This function is drawn from 25(2)(h) of Broadcasting Act 2009. The wording has been generalised to say "content" instead of "programming and broadcasting services" in order to cover non-linear services. This function is aligned with and expands on objective 9 of the 20-Year Strategy for the Irish Language 2010-2030: "High quality broadcast services through the medium of Irish will be ensured, especially through the continuous development of RTÉ, Raidió na Gaeltachta and TG4"
15.	Conduct or commission research, studies and analysis on matters relating to the functions of the Commission and publish, in the form and manner that the Commission thinks fit, such findings as it considers appropriate (which may consist of, or include, a study or analysis of any development outside the State)	The Commission would be enabled to carry out research on matters relating to its functions. This would enable the Commission to better positioned to respond to changes in the external environment. This function is drawn from s.10 of CCP Act 2014
16.	Undertake media merger examinations in accordance with the provisions of the Competition Act 2002 (as amended).	The Commission would assume the BAI's current role in media merger assessments.
17.	Promote diversity in control of media businesses operating in the State	s.25(2)(c) of Broadcasting Act 2009 – updated to refer to media businesses in general instead of broadcasters

18.	Co-operate with other authorities whether in the State or elsewhere charged with responsibility for the enforcement of laws relating to (i) illegal or harmful online content; (ii) the protection of children; (iii) the allocation for the frequency range dedicated to sound and television broadcasting	This function enables the Commission to cooperate with relevant bodies such An Garda Síochána and other regulatory bodies. Similar provisions are found in the Data Protection Act 2018 (DPC Act 2018) and CCP Act 2014
19.	Cooperate with other bodies outside the State which perform similar functions to the Commission	This function is drawn from s.26(2)(f) of Broadcasting Act 2009 and is a standard provision for regulatory bodies.
20.	Have a statutory role in relation to the following: (i) reviewing existing online safety and audio-visual legislation and proposals for such legislation (ii) Undertaking a strategic review or reviews of the regulated sectors covering one or more of the following areas: (a) sectoral funding (b) technological and societal change (c) the protection of children (d) other relevant strategic areas as directed by the Minister	This function is drawn from s.17 of CCP Act 2014 provides the Commission with a statutory role in relation to reviewing existing legislation and regulated sectors.
21.	Be responsible for the licensing of radio and television services (additional to those provided by RTÉ, TG4, the Houses of the Oireachtas Channel and the Irish Film Channel) operating in the State	This function is a continuation of the Contract Awards Committee's role in licencing as set out in s.27 of the 2009 Act.
22.	Impose a levy on [insert relevant industry categories] to ensure it is sufficiently resourced to properly execute its statutory functions	This function is drawn from s.26(d) of 2009 Act and enables the Commission to raise funds from industry levies.
23.	Carry out other functions as may be assigned to it from time to time by or under any other enactment	This is a standard function for regulatory bodies. Similar provisions are found in DPC Act 2018 and CCP Act 2014
24.	All functions that, immediately before the	This could be a simpler solution than

	establishment day, were vested in the Broadcasting Authority of Ireland are transferred to the Commission	restating the current functions of the Authority, and statutory committees as set out under s.26, 27 and 28 of the 2009 Act. This needs further consideration as some elements of sections 26-28 will become irrelevant or require minor amendment. The precise functions to be transferred could be set out in a schedule to the Act. Legal advice is needed on the most efficient solution for transferring regulatory functions to the new Commission.
25.	Draw up a statement of strategy	This is based on s. 29 of the 2009 Act and is a standard function for regulatory bodies.
26.	Ensure that appropriate systems and procedures are in place to achieve the Commission's strategic objectives and to take all reasonable steps available to it to achieve those objectives.	This function is drawn from s.10(3)(g) of the CCP Act 2014
27.	Have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently	This function is drawn from similar provisions in DPC Act 2018 and CCP Act 2014

Appendix A

Regulatory Remit of Commission

An options paper has previously gone to the Minister on the matter. As set out in the aforementioned paper, it was recommended that Option 4 be pursued as it would address the key issues identified in the most efficient, effective and cohesive manner and is likely to be politically and publically acceptable.

The options evaluated are outlined below. Following consideration by the Minister, options 4 and 5 were put forward to public consultation.

1. AVMSD minimum

Under this option the regulatory provisions of the AVMSD would be assigned to the Broadcasting Authority of Ireland (BAI) and the current part-time board structure of the BAI would be maintained.

2. AVMSD with a separate regulatory structure for VSPS

Under this option the regulatory provisions of the AVMSD in relation to television and on-demand audiovisual media services would be assigned to the BAI under its current structure and the video sharing platform services provisions would be assigned to a separate regulatory body.

3. AVMSD with the BAI reframed as a Media Commission

Under this option the relevant regulatory functions under the Broadcasting Act 2009 would be assigned to a commission with an executive chairperson and a Commissioner responsible for each of the three aspects of the AVMSD, those relating to television, those relating to on-demand audiovisual media services, and those relating to video sharing platform services.

4. Option 3 but incorporating aspects of the Digital Safety Commissioner Bill

This option is similar to option 3 but would incorporate a version of the notice and take down system proposed by the Digital Safety Commissioner Bill into the new Media Commission alongside the provisions of the AVMSD relating to video sharing platform services.

- The advantages of this option are that it is more efficient from a legislative and cost perspective to reform an existing regulatory structure than creating a new one, that it would ensure the effective implementation of the revised AVMSD, that decision making would be full time and dynamic, and that it would create a framework through which upcoming or future content related initiatives and issues arising at both a national and EU level can be addressed. A further positive is that this option may be seen to more actively address political and public concerns.

- The main drawback of this option is that a system of notice and take down for harmful content based on individual complaints may not be efficient and effective, nor meet public expectations on a larger scale.

5. Option 2 but with the VSPS structure incorporating aspects of the DSC Bill

This option is similar to option 2 but would incorporate a version of the notice and take down system proposed by the Digital Safety Commissioner Bill alongside the video sharing platform provisions of the revised AVMSD into a new regulatory body separate to the BAI.

- This option was not recommended to the Minister as it would require the establishment of another regulatory body. Furthermore, it does not take into account the ongoing convergence of media where the same businesses are likely to be involved in many mediums, both online and traditional.

- However, as with option 4, an advantage of this option is that it may be seen to more actively address political and public concerns and a further negative is that a system of notice and take down for harmful content based on individual complaints may not be efficient and effective, nor meet public expectations on a larger scale.

Appendix B

Summary of public consultation views

Overall, the respondents favoured the establishment of a Media Commission, incorporating the existing regulatory functions set out in the Broadcasting Act 2009, which would be responsible for all four strands of regulation. As noted in the explanatory note to the public consultation, under this approach at least one of the commissioners would be designated as an Online Safety Commissioner.

The respondents who favoured the establishment of a Media Commission stated that the ongoing convergence of media platforms, operational efficiencies for services, the public and the State and public expectation support this approach. In relation to the ongoing convergence of media platforms, many respondents stressed the growing trend for a single platform to act as more than one kind of service. For example, a platform could act as a Television Broadcasting Service, an On-demand Audiovisual Media Service, as a Video Sharing Platform Service and as a wide variety of other services through a single site, app or portal. These respondents also emphasised the possibility of knowledge sharing and some streamlined or complementary processes under a single regulatory structure.

A few respondents suggested that stakeholder or wider expertise could be brought into a Media Commission structure through statutory forums or boards.

Several respondents disagreed with this approach and favoured assigning the regulation of On-demand Audiovisual Media Services to the Broadcasting Authority of Ireland and establishing a new regulatory body to regulate Video Sharing Platform Services under Strand 2 and operate the national online safety system under Strand 1. These respondents emphasised that different skillsets and expertise are needed to regulate editorial and non-editorial services and the risk of importing an editorial regulatory mind-set into a non-editorial environment.

Regardless of the regulatory structure they favoured, the respondents stressed that a regulator or regulators would need to be sufficiently resourced, including being staffed with appropriately skilled persons and funded to the degree necessary to comfortably carry out its functions.

Regulatory Structures and Functions: Paper 2

Introduction

This paper is a follow on from Regulatory Structures and Functions: Paper 1, which outlined the rationale for the multiperson media commission structure and discussed pertinent issues around the implementation of such a structure.

This paper is split into 2 parts. Part 1 addresses issues around the transition to the Media Commission and structural issues including staffing, resources and governance. Part 2 examines the changes required to the Broadcasting Act to implement a Media Commission structure.

Drafts of the provisions implementing the recommended approaches can be found at **Appendix 1**.

Ministerial Decisions Sought

Issue	**Recommendation**
Classification of staff – Civil or Public Service	It is recommended that staff of the Commission are classified as public servants.
Accountability to Oireachtas Committees	It is recommended that: • The chairperson of the Commission is accountable to the PAC • Individual Commissioners should be answerable to other Oireachtas Committees.
Cooperation with other public bodies	It is recommended that provision is made for cooperation with other bodies.
Financial management and reporting	It is recommended that standard provisions in line with other regulatory bodies are included in the heads of bill.

Other Recommendations:

Issue	**Recommendation**
Staffing requirements and resources	It is recommended that the Department should

	carry out an analysis of workforce and resource requirements at a date closer to the proposed establishment of the Commission.
Accommodation/Lease Arrangements	It is recommended that the Department engage with BAI on this matter once there is an indication of the staffing requirements for the Commission.

Issues for legal advice

A number of legal issues were identified during the development of this paper. Legal advice has been received on these questions and is set out below:

Issue	**Question**	**Response**
Approach to Part 2 of the Broadcasting Act 2009	Is the proposed approach to delete Part 2 in its entirety and replace with a new Part reasonable? It is considered that this could represent a tidier solution from a drafting perspective than amending the existing sections in Part 2.	This is acceptable from a legal perspective. The proposed legislation is establishing and creating a new statutory entity, bestowing powers and functions for the first time on the new entity and dissolving the Broadcasting Authority. Deletion of Part 2 of the 2009 Act is in line with this.
Deletion of sections 32, 57 and 174-178 of the Broadcasting Act 2009	These sections are deemed to be unnecessary from a policy perspective. Are there any potential repercussions arising from the deletion of these sections?	These sections would not have a relevance to the new entity. Sections 174-178 deal with transitional provisions pertaining to the old Broadcasting Complaints Commission and BCI. Their deletion is not a problem.
Appendix 1 - Head 5, subsection (4)(a)	Does the chairperson need to apply in this case or is it the Commissioner in question that applies?	It is considered that it should be the Commissioner in question who is appearing before the Committee that applies.
Appendix 1 - Head 16, subsection (2)(c)	Does a specific reference to matters of criminal law need to be included here? For example, it would not the policy intention that the Gardaí would share information that could compromise an	It is considered that no mention should be expressly made as to the functions of the Gardaí or indeed DPP in criminal proceedings.

	ongoing case. Perhaps some form of exclusion is required here.	

Part 1 – Structures and Transition

1. Staffing

1.1 Number of staff required in Media Commission

It is not possible to estimate the overall staffing requirements of the Commission at this juncture as decisions are required on the precise nature of the regulatory arrangements which will apply to the online safety strand. In particular, the issue of whether complaints will be treated on an individual, aggregated or systemic basis will have implications for the staffing numbers required. If a decision is made to treat complaints on an individual basis, the staffing requirements for the organisation will increase considerably given the volume of complaints currently handled by social media companies. If a systemic or aggregated approach to complaints is taken it is expected that the staffing requirements will be lower. Furthermore, the EU wide reach of some of the regulated strands (e.g. Video Sharing Platform Services) is likely to generate further demand for resources.

Regardless of the regulatory approach taken, it is envisaged that the required staffing levels will be considerably higher than the c.40 staff currently working on the regulatory aspects of the Broadcasting Act 2009 in the BAI.

Recommendation

It is recommended that the Department carries out an analysis of workforce and resource requirements at a date closer to the proposed establishment of the Commission. Engagement will be required with the Department of Public Expenditure and Reform on the proposed staffing numbers as regulatory bodies are subject to the Employment Control Framework.

1.2 Transition of BAI staff to Commission

Provision is required to transfer existing BAI staff (c. 40 staff) and their contractual rights to the new structure. It is envisaged that these staff will continue their roles in the linear division of the new Commission.

1.3 Pay and grading

The Commission will require relevant expertise to effectively discharge its functions. A more flexible pay and grading structure in the Commission would assist in the recruitment of specialist regulatory staff. The Civil Service grading structure which currently applies in the BAI is considered too restrictive given the degree of specialisation that would be required for staff of the Commission. A more flexible pay structure is expected to be cost neutral to the Exchequer as the Commission will be funded through industry levies. A more flexible pay structure is seen across a number of regulators, including CCPC, CRU and ComReg. A more flexible pay structure would entail the regulator having discretion in terms of the point on which new entrants are placed on a pay scale.

The need for flexibility in pay for specialist roles is affirmed by the recommendations in the recently published report of the Public Service Pay Commission, which noted that public service employers

may require some flexibility in terms of pay to address specific recruitment and retention difficulties in particular specialist areas.[1]

1.4 Classification of staff – Civil v Public Servants

A decision is required as to whether staff of the Media Commission should be classified as civil or public servants. A review of comparator regulatory bodies shows that they are predominately public service bodies. CCPC, ComReg, CRU, and the current broadcasting regulator are classified as public service bodies while the Data Protection Commission is classified as a civil service body. It should be noted that BAI staff transferred to the Commission will retain their existing terms and conditions.

The key features of the civil service and public service bodies are set out as follows:

Comparison of Civil and Public Service Bodies		
Category	**Civil Servants**	**Public Servants**
Pay	Pay rates regulated directly through circulars issued by Minister for Public Expenditure and Reform (MPER)	Pay rates would be determined by Commission subject to the approval of Minister and MPER. More scope for flexibility in pay rates depending on skills required. General public service pay agreements may apply depending on the body in question and the specific industrial relations arrangements in place.
Grading	Standard general and technical civil service grades. While there is a move towards greater specialisation in the civil service, a more technical body such as the Media Commission could be constrained by the overall grading system.	Public service bodies have more flexibility around the grading of staff. Public service bodies are free to formulate their own grading systems to better suit their needs, subject to DPER approval.
Tenure/ Dismissal	Staff generally appointed for an indefinite period. Staff who complete probation serve "*at the will and*	More flexibility is available to public bodies regarding the tenure of employment.

[1] Report of the Public Service Pay Commission Recruitment and Retention Module 2 (July 2019) https://paycommission.gov.ie/wp-content/uploads/Report-of-the-PSPC.pdf

	pleasure of the government" i.e. permanent tenure. It is perceived to be difficult to dismiss underperforming staff.	Dismissal procedures are in line with standard employment law.
HR matters	Working hours, annual leave, sick leave etc. directly regulated by Minister for Public Expenditure and Reform.	Public service bodies have more leeway in setting terms and conditions for employees. There can be a lack of consistency between public service bodies and the civil service standards.
Performance management	Standardised performance management system in place	Varies between bodies. Some use PMDS and some use bespoke performance management system.
Mobility	Access to civil service wide mobility opportunities	Currently no scheme or system in place to facilitate mobility to other public/civil service bodies.
Superannuation	New entrants are members of the single public service pension scheme	New entrants are members of the single public service pension scheme.
Appropriateness in a regulatory context	Not necessarily an issue as officials in independent bodies such as the Data Protection Commission and the C&AG are classified as civil servants of the State. There may however be a public perception that civil servants are not fully independent.	Public bodies are generally perceived to be more independent of central government.

Recommendation

On balance, it appears more appropriate to classify the Media Commission as a public service body for the following reasons:

- Perception of independence
- Alignment with other regulatory bodies (e.g. CCPC, ComReg, CRU)
- Flexibility around pay and conditions for staff.

A draft provision in relation to staff is set out in Head 1 in Appendix 1.

2. Governance

2.1 Strategy statement and work programme

It is a standard requirement that all State bodies have a statement of strategy in place to set appropriate objectives and goals and identify relevant indicators and targets against which performance can be clearly measured.

It is noted from a review of comparative legislation that it is standard practice to require the regulator to prepare an annual work programme for submission to the Minister. A work programme generally details the priorities of the regulator for that year, having regard to the objectives in its statement of strategy and its available resources.

Recommendation

Accordingly, it is recommended that standard provisions in relation to statements of strategy and work programmes be included in the heads of bill. See Head 2 in Appendix 1.

2.2 Accountability

A regulator exists to achieve objectives deemed by government and the legislature to be in the public interest and operates using the powers conferred by the legislature. A regulator is therefore accountable to the legislature, whether directly or through the Minister.

In a regulatory context, accountability can be split into two broad areas: financial accountability and accountability for the performance of functions.

Financial accountability

In terms of financial accountability, it is standard for the head of a regulatory body to be called before the Public Accounts Committee to account for the regularity and propriety of the body's expenditure. In line with the existing Broadcasting Act and other regulatory bodies, it is recommended that a provision for the chairperson of the Commission to appear before the PAC is included in the heads of bill.

Accountability for performance of functions

In relation to accountability for the achievement of strategic or public policy goals, it is standard to include a provision to call Commissioners before an Oireachtas Committee. For example, section 27 of the Competition and Consumer Protection Act 2014 states that "*the chairperson of the Commission shall, at the request in writing of a Committee, attend before it to give account for the general administration of the Commission*".

Attendance before Oireachtas Committees

A review of comparative legislation shows that is commonplace to call the chairperson of a regulatory body to give account to Oireachtas Committees. The legislation underpinning the Commission for the Regulation of Utilities takes a different approach and only refers to the "Commission" being accountable to Oireachtas Committees.

Given the public and political focus on online safety, it may be preferable for the legislation to state that the Commission is accountable to the Oireachtas rather than just the chairperson. This would allow the Online Safety Commissioner or other Commissioners to be called before an Oireachtas committee to answer questions on their specific areas of responsibility and expertise.

Recommendations

- It is recommended that the chairperson of the Commission is accountable to the PAC.
- It is recommended that individual Commissioners should be answerable to other Oireachtas Committees. See Heads 3 and 4 in Appendix 1.

Reporting and information sharing

The regulator should aim to foster a "no surprises" relationship with the Department and the Oireachtas. Accordingly, appropriate reporting methods and metrics should be established to monitor regulatory performance. Based on a review of comparative legislation and the existing Broadcasting Act, it is standard practice to include provision for the production of annual reports. Furthermore, it is common to see provisions along the lines of "*the Commission shall supply to the Minister any such information as the Minister may from time to time require regarding the performance of its functions*".

The recent review of the Commission for Regulation of Utilities by the OECD[2] contains some relevant recommendations in terms of how regulators should report to the Minister and the legislature. Among the recommendations was the suggestion that the regulator should maintain a high level dashboard of key performance indicators which also cover key sector trends. This would enable the Minister and the Oireachtas Committees to easily assess performance.

The OECD report also recommended regulators should structure meetings with Oireachtas Committees around key milestones occurring over the lifecycle of the regulatoŕs planning and reporting activities. These meetings would also provide an opportunity to discuss trends and long-

[2] https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_communications_climate_action_and_environment/submissions/2018/2018-03-27_opening-statement-dr-paul-mcgowan-commission-for-regulation-of-utilities_en.pdf

term challenges for the sectors overseen by the regulator in a manner that would be mutually beneficial for the regulator and the Oireachtas.

It may be useful to remain cognisant of these findings from a governance and accountability perspective once the regulator is established.

Recommendation

Is it recommended that standard provisions in relation to reporting are included. See Head 5 in Appendix 1.

2.3 Integrity

Regulatory bodies must demonstrate high standards of integrity, holding all personnel to high standards of conduct, and avoiding any suggestion that impropriety or illegal behaviour is tolerated.

Accordingly, it would be appropriate to include provisions across the following areas:

Disclosure of interests

Similar to the existing provision in the Broadcasting Act 2009, it is considered appropriate that Commissioners and staff would be obliged to disclose conflicts of interest.

Prohibition on disclosure of confidential information

Given the nature of the information that staff of the Commission are likely to be exposed to, it is prudent to include an explicit provision to prohibit disclosure of confidential information. This will provide assurance to regulated entities that procedures are in place to prevent the release of commercially sensitive information and trade secrets.

Recommendation

It is recommended that standard provisions in relation to the above items are included in the heads of bill. See Heads 6 and 7 in Appendix 1.

2.4 Meeting procedures

A review of comparative legislation shows that there are differing approaches around the level of detail in legislation regarding meeting procedures. The CCPC take a highly prescriptive approach whereas the DPC is allowed to regulate its own procedures. In the interests of reducing administrative burden, it would appear to be preferable to include a simple provision to allow the Commission to regulate its own meeting procedures, for example: *"Subject to this Act, the Commission shall regulate its own procedures".*

Recommendation

It is recommended that a simple provision be included to provide that the Commission shall regulate its own procedures. This provision would be included under the section addressing the functions of the Commission. See Head 8 in Appendix 1.

2.5 Policy communications from Minister

Section 30 of the Broadcasting Act provides that the Minister may make policy communications to the regulator "*in the interests of the proper and effective regulation of the broadcasting sector".* As the regulator is only required to "*have regard to*" the policy communication, the independence of the regulator in the performance of its functions cannot be undermined by a policy communication issued by the Minister. For the purposes of the Online Safety and Media Regulation Bill this section could be amended to encompass the other regulatory strands.

It is noted from the Communications Regulation Act 2002 and the Competition and Consumer Protection Act 2014 that stronger provisions exist in which the Minister can compel the regulator in certain circumstances to comply with directions but this type of power is not considered appropriate in the context of the Media Commission given the nature of the media sector.

Recommendation

It is recommended that this section is amended to encompass the other regulatory strands. See Head 9 in Appendix 1.

3. Financial Management

3.1 Accounts and audit

In line with standard practice, the Commission will be audited by the Comptroller and Auditor General and the accounting year will run from 1 January to 31 December. A transitional provision will be required in relation to the production of the final accounts of the BAI.

Recommendation

It is recommended that standard provisions apply. See Head 10 in Appendix 1. See Head 24 for a transitional provision in relation to the production of the final accounts of the BAI.

3.2 Superannuation

The Commission will require a pension scheme to be established for staff that joined the public service prior to 2013. New entrants will be required to join the single public service pension scheme and existing staff who joined after 2012 will continue to be members of the Single Public Service Pension Scheme. After establishment, the Commission will be required to prepare a new scheme for approval by the Minister and the Minister of Public Expenditure and Reform.

Recommendation

It is recommended that standard provisions apply regarding pension schemes. See Head 11 in Appendix 1.

3.3 Estimates

Under section 37(1) of the Broadcasting Act 2009, the regulator is required to prepare 3 year estimates of its income and expenditure.

This information is useful for entities in regulated sectors as it provides a forecast of operating expenses for the regulator. As industry levies are based on the operating costs of the regulator, this allows regulated entities forecast their expenditure in terms of expected levies. Therefore, it is considered appropriate to retain this provision.

Recommendation

This provision is currently in operation under the Broadcasting Act 2009 and its retention is recommended for the reasons outlined above. See Head 10 in Appendix 1.

3.4 Grants

It is likely that start-up funding will be required to defray the Commission's initial establishment costs. A review of comparative regulators shows that it is standard practice to include such a provision for grants in the legislation. Engagement will be required with the Department of Public Expenditure and Reform to discuss the optimal method for providing start-up funding for the Commission.

Recommendation

A draft provision to provide grants to the Commission in line with standard practice is included in Head 12 in Appendix 1. Inclusion of this provision will be subject to the outcome of discussions with DPER.

3.5 Borrowings

In line with standard practice for independent regulatory bodies, it is recommended that provision be made for the Commission to borrow in the event of any temporary shortfall in funding during the financial year.

At present, section 35 of the Broadcasting Act states:

35.— (1) The Authority may, with the approval of the Minister, given with the consent of the Minister for Finance, borrow temporarily such sums as it may require for the purpose of providing for current expenditure.

(2) The Authority may, with the approval of the Minister, given with the consent of the Minister for Finance, borrow money by means of the creation of stock or other forms of security to be issued,

transferred, dealt with and redeemed in such manner and on such terms and conditions as the Authority, with the consent of the Minister for Finance, may determine.

(3) The borrowing powers conferred by subsection (2) on the Authority may, subject to the consent of the Minister, be exercised for any purpose arising in connection with the performance of its functions, but there may be attached to a consent to borrow the condition that the monies shall be utilised only for the purpose of a programme of capital works approved by the Minister.

(4) The terms upon which monies are borrowed under subsection (2) may include provisions charging the monies and interest thereon upon all property of whatsoever kind for the time being vested in the Authority or upon any particular property of the Authority and provisions establishing the priority of such charges amongst themselves.

It is proposed that the provisions of section 35 are simplified to state: *"The Commission may borrow money (including money in a currency other than the currency of the State) for the purpose of performing any of the functions of the Commission, subject to the consent of the Minister and the Minister for PER and any conditions they may determine."*

Recommendation

It is recommended that a standard provision be included in relation to borrowings. See Head 13 in Appendix 1.

4. Consultants and advisors

It would appear to be preferable to encourage the development of in-house expertise within the new regulator and to avoid over reliance on external consultants. This would foster the development of corporate knowledge within the organisation.

However, the use of consultants will likely be unavoidable given the breadth of the Commission's remit. Accordingly, it is proposed that a provision similar to that in section 18 of the Broadcasting Act 2009 is included in the heads of bill

Section 18 of Broadcasting Act 2009:

18.— (1) The Authority may from time to time engage such consultants or advisers as it or a statutory committee may consider necessary for the performance of the functions of the Authority or a statutory committee, and any fees due to a consultant or adviser engaged under this section shall be paid by the Authority out of monies at its disposal.

(2) The Authority or a statutory committee and the chief executive shall have regard to, but shall not be bound by, the advice of any consultant or adviser under this section.

Recommendation

It is recommended that a provision similar to that in section 18 of the Broadcasting Act 2009 is included in the heads of bill. See Head 14 in Appendix 1.

5. Cooperation with other bodies

Cooperation in a regulatory context refers to the process of reducing redundancy, contradictions, enforcement gaps, and other inconsistencies between the actions of regulatory agencies. Given the proposed remit of the Media Commission in relation to online safety, there will be significant overlap in particular with work undertaken by bodies such as An Garda Síochána, D/Justice, Data Protection Commission etc.

The Law Reform Commission's recent report on Regulatory Powers and Corporate Offences notes that cooperation agreements provide the following benefits:

- Avoiding duplication of activities between regulators;
- Ensuring consistency between decisions and other actions taken by regulators;
- Information sharing and knowledge transfer.

Given the benefits of cooperation agreements, it appears prudent to include such a provision in the Online Safety and Media Regulation Bill. In a regulatory context, cooperation agreements commonly take the form of a memorandum of understanding. It is noted from a review of comparative legislation that the Competition and Consumer Protection Act 2014 contains a detailed provision in relation to cooperation and it is proposed that this provision is used as a model for the Media Commission's cooperation with other entities.

(i) Proposed provision

It is proposed to include a general provision in relation to cooperation with other bodies, for example: "*The Commission, in the interests of the effective discharge of its functions, may enter into cooperation agreements with other bodies as it sees fit*".

This would give the Commission flexibility to cooperate with bodies as it deems appropriate.

Recommendation

It is recommended that general provision is included for the Commission to cooperate with other bodies as it sees fit. See Head 15 in Appendix 1.

6. Premises/Leases

The precise accommodation requirements for the new Commission cannot be determined as decisions are required on the nature of the regulatory arrangements to apply to the online safety strand, as noted in section 1.

It is envisaged that the BAI would enter into negotiations for the provision of accommodation before the establishment of the new body. Provision will be made so that any contract entered into by BAI will automatically carry across to the Commission. Any acquisition of any accommodation through purchase or lease must comply with Circular 17/2016:"*Policy for Property Acquisition and for Disposal of Surplus Property".* In line with this circular, is envisaged that the OPW would assess if the new Commission could be accommodated within the existing stock of State property in Dublin.

The BAI/new Commission will also require the approval of the Minister and Minister for Public Expenditure and Reform prior to entering into a new lease. It should be noted that the lease on BAI's current premises at 2-5 Warrington Place expires in 2021.

Recommendation

It is recommended that the Department engage with BAI on this matter once there is an indication of the staffing requirements for the Commission.

7. Standard Transitional Arrangements

In line with standard practice for the transfer of functions between bodies, the following provisions are required to ensure the orderly transition of functions from the Broadcasting Authority of Ireland to the Media Commission. See Heads 16 to 23 in Appendix 1 for a full list of transitional provisions.

Item	**Commentary**
Transfer of land and other property	Standard transitional provision
Transfer of rights and liabilities, and continuation of leases, licences and permissions granted by Broadcasting Authority of Ireland	This provision will allow the BAI to continue any lease it holds. It will also allow the continuation of licences, contracts and any other permissions granted by the Authority or its statutory committees.
Liability for loss occurring before establishment day	Standard provision to allow any legal proceedings to continue.
Provisions consequent upon transfer of functions, assets and liabilities to Commission	Standard transitional provision

Part 2

Changes required to Broadcasting Act 2009 to establish Media Commission

The following table sets out the sections which require amendment in the Broadcasting Act 2009 as a result of a decision to establish a Media Commission. It is important to note that this table does not take account of the new functions which are to be assigned to the Media Commission, whether National Online, VSPS or Video On-Demand. The approach to be taken to these new functions will have an impact on the complexity of the required amendments.

It should be noted that while some of sections (e.g. licencing and contracts) in the below table could be simplified or amended to improve the operation of the Act, the timelines in relation to the production of Heads of Bill mean that the majority of matters not directly related to the transposition of the AVMSD and the implementation of online safety regulation will be set aside for a future review of the operation of the Broadcasting Act 2009.

Consideration should be given to repealing the entirety of Part 2 of the Broadcasting Act 2009 and replacing it with a new Part which addresses the Media Commission's structures and functions. This could represent a tidier solution from a drafting perspective than amending the existing sections in Part 2. Sections 5 to 38 in the table below comprise Part 2 of the current Act.

Proposed amendments to Broadcasting Act 2009		
Section	**Short description**	**Proposed amendments (complex or simple)**
2	Definitions	Simple: Amendments to reflect that the Commission has replaced the Authority
5	Establishment Day	Simple: New establishment day for Media Commission
6	There stands established...	Simple: New section requiring the title of the Media Commission in English and Irish – previous section 6 deleted
7	Body Corporate and Seal	Simple: Insert standard provision in line with other statutory bodies
8-13	Appointment to the Authority and Committees/Criteria/Terms and Removal/Chair/Exclusions	Simple: Repeal as these entities will no longer exist
14	Chief Executive Officer	Complex: Deletion and replaced by section(s) establishing multi-person commission

15	Staff	Simple: Provision to be simplified and brought in line with other Commissioner led regulators. It is proposed that staff of the Commission will be public servants.
16	Superannuation	Simple: Existing section deleted and replaced with standard provision to establish scheme for pre 2013 public servants
17	Advisory Committees	Complex: Existing section will be deleted and replaced. The issue of advisory committees is addressed in Regulatory Structures and Functions: Paper 1
18	Consultants and Advisers	Simple: Existing section will be updated
19	Accountability to PAC	Simple: Existing section simplified. Chairperson of Commission to be accountable to PAC
20	Accountability of Chair and CEO to Oireachtas Committees	Simple: Section to be simplified as Chair and Authority will no longer exist. It is proposed that individual Commissioners will be accountable to Oireachtas Committees in this section
21	Disclosure of Interest by Authority and Committee Members	Simple: Repeal as the entities will cease to exist
22	Disclosure of interests by Staff and Commissioners	Simple: Standard provision in line with other regulatory bodies to be included.
23	Code of Conduct	As this is a requirement of the 2016 Code of Practice for the Governance of State Bodies, it doesn't appear necessary to retain this provision. The DPC and CCPC do not have such a provision in legislation.
24	Independence	Simple: Amendment to replace Authority and Committees with Media Commission
25	Objectives of Authority	Complex: See revised list of objectives in Regulatory Structures and Functions: Paper 1
26	Functions of Authority	Complex: See revised list of functions in Regulatory Structures and Functions: Paper 1

27	Functions of Contract Awards Committee	Section to be repealed
28	Functions of Compliance Committee	Section to be repealed
29	Statements of Strategy	Section deleted and replaced
30	Policy Communication	Proposed to retain this section and expand to encompass other regulatory strands.
31	Powers	Complex: Replace Authority with Commission, see proposed powers in the Regulatory Powers policy paper
32	Duties	Simple: Section appears to be unnecessary – it is proposed to not retain this section. The draft head on prohibition of disclosure of confidential information should address the references in this section to disclosure of commercially sensitive information. Legal advice is required on the deletion of this section as it does not appear to be in active use currently by the BAI.
33	Levy	Complex: To be addressed in policy paper on levies (January 2020)
34	Exchequer Funding	Simple: Proposed that section is simplified and retained
35	Borrowings	As 34
36	Deposits and Charges	Simple: Replace Authority and Contract Awards Committee with Commission
37	Accounts and Audit	Simple: Replace Authority with Commission. Proposed that section is retained and simplified
38	Annual Report	Simple: Replace Authority with Commission. Proposed that section is retained and simplified
39(1)(c)	News and Current Affairs Derogation	Simple: Replace Authority with Commission

39(3)	News and Current Affairs Derogation	As at 39(1)(c)
40	Recording of Broadcasts	Simple: Replace Compliance Committee with Commission
42	Broadcasting Codes	Simple: Replace Authority with Commission;. policy paper on Regulating Audiovisual Media Services will examine the appropriateness of integrating linear and on demand in the same code.
43	Broadcasting Rules	Simple: Replace Authority with Commission; potential to simplify the text
44	Inspection of Draft Codes and rules	Simple: Replace Authority with Commission
45	Presentation of Codes and Rules to Minister	Complex: Replace Authority with Commission; The policy paper on Regulating Audiovisual Media Services will consider whether subsections 3 and 4 can be amended to allow for the Commission to review codes and rules as and when necessary, or at the direction of the Minister etc.
46	Cooperation with other parties – standards and self-regulation	Simple: Replace Authority with Commission;
47	Code of Practice – Complaints Handling	Simple: Replace Compliance Committee with Commission
48	Complaints Process	Simple: Replace Compliance Committee with Commission. The policy paper on Regulating Audiovisual Media Services will consider if there is scope to give greater flexibility to the Commission in how it considers complaints and in the case of standard issues, to make the assessment of complaints quicker.
49	Right of Reply	Simple on the face of it, but Potentially Complex: Replace Authority and Compliance Committee with Commission the policy paper on Regulating Audiovisual Media Services will examine if it is feasible to simplify this section as part of the Online Safety and Media Regulation Bill.

50	Investigation into affairs of the Contractor	Complex: Replace Compliance Committee with Commission
51	Termination or suspension of contract	Complex: Replace Compliance Committee and Authority with Commission
52	Definitions	This issue is to be considered as part of the overall approach to regulatory investigations and administrative sanctions.
53	Investigations into affairs of broadcaster	As at 52
54	Report and findings	As at 52
55	Financial Sanctions	As at 52
56	Matters to be determined in determining the amount	As at 52
57	Notification	General provisions in relation to notification are not included in more recent regulatory Acts such as the Competition and Consumer Protection Act 2014 and Data Protection Act 2018. Accordingly, it may be possible to delete this section. Legal advice required on deletion. Provision seems, on the face of it, to be overly prescriptive. If this provision is retained it may require changes to definitions (i.e. Media Service Providers instead of broadcasters).
58	Interpretation	Definitions require updating depending on approach to be taken, i.e. Media Service Providers instead of broadcasters/ registration or otherwise of on-demand services etc. 58(2) needs to be updated to ensure continuation of broadcasting contracts entered into by BAI. This issue will be examined in the paper on Regulating Audiovisual Media Services.
59	Broadcasting Licence	Simple: Replace Authority with Commission –
60	Variation of Broadcasting Licence	Simple: Replace Authority with Commission
61	Emergencies	Simple: Replace Authority with Commission

62	Restriction on Award of sound broadcasting contract	Simple: Replace Contract Awards Committee and Authority with Commission.
63	Sound Broadcasting Contracts	Simple: Replace Contract Awards Committee and Authority with Commission.
64	Community Sound Broadcasting Contracts	Simple: Replace Contract Awards Committee and Authority with Commission.
65	Applications of Sound Broadcasting Contracts	Simple: Replace Contract Awards Committee and Authority with Commission.
66	Determination of Application	Simple: Replace Contract Awards Committee, Compliance Committee and Authority with Commission.
67	Fast track process	Simple: Replace Contract Awards Committee, Compliance Committee and Authority with Commission
68	Temporary or institutional sound broadcasting contract	Simple: Replace Contracts Awards Committee and Authority with Commission;
69	Terms and Conditions of Broadcasting Contract	Simple: Replace Compliance Committee and Authority with Commission
70	Television programme services contract	Simple: Replace Contracts Awards Committee and Authority with Commission
71	Content Provision Contracts	Simple: Replace Authority and Contract Awards Committee with Commission
72	Community Content Provision Contracts	Simple: Replace the Authority with Commission
73	Assessment of Community Needs	Simple: Replace Authority with Commission.
74	Electronic Programmes Guide	Simple: Replace Authority with Commission. Consider whether this section can be developed, is there scope to move away from EPGs and can something be said about new methods of user interfaces in section 74(5) for example? One potential simple way of capturing all forms of user interface would be to remove “schedule” from 74(1) and update the definitions so that they are not tied to “broadcasting services”. The issue of prominence is addressed in the policy paper

		on Regulating Audiovisual Media Services.
75	Rules for Programmes Guide	Simple: Replace Authority with Commission. Consider whether this can be combined with 74.
76	Transmission of Broadcasting Services by MMD system	Simple: Consultation with ComReg required on the appropriateness of retaining this section. This issue will be addressed in the paper on Regulating Audiovisual Media Services.
77	Must-Carry and Must-Offer	Simple: Replace Authority with Commission.
78	Offences	Potentially complex: Section can likely be deleted and issue addressed under new provision on offences.
86(4)	Exclusions from Board Membership	Simple: Amend and replace Commissioner/Staff Member of Commission.
96(16)	Audience Councils	Simple: Replace Authority with Commission
100	Sectoral Impact Assessments	Simple: Replace Authority with Commission
101(3)	Public Service Statement	Simple: Replace Authority with Commission
102	Annual Statement of Performance Commitments	Simple: Replace Authority with Commission
103(4)(a)	Ministerial Consent	Simple: Replace Authority with Commission
104	Establishment of Subsidiaries or Joint Ventures	Simple: Replace Authority with Commission
106(3)	Consultation on fixing of limits	Simple: Replace Authority with Commission. In order not to unduly impact the advertising market, it will be important to ensure that any changes implemented in Commercial TV as a result of AVMSD, are reflected appropriately in the limits on RTE. Similarly, if flexibility is granted for Commercial Radio in Section 41, it should be reflected appropriately in the limits on RTÉ's sound broadcasting advertising. Issue to be addressed in policy paper on Regulating Audiovisual Media Services.

107	Borrowing	Simple: Replace Authority with Commission
109(13)	Accounts and Audit	Simple: Replace Compliance Committee with Commission
111	Access to Archives	Simple: Replace Authority and Compliance Committee with Commission
112	Code of Fair Trading Practice	Simple: Replace Authority and Compliance Committee with Commission
114(g)&(h)	Principal Objects of RTÉ	Simple: Replace Authority with Commission
115	Broadcasting Infrastructure	Simple: Replace Authority with Commission
116(5)	Independent Programme Account	Simple: Replace Authority with Commission
118(1)(g)&(h)	Principal Objects of TG4	Simple: Replace Authority with Commission
124	Recommendations as to changes to Public Funding	Simple: Replace Authority with Commission
128	Oversight of Public Funding of Houses of the Oireachtas and Irish Film Channel	Simple: Replace Authority with Commission
129	Definitions	Simple: Replace Authority with Commission.
130	Additional Functions of RTÉ	Simple: Replace Authority with Commission.
131	Additional Functions of Authority	Simple: Replace Authority and Compliance Committee with Commission.
132	ComReg duties DTT	Simple: Replace Authority with Commission
133	ComReg duties DT radio	Simple: Replace Authority with Commission
134	Amendment of Sound Broadcasting Services	Simple: Replace Authority, Contract Awards Committee and Committee with Commission
136	Application for Mux contracts	Simple: Replace Authority & Contract Awards Committee with Commission
137	Determination of Applications for Mux contracts	Simple: Replace the Contract Awards Committee with Commission
138	T&Cs of Mux Contracts	Simple: Replace the Authority with

		Commission
139	Analogue Switch-Off	Simple: Replace Authority with Commission, Paper on Regulating Audiovisual Media Services will consider whether there are any elements of this section which can be repealed. BAI will be consulted on this matter.
154	Broadcasting Funding Scheme	Simple: Replace Authority with Commission, consider insertion of a mechanism whereby the Commission will recommend revisions to these schemes – including the inclusion of On-demand services and services not established in Ireland, within x years of the Act coming into force. Changes to this section are addressed in the policy paper on Regulating Audiovisual Media Services.
155	Objectives of scheme	Simple: Replace Authority with Commission
156	Amounts to be paid to scheme	Simple: Replace Authority with Commission
157	Broadcasting Fund	Simple: Replace Authority with Commission
158	Reviews of Scheme	Simple: Replace Authority with Commission – potential location for addition referred to at 154
159	Winding up and dissolution	Simple: Replace Authority with Commission
174	Dissolution of BCI and saver	Simple: Consider whether sections 174-178, which comprise Part 12 of the Act can now be repealed. Existing sections in Part 12 could be repealed and replaced with transitional provisions for BAI. Legal advice is required on appropriateness of deletion.
175	Dissolution of BCC and saver	As at 174
176	Transitional Provisions – BCI	As at 174
177	Transitional Provisions – BCC	As at 174
178	Final Accounts of BCI	As at 174
185	Amendment of section 5 of Act of 1998	Simple: Replace BAI with Media Commission (so as to distinguish from Referendum

		Commission)

Appendix 1

Draft heads of Bill

Head 1

Provision – Staff of the Commission

(1) The Commission may, with the consent of the Minister given with the approval of the Minister for Public Expenditure and Reform, appoint such and so many persons to be members of the staff of the Commission as it may from time to time determine.

(2) The terms and conditions of service of a member of the staff of the Commission shall, with the consent of the Minister given with the approval of the Minister for Public Expenditure and Reform, be such as may be determined from time to time by the Commission.

(3) There shall be paid by the Commission to the members of its staff such remuneration and allowances as, from time to time, the Commission, with the consent of the Minister given with the approval of the Minister for Public Expenditure and Reform, determines.

Explanatory note:

This provision allows the Commission to hire staff on such terms and conditions as it may determine, subject to the consent of the Minister given with the approval of the Minister for Public Expenditure and Reform.

Head 2

Provision – Strategy statement and work programme

1) As soon as practicable after the establishment day, and thereafter at least 3 months before each third anniversary of the establishment day, the Commission shall prepare and submit to the Minister a strategy statement for the following 3 year period.

(2) A strategy statement shall –

(a) specify the key objectives, outputs and related strategies (including the use of resources) of the Commission.

(b) have regard to the need to ensure the most beneficial, effective and efficient use of the Commission's resources,

(c) except for the first strategy statement, include a review of the outcomes and effectiveness of the preceding strategy statement,

(d) specify the manner in which the Commission proposes to assess its performance in respect of the objectives referred to in paragraph (a), taking account of relevant performance indicators (financial and non-financial),

(e) include the Commission's plans as to the number, nature and scope of contracts that it proposes to enter into during the period covered by the statement

(f) be prepared in the form and manner that the Minister may from time to time direct, and

(g) include any other matters that the Minister may from time to time direct.

(3) When preparing the strategy statement, the Commission may consult such persons as it considers appropriate.

(4) Prior to the adoption of a strategy statement and its presentation to the Minister, the Commission shall undertake a public consultation process on a draft of the strategy statement

(5) As soon as practicable after a strategy statement has been submitted to the Minister under subsection (1), the Minister shall cause a copy of the strategy statement to be laid before each House of the Oireachtas and the strategy statement shall be published in the form and manner that the Commission considers appropriate

(6) The Commission shall prepare and submit to the Minister, at least 2 months before the commencement of each financial year, a work programme relating to the discharge of its functions, including—

(a) having regard to the strategy statement, the objectives of the Commission for that year and its strategy for achieving those objectives,

(b) the priorities of the Commission for that year, having regard to those objectives and its available resources, and

(c) any other matters that the Minister may from time to time specify when issuing directions or guidelines under subsection *(7).*

(7) The Minister may, from time to time, issue directions or guidelines to the Commission concerning the preparation of the work programme and the Commission shall comply with those directions and prepare the work programme in accordance with those guidelines.

Explanatory note:

This head provides for the Commission to prepare a statement of strategy and a work programme.

Head 3

Provision - Accountability of Chairperson to Committee of Public Accounts

(1)The chairperson is the accounting officer for the Commission.

(2) The chairperson of the Commission shall, whenever required in writing to do so by the Committee of Dáil Éireann established under the Standing Orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General, give evidence to that Committee in relation to matters including the regularity and propriety of transactions, the economy and effectiveness in the use of expended funds and related matters.

Explanatory note:

Accountability to an Oireachtas Committee, rather than to the Minister and Department, will serve to underpin the independence of the Commission while ensuring adequate financial control.

Head 4

Provision - Accountability of Commissioner to other Oireachtas Committees

(1) A Commissioner shall, at the request in writing of a Committee, attend before it to give account for the general administration of the Commission.

(2) The Commissioner shall not be required to give account before a Committee for any matter which is or has been or may at a future time be the subject of proceedings before a court or tribunal.

(3) Where the Commissioner is of the opinion that a matter in respect of which he or she is requested to give an account before a Committee is a matter to which subsection (2) applies, he or she shall inform the Committee of that opinion and the reasons for the opinion and, unless the

information is conveyed to the Committee at a time when the Commissioner is before it, the information shall be so conveyed in writing.

(4) Where the Commissioner has informed a Committee of his or her opinion in accordance with subsection (3) and the Committee does not withdraw the request referred to in subsection (2) in so far as it relates to a matter the subject of that opinion—

(a) the Commissioner may, not later than 21 days after being informed by the Committee of its decision not to do so, apply to the High Court in a summary manner for determination of the question whether the matter is one to which subsection (3) applies, or

(b) the Chairperson of the Committee may, on behalf of the Committee, make such an application,

and the High Court shall determine the matter.

(5) Pending the determination of an application under subsection (4), the Commissioner shall not attend before the Committee to give account for the matter the subject of the application.

(6) If the High Court determines that the matter concerned is one to which subsection (3) applies, the Committee shall withdraw the request referred to in subsection (2), but if the High Court determines that subsection (3) does not apply, the Commissioner shall attend before the Committee and give account for the matter.

(7) In this section, a reference to "Commissioner" shall be taken to be a reference to any member of the Commission.

Explanatory note

Provide that any Commissioner can be called before an Oireachtas Committee. Given the diverse range of activities likely carried out by the Commission, it is considered appropriate that any Commissioner, not just the Chairperson, can be called to answer before an Oireachtas Committee. This is particularly relevant for the role of Online Safety Commissioner.

Head 5

Provision – Reporting by Commission

(1) The Commission shall not later than 30 June in each year prepare and submit to the Minister a report on its activities in the immediately preceding year (in this section referred to as the "annual report"), and the Minister shall, as soon as may be after receiving the annual report, cause copies of the annual report to be laid before each House of the Oireachtas.

(2) An annual report shall include information in such form and regarding such matters as the Minister may direct but nothing in this subsection shall be construed as requiring the Commission to include information the inclusion of which would, in the opinion of the Commission, be likely to prejudice the performance of its functions.

(3) An annual report shall include details of any scheme approved under Part 10 [of the current Broadcasting Act i.e. relating to the Broadcasting Fund].

(4) An annual report shall include a report to the Minister on progress made towards increasing accessibility of audiovisual media services to people with disabilities, and in particular, on progress made to achieve the targets set out in any broadcasting rules.

(5) The Commission may from time to time furnish to the Minister such information or reports about the performance of its functions as it considers appropriate.

(6) In addition to information provided by the Commission in its annual report and in any reports made under subsection (5) the Commission shall supply to the Minister such information as the Minister may from time to time require regarding the performance of its functions.

(7) The Commission shall arrange for an annual report that has been laid before each House of the Oireachtas in accordance with subsection (1) to be published online as soon as practicable after copies of the report are so laid.

Explanatory Note

This is a standard provision for legislation of this kind.

Head 6

Provision - Prohibition on unauthorised disclosure of confidential information

(1) A relevant person shall not disclose confidential information obtained by him or her while performing functions under this Act unless he or she is required or permitted by law, or duly authorised by the Commission, to do so.

(2) Subsection (1) shall not operate to prevent the disclosure by a relevant person of information—

(a) in a report to the Commission or a Commissioner,

(b) to a Minister of the Government, and

(c) to a public authority, whether in the State or otherwise, for the purposes of facilitating cooperation between the Commission and such authority in the performance of their respective functions.

(3) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a class A fine.

(4) In this section—

"confidential information" includes information that is expressed by the Commission to be confidential either as regards particular information or as regards information of a particular class or description;

"relevant person" means—

(a) a Commissioner,

(b) a member of staff of the Commission,

(c) an authorised officer,

(d) any other person engaged under a contract for services by the Commission or a member of the staff of such a person, or

(e) a person who has acted in a capacity referred to in any of paragraphs (a) to (d).

Explanatory Note

Given the nature of the information that staff of the Commission are likely to be exposed to, it is prudent to include an explicit provision to prohibit disclosure of confidential information. This will provide assurance to regulated entities that procedures are in place to prevent the release of commercially sensitive information and trade secrets.

Head 7

Provision – Disclosure of interests

(1) Where a member of the staff of the Commission, a member of the Commission, or a consultant or adviser engaged under section [insert section pertaining to engagement of consultation and

advisors], in a category specified before engagement by the Commission, has an interest, otherwise than in his or her capacity as such, in any contract, or any proposed contract to which the Commission is or is proposed to be a party, or in any agreement or arrangement or proposed agreement or arrangement to which the Commission is or is proposed to be a party, that person—

(a) shall disclose to the Commission his or her interest and the nature of it,

(b) shall take no part in the negotiation of the contract, agreement or arrangement or in any deliberation by members of the Commission or the committee or members of the staff of the Commission in relation to it,

(c) shall not influence or seek to influence a decision to be made in the matter, and

(d) shall not make any recommendation in relation to the contract, agreement or arrangement.

(2) Subsection (1) does not apply to a person as regards a contract or proposed contract of employment of that person as a member of the staff of the Commission.

(3) Subsection (1) does not apply to a person as regards a contract or proposed contract for services in respect of that person.

(4) Where a person to whom subsection (1) applies fails to comply with a requirement of this section, the Commission shall decide the appropriate action (including removal from office or termination of contract) to be taken.

Explanatory Note

This head is based on section 22 of the Broadcasting Act 2009. It provides that staff and Commissioners are obliged to disclose certain interests to the Commission in relation to any actual or proposed contract, arrangement or agreement entered into by the Commission.

Head 8

Provision – Meeting Procedures

The following provision is proposed to be included as a subsection under the Functions head:

(x) Subject to this Act, the Commission shall regulate its own procedures.

Explanatory Note

This provision enables the Commission to regulate its own procedures.

Head 9

Provision - Policy Communications

(1) In the interests of the proper and effective regulation of [insert regulated sectors] and the formulation of policy applicable to such proper and effective regulation, the Minister may issue such policy communications to the Commission as he or she considers appropriate to be followed by the Commission in the performance of its functions. The Commission in performing its functions shall have regard to any such communications.

(2) Before issuing a communication, the Minister shall give to the Commission and publish a draft of the proposed communication and—

(a) give the reasons for it, and

(b) specify the period (being not less than 21 days from the date of giving it to the Commission or such publication, whichever is the later) within which representations relating to the proposal may be made by interested parties.

(3) The Minister, having considered any representations made under subsection (2), may issue the communication with or without amendment.

(4) Where the Minister proposes to prepare a communication which, in the opinion of the Minister, has or may relate to the functions of another Minister of the Government, the Minister shall not issue to the Commission or publish a draft of the proposal under subsection (2) without prior consultation with that other Minister of the Government.

(5) The Minister shall not issue a communication in respect of the performance of the functions of the Commission in respect of individual undertakings or persons.

(6) The Minister shall not issue a communication under subsection (1) in respect of the performance of the functions of the Commission in relation to [insert sections/parts of Act pertaining to enforcement and contracting activities].

(7) A communication shall be laid before each House of the Oireachtas by the Minister as soon as may be after it is made.

(8) In this section “communication” means a policy communication under this section.

Explanatory Note:

This head is drawn from section 30 of the Broadcasting Act 2009. It enables the Minister to issue general policy communications to the Commission.

Head 10

Provision - Superannuation

The Commission shall make a scheme or schemes granting of superannuation benefits to or in respect of:

(a) Relevant members of the Commission

(b) Relevant members of staff of the Commission

A scheme prepared and submitted under this section shall not provide for the granting of superannuation benefits to or in respect of any person where the Single Public Service Pension Scheme applies to that person.

Explanatory Note:

This Head is to provide for a superannuation scheme for the relevant members and staff of the commission who are not members of the Single Public Service Pension Scheme. This encompasses staff transferred from the BAI that would have been members of the BAI superannuation scheme and staff that joined the public service prior to 2013.

Head 11

Provision – Power to borrow

The Commission may borrow money (including money in a currency other than the currency of the State) for the purpose of performing any of the functions of the Commission, subject to the consent of the Minister and the Minister for PER and any conditions they may determine.

Explanatory Note

This head provides that the Commission may, subject to the consent of the Minister and the Minister for PER, borrow money for the purpose of performing any of its functions. This head is a simplification of section 35 of the Broadcasting Act 2009.

Head 12

Provision - Grants to Commission

In each financial year, the Minister may advance to the Commission out of moneys provided by the Oireachtas such sums as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.

Explanatory Note

This head simplifies section 34 of the Broadcasting Act 2009 and provides that the Minister may, with the consent of the Minister for PER, advance monies to the Authority for the performance of its functions. Text of head is based on section 21 of the Competition and Consumer Protection Act 2014.

Head 13

Provision - Accounts of Commission

(1) The Commission shall submit estimates of income and expenditure to the Minister in such form, in respect of such periods and at such times as may be required by the Minister and shall furnish to the Minister any information which the Minister may require in relation to those estimates, including proposals and future plans relating to the performance by the Commission of its functions over a specified period of years.

(2) The Commission shall keep in such form as may be approved by the Minister with the consent of the Minister for PER all proper and usual books or other records of account of—

(a) all monies received or expended by the Commission, and

(b) all property, assets and liabilities of the Commission,

including an income and expenditure account and a balance sheet and, in particular, shall keep such special accounts (if any) as the Minister may from time to time direct.

(3) The Commission shall, whenever so requested by the Minister, permit any person appointed by the Minister to examine the books or other records of account of the Commission in respect of any financial year or other period and shall facilitate any such examination, and the Commission shall pay such fee as may be fixed by the Minister.

(4) Accounts kept in pursuance of this head, signed by the chairperson and one other member or in the absence of the chairperson by two members of the Commission, shall be submitted by the Commission to the Comptroller and Auditor General for audit as soon as practicable, but not later than 3 months, after the end of the financial year to which the accounts relate.

(5) When so audited, a copy of the accounts together with a copy of the report of the Comptroller and Auditor General thereon shall be presented by the Commission to the Minister who shall, as soon as practicable but not later than 3 months thereafter, cause copies of them to be laid before each House of the Oireachtas.

(6) The financial year of the Commission shall be the period of 12 months ending on 31 December in any year, and for the purposes of this section the period commencing on the establishment day and ending on the following 31 December is deemed to be a financial year.

(7) The Commission shall publish, with the consent of the Minister and the Minister for PER, on a website maintained by the Commission, such estimates of income and expenditure as are required to be prepared under subsection (1) or a summary of them.

Explanatory Note

This is a standard provision for legislation of this kind. A provision for the Commission to produce estimates of its income and expenditure is included. This head is based on section 37 of the Broadcasting Act 2009.

Head 14

Provision – Consultants and Advisors

(1) The Commission may from time to time engage such consultants or advisers as it may consider necessary for the performance of the functions of the Commission, and any fees due to a consultant or adviser engaged under this section shall be paid by the Commission out of monies at its disposal.

(2) The Commission shall have regard to, but shall not be bound by, the advice of any consultant or adviser under this section.

Explanatory Note

This provision allows the Commission to engage consultants and advisors as it deems necessary for the performance of its function. This head is based on section 18 of the Broadcasting act 2009.

Head 15

Provision - Cooperation between Commission and other bodies

(1) The Commission, in the interests of the effective discharge of its functions, may enter into cooperation agreements with other bodies as it sees fit.

(2) The Minister shall be furnished by the Commission with a copy of any agreement made under this section and any variation thereof.

(3) The Commission may cooperate with other bodies outside the State which perform similar functions to the Commission.

Explanatory Note:

This head provides for the Commission to enter into cooperation agreements with other bodies as it sees fit.

Transitional Provisions

Head 16

Provision - Dissolution of the Broadcasting Authority of Ireland

The Broadcasting Authority of Ireland and statutory committees of the Authority are dissolved on the establishment day of the Media Commission.

Notwithstanding any of the conditions of their appointment, the term of a member of the Authority or a member of the statutory committees of the Authority terminates on the establishment day.

Explanatory note:

This head provides that the BAI is dissolved. Terms of members of the Authority and the Statutory Committees therefore expire on the establishment day of the Commission as a result.

Head 17

Provision - Transfer of Functions to the Commission

All functions that, immediately before the establishment day, were vested in the Broadcasting Authority of Ireland and the statutory committees of the Authority are transferred to the Commission.

References in any Act of the Oireachtas passed before the establishment day or in any instrument made before that day under an Act of the Oireachtas to the Broadcasting Authority of Ireland shall, on and after that day, be construed as references to the Commission.

The section shall come into operation on the establishment day.

Explanatory Note:

This head provides that the relevant functions of the BAI are transferred to the Commission on the establishment day.

Head 18

Provision - Transfer of staff to Commission

Save in accordance with a collective agreement negotiated with a recognised trade union or staff association, the Commission shall accept into its employment on the establishment day each person (other than the Chief Executive of the Broadcasting Authority of Ireland) who immediately before that day was a member of the staff of the Broadcasting Authority of Ireland on such terms and conditions of service relating to remuneration as are not less favourable than the terms and conditions of service relating to remuneration to which the person was subject immediately before that day.

Explanatory Note:

This head provides that staff of the BAI will be transferred to the employment of the Commission on the same terms and conditions as their previous employment.

Head 19

Provision - Transfer of land and other property

(1) On the establishment day, all lands that, immediately before that day, were vested in BAI and all rights, powers and privileges relating to or connected with such lands shall, without any conveyance or assignment, stand vested in the Commission for all the estate or interest therein that, immediately before the establishment day, were vested in BAI, but subject to all trusts and equities affecting the lands continuing to subsist and being capable of being performed.

(2) On the establishment day all property (other than land), including choses-in-action, that immediately before that day, was vested in BAI shall stand vested in the Commission without any assignment.

(3) Every chose-in-action vested in the Commission by virtue of subsection (2) may, on and from the establishment day, be sued on, recovered or enforced by the Commission in its own name, and it shall not be necessary for the Commission, or BAI, to give notice to any person bound by the chose-in-action of the vesting effected by that subsection.

Explanatory Note:

This is a standard provision pertaining to the transfer of functions from a dissolved body.

Head 20

Provision - Transfer of rights and liabilities, and continuation of leases, licences and permissions granted by Broadcasting Authority of Ireland

(1) All rights and liabilities of BAI arising by virtue of any contract or commitment (expressed or implied) entered into by it before the establishment day shall on that day stand transferred to the Commission.

(2) Every right and liability transferred by subsection (1) to the Commission may, on and after the establishment day, be sued on, recovered or enforced by or against the Commission in its own name, and it shall not be necessary for the Commission, or BAI, to give notice to the person whose right or liability is transferred by that subsection of such transfer.

(3) Every lease, licence, wayleave or permission granted by BAI in relation to land or other property vested in the Commission by or under this Act, and in force immediately before the establishment day, shall continue in force as if granted by the Commission.

Explanatory Note:

This is a standard provision pertaining to the transfer of functions from a dissolved body. It ensure that contracts or licences awards by BAI will remain in force.

Head 21

Provision - Liability for loss occurring before establishment day

(1) A claim in respect of any loss or injury alleged to have been suffered by any person arising out of the performance before the establishment day of any of the functions of the BAI shall on and after that day, lie against the Commission and not against the dissolved body.

(2) Any legal proceedings pending immediately before the establishment day to which BAI is a party, shall be continued, with the substitution in the proceedings of the Commission in so far as they so relate, for the BAI.

(3) Where, before the establishment day, agreement has been reached between the parties concerned in settlement of a claim to which subsection (1) relates, the terms of which have not been implemented, or judgment in such a claim has been given in favour of a person but has not been

enforced, the terms of the agreement or judgment, as the case may be, shall, in so far as they are enforceable against the BAI, be enforceable against the Commission and not the BAI.

(4) Any claim made or proper to be made by the BAI in respect of any loss or injury arising from the act or default of any person before the establishment day shall be regarded as having been made by or proper to be made by the Commission and may be pursued and sued for by the Commission as if the loss or injury had been suffered by the Commission.

Explanatory Note:

This is a standard provision pertaining to the transfer of functions from a dissolved body.

Head 22

Provisions consequent upon transfer of functions, assets and liabilities to Commission

(1) With effect from the establishment day the following are transferred to the Commission:

i. all rights and property and rights relating to such property held or enjoyed immediately before that day by the Broadcasting Authority of Ireland, and

ii. all liabilities incurred before that day by the Broadcasting Authority of Ireland which had not been discharged before that day,

and, accordingly, without any further conveyance, transfer or assignment

(i) the said property, real and personal, shall, on that day, vest in the Authority for all the estate, term or interest for which, immediately before that day, it was so vested in the Broadcasting Authority of Ireland, but subject to all trusts and equities affecting the property and capable of being performed,

(ii) those rights shall, on and from that day, be enjoyed by the Commission, and

(iii) those liabilities shall, on and from that day, be liabilities of the Commission

(2) All moneys, stocks, shares and securities transferred to the Commission by this head which, immediately before the establishment day, are in the name of the Broadcasting Authority of Ireland, shall be transferred into the Commission's name on the establishment day.

(3) Every right and liability transferred to the Commission by this head may, on or after the establishment day, be sued on, recovered or enforced by or against the Commission in its own name

and it shall not be necessary for the Commission to give notice of the transfer to the person whose right or liability is transferred by this head.

(4) The Commission shall not, without the consent of the Minister, dispose of any part of any land or any interest therein transferred to or vested in the Commission under this head

Explanatory Note:

This is a standard provision pertaining to the transfer of functions from a dissolved body.

Head 23

Provision - Final accounts and final annual report of Broadcasting Authority of Ireland

(1) Final accounts of the Broadcasting Authority of Ireland shall be drawn up by the Commission as soon as may be after the establishment day but not later than 6 months thereafter in such form as may be approved of by the Minister, in respect of the accounting year or part of the accounting year Broadcasting Authority of Ireland.

(2) Accounts prepared pursuant to this head shall be submitted as soon as may be by the Authority to the Comptroller and Auditor General for audit, and, immediately after the audit, a copy of the income and expenditure account and of the balance sheet and of such other (if any) of the accounts as the Minister may direct and a copy of the Comptroller and Auditor General's report on the accounts shall be presented to the Minister who shall cause copies thereof to be laid before each House of the Oireachtas.

Explanatory Note:

This head refers to the final accounts of the Broadcasting Authority of Ireland and how they should be drawn up and in such form so they may be approved of by the Minister in respect of the accounting year or part of an accounting year of the Broadcasting Authority of Ireland ending immediately before the establishment day.

Policy Paper on Regulatory Powers of a Media Commission

1. Background

The Online Safety and Media Regulation Bill will underpin a system for the regulation of "harmful online content", including Video Sharing Platform Services, and Audiovisual Media Services such as Television Broadcasting Services and On-demand Audiovisual Media Services. The Bill will update the regulatory framework for Television Broadcasting Services and On-demand Audiovisual Media Services, establish a framework for regulating Video Sharing Platform Services as well as providing oversight for the national online safety system.

Some of these innovations will be derived from the implementation of the revised Audiovisual Media Services Directive ("AVMSD"). This directive sets minimum rules and standards across the European Union for Video Sharing Platform Services ("VSPS") and Audiovisual Media Services including On-demand Audiovisual Media Services ("ODAVMS") and Television Broadcasting Services.

The Bill is based on four strands;

i. National regulatory measures to improve online safety.

ii. Implementation of new EU provisions in relation to rules for VSPS located in Ireland.

iii. Updating the regulation of ODAVMS.

iv. Updating the regulation of Television Broadcasting Services.

To fulfil these four functional strands, it is proposed that a Media Commission be established incorporating the existing functions provided for in the Broadcasting Act, 2009.

The Law Reform Commission ("LRC") *Report on Regulatory Powers and Corporate Offences*[1] recommended that specific "core" regulatory powers should be available within regulators' regulatory toolkits. Having regard to the proposals of the LRC, this paper has identified eight core enforcement and sanction powers which may be considered the "core" powers of the proposed Media Commission (a more thorough examination of the powers is contained in **Appendix II**).

[1] LRC 119-2018

2. Decisions Sought

Decisions are sought from the Minister in relation to the following matters:

- whether the "core" regulatory powers as identified in this overview and the Analysis Paper (at **Appendix 2**), which are adapted from the recommendations of the LRC, are appropriate to fulfil the functions of the proposed Media Commission, and

- whether the tailored approach (illustrated below), whereby some "core" regulatory powers are assigned generally to the regulator while other "core" powers are assigned specifically to certain functional areas of the Media Commission, is appropriate.

It may be noted that the instances in which these powers can be applied are tied to the drafting of specific provisions of the Bill, for example provisions relating to codes, and therefore those instances will be drafted as the relevant policy papers are drawn up.

A draft of the relevant head is located at **Appendix I** of this paper.

	Strand 1 (National measures)	Strand 2 (VSPS)	Strand 3 (ODAVMS)	Strand 4 (TV)
Power to issue notices, warnings, etc.	✓	✓	✓	✓
Power to devise, implement, monitor and review codes of practice	✓	✓	✓	✓
Power to conduct investigations	✘	✘	✘	✓
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	✓	✓	✓	✘
Power to impose administrative financial sanctions and to enter into settlements	✓	✓	✓	✓
Power to prosecute summary offences	✓	✓	✓	✓
Licencing powers	✘	✘	✘	✓
Registration	✘	✘	✓	✘

3. Issues for legal analysis

Exercise of powers	Legal advice will need to be sought on where powers may be exercised by an individual Commissioner or the Commission as a whole.
Investigatory powers	Legal advice will need to be sought on how investigatory powers ought to be expressed and exercised – specifically in relation to the interplay between BAI type investigations and investigations by authorised officers.
Court oversight	Legal advice will need to be sought in relation to the nature and extent of court oversight of sanctions imposed by the Media Commission, in particular administrative financial sanctions.

4. Description of "core" powers

As noted, the LRC has identified specific "core" regulatory powers which should be available within regulators' regulatory toolkits.

The LRC recommends there should be a general template of "core" regulatory powers while also recognising the nuances and differences between different regulatory sectors and regimes. The LRC recommends that financial and economic regulators should each hold a number of core powers;

- the power to issue a range of warning directions or notices, including to obtain information by written request and "cease and desist" notices;
- the power to enter and search premises and take documents and other material;
- the power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or to produce documents (including provision for determining issues of privilege);
- the power to impose administrative financial sanctions, subject to court oversight, to ensure compliance with constitutional requirements;
- the power to enter into wide-ranging regulatory compliance agreements or settlements; and
- the power to bring summary criminal prosecutions.

Further, the LRC notes that while certain other powers including licensing powers and "fitness and probity requirements" are of significant importance, it does not consider that they should be "core" powers which should be held by default by regulators.

For the purposes of this paper certain statutory regulatory powers held by comparator regulators (the Broadcasting Authority of Ireland ("BAI"), the Data Protection Commission ("DPC"), the Commission for Communications Regulation ("ComReg"), the Competition and Consumer Protection Commission ("CCPC") and the Commission for the Regulation of Utilities ("CRU")), will be considered in light of the four key functional areas of the proposed Media Commission.

While the LRC describes powers in relation to entry, search, seizure, to compel attendance of persons before an authorised officer/regulator and power to compel production of materials, this paper considers those powers to be inherent in the power of a regulator to appoint authorised officers. Further this paper draws a distinction between the investigatory powers of a regulator; for example, in circumstances where a regulator has a close licensing/contractual based relationship with a regulated entity, investigations without the wide ranging and invasive powers of authorised officers may not be warranted. Therefore, in this paper there is a separate category for the power to carry out investigations.

Similarly, it is submitted that the power to impose administrative financial sanctions is intrinsically linked to the power to enter into settlement agreements and therefore these powers are considered as a single category. Considering administrative financials sanctions together with the power to enter into settlement agreements underpins the approach to regulation typified by the creation of a "culture of compliance". If a regulator had the power to impose administrative financial sanctions absent the power to enter into settlements, regulated entities would not be incentivised to engage constructively with the regulator.

Given that the proposed Media Commission will have competence across a number of regulatory areas it is considered appropriate that a range of "core" powers be allocated to that body beyond the core powers recommended by the LRC. The regulatory powers to be considered in this paper are:

- the power to issue a range of notices, warnings, etc.,
- the power to develop, implement and monitor codes of practice,
- the power to conduct investigations,
- the power to appoint authorised officers with significant investigatory powers,
- the power to impose administrative financial sanctions, subject to court oversight,
- the power to prosecute summary offences, and
- the power to license regulated entities in certain circumstances and sectors, and
- the power to implement and maintain a non-contractual registration system for ODAVMS.

An overview of these powers can be found in the table below:

Power	Overview
i. Power to issue notices, warnings, etc.	• The basis for such a power is mixed; encourages both compliance and also affords power to a regulator to sanction non-compliant entities. • Issuing a notice represents a formal means by which a regulator may notify a regulated entity that it believes that it has breached or is in breach of responsibilities or obligations, to encourage a regulated entity to adjust its behaviour, to justify its behaviour, or to indicate that further action will be taken if non-compliance continues. • A notice represents a relatively low level regulatory action and may be appropriate where a more high level intervention is not warranted. • A failure to comply with the terms outlined by a regulator in a notice may lead to a more serious regulatory intervention such as a warning being issued. • This tiered approach provides flexibility to a regulator. • Comparator bodies which also hold such power; BAI, DPC, ComReg, CCPC and CRU.
ii. Power to devise, implement, monitor and review codes of practice.[2]	• Systemic type power focused on creating culture of compliance. • Such a code outlines the rules, responsibilities, and or proper practices for regulated entities. • While most organisations will have codes of conduct in relation to specific matters, many regulators are empowered by statute to devise codes in relation to certain matters within their area of operation. • The development of codes affords an opportunity for

[2] Such power may also interact with the potential for the regulator to designate certain services for additional obligations, to specify what those obligations may entail, what measures will be expected to be taken to meet these obligations and what the reporting requirements will be in relation to such measures.

		engagement between a regulator and regulated entities. • Comparator bodies which also hold such power: BAI, DPC, ComReg and CCPC.
iii.	Power to conduct investigations.	• An enforcement type power (reflecting the investigatory process as contained in the Broadcasting Act, 2009) to be deployed where it is suspected a breach has or is occurring. • The statutory power to conduct an investigation into a specific matter involving the conduct or affairs of a regulated entity. • This power may be considered as a less extensive power than those associated with the appointment of authorised officers, however such a power may be more appropriate than the appointment of authorised officers depending on particular circumstances, for example; o the level of severity of an issue to be investigated, o where the relationship between the regulator and regulated entity is based on a contract/license, the provisions of such contract/license will give the regulator significant power or influence in relation to the regulated entity which negates the need for an authorised officer type investigation, o if the regulator is market facing and deals with large corporate entities, more robust powers associated with authorised officers may be more appropriate. • Comparator bodies which also hold such power: BAI, ComReg, CCPC.
iv.	Power to appoint authorised officers with significant investigatory powers to conduct	• A robust enforcement power. • Authorised officers conduct investigations and hold investigatory powers including; entry, search and seizure,

investigations.	to compel individuals to produce materials or to provide evidence, to procure warrants to enter premises such as private dwellings, to be accompanied by other authorised officers or members of An Garda Síochána. • Authorised officers typically produce an investigation report which is passed to the regulator for further consideration. • The power to appoint authorised officers is largely associated with market facing regulators[3] who may need to exert such power where: o they do not have direct contact/influence on the commercial activities of regulated entities, o the regulated entity is a significant, independent corporate entity. • The power to appoint authorised officers to conduct investigations is applicable to the Media Commission as it will have responsibility for regulating certain activities of significant commercial entities with attendant dangers in relation to online harms. • Comparator bodies which also hold such power: DPC, ComReg, CCPC, and CRU.
v. Power to impose administrative financial sanctions and to enter into settlements	• A strong enforcement power, involves the imposition of financial sanctions on a regulated body for serious regulatory breaches, court oversight is required. • The exercise of such a power will reflect major wrongdoing on the part of a regulated entity. • Such powers are not widespread among regulators in Ireland. • The existence of a potentially significant financial penalty

[3] While the Media Commission may not be considered as a typical market facing regulator in the same sense as, for example the CRU, it will nonetheless, like the DPC, engage with significant commercial entities and requires robust powers to ensure its effectiveness.

		represents a meaningful penalty for wrongdoing but also serves as an incentive for compliant behaviour. • Comparator bodies which also hold such power: BAI, DPC and CRU.
vi.	Power to prosecute summary offences	• An enforcement power to prosecute minor offences in the District Court. • The power to prosecute summary offences is common across many regulatory bodies. • Sanctions for such offences are typically a 'class A' fine and or a period of imprisonment not exceeding twelve months, or both. • Comparator bodies which also hold such power: DPC, ComReg, CCPC and CRU.[4]
vii.	Licencing powers[5]	• A compliance and enforcement type power. • Some regulators have the power to grant or otherwise convey licenses to entities operating in a particular sector or market. • Entities must typically meet and maintain standards and abide by certain conditions to obtain and retain a contract/license. Facilitates significant oversight of particular area or activity. • Licensing is an important regulatory function. The ability to grant licenses comes with the corollary of the power to withdraw licenses. This is a significant regulatory sanction which may remove an entity's ability to function. Such action would only occur where significant regulatory or other breaches had occurred.

[4] While certain summary offences are contained in the Broadcasting Act, 2009, it does not appear that the BAI prosecutes such matters.

[5] While licensing powers are specifically applicable to the television strand of the Bill, a non-contractual registration system for ODAVMS is envisaged. Such an approach seeks to align the provisions in relation to ODAVMS with those relating to television while respecting the inherent differences in the mediums.

	• Comparator bodies which also hold such power: BAI, ComReg, and CRU.
viii. Registration powers	• A compliance type power. • Provides a means by which a regulator, while not exercising influence through licensing or contractual arrangements, ensures that certain entities engage with the regulator and abide by the policies or procedures prescribed by the regulator. • Registration powers may interact closely with the powers to devise, implement, monitor and review codes of practice. • To ensure that entities comply with a registration scheme it is necessary that there would be sanctions for non-compliance.

5. Findings

These findings are based on a comparative analysis of the above eight "core" regulatory powers as exercised by five regulatory bodies (Broadcasting Authority of Ireland, Data Protection Commission, Commission for Communications Regulation, Competition and Consumer Protection Commission, and Commission for Regulation of Utilities).

Based on this assessment a number of policy options were identified, including assigning none of the "core" powers to the Media Commission, assigning very limited powers to the Media Commission, a tailored approach assigning powers to certain strands and, assigning all of the "core" powers across the four functional strands of the Media Commission. Then the options were considered in light of eight criteria.

Based on this assessment it was found that a tailored approach whereby certain powers are assigned across the four strands while others are limited to specific strands would be appropriate.

Power	Main Finding	Policy Recommendation	Potentially Related Functions[6]
i. Power to issue notices, warnings, etc.	• A versatile and dynamic regulatory power. • Provides effective and proportionate intervention powers to a regulator.	• This power should be available to the Media Commission across all four of its functional strands.	• To promote and protect the interests of the public in relation to audio-visual and online content. • To enforce the relevant statutory provisions. • To encourage compliance with the relevant statutory provisions, which may include the publication of notices containing practical guidance as to how those provisions may be complied with.
ii. Power to devise, implement, monitor and review codes of practice[7]	• Codes provide clarity to regulated entities in relation to their obligations. • Promote engagement between regulator and regulated entities.	• This power should be available to the Media Commission across all four of its functional strands.	• To promote and protect the interests of the public in relation to audio-visual and online content. • To enforce the relevant statutory provisions. • Promote and stimulate the development of Irish language content. • Provide a regulatory

[6] These potential functions are drawn from the draft policy paper on the objectives and functions of the Media Commission.
[7] This power may also be deemed to be a function of the Media Commission.

	• Essential for fostering a 'culture of compliance'.		environment that will sustain independent and impartial journalism. • Promote, where appropriate, the development of alternative dispute resolution procedures as a means of resolving complaints.
iii. Power to conduct investigations	• Such powers provide flexibility to a regulator in its response to suspected on-going or previous breaches. • Specifically applicable where there is a close relationship between the regulator and regulated entities.	• This power should be available to the Media Commission under the fourth strand (broadcasting). • Particularly important in relation to the broadcasting strand in light of previous experience which has shown such powers to be effective and efficient.	• To promote and protect the interests of the public in relation to audio-visual and online content. • To carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any suspected breach of the relevant statutory provisions. • To enforce the relevant statutory provisions.
iv. Power to appoint authorised officers with significant investigatory powers to	• A strong enforcement type power. • Authorised officers fulfil a key role by	• This power should be available to the Media Commission across strands 1 (national	• To promote and protect the interests of the public in relation to audio-visual and online content. • To carry out an

conduct investigations	providing regulators with a robust means of investigating the activities of regulated entities, particularly significant commercial entities.	regulatory measures), 2 (VSPS) and 3 (ODAVMS).	investigation, either on its own initiative or in response to a complaint made to it by any person, into any suspected breach of the relevant statutory provisions. • To enforce the relevant statutory provisions. • The Commission shall have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently.
v. Power to impose administrative financial sanctions	• Significant sanction power. • A meaningful response to serious regulatory breaches. • The possibility of imposing significant financial sanctions acts as a strong deterrent to wrongdoing.	• This power should be available to the Media Commission across all four of its functional strands. • The need for court oversight is a significant factor which must be considered – this will be particularly important	• To promote and protect the interests of the public in relation to audio-visual and online content. • To enforce the relevant statutory provisions • The Commission shall have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently

		where the regulator and regulated entities do not have a close operational relationship – strands 1 (national regulatory measures), 2 (VSPS) and 3 (ODAVMS).	
vi. Power to prosecute summary offences[8]	• A valuable enforcement power. • Such powers ensure that a regulator may pursue regulated entities for breaches of relevant statutory provisions.	• This power should be available to the Media Commission across all four of its functional strands. • While the contract/licen se based relationship between the regulator and regulated entities under strand 4(broadcastin g) will largely negate the likelihood of	• To promote and protect the interests of the public in relation to audio-visual and online content • To enforce the relevant statutory provisions. • The Commission shall have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently.

[8] It may be noted that while the power to prosecute summary offences is a specific "core" regulatory power, more serious matters may be referred to the DPP for prosecution on indictment. In practice it may also be the case that a District Court Judge may refuse jurisdiction in a summary prosecution case where they deem the matter to be more serious. In such cases the matter would have to be referred to the DPP. If the DPP chose to pursue the matter, the case would have to be reconstituted.

		this power being invoked under that strand, it is advisable that there be consistency in relation to this power.	
vii. Licencing powers	• One of the most significant powers a regulator can hold. • The revocation of a license is a significant penalty.	• This power should be available to the Media Commission under strand 4 (broadcasting). • The contract/license model operated by the BAI should be maintained.	• Ensure the provision of open and pluralistic broadcasting and audio-visual media services. • Stimulate provision of high quality, diverse and innovative content from commercial, community and public service media providers and independent producers. • To promote and protect the interests of the public in relation to audio-visual and online content. • To enforce the relevant statutory provisions. • Promote and stimulate the development of Irish language content. • Promote diversity in control of media businesses operating in the State.

			• Provide a regulatory environment that will sustain independent and impartial journalism. • The Commission shall be responsible for the licensing of radio and television services (additional to those provided by RTÉ, TG4, the Houses of the Oireachtas Channel and the Irish Film Channel) operating in the State. • The Commission shall prepare and submit proposals to the Minister for a scheme or schemes for the granting of funds to support the production of audio-visual content and sound broadcasting content.

viii.	Registration powers	• A flexible compliance power. • Registration creates a direct relationship between a regulator and regulated entity, but significantly, is not as intrusive as a contract/licen se based system.	• This power should be available under strand 3 (ODAVMS) only. • Such an approach provides a simple and flexible system which will align ODAVMS with other areas while recognising the commercial realities of such services.	• Ensure the provision of open and pluralistic broadcasting and audio-visual media services. • To promote and protect the interests of the public in relation to audio-visual and online content. • The Commission shall prepare and submit proposals to the Minister for a scheme or schemes for the granting of funds to support the production of audio-visual content and sound broadcasting content.

6. Potential Operation in practice

The following is a high level overview of the potential operation of the "core" regulatory powers in practice by the Media Commission.

i. Power to issue notices, warnings, etc.[9]

- If a Commissioner[10] is of the view, following a disclosure by a regulated entity, an investigation by the Commission or an investigation by an authorised officer, that a regulated entity has been or is in breach of its obligations, the Commissioner may issue a notice.

- Such a notice may state the view of the Commissioner, and how they formed that view, that a breach has or is occurring and;

    - invite a response from the regulated entity,

    - outline the steps expected to be taken by the regulated entity to remedy the breach.

- If a regulated entity does not respond to a notice, or if it does not take steps to remedy the breach or if doesn't take sufficient steps to remedy the breach the Commission may issue a warning.

    - Such a warning will outline the view of the Commission that a breach has or is occurring and outline the steps that the Commission will take if the breach is not remedied.

    - Such steps may include;

        - reviewing the terms of the regulated entity's contract/licence,

        - making a public statement that the regulated entity is in breach of its obligations,[11]

[9] This approach draws from the BAI's existing procedures. It may be noted however that the BAI's relationship with regulated entities is based on a contract/license system. The tiered approach utilised by the BAI featuring a range of proportionate responses provides a useful template for the Media Commission which will have a range of functions (including those currently exercised by the BAI). When it comes to drafting the powers, the coercive powers of the DPC outlined in s. 127 of the Data Protection Act, 2018, will provide a useful template. Following an investigation, if the Commission decides a breach has taken place a range of notice type actions are provided for in statute. Such notices may need to be tailored in relation to each of the four strands.

[10] Legal advice will need to be sought on where the legislation can refer to a Commissioner or the Commission as a whole.

[11] Specific provision reflects a current power of ComReg as provided for under s. 31(3) of the SI No. 337/2011

- imposing an administrative financial sanction,
- pursuing a summary prosecution,
- referring a matter to the DDP for a prosecution on indictment,
- applying to the Court for a relevant order.

ii. Power to devise, implement, monitor and review codes of practice[12]

- Codes of practice in relation to each of the four functional areas of the Media Commission will be developed.
    - This development may draw on the views of relevant stakeholders as well as expert opinion perhaps in the form of advisory committees.
- Regulated entities may be required to prepare reports and submit same to the relevant Commissioner on a regular basis.
    - Such reports will outline a regulated entity's compliance or otherwise with codes of practice.
- Where regulated entities fail in their obligations the Commission or Commissioner may decide to issue sanctions, compliance directions, etc.
- Given the dynamic nature of technology and media, codes of practice must be reviewed on a regular basis to ensure they are fit for purpose to fulfil the objectives and functions of the Media Commission.

[12] s. 42 of Broadcasting Act, provides that the BAI prepare and update codes governing standards and practices of broadcasters. Broadcasters must comply with such codes. Art 40 of the GDPR calls for the encouragement of codes of practice to contribute to the proper application of the Regulation. A significant issue with regard to codes is the fact that while the BAI's provisions provide a tested template, the nature of the relationship between the BAI and regulated entities will be maintained in strand four of the Bill. The fact that the Media Commission and regulated entities will not have such an close relationship across the other three strands will necessitate robust drafting of obligations in relation to codes and appropriate and effective provisions for non-compliance must be in place.

iii. Power to conduct investigations[13]

- Where it is suspected that a breach is occurring or has occurred, or a regulated entity is not providing a service in accordance with their contract, a Commissioner may wish to appoint an individual to investigate the matter.
    - This will be particularly relevant where it may not be appropriate to appoint an authorised officer.
    - This power is most relevant to the broadcasting strand of the Media Commission's functions. The close relationship created by the contract/license system lends itself to such an approach.
- A suitably qualified person will be appointed to carry out an investigation based on a defined remit.
- An investigator will have the power to require a regulated entity to;
    - produce information or records in their possession or control,
    - enter the premises of the regulated entity to conduct examinations of relevant equipment,
    - require the regulated entity to attend before the investigator.
- If an investigator finds that a breach has or is occurring or if a regulated entity is not providing a service in accordance with their contract, the investigator must notify the regulated entity of this finding and afford them the opportunity to make submissions at a hearing before the Commission.
- Having considered any submissions the Commission may make a finding appropriate in the circumstances.
    - Such a finding may result in the Commission deciding to impose a sanction or sanctions on the regulated entity.

[13] The BAI's investigatory powers are set out in s. 50 of the Broadcasting Act, 2009. The BAI, by virtue of its contract/license based relationship with regulated entities does not require the level of intrusive powers associated with Authorised Officers. Indeed, the example of the *Mission to Prey* investigation demonstrates the effectiveness of the BAI's investigatory powers. As per s. 38A of the Communications regulation Act, 2002, and s. 10 of the Consumer Protection Act, 2014, ComReg and the CCPC hold powers to compel individuals to give evidence or produce documentation. These provisions provide guidance in relation to market facing regulators exercising investigatory powers separate from the appointment of Authorised Officers.

iv. Power to appoint authorised officers with significant investigatory powers to conduct investigations[14]

- Where following a disclosure by a regulated entity, or where it is suspected that a breach has occurred or is occurring, a Commissioner may appoint an authorised officer to investigate same.

    - In certain circumstances the Commission may wish to appoint authorised officer(s) to investigate activities of regulated entities across a certain sector.

- The authorised officer may be an employee of the Commission or any suitably qualified person, this may include members of An Garda Síochána.[15]

- Authorised officers will have a wide range of investigatory powers. Such powers will have to be properly calibrated in relation to the requirements and realities of the four functional strands of the Media Commission.

    - Authorised officers typically hold powers of entry, search and seizure, to seek information from relevant parties, to apply for a warrant, to be accompanied by other officers or members of An Garda Síochána.

- Having completed an investigation an authorised officer will produce a draft written report and provide a copy of same to the regulated entity and invite submissions.

- Having considered such submissions, if any, the authorised officer will produce a final investigation report and submit same to the relevant Commissioner with any submissions annexed.

    - Where more than one authorised officer is appointed to conduct an investigation reports will be completed jointly.

    - The authorised officer will state whether or not they are satisfied a breach has or is occurring and the grounds for same.

    - The authorised officer will not make any determination in relation to sanctions which may apply.

[14] Statutory provisions relating to the appointment of Authorised Officers are lengthy and reflect the functions and objectives of the regulators to which they relate. This example reflects a somewhat simplified general approach which draws on elements of the powers of several regulators. It may be noted that the powers of authorised officers may need to be tailored to the respective functions of the Media Commission.
[15] S 35(6) Competition and Consumer Protection Act, 2014

- On receipt of the final investigation report, the Commissioner shall consider the report and any annexes.

- The Commissioner may form the view that further information is required;

    - they may conduct an oral hearing,

    - they may invite further submissions from the regulated entity,

    - they may direct the authorised officer to conduct such further investigation as deemed necessary.

- Following the conclusion of the gathering of further information, the final investigation report with submissions and further information annexed will be presented to the Commission.

    - The Commission may be satisfied that there has been no breach, or

    - The Commission may be satisfied that there is or has been a breach.

- The Commission will notify the regulated entity accordingly and how it reached its decision, and its proposed course of action, such course of action may include the use of enforcement or sanctioning powers.

v. Power to impose administrative financial sanctions[16]

- Where the Commission decides that a sanction is appropriate it may impose, *inter alia*, an administrative financial sanction.[17]

    - The Commission will notify the regulated entity of this decision and the reasons for it.

    - The Commission will indicate the level of the administrative financial sanction to be imposed if the matter is to be dealt with by the Commission. The Commission will

[16] This approach largely reflects the powers of the BAI which is deemed to be a robust procedure which is largely applicable to the four functional strands of the Media Commission. A key element which is imported from the DPC approach is the specification of the Circuit Court as the court of first instance where appropriate.
[17] Pursuant to s. 55(a(ii) of the Broadcasting Act, 2009,the maximum fine which be imposed by the BAI is €250,000. Pursuant to s. 141 of the Data Protection Act, 2018 and in accordance with Article 83 of the General Data Protection Regulation, the Data Protection Commission may impose an administrative financial sanction up to €20,000,000, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher. Pursuant to s. 55 of the Electricity Regulation Act, 1999, as amended, the CRU may impose a sanction of €50,000 to constitute the whole or part of the cost to of an investigation and/or a sanction not exceeding 10 per cent of a regulated entity's turnover.

have regard to a prescribed set of criteria (including mitigating factors such as co-operation and aggravating factors such as material gain from wrongdoing and scale and severity of the impact on the public) when assessing the appropriateness of the administrative financial sanction and the level of same.

- Pursuant to that notification the regulated entity may request, based on a specific statutory provision[18] that the Commission deal with the matter.

- The Commission will have the power to enter into settlement agreements with regulated entities, for example where a regulated entity has cooperated with an investigation. Such settlement agreements should induce cooperation with the regulator by discounting the administrative financial sanction to be imposed.[19]

- If the regulated entity does not make a request for the Commission to deal with the matter under the specific statutory provision, the Commission may apply to Court for an order.

  - Where the level of sanction identified by the Commission as appropriate is less than €75,000 the Court will be the Circuit Court.

    - In certain circumstances the Circuit Court may refuse jurisdiction, in such cases the matter will be transferred to the High Court.

  - Where the sanction is above €75,000, the Court will be the High Court.

- The Court may; determine that there is or was a breach, have regard to the recommendation of the Commission and direct the regulated entity to pay an administrative financial sanction, make such order as appropriate, or dismiss the application and make any order as to costs as is appropriate.

- If the matter was initiated in the Circuit Court an appeal may be made to the High Court on a point of law, if the matter was initiated in the High Court an appeal may be made to the Court of Appeal on a point of law.

[18] Such as s. 54(4)(b) of the Broadcasting Act, 2009.

[19] S. 33AV of the Central Bank Act, 1942 empowers the Central Bank to enter into settlement agreements with financial service providers (whether individuals or corporate bodies) suspected of breaching certain provisions of the financial services legislation. Under s. 14B of the Competition Act, 2002, the CCPC and ComReg have a statutory power to negotiate agreements with regulated entities that are suspected of breaching competition law.

vi. Power to prosecute summary offences[20]

- Where following a disclosure by a regulated entity, an investigation/inquiry, an investigation by an authorised officer it is found that a regulated entity or connected individual or individuals have breached statutory provision, the Commission may institute summary proceedings where appropriate.

- Such proceedings may result in a class A fine, a fine not exceeding €5,000, or a term of imprisonment not exceeding twelve months, or both. Provisions may be made for a continuing fine for each day an offence continues if appropriate.[21]

vii. Licencing powers[22]

- Such powers are limited to the broadcasting strand.

- The regime which currently operates is as follows;

    - The Communications Regulator grants a licence to the Broadcasting Authority of Ireland under s. 5 of the Wireless Telegraphy Act, 1926.

    - The Broadcasting Authority may conclude a broadcasting contract with a broadcasting contractor.

        - Such a contract must contain a condition requiring the broadcasting contractor to establish, maintain and operate the broadcasting transmitter concerned in accordance with such terms and conditions as the Communications Regulator attaches to the broadcasting licence to which the contract relates.

    - The Broadcasting Authority may then authorise a broadcasting contractor to operate a broadcasting transmitter and provide a broadcasting service.

- This system creates a close relationship between the regulator and the regulated entity. The key obligations of the regulated entity stem from the terms of the broadcasting contract.

viii. Registration Powers

- Such powers should be limited to the ODAVMS strand.

[20] Provisions relating to summary prosecution are almost identical across the statutes considered in the comparative study.
[21] It may be noted that if an entity fails to engage with a regulator or is in habitual breach of its obligations, the regulator may refer the matter to the DPP in relation to specific offences to be prosecuted on indictment.
[22] It is envisaged that the contract/licensing regime operated by the BAI would be maintained under the fourth (broadcasting) strand of the Media Commission.

- The regime which is currently operated by the CRU involves the appointment of designated bodies to oversee the registration of electrical contractors and gas installers. The designated bodies are responsible for registering members, monitoring compliance with certain criteria, inspecting the quality of work, etc.

- The use of a designated body to operate day to day matters may be attractive and could provide a means by which to build on the current regime. Such an approach would constitute an augmentation of the current co-regulation model. Alternatively, it may be desirable to make a break with this model and to put in place a new system.

- In general terms it may be desirable for the registration system to be operated within the Media Commission under the direction of the relevant Commissioner. The Commission, in consultation with relevant stakeholders, would devise, implement, monitor and review codes of practice for the sector. If breaches are suspected, provision could be made for the appointment of authorised officers to investigate same. If an entity fails to register an appropriate response may be a summary prosecution.

7. Other Powers

Regulatory powers do not exist in a vacuum they are interrelated and closely linked with other non-core powers which may be held by a regulator.

As such, there are numerous other powers that may be provided to the Media Commission to carry out its functions, such as:

- seeking court orders to block access to online services,

- specific types of notices (such as take down notices), and,

- provisions in relation to co-operation between regulatory bodies and the related power of entering into memoranda of understanding with other bodies.

These powers will be scoped out and addressed on an individual basis in subsequent policy papers.

8. Conclusion

It is submitted that the eight "core" regulatory powers identified in this paper are appropriate and necessary for the Media Commission to fulfil its respective functions. These powers are interrelated and will complement one another and will be augmented by other non-core powers. The aim of an efficient regulatory system is to create a culture of compliance where serious breaches do not occur and where they do that a regulated entity will engage with the regulator to remedy the breach.

This paper recommends that a tailored approach be taken to the "core" regulatory powers to be assigned to the Media Commission. Based on the assessment carried out it is clear that an approach whereby the power to issue notices, implement and oversee codes of practice, impose administrative financial sanctions and to prosecute summary offences would be assigned to all four strands. The power to conduct investigations (as described in the Broadcasting Act, 2009) should be assigned to strand 4, the power to appoint authorised officers to conduct investigations and the power to prosecute summary offences would be assigned to strands 1, 2 and 3, registration powers would be assigned to strand 3, while licensing powers would remain assigned to strand 4.

There are a number of other important powers which may play an important role in empowering the Media Commission to fulfil its functions such as; seeking court orders to block access to online services, specific types of notices (such as take down notices), provisions in relation to co-operation between regulatory bodies and the related power of entering into memoranda of understanding with other bodies. As these powers need to be considered in conjunction with other policy issues, they will be examined on an individual basis as specific policy papers and provisions are drafted.

Heads will be drafted to provide the Media Commission with these core regulatory powers. The instances in which these powers can be applied are tied to the drafting of specific provisions of the Bill, for example provisions relating to codes, and therefore those instances will be drafted as the relevant policy papers are drawn up.

Appendix I – Draft Head

A provision to confer on the Media Commission a prescribed list of core powers.

The Commission shall have all such powers as are necessary or expedient for the performance of its functions. Said powers shall include, but are not limited to;

a) the power to issue notices and warnings,

b) the power to devise, implement, monitor and review codes, including codes of practice,

c) the power to conduct investigations, and for the necessary powers to be conferred on the Commission to conduct such investigations,

d) the power to appoint authorised officers to carry out investigations and to confer such authorised officers such powers as are necessary to fulfil their duties,

e) the power to impose administrative financial sanctions, subject to court confirmation, and the power to enter into settlement arrangements,

f) the power to prosecute summary offences,

g) the power to convey licenses to television broadcasting services,

h) the power to operate a registration system for on demand audio-visual media services.

Appendix II – Analysis of Regulatory Powers of a Media Commission

1. Background and Statement of Issue being examined

This paper considers certain "core" regulatory powers, in the context of the development of an Online Safety and Media Regulation Bill. It is envisaged that this Bill will underpin a system for the regulation of "harmful online content". The Bill will update the regulatory framework for Television Broadcasting Services, On-demand Audiovisual Media Services as well as providing oversight for the national online safety system. Some of these innovations will be derived from the implementation of the revised Audiovisual Media Services Directive ("AVMSD"). This directive sets minimum rules and standards across the European Union for Audiovisual Media Services including Video Sharing Platform Services ("VSPS") and On-demand Audiovisual Media Services ("ODAVMS").

The Bill is based on four strands;

- The first relates to the national regulatory measures to improve online safety. This includes the oversight systems which could be put in place to ensure that online platforms improve how they deal with and remove "harmful online content", what kinds of material should be considered "harmful online content" and what kinds of online services should be covered by this system.
- The second strand relates to how Ireland will implement the new EU provisions in relation to rules for VSPS located in Ireland, the limits of the definition of a VSPS, the kind of regulatory relationship needed to implement the principles, the oversight approach to regulation in the Directive and how such oversight should work on a practical level.
- The third and fourth strands relate to the updating of regulation of ODAVMS and TV services located in Ireland with significant focus on the alignment of rules and requirements for TV and on demand services.

a. Objectives

This paper considers a number of regulatory bodies and the powers assigned to those bodies in statute, and how they are expressed. A comparative assessment has been conducted in relation to these regulatory powers in the context of the development of the Bill. It may be noted that regulatory powers do not exist in isolation and considering the powers on their own is an artificial process, however it is necessary to provide illumination in relation to the development of legislative proposals.

b. Can the Regulator fulfil the functions assigned to it? What are the functions?

For the purposes of this paper it is assumed that the structure of the regulator will be that of a Media Commission, incorporating the existing functions of the Broadcasting Authority of Ireland, responsible for all four strands of regulation. Therefore, the Media Commission would be responsible for;

- Strand 1: overseeing the operation of the national online safety system,
- Strand 2: regulating Video Sharing Platform Services,
- Strand 3: regulation of On-demand Audiovisual Media Services, and,
- Strand 4: regulation of Television Broadcasting Services.

As such, this paper will consider the powers necessary to fulfil the functions of the Commission under these four strands. On the basis of the Department's analysis and informed by the public consultation on the regulation of harmful online content and the transposition of the Audiovisual Media Services Directive there is a measure of consensus in relation to the extent of these four functions.

- Strand 1: while a definition of harmful content poses challenges it is clear that such content will require a regulatory response. The main question to be addressed from a regulatory powers perspective is whether there will be a systemic or complaints based approach or a hybrid system. The public consultation indicates that there is a value in a systemic approach whereby service providers will be required to abide by principles or codes in designing and operating their services. Such principles or codes would be set out by the regulator who would have oversight of measures, targets and obligations of service providers.
- Strand 2: the public consultation was largely supportive of a tiered or risk-based approach whereby a wide range of services would abide by certain limited obligations while certain categories of online services or designated online services would abide by stricter or more stringent obligations. This reflects our preferred view as a logical and proportionate approach.
- Strand 3: the public consultation found that there should be a direct regulatory relationship between ODAVMS in the State and the Media Commission and that similar content rules as those that apply to Television Broadcasting Services should apply to ODAVMS. This system would be underpinned by a non-contractual registration system for ODAVMS.

- Strand 4: it was indicated that no substantial changes should be made to the regulation of Television Broadcasting Services and that the functions and accompanying powers of a regulator in this area should be carried over from those present in the Broadcasting Authority of Ireland.

c. *Regulatory Powers*

The powers of regulators can be illustrated using the "regulatory pyramid" with "soft" powers such as education at the bottom, with more serious "hard" powers further up the pyramid such as inspection and enforcement, with administrative sanctions, criminal prosecutions and license revocation at the apex. The effective exertion of "soft" powers mitigates the need to exercise "hard" powers while the existence of "hard" powers makes "soft" powers more effective.

The regulatory pyramid is derived from Ayers & Braithwaite's "responsive regulation" approach which recognises the wide range of actions and interventions used by regulators. It is noted that the approach to regulation has transitioned to a "behaviour based approach" which seeks to change the behaviour or culture within regulated entities. Hodges & Voet have set out the features of what they describe as "the most effective regulatory systems";

- establishment of clear rules and their interpretation;
- identification of individual/systemic problems;
- decision on whether behaviour is illegal, unfair or acceptable;
- cessation of illegality;
- identification of root cause;
- identification of actions needed to prevent reoccurrence;
- application of actions;
- dissemination of information to stakeholders;
- redress;
- sanctions;
- on-going monitoring.

In approaching this issue, attention may be drawn to the recent Law Reform Commission ("LRC") *Report on Regulatory Powers and Corporate Offences*.[23] The LRC identifies specific "core" regulatory powers which should be available within regulators' regulatory toolkits. The LRC notes that regulatory legislation lacks consistency due to the *ad hoc* nature of legislative drafting and the varying ways in which these powers are expressed in statute.

Similarly, the multiplicity of statutes in relation to regulators has given rise to a fractured body of case law. The LRC recommends there should be a general template of "core" regulatory powers while also recognising the nuances and differences between different regulatory sectors and regimes. The benefits of such a template may include consistency in statutory language to facilitate regulators in applying their powers in similar ways which would simplify obligations of regulated entities, and the development of a cohesive body of court rulings in relation to comparable powers which would assist with consistent enforcement activity. The LRC recommends that financial and economic regulators should each hold a number of core powers;

- the power to issue a range of warning directions or notices, including to obtain information by written request and "cease and desist" notices;
- the power to enter and search premises and take documents and other material;
- the power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or to produce documents (including provision for determining issues of privilege);
- the power to impose administrative financial sanctions, subject to court oversight, to ensure compliance with constitutional requirements;
- the power to enter into wide-ranging regulatory compliance agreements or settlements; and
- the power to bring summary criminal prosecutions.[24]

Further, the LRC notes that while certain other powers including licensing powers and "fitness and probity requirements" are of significant importance, their appropriateness should be considered on a case by case basis and not classed as "core" powers.

For the purposes of this paper certain statutory regulatory powers held by the comparator regulators will be considered in light of the four functional strands of the proposed Media Commission. While the LRC describes powers in relation to entry, search, seizure, to compel attendance of persons before an authorised officer/regulator and power to compel

[23] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences*, (LRC 119-2018)
[24] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences Volume 1*, (LRC 119-2018) at page 4

production of materials, this paper considers those powers to be inherent in the power of a regulator to appoint authorised officers.[25] Further, this paper draws a distinction between the investigatory powers of a regulator; for example, in circumstances where a regulator has a close licensing/contractual based relationship with a regulated entity investigations with the wide ranging powers of authorised officers may not be warranted, therefore in this paper there is a separate category for the power to carry out investigations.

Similarly, it is submitted that the power to impose administrative financial sanctions is intrinsically linked to the power to enter into settlement agreements and therefore these powers are considered as a single category. Considering administrative financials sanctions together with the power to enter into settlement agreements underpins the approach to effective regulation typified by the creation of a "culture of compliance". If a regulator had the power to impose administrative financial sanctions absent the power to enter into settlements, regulated entities would not be incentivised to engage constructively with the regulator.

Additionally, the Media Commission will have responsibilities in relation to the regulation of ODAVMS. Therefore, it is recommended, based on the reposes to the public consultation that a non-contractual registration system for ODAVMS be provided for by statute.

Given that the proposed Media Commission will have competence across a number of regulatory areas it is considered appropriate that a range of "core" powers be allocated to that body beyond those outlined in the LRC recommendations. The regulatory powers to be considered in this paper are:

- the power to issue a range of notices, warnings, etc.,
- the power to develop, implement and monitor codes of practice,
- the power to conduct investigations,
- the power to appoint authorised officers with significant investigatory powers,
- the power to impose administrative financial sanctions, subject to court oversight,
- the power to prosecute summary offences,
- the power to license regulated entities in certain circumstances and sectors, and,
- the power to operate a registration system for ODAVMS.

[25] Nevertheless, it should be noted that it may be necessary to augment the exact powers of authorised officers to reflect their specific objective duties and functions under the respective functional strands.

Power	Overview
• Power to issue notices, warnings, etc.	• The basis for such a power is mixed; encourages both compliance and also affords power to regulator to sanction non-compliant entities. • Issuing a notice represents a formal means by which a regulator may notify a regulated entity that it believes that it has or is in breach of responsibilities or obligations, to encourage a regulated entity to adjust its behaviour, to justify its behaviour, or to indicate that further action will be taken if non-compliance continues. • A notice represents a relatively low level regulatory action and may be appropriate where a more high level intervention is not warranted. • A failure to comply with the terms outlined by a regulator in a notice may lead to a more serious regulatory intervention such as a warning being issued. • This tiered approach provides flexibility to a regulator.
• Power to devise, implement, monitor and review codes of practice	• Systemic based power focused on creating culture of compliance. • Such a code outlines the rules, responsibilities, and or proper practices for regulated entities. • While most organisations will have codes of conduct in relation to specific matters, many regulators are compelled by statute to devise codes in relation to certain matters within their area of operation. • The development of codes affords an opportunity for engagement between a regulator and regulated entities.
• Power to conduct investigations	• Enforcement type power (based on investigatory powers as contained in the Broadcasting Act,

	2009) to be deployed where it is suspected a breach has or is occurring. • The statutory power to conduct an investigation into a specific matter involving the conduct or affairs of a regulated entity. • This power may be considered as a less extensive power than those associated with the appointment of authorised officers, however such a power may be more appropriate than the appointment of authorised officers depending on particular circumstances, for example; o the level of severity of an issue to be investigated, o the relationship between the regulator and regulated entity (e.g. whether they have a contractual relationship), and, o the status of the regulator as a market facing regulator.
• Power to appoint authorised officers with significant investigatory powers to conduct investigations	• A robust enforcement power. • Authorised officers conduct investigations and hold investigatory powers which typically include; entry, search and seizure, to compel individuals to produce materials or to provide evidence, to procure warrants to enter premises such as private dwellings, to be accompanied by other authorised officers or members of An Garda Síochána. • Authorised officers produce an investigation report which is passed to the regulator for further consideration. • The power to appoint authorised officers is largely associated with market facing regulators who may need to exert such power where; o they do not have direct contact/influence on the commercial activities of regulated

	entities, ○ the regulated entity is significant independent corporate entity. ▪ This is a highly relevant consideration in the context of the Media Commission which will have a significant regulatory role with regard to major multinational corporations.
• Power to impose administrative financial sanctions	• Strong enforcement power, impose financial sanctions on a regulated body for serious regulatory breach, court oversight required. • The exercise of such a power will reflect major wrongdoing on the part of a regulated entity. • As may be noted from the comparison below such powers are not widespread among regulators. • The existence of a potentially significant financial penalty represents a meaningful penalty for wrongdoing but also serves as an incentive for compliant behaviour.
• Power to prosecute summary offences[26]	• Enforcement power. Prosecute minor offences in the District Court. • The power to prosecute summary offences is common across many regulatory bodies. • Sanctions for such offences are typically a 'class A' fine and or a period of imprisonment not exceeding twelve months.[27]

[26] It may be noted that this power specifically relates to a regulator having the power to institute and prosecute certain proceedings in its own name in the District Court. Generally in legislation relating to regulation, offences will be specified along with sanctions which may be imposed on summary prosecution on indictment. A regulator has discretion, where an offence is specified in a relevant statute and it believes that a breach has occurred or is occurring, to refer the matter the gardaí/DPP.

• Licencing powers[28]	• A compliance and enforcement type power. • Some regulators have the power to grant or otherwise convey licenses to entities operating in a particular sector or market. • Entities must typically meet and maintain standards and abide by certain conditions to obtain and retain a license. Provides significant oversight of particular area or activity. • Licensing is an important regulatory function. The ability to grant licenses comes with the corollary of the power to withdraw licenses. This is a significant regulatory sanction which may remove an entity's ability to function. Such action would only occur where significant regulatory or other breaches had occurred.
• Registration powers	• A compliance type power. • Provides a means by which a regulator, while not exercising influence through licensing or contractual arrangements, ensures that certain entities engage with the regulator and abide by the policies or procedures prescribed by the regulator. • Registration powers may interact closely with the powers to devise, implement, monitor and review codes. • To ensure that entities comply with a registration scheme it is necessary that there would be sanctions for non-compliance.

[27] Pursuant to the Fines Act, 2010, a class A fine means a fine not exceeding €5,000.

[28] An important administrative function of the Media Commission under the third strand (ODAVMS) will be the operation of a non-contractual registration system for ODAVMS. Such a system will be underpinned by the enforcement and sanctioning powers of the Commission.

d. Other Regulatory Powers

This paper considers certain regulatory powers deemed to be "core" powers in the context of the proposed Media Commission. Regulatory powers do not exist in a vacuum they are interrelated and closely linked with other non-core powers which may be held by a regulator. As such, it may be noted that there are numerous other regulatory powers that may be provided to the Media Commission to carry out its functions, such as; seeking court orders to block access to online services, specific types of notices (such as take down notices), provisions in relation to co-operation between regulatory bodies and the related power of entering into memoranda of understanding with other bodies.

These powers are beyond the scope of this paper and will be examined on an individual basis in due course.

2. Relevant National Approaches

This paper has identified a number of comparator regulatory bodies and will assess their core powers and how these powers are expressed in statute.

- The Broadcasting Authority of Ireland ("BAI") was established under the Broadcasting Act, 2009 ("the 2009 Act"). The BAI is the regulator of broadcasting in Ireland and its functions include; licensing radio and television services, the review of the performance of RTÉ and TG4 in relation to their annual public objects, review the adequacy of public funding, monitoring and enforcing compliance with the broadcasting codes and rules, and dealing with complaints.

- The Data Protection Commission ("DPC") was established pursuant to the Data Protection Act, 2018 ("the 2018 Act"). The DPC is the national independent authority responsible for upholding the fundamental right of individuals in the EU to have their personal data protected. The DPC is the Irish supervisory authority for the General Data Protection Regulation (GDPR).

- The Commission for Communications Regulation ("ComReg") was established under the Communications Regulations Act, 2002 ("the 2002 Act"). ComReg is responsible for the regulation of the electronic communications sector (telecommunications, radio communications, broadcasting transmission and premium rate services) and the postal sector.

- The Competition and Consumer Protection Commission ("CCPC") enforces competition and consumer protection law. It assesses the impact of mergers on competition, it promotes consumer and economic welfare and the maintenance of safety standards in consumer products. The CCPC's powers are set out in the Competition and Consumer Protection Act, 2014 ("the 2014 Act").

- The Commission for Regulation of Utilities ("CRU") is the regulator for energy and water. The CRU has a wide range of economic, customer protection and safety responsibilities in energy and water. The powers of the CRU are largely set out in the Energy Regulation Act, 1999, as amended ("the 1999 Act").

i. Issuing of a Notice, Warning, etc.

- BAI,[29]
    - The BAI has a Compliance and Enforcement Policy[30] which provides details in relation to compliance and warning notices. It is noted that "(s)ome, but not necessarily all, contracts contain provisions relating to the issue of compliance notices, warning notices and other related provisions. Where the contract with a particular contractor contains such provisions, BAI will have regard to those provisions in connection with its engagement with the contractor concerned."[31]
    - a compliance notice may be issued where it appears to the BAI that there is non-compliance;
        - the contractor or broadcaster may then bring themselves into compliance independently,
        - the BAI may follow up to see what the contractor or broadcaster has done to remedy the matter,

[29] Such powers are related to the BAI's licensing/contract regime and are based on contract law rather than directly based on statute.
[30] Broadcasting Authority of Ireland, 'BAI Compliance and Enforcement Policy', November 2014, available at: https://www.bai.ie/en/broadcasting/regulation/#al-block-7 [accessed: 18/06/2019]
[31] This is not based on statute, rather based on contract law; it reflects the BAI's status as a non-economic regulator.

        - the issue of a compliance notice does not constitute a finding or pre-judgment of noncompliance by the BAI or the Compliance Committee,

    - a warning notice may be issued where it appears to the BAI that there is non-compliance of a relatively serious nature or where it is a reoccurrence of the same or a similar matter;

        - the contractor or broadcaster is asked to provide to, and agree with, the BAI a plan for remedying the apparent non-compliance and ensuring there is no re-occurrence of it,

        - the issuing of a warning notice ensures that a contractor or broadcaster is aware that the matter is considered to be relatively serious, whilst at the same time providing an opportunity for the BAI and a contractor or broadcaster to work together to resolve the issue without the need for it to be formally referred to the Compliance Committee,

        - if the matter is not remedied to the BAI's satisfaction, the matter may be referred to the Compliance Committee which may ultimately result in an investigation and formal sanctions,

        - the issue of a warning notice does not constitute a finding or pre-judgment of noncompliance by the BAI or the Compliance Committee.

- DPC

    - Under the Data Protection Act, 2018, following an inquiry (with or without investigation) if the Commission decides that an infringement has occurred, corrective powers may be applied. The DPC's corrective powers are outlined in s. 127 of the Data Protection Act, 2018. The Commission may do one or more of the following;

        - issue a warning to the controller or processor that intended data processing is likely to infringe a relevant provision;

        - issue a reprimand to the controller or processor where data processing by the controller or processor has infringed a relevant provision;

- order the controller or processor to comply with a data subject's request to exercise his or her rights under a relevant provision;
- order the controller or processor to bring processing into compliance with a relevant provision, in a specified manner and within a specified period;
- order the controller to communicate a personal data breach to data subjects;
- impose a temporary or definitive limitation, including a ban on processing;
- impose a restriction on processing by the controller or processor;
- order the suspension of data transfers to a recipient in a third country or to an international organisation,
- the Commission may serve on the controller or processor concerned an enforcement notice requiring it to take such steps as the Commission considers necessary for those purposes.[32]

- ComReg
  - Pursuant to SI N0. 337/2011 – European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011, the Commission is obliged to monitor compliance with those regulations,
    - where it finds that an undertaking is not compliant it may notify the undertaking of such finding and give the undertaking an opportunity to state its views or to remedy the non-compliance,[33]
    - such notification may be published,[34]
    - such notification may be amended or revoked,[35]
    - at the end of the period specified in the notice, if the undertaking is still non-compliant, the Commission may apply to the High Court for an order,

[32] s. 127(2)
[33] s. 31(2)
[34] s. 31(3)
[35] s. 31(4)

- such order may constitute; a declaration of non-compliance, an order directing compliance, a financial penalty for non-compliance.[36]

- CCPC,
    - Pursuant to s. 75(2) of the Consumer Protection Act, 2007, an authorised officer who is of the opinion that a person is committing, or has committed a prohibited act or practice may issue a written notice (a "compliance notice") on that person, such a notice must;
        - be signed and dated by the authorised officer,
        - contain a statement of the alleged contravention and the reasons of the authorised officer's opinion,
        - direct the person to remedy the breach,
        - specify the date for remedy,
        - notify the person they may appeal to the District Court.

- CRU,
    - Under Part IX the Electricity Regulation Act, 1999, as amended, the CRU may impose a 'minor sanction', such a sanction may constitute;
        - the issue to a regulated entity of advice, a caution, a warning, a reprimand, or any combination of these sanctions.

- Discussion – general comments
    - The power to issue such a notice, warning, etc. is common across all regulators considered.
    - The power to make such interventions appear to be a useful and nuanced power which may be used effectively to foster a culture of compliance. It will not be necessary in the majority of instances to pursue punitive measures

[36] s. 31(9)

and it will be important for regulators to have such official powers to 'nudge' regulated entities.

Function of Media Commission	Analysis of power to issue notices, warnings, etc.
• Strand 1: overseeing the operation of the national online safety system, • Strand 2: regulating Video Sharing Platform Services, • Strand 3: regulation of On-demand Audiovisual Media Services, and, • Strand 4: regulation of Television Broadcasting Services.	• Such a power is highly desirable across the four functional areas of the Media Commission. • The interplay between codes of practice and notices represent a standardised and transparent means of encouraging compliant behaviour. • The ability to issue a series of increasingly serious communications to a regulated entity represents a proportionate and targeted approach. • In cases of serious flouting or of rules such notices could lead to more serious sanctions such as administrative financial sanctions.

ii. Code of Conduct

While most organisations devise codes of conduct for various purposes, in the present context this paper considers where such power is attributed to a regulator in statute.

- BAI,
    - s. 42 provides that the BAI prepare and update codes governing standards and practices of broadcasters.

- All broadcasters must comply with codes and any revisions of codes,[37] such codes, *inter alia*, provide;
    - all news is reported in an objective and impartial manner,
    - current affairs is reported in an objective and impartial manner,
    - material which incites crime or which is seditious will not be broadcast,
    - privacy of individuals is respected,
    - no preference is shown in allocation of time for party political broadcasts,
    - sensitive material; violent/sexual, is presented with sensitivity and regard for impact on audiences,
    - children's interests are protected with regard to advertising etc. material,
    - audience interests are protected with regard to advertising etc. material,[38]
    - advertisements of certain food and beverage may be prohibited[39]
- When preparing or revising a code regard must be had to;
    - the degree of harm or offence likely to be caused by material,
    - size and composition of potential audience,
    - the nature of a programme's content and audience expectations in this regard,
    - possibility of people being unintentionally exposed to content,
    - desirability of maintaining independence of editorial control.[40]
- In devising such a code the BAI may consult with relevant public health authorities.[41]
- Codes must be presented to the Minister.[42]

[37] s. 42(6)
[38] s. 42(2)
[39] s. 42(4)
[40] s. 42(3)
[41] s. 42(5)

- DPC,
    - Article 40 of the GDPR calls for the encouragement of codes of practice to contribute to the proper application of the Regulation,
    - s. 32 of the Data Protection Act, 2018, calls on the Commission to encourage the implementation of a code of conduct in relation to; the protection of children, the information to be provided by a controller to children, the manner in which the consent of the holders of parental responsibility over a child is to be obtained for the purposes of Article 8, integrating the necessary safeguards into processing in order to protect the rights of children in an age-appropriate manner for the purpose of Article 25, and the processing of the personal data of children for the purposes of direct marketing and creating personality and user profiles.

- ComReg
    - As per s. 15 of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010, ComReg put in place a strict code of practice which all premium rate service providers must comply with.

- CCPC
    - One of the functions of the Commission listed at s. 10(3)(g) is to review and approve codes of practice in accordance with s. 88 of the Consumer Protection Act, 2007, which section relates to the voluntary submission of codes for review and approval by the Commission.

- Discussion – general comments
    - Placing the production of codes of conduct in relation to specific matters on a statutory basis signals a strong focus on the importance of such materials.
    - Such codes represent a softer regulatory approach, often involving stakeholder engagement, fostering cooperation between the regulator and the regulated entities.

[42] s. 42(7)

- Allows for updating provisions without legislative amendments.

Function of Media Commission	Analysis of statutory power to implement codes of practice
Strand 1: overseeing the operation of the national online safety system, Strand 2: regulating Video Sharing Platform Services, Strand 3: regulation of On-demand Audiovisual Media Services, and, Strand 4: regulation of Television Broadcasting Services.	• Such statutory powers are applicable to the four functional areas of the Media Commission. • They underpin best practice/rules in particular areas. • Having such powers based on statute ensures that provision can be made for the factors to be considered in devising them, procedures for review, and input of expert advice. • This provides significant clarity for both a regulator and regulated entities. • By expressing such power in statute it could link clearly to responses (incl. sanctions) by a regulator where there is non-compliance. • The experience and institutional knowledge of the BAI in relation to devising, implementing, monitoring and revising statutory codes of practice will be of benefit to the Media Commission.

iii. Investigations

All of the regulators considered hold investigatory powers. For the purposes of this paper investigatory powers are distinguished from the power to appoint an authorised officer for the purpose of investigation, which officers typically enjoy significant powers such as entry, search and seizure.

- BAI,
    - The investigatory powers of the BAI are more circumscribed than the other comparators. This reflects the fact that the BAI is not a traditional economic regulator and exerts significant regulatory influence through its licencing/contract relationships (it may be noted the BAI does have has power to apply for search warrants to investigate breaches of the Wireless Telegraphy Acts or the Broadcasting (Offences) Acts).[43]
    - The BAI's investigatory powers are set out in s. 50 of the 2009 Act. If the Compliance Committee has reasonable grounds for believing that a contractor is not providing a service in accordance with the terms of the contractor's contract, the Committee may appoint an investigator.[44]
    - Such an investigation may consider the operational, programming, financial, technical or other affairs of a holder of a contract.[45]
    - An investigator may be a member of the staff of the Authority or another person the Committee considers to be suitably qualified.[46]
    - The powers of the investigator are set out in s. 50(4), the investigator may; require the contractor to produce information or records in their possession or control, enter the premises of the contractor to conduct examinations of broadcasting equipment, and require the contractor to attend before the investigator.
    - If, having conducted an investigation, an investigator is of the view that a contractor is not providing a service in accordance with the terms of the contract, the investigator must notify the contractor of this finding and afford the contractor the opportunity to make submissions at a hearing before the Compliance Committee.[47]
    - Having considered the submissions (if any) the Committee may make a finding that a contractor is not providing a service in accordance with the terms of the contract, or a finding appropriate in the circumstances.[48]

[43] Schedule 2, s. 8
[44] s. 50(2)
[45] s. 50(1)
[46] s. 50(2)
[47] s. 50(5)
[48] s. 50(7)

- ComReg
    - It may be noted that ComReg also has the power to appoint authorised officers with significant investigatory powers.
    - Pursuant to s. 38A of the 2002 Act, the Commission may compel individuals to give evidence or produce documents. This power may be exercised where the Commission "believes on reasonable grounds" that an individual may be able to give evidence relating to matters concerning the Commission's functions or objectives (other than relating to postal services).
    - A person subject to such a request will receive a notice requiring the person to appear before the Commission to give evidence or produce documentation, the notice must specify what matter the evidence or documentation relates to as well as the time and place they must appear and who they will appear before.[49]
        - It is submitted that the wording of this section, specifically the specific reference to giving evidence or production of documentation, significantly reduces the effectiveness of such a power.
        - However, as noted, ComReg may exert more robust investigatory powers through the appointment of authorised officers.
    - A person appearing before the Commission is subject to the same liabilities as a witness in High Court proceedings.[50] The person may be required to swear an oath or make an affirmation.[51]

[49] ss. 38A(2), (3)
"38A. — (1) If the Commission believes on reasonable grounds that a person may be able to give evidence, or to produce a document, that relates to a matter concerning the performance or exercise of any of the Commission' s functions or objectives (other than its functions or objectives relating to postal services) , it may serve on the person a notice requiring the person to appear before it —
(a) to give evidence about the matter, or
(b) to produce the document for examination.
(2) The notice shall specify —
(a) the matter to which the evidence or document relates, and
(b) the date, time and place at which the person is required to appear before the Commission.
(3) The notice may require the person concerned to appear before a specified Commissioner or a specified member of the Commission ' s staff and, if it does so, a reference in this Part to the Commission is to be read as a reference to the Commissioner or staff member concerned."
[50] s. 38F
[51] s. 38B(2)

- The Law Reform Commission has long recommended the abolition of oaths for civil and criminal proceedings with preference for affirmation due to its secular nature.[52]

- A person appearing before the Commission may be accompanied by legal representation, or with approval of the Commission, another person.[53] The Commission may give directions as to who may be present and to restrict publication of the evidence of documentation.[54] As per s. 38C(5)(a) & (b) nothing in a direction may prevent the presence of a legal representative or other person representing the individual or a Commissioner or member of the Commission's staff.

    - This seems to contradict s. 38B(3) which states Commission approval is required for an individual to be accompanied by a person who is not a legal representative, it may be that permission of the Commission is not required for a McKenzie Friend type representative (who may provide moral or administrative support), while approval is required to be accompanied by someone who is not an advocate.

- Giving evidence or production of documents will be carried out in private[55] unless a request for the matter to be dealt with in public by the individual is made and the Commission is satisfied that it is in the public interest to do so.[56]

- It is an offence (save with reasonable excuse such as; self-incrimination or exposure to a penalty);[57]

    - for a person to be present when evidence is given or documentation produced in private, who is not entitled to be present pursuant to a direction under s. 38C,

    - to refuse to swear an oath or make an affirmation when required to do so by the Commission,

    - to refuse to give evidence or fail to answer a question,

    - to fail to produce a document that is required.

[52] Law Reform Commission, *Report on Oaths and Affirmations* (LRC 34-1990), p. 55 , available at: https://www.lawreform.ie/_fileupload/Reports/rOaths.htm [accessed: 19/06/19]
[53] s. 38B(3)
[54] ss. 38C(4)(a)&(b)
[55] s. 38C(1)
[56] ss. 38C(2), (3)
[57] s. 38E(2)

- A person guilty of such an offence is liable to a fine not exceeding €5,000.[58]

- CCPC,
  - It may be noted that the CCPC also has the power to appoint authorised officers with significant investigatory powers.
  - S. 10 of the 2014 Act states that a function of the Commission is to carry out investigations of its own motion or in response to a complaint in relation to a breach of statutory provisions, a breach of Article 101 or 102 of the Treaty on the Functioning of the European Union, and notwithstanding their repeal, breaches of the Competition (Amendment) Act, 1996 and the Competition Act, 1991, that has occurred.
  - Details of such investigations are set out in s. 18 of the 2014 Act. The Commission has the power the summon (such summons to be signed by a member of the Commission[59]) witnesses and examine on oath a witness called before it, require witnesses to produce books, documents and records, by notice require any person or undertaking to provide the Commission with necessary information.[60]
  - Witnesses before the Commission are entitled to the same immunities and privileges as witnesses before the High Court.
  - A person is guilty of an offence if they; do not attend after being summoned, refuse to take an oath[61] required by the Commission, fail to produce books, documents and records, fail to answer a question, provide the Commission with information they know to be false or misleading, fail to provide information pursuant to a s. 18(1)(d) notice, or does anything which is comparable to contempt of court.
  - A person guilty of such an offence is liable on summary[62] conviction to a class A fine or a term of imprisonment not exceeding 12 months or both, or on conviction on indictment, a fine not exceeding €30,000 or a term of imprisonment not exceeding 5 years or both.

- Discussion – general comments;

[58] s. 38H(2)
[59] s. 18(3)
[60] s. 18(1)(a), (b), (c), (d)
[61] The specific reference to “oath” only necessitates recourse to the Interpretation Act.
[62] s. 18(5)

- The existence of powers below the level of appointment of authorised officers appears to provide flexibility to a regulatory body in how it addresses a complaint or other matter which, at least initially, may not require significant investigatory powers to be brought to bear on the matter.
- It would appear that investigation powers are appropriate for bodies which enjoy significant influence over regulated entities or bodies which are market facing and require a versatile means of considering matters such as complaints from the public.
- It is submitted that the effectiveness of such powers are linked to the attitude of a regulated entity to regulation. As noted below the BAI experience in the *Mission to Prey* investigation demonstrates the effectiveness of such powers. However, if a regulated entity chose to challenge the matter in court rather than defer to the regulator as occurred in the *Mission to Prey* investigation, such powers could be significantly hampered by litigation with attendant costs and delays.
- Such powers are appropriate and desirable for strand 4 (broadcasting). Detailed examination will be required to assess how such powers may be expressed in statute and how they would interact with powers in relation to authorised officers etc.

Function of Media Commission	Analysis of power to conduct investigations
• Strand 1: overseeing the operation of the national online safety system, • Strand 2: regulating Video Sharing Platform Services, • Strand 3: regulation of On-demand Audiovisual Media Services, and,	• Such powers are appropriate where the regulator and regulated entity have a close legal relationship as is the case with regard to the contractual/licence based relationship between the BAI and broadcasters. • The relative closeness of a regulator and regulated entity is an important consideration in assigning relevant regulatory powers. • Therefore, authorised officer based investigations are considered more appropriate for these functional strands.

• Strand 4: regulation of Television Broadcasting Services.	• The BAI currently holds such powers (the BAI is the only body considered which does not have the power to appoint authorised officers.) • This reflects the nature of the BAI as a non-market facing regulator with significant contract/license based relationship with regulated bodies. • The investigative powers attributed to the BAI have been exercised on one occasion, in the case of the investigation into RTÉ's *Prime Time Investigates Mission to Prey*. On that occasion the broadcaster, pursuant to s. 54(4)(b) of the 2009 Act, requested that the Authority deal with the matter. • A level of caution must be expressed however, while this example has demonstrated the efficiency and effectiveness of such investigations it must be noted that definitive conclusions may not be drawn from a single example. A critical assessment of the applicability of such powers must be made in the context of the new paradigm created by a Media Commission with wide ranging functions.

iv. *Appointment of Authorised Officers*

The power to appoint an authorised officer, with significant investigatory powers, is shared by four of the comparators (excluding the BAI).

- DPC,
    - Under the 2018 Act, the DPC may carry out inquiries; in relation to complaints,[63] to ascertain whether an infringement of a relevant provision[64] or a relevant enactment[65] has occurred or is occurring.
    - The Commission may direct one or more authorised officers to carry out the investigation[66] and submit a report to the Commission,[67] the Commission may define the scope and terms of the investigation,[68] where more than one authorised officer is appointed the report is prepared jointly.[69]
    - Once appointed, the authorised officer must give the controller or processor a written notice setting out the particulars of the complaint or where the examination[70] is being carried out,[71] and afford the controller or processor an opportunity to respond within 7 days (and not more than 28 days).[72]
    - An authorised officer has the power to;
        - enter any place where any activity connected with processing of personal data takes place, where material is kept, search and inspect the place and materials, require a person at that place (controller, processor, employee or agent) to produce materials and information, secure material for later inspection, inspect or take extracts of material, remove and retain materials, operate any data equipment (computer etc.), compel a person to provide assistance in relation to

[63] s. 109(5)(e) of the 2018 Act
[64] s. 123(1)
[65] s. 110(1)
[66] s. 137(2)(a)
[67] s. 137(2)(b)
[68] s. 137(3)
[69] s. 137(4)
[70] An "examination" means any process for determining the knowledge, intelligence, skill or ability of a person by reference to his or her performance in any test, work or other activity;
[71] s. 137(5)(a)(i)&(ii)
[72] s. 137(5)(b)

equipment; provide materials in suitable form, provide passwords, enable examination,[73]

- be accompanied by other authorised officers or members of An Garda Síochána,[74]
- require a person to provide them with their name and address for the purpose of applying for a warrant,[75]
- if prevented from entering a place in the performance of their function, an authorised officer may apply for a warrant under s. 131,[76]
    - an authorised officer may not enter a dwelling without the consent of the occupier or in accordance with a s. 131 warrant,[77]
        - if a judge of the District Court is satisfied, on the sworn information of an authorised officer, that information necessary for the performance of the authorised officer's functions is held at any place, the judge may issue a warrant authorising the authorised officer, accompanied by other persons or a member of An Garda Síochána as necessary, to enter the place with reasonable force,[78]
        - such warrant is valid for 28 days[79] and may be extended on application,[80] multiple applications for new warrants may be made in respect of same location,[81]
- require a controller or processor (or an employee or agent of such) who in the authorised officer's opinion; possesses information relevant to the investigation or has any record or document relevant to the investigation, to provide same to the authorised officer[82] and

[73] s. 130(1)&(2)
[74] s. 130(3)
[75] s. 130(4)
[76] s. 130(5)
[77] s. 130(6)
[78] s. 131(1)
[79] s. 131(2)
[80] s. 131(3)
[81] s. 131(5)
[82] s. 138(1)(a)(i)&(ii)

require that person to attend before them to provide that information or material,[83]

- the period for compliance will be specified, as will the place at which the person will attend or deliver the material concerned or the place the material shall be sent,[84]
- a person required to attend before an authorised officer must answer any question asked fully and truthfully (under oath, if required[85]) an authorised officer may, of their own volition, conduct an oral hearing;[86]
    - persons subject to such requirements are entitled to the same immunities and privileges as witnesses before the High Court,
    - statements or admissions made by a person subject to such requirements are not admissible in evidence in proceedings for an offence (other than under s. 138(12)),[87]
    - requirements do not impact rules in relation to legally privileged material, this section cannot compel a person to produce materials which would be exempt in court proceedings due to legal privilege,[88]
        - where it appears to an authorised officer that a person is failing to comply with such requirements, the authorised officer may, on notice to the person and with the consent of the Commission, apply to the Circuit Court for an order,[89]
            - if the Court is satisfied the person has failed to comply with the requirement, the Court may make an order requiring

[83] s. 138(1)(b)
[84] s. 138(2)(a)&(b)
[85] s. 138(3)(a)&(b)
[86] s. 138(10)
[87] s. 138(8)
[88] s. 138(9)
[89] s. 138(4)

the person to comply or substitute a different requirement,[90]

- a person who withholds, destroys or conceals information or materials, fails or refuses to comply with a requirement of an authorised officer, provides false or misleading information or materials, obstructs or hinders the authorised officer in the performance of their functions, shall be guilty of an offence,
  - on summary conviction – a class A fine or imprisonment not exceeding 12 months, or both, or
  - on indictment – a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years or both,[91]

- after the investigation, the authorised officer having considered all information, materials, statements, submissions and evidence, must prepare a draft written report,[92] a copy of which must be given to the controller or processor with a notice giving them 28 days to make submissions,[93]
  - after this period the authorised officer must consider any submissions and make any revisions to the draft and prepare the investigation report and submit it to the Commission with any submissions annexed,[94]
- a draft investigative report must be in writing and state whether or not the authorised officer is satisfied an infringement of the relevant provision or enactment by the controller or processor has or is occurring[95] and the grounds for same[96] (if not so satisfied it may specify whether further

[90] s. 138(5)(a)&(b)
[91] s. 138(12)
[92] s. 139(1)
[93] s. 139(1)(i)&(ii)
[94] s. 139(2)(a)&(b)
[95] s. 139(3)(a)
[96] s.139(3)(b)

investigation is warranted and the matters to which such investigation should relate[97]),

- where the authorised officer is satisfied an infringement of the relevant provision or enactment by the controller or processor has or is occurring they may not make any recommendation or express any opinion as to the corrective power to be exercised,[98]

- on receipt of an investigation report, the Commission shall consider the report and any annexes,[99]

    - if the Commission forms the view that further information is required it may; conduct an oral hearing, give the controller or processor a copy of the investigation report and a notice giving the controller or processor 21 days to make submissions in relation to matters specified by the Commission or direct an authorised officer to conduct such further investigation as the Commission considers necessary.[100]

- ComReg,

    - S. 39 of the Communications Regulation Act, 2002, as amended, empowers the Commission to appoint authorised officers for the purposes investigating offences pursuant to that Act and the Competition Act, 2002.

    - On appointment an authorised officer will be furnished with a certificate of appointment.[101]

    - An authorised officer has the power to;

        - enter any premises, vehicle or vessel where relevant[102] activities take place, search and inspect the location and any materials found there,[103]

[97] s. 139(c)(ii)
[98] s. 139(4)
[99] s. 140(1)
[100] s. 140(2)
[101] s. 39(2)
[102] "relevant activity" means the provision of electronic communications services, networks or associated facilities or postal services or premium rate services

- require any such person to produce material relating to relevant activities,[104]
- secure for later inspection any such premises in which materials relating to relevant activities are stored,[105]
- inspect or take extracts from material, or in relation to material in non-legible form, take copy of or extract in permanent legible form,[106]
- remove materials for examination,[107]
- require the person to maintain materials for such period as is reasonable for,[108]
- require the person to provide any information reasonably required in relation to relevant activities,[109]
- make inspections, tests and measurements of machinery, apparatus, appliances and other equipment on the premises or vessel or at the place,[110]
- require any person at the place or vessel to render all reasonable assistance,[111]
- take photographs or make any record or visual recording of any activity on such premises or vessel,[112]

o where an authorised officer exercising their powers is prevented from entering a place or vessel, an application for a s. 40 warrant may be made to authorise such entry,[113]

- where a District Court judge is satisfied, on sworn information of an authorised officer, that there are reasonable grounds that information required by the authorised officer is held at a premises or vehicle, the judge may issue a warrant allowing an authorised officer,

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[103] s. 39(3)(a)
[104] s. 39(3)(b)
[105] s. 39(3)(c)
[106] s. 39(3)(d)
[107] s. 39(3)(e)
[108] s. 39(3)(f)
[109] s. 39(3)(g)
[110] s. 39(3)(h)
[111] s. 39(3)(i)
[112] s. 39(3)(j)
[113] s. 39(4)

accompanied by other authorised officers or members of the Garda Síochána to enter that place or vehicle with reasonable force,[114]

- an authorised officer may not enter a private dwelling without the consent of the occupier unless they have obtained a s. 40 warrant to authorise such entry,[115]
- a person who; obstructs, impedes or assaults[116] an authorised officer in the exercise of a power under s. 39, fails or refuses to comply with a requirement, alters, suppresses or destroys materials, gives false or misleading information, falsely represents themselves as an authorised officer, is guilty of an offence and is liable on summary conviction to a fine not exceeding €3,000,[117]
- where an offence is committed by a body corporate and was committed with the consent, connivance or attributable to neglect by a director, manager, secretary or other officer or person purporting to act in such capacity, that person, as well as the body corporate, is guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the first mentioned offence.[118]
- authorised officers are indemnified.[119]

- CCPC,
  - Chapter 2 of the Competition and Consumer Protection Act, 2014, details matters relating to authorised officers.
  - The Commission may appoint authorised officers, "including"[120] staff of the Commission and such appointment "may"[121] be for a fixed period.[122]
  - Authorised offices are provided with a warrant of appointment,[123]

[114] s. 40
[115] s. 39(5)
[116] This provision appears to create a special class of 'regulatory assault' carrying a different penalty than s. 18 of the Criminal Justice (Public Order) Act, 1994, which section specifies a fine of €2,500 or a term of imprisonment not exceeding 12 months or both for a summary conviction.
[117] s. 39(5)
[118] s. 42
[119] s. 41
[120] This implies that they may appoint people who are not staff of the Commission.
[121] Implies that appointment may be permanent subject to further provisions, redundant in light of s. 35(4)
[122] s. 35(1)
[123] s. 35(3)

        - the warrant of appointment will in court proceedings constitute proof of appointment without further evidence until proved contrary,[124]

    - appointment will cease if;
        - revoked by the Commission,
        - if appointment is for a fixed period and that period expires,
        - if the person is a member of staff of the Commission and that person ceases to be a member of staff,[125]
    - an authorised officer exercising their powers may be accompanied by other authorised officers or members of An Garda Síochána,[126]
    - an authorised officer may be a member of An Garda Síochána,[127]
    - falsely representing oneself as an authorised officer is an offence punishable on summary conviction with a class A fine or imprisonment not exceeding 12 months or both,[128]
        - if a member of An Garda Síochána is of the opinion such an offence is or has been committed, then they may arrest the person without a warrant,[129]
    - a person is guilty of an offence who; obstructs or impedes an authorised officer in the exercise of their powers, who without reasonable excuse fails to comply with a request or requirement or gives information with is false or misleading,[130]
        - a person guilty of such an offence on summary conviction is liable to a class A fine or imprisonment for up to 6 months or both, or if convicted on indictment a fine of up to €50,000[131] or imprisonment up to 3 years or both,[132]

[124] s. 35(12)
[125] s. 35(4)
[126] s. 35(5)
[127] s. 35(6)
[128] s. 35(7)
[129] s. 35(10)
[130] s. 35(8)
[131] Significant monetary penalty, reflects possible significance of breaches of consumer or competition legislation.
[132] s. 35(9)(a)&(b)

- in proceedings by way of summons, service may be effected by an authorised officer,[133]
- powers of authorised officers are differentiated between those which exist for the purposes of enforcing relevant statutory provisions[134] and those which relate to investigations under the 2002 Act,
- with regard to enforcing relevant statutory provisions, authorised officers may;
    - enter any place where it is believed trade or business is carried on or has relevant materials and search and inspect the place and any materials,[135]
    - secure any place for later inspection,[136]
    - remove materials relating to a trade, business or activity for such period as is reasonable for further examination and take reasonable steps for the preservation or prevent interference with material - subject to a warrant being issued by a judge of the District Court for that purpose,[137]
    - require any person who carries on a trade, business or activity or any employee; to give their name, home address and occupation,[138] provide materials,[139]
        - require such person to give information reasonably required in regard to trade, business or activity of persons carrying on such, and with regard to unincorporated entities details of membership, committee, management or controlling authority,[140]

[133] s. 35(11)
[134] As per s. 2 of the A2014 Act - "relevant statutory provisions" means— (a) "relevant statutory provisions" within the meaning of the Act of 2007 [Consumer Protection Act 2007], (b) the Act of 2002 [Competition Act 2002], and any instrument made under that Act for the time being in force, and (c) this Act, and any instrument made under this Act for the time being in force.
[135] s.36(1)(a)
[136] s. 36(1)(b)
[137] s. 36(1)(c)
[138] s. 36(1)(d)(i)
[139] s. 36(1)(d)(ii)
[140] s. 36(1)(f)

- require such person to give other information reasonable required in respect of trade, business or activity,[141]

- inspect and take copies or extracts from materials or for material in non-legible form take copy or extract in legible form,[142]

- require a person who uses or on whose behalf data equipment is used to afford authorised officer all reasonable assistance in relation to it and assist in retrieval of information,[143]

- summon any person employed in connection with trade, business or activity to give any information or materials reasonably required,[144]

- an authorised officer may enter a place at which there are reasonable grounds to believe trade, business or activity has or is being carried on and buy goods and take them or confirm price or other information,[145]

- an authorised officer may not enter a private dwelling without the consent of the occupier without a warrant from the District Court,

    - the authorised officer may apply to a District Court judge for a warrant in relation to any place,[146]

    - if a District Court judge is satisfied, on information given on oath by an authorised officer, that there is reasonable grounds to suspect evidence or relating to the commission of an offence under relevant statutory provisions is to be found at that place, the judge may grant a warrant to allow authorised officer together with other authorised officer(s) or members of An

[141] s. 36(1)(g)
[142] s. 36(1)(e)
[143] s. 36(1)(h)
[144] s. 36(1)(i)
[145] s. 36(2)
[146] s. 36(4)(a)

Garda Síochána as appropriate to enter and search using reasonable force,[147]

- where an advertisement[148] does not include the name and address of a person or agent who procured the publication, the Commission or authorised officer may, within 12 months of publication, request the name and address of such person or his agent,[149]

  - a person who fails to comply or give false or misleading information will be guilty of an offence on summary conviction liable to class A fine or imprisonment up to 12 months or both,[150]

- with regard to investigations under the Act of 2002, an authorised officer requires a warrant to exercise powers,[151]

  - such a warrant may be obtained if a District Court judge is satisfied by information on oath of an authorised officer that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence under the 2002 Act is to be found in any place. Such warrant will authorise the authorised officer with other authorised officer(s) or members of An Garda Síochána as appropriate, for one month to enter and search the place using reasonable force and exercise any and all powers in this section,[152]

    - section 9 of the Criminal Justice Act, 1976,[153] applies to an authorised officer carrying out a search in the same way it applies to a member of An Garda Síochána,

[147] s. 36(4)(b)
[148] s. 36(7) "In this section "advertisement" has the same meaning as it has in the Act of 2007." The Act of 2007 refers to the Consumer Protection Act, 2007. Section 2 of that act; "advertisement" includes any form of advertising or marketing.
[149] s. 36(5)
[150] s. 36(6)
[151] s. 37(1)
[152] s. 37(3)
[153] "9.—(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897 , shall apply to the thing so seized in the

- the powers of an authorised officer are as follows;
    - enter and search, with reasonable force, any place connected with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in such business, is carried on,[154]
    - enter any place occupied by a director, manager or any member of staff of an undertaking that carry on activities and where there are reasonable grounds for believing that relevant materials are kept there,[155]
    - seize and retain relevant material found in such places and take necessary steps for preserving and preventing interference with same,[156]
    - require a person connected with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in such business, to give their name, home address and occupation[157] and provide the authorised officer with relevant material and where the material is in non-legible format, to provide legible form,[158]
        - to require such person to give the authorised officer any information required in regard to a person (and in regard to the activity)[159] carrying on the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons

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same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.
(2) If it is represented or appears to a person proposing to seize or retain a document under this section that the document was, or may have been, made for the purpose of obtaining, giving or communicating legal advice from or by a barrister or solicitor, that person shall not seize or retain the document unless he suspects with reasonable cause that the document was not made, or is not intended, solely for any of the purposes aforesaid."

[154] s. 37(2)(a)
[155] s. 37(2)(b)
[156] s. 37(2)(c)]
[157] s. 37(2)(d)(i)
[158] s. 37(2)(d)(ii)
[159] s. 37(2)(g)

engaged in such business, and with regards to unincorporated bodies information in regard to membership and its committee of management or other controlling authority,[160]

- inspect and take copies or extracts of relevant material and where the material is in non-legible format copies of or extracts from such in permanent legible form,[161]

- where a person is arrested on suspicion of an offence under s. 6/7 of the 2002 Act[162] and the person has been taken and detained in a Garda Station, or if they were arrested in a Garda Station and have been detained under s. 4 of the Criminal Justice Act, 1984, up to 2 authorised officers accompanied by a member of An Garda Síochána may attend and participate in the questioning of the person – but only if the garda requests the authorised officer to do so and the garda is satisfied that it is necessary and proper for the investigation,[163]

- such an authorised officer who commits an act or omission which if made by a garda would be a contravention of a regulation made under s. 7 of the Criminal Justice Act 1984,[164] will not of itself render the authorised officer criminally or civilly liable or affect the lawfulness of the custody or admissibility of any statement made by the person,[165]

- where a person is in court charged with an offence under s. 6/7 of the 2002 Act, a copy of recordings of questioning by gardaí or authorised officer(s), while they were detained in a garda station or elsewhere in connection with an investigation into the offence will only be given to the person or their legal

[160] s. 37(2)(f)
[161] s. 37(2)(e)
[162] s. 6 relates to price fixing etc., while s. 7 relates to abuse of a dominant position.
[163] s. 37(5)
[164] s. 7 relates to the treatment of person in custody, this is a significant potential encroachment on the rights of a detainee.
[165] s. 37(7)

representative if ordered by court with such conditions as the court may specify,[166]

- such a recording (or transcript thereof, or both) may be admitted as evidence at trial,[167]
    - a statement made in such a recording may be admissible even if not; taken down in writing at the time, it is not in writing and signed by the person who made it or both,
    - this does not affect the admissibility of a statement made by the person whether during questioning by the garda or authorised officer at a garda station or elsewhere, whether it is signed or not, or whether it is recorded electronically.

- CRU,
    - Part IX of the Electricity Regulation Act, 1999, as inserted by the Energy Act, 2016, details matters relating to investigations.
    - Section 56 concerns the appointment of inspectors.
        - The Commission may appoint members of staff or other persons (with consent of the Minister for Public Expenditure and Reform) as it thinks fit to be inspectors for such time and subject to such terms as it may determine.[168]
        - When appointed an inspector is furnished with a certificate of appointment. When exercising their powers an inspector must produce this certificate if requested to do so.[169]
    - The Commission may launch an investigation if it considers it necessary to do so to perform any of its functions.[170]

[166] s. 37(8)
[167] s. 37(10)
[168] s. 56(1)(a)&(b)
[169] s. 56(2)
[170] The CRU has wide ranging functions, these are set out in s. 9 of the Electricity Regulation Act, 1999, as amended

- The Commission will appoint an inspector subject to terms and conditions as it sees fit, to carry out the investigation and to submit a report to the Commission,[171] the report to be completed jointly where more than one inspector is appointed to carry out an investigation.[172]

- The terms of appointment of an inspector may define the scope of the investigation[173], the matters to be investigated, the period to which it is to extend or otherwise.

- Once an inspector is appointed they must give to the specified body notice of the matters which the investigation relates[174] as well as copies of documents relating to the investigation as well as Part IX of the Act and afford the specified body a period of 30 days (or more) to respond to the matter to which the investigation relates.

- The powers of inspectors are wide ranging, an inspector may;

    - enter, inspect, examine and search any premises of a specified body,[175]

    - enter, inspect, examine and search any dwelling occupied by a specified body[176] or a director, manager or any member of staff[177] of a specified body[178] where there are reasonable grounds to believe records, books, accounts or other documents relating to the carrying on of that activity are being kept,

[171] s. 57(2)(a)&(b)
[172] s. 57(4)
[173] s. 55 of the Act defines "improper conduct" as "(a) failure by the holder of a licence under subsection (1)(b) of section 14 to comply, under subsection (2M)(b) of that section, with such standards of performance as may be specified by the Commission under subsection (2M)(a) of that section in the licence concerned, (b) failure by the holder of a licence under section 14(1)(e) , (g) or (h) , as the case may be, to comply, under Regulation 26(1) of the European Communities (Internal Market in Electricity) Regulations 2005 (S.I. No. 60 of 2005), with such standards of performance as may be specified by the Commission under Regulation 26(2) of those Regulations in the licence concerned, (c) failure by an interconnector operator to comply with the determination of the Commission under section 34A(5) , (d) failure, by the holder of a licence under section 16 (1)(a) of the Gas (Interim) (Regulation) Act 2002 , under section 16(1F) of that Act, to keep, and make available on a request being made, data relating to transactions in gas supply contracts and gas derivatives with wholesale customers, transmission system operators and storage and LNG operators, or (e) failure by the holder of a licence under subsection (1)(a) , (c) or (d) of section 16 of the Gas (Interim) (Regulation) Act 2002 to comply, under subsection (4A)(b) of that section, with such standards of performance as may be specified by the Commission under subsection (4A)(a) of that section in the licence concerned".
[174] s. 55 of Act defines "specified body" as a person referred to in any of paragraphs (a) to (e) of the definition of "improper conduct".
[175] s. 58(1)(a)
[176] s. 58(1)(b)(i)
[177] This is a wide ranging provision but a warrant is required for entry to a private dwelling.
[178] s. 58(1)(b)(ii)

- compel a person found on those premises to produce any records, books, accounts or other documents which it is necessary for the inspector to see for the purposes of the investigation,[179] the inspector may examine and copy such materials and require the person to provide a copy of them or any entries,
- require such a person to provide facilities or assistance within their control or responsibility to enable the inspector to exercise their powers,
- require any person who or on whose behalf data equipment is used in connection with an impugned activity to afford all reasonable assistance in respect of its use,
- require a specified body or relevant employee or agent to take action to allow inspection of bank accounts and to obtain copies of bank documents,
- be accompanied by a member of An Garda Síochána if necessary,
- require a person who, in the inspector's opinion, possesses information related to the investigation or has any records, books, accounts or other documents relevant to the investigation to provide that information and those documents to the inspector and where appropriate require that person to attend before the inspector to provide the documentation,
    - such a requirement will specify the place where the person will attend to give the information, where they will provide the materials or where they will deliver the materials to,
- where a person is required to attend before an inspector they must answer questions fully and truthfully and if required to answer questions under oath,
- the requirements in this section cannot compel a person to produce material which is legally privileged,[180]
- a person subject to requirements is entitled to the same immunities and privileges in respect of compliance with such requirement as if the person were a witness before the High Court,[181]

[179] s. 58(1)(c)
[180] s. 58(12)

- any statement or admission made in relation to a requirement is not admissible against that person in criminal proceedings other than criminal proceedings for an offence under subsection (17),[182]
- where a person has failed to comply with a requirement, the inspector may, with the permission of the Commission, apply to the Circuit Court for an order to compel that person to comply with the requirement within a period specified by the Court,[183]

- an inspector may not enter a private dwelling, without the consent of the occupier, without a warrant,[184]
  - such warrant may be issued by a judge of the District Court if satisfied on the sworn information of an inspector that; there are reasonable grounds for believing relevant materials are held there, if an inspector has been prevented from entering the premises, or it is necessary for the inspector to enter a private dwelling to exercise their powers,
  - such a warrant will authorise an inspector to enter the premises at any time within 30 days of issue, the inspector may be accompanied by such persons as necessary and may use such reasonable force as necessary,
- an inspector may, on their own motion or at the request of the specified body, conduct an oral hearing;
  - a person who destroys, withholds, or conceals materials, who refuses to comply with a requirement of an inspector, or hinders or obstructs the inspector, will be guilty of an offence (summary – class A fine and/or imprisonment for up to 12 months, or on indictment – a fine up to €50,000 and/or a term of imprisonment of 5 years),[185]
  - where a specified body is summarily convicted of an offence (under s. 58(17)) the Court may order any license of authorisation be revoked and the former holder may be prohibited from holding such authorisation permanently or for a specified period.

[181] s. 58(10)
[182] s. 58(11)
[183] s. 58(7)
[184] s. 58(13)
[185] s. 58(17)

- such an order is subject to the usual provisions relating to a stay pending appeal,[186]

- where a specified body is convicted on indictment of an offence (under s. 58(17)) the court will order that all licenses or authorisations be revoked permanently,

  - such an order is subject to the usual provisions relating to a stay pending appeal,[187]

- having completed their investigation and considered all materials etc., they must prepare a draft report, provide a copy to the specified body (together with a copy of s. 59), and notice of the 30 day period for further submissions,

- on the expiry of 30 days and having considered any submissions and made any revisions to the draft the inspector will prepare a final report[188] and submit it to the Commission with any submissions annexed,

- where the inspector finds that the improper conduct by the specified body has occurred or is occurring, they will not make any recommendation or express an opinion in relation to appropriate sanctions,

- once the Commission receives the inspector's report the Commission must consider the report and any annexes,[189]

  - if the Commission is satisfied that the improper conduct occurred or is occurring it may impose a major sanction or a minor sanction,

    - a minor sanction – issue to a specified body; advice, caution, warning, reprimand or any combination of these,

    - a major sanction – a direction that the specified body pay a sum not exceeding €50,000, being whole or part of the cost to the Commission of the investigation, a direction that the specified body pay 10% of its turnover as a penalty or a combination of both,

      - if imposing a sanction the Commission must take into account;[190]

[186] s. 19(a), (b), (c)
[187] s. 21(a), (b), (c)
[188] s. 59(2)
[189] s.60(1)
[190] s. 65

- the appropriateness and proportionality in relation to the improper conduct,
- whether the sanction will be a sufficient incentive to ensure that such conduct will not reoccur,
- the seriousness of the improper conduct,
- the turnover of the specified body in the financial year ending in the year immediately before the financial year in which the improper conduct last occurred,
- any failure of the specified body to cooperate with the investigation,
- any excuse or explanation for non-cooperation,
- any gain made by the specified body as a result of the improper conduct,
- any loss or costs incurred as a result of the improper conduct,[191]
- duration of improper conduct,
- repeated occurrence of improper conduct by specified body,
- continuation of improper conduct after notification of investigation,
- absence or failure of internal mechanisms,
- extent and timeliness of remedial actions,
- whether a sanction in respect of similar improper conduct has been imposed on the specified body by court, Commission or otherwise,

[191] It is difficult to understand the rationale for such a consideration – 'they've suffered enough' type factor?

- any precedents set by court, Commission, or otherwise in respect of previous improper conduct,

- after making such a decision the Commission will give a written notice of the decision to the specified body, such notice will; set out the major or minor sanction imposed, and the reasons for such imposition,[192]

  - the Commission may publish particulars in relation to the imposition of major or minor sanctions,[193]

- if the Commission is not satisfied that the improper conduct has or is occurring but believes further investigation is warranted, it may so order,[194]

- if it is not satisfied that the improper conduct has or is occurring but believes further investigation is not warranted it will take no further action,[195]

- having considered a report, the Commission may conduct an oral hearing or give the specified body a copy of the investigation report and a written notice allowing it to make written submissions within 30 days where it considers it proper to do so to make a decision and to observe fair procedures,

- where the Commission decides to impose a major sanction, same must be confirmed by the High Court,[196]

  - having received such a notice the specified body may appeal that decision to the High Court within 30 days,[197]

    - the High Court may hear evidence whether or not it was adduced or made to an inspector or Commission,[198]

    - the High Court may; confirm the decision subject to appeal (taking into consideration the s. 65 factors),[199] cancel the

[192] s. 60(3)
[193] s. 60(7)
[194] s. 60(2)(b)
[195] s. 60(2)(c)
[196] s. 61
[197] s. 62(1)
[198] s. 62(2)
[199] s. 62(3)(a)(i)

decision and replace it[200] with a different major sanction and/or impose a minor sanction (taking into consideration the s. 65 factors), or impose neither a major sanction nor a minor sanction, and to make an order as to costs as deemed appropriate.

- where a specified body does not appeal to the High Court within the 30 day limit, the Commission will make an application by motion, on notice to the specified body, for confirmation of the decision[201] and the Court will confirm the decision unless there is good reason not to do so,[202]

- the decision of the High Court under ss. 62&63 is final, however the Commission or specified body may appeal on a point of law to the Court of Appeal.

- Discussion – general comments

  - While the powers of authorised officers are wide and varied, they do in general share the powers to enter, search and seize materials related to their investigation, to seek information from relevant parties, to apply for a warrant, to be accompanied by other officers or members of An Garda Síochána.

  - The powers of authorised officers reflect the aims, objectives and functions of their respective regulators.

    - For example, for a market facing regulator such as the CCPC, its authorised officers may in certain circumstances interview individuals detained in relation to certain competition related offences. This reflects the high level of expertise of individuals who investigate such offences as a matter of course.

  - The powers to be assigned to authorised officers will be dictated by the level of intervention which is necessary for a regulator to fulfil its role and may be abrogated if a system focused approach is taken.

[200] s. 62(3)(a)(ii)
[201] s. 63(1)
[202] s. 63(2)

- As can be gleaned from the above, the power to appoint authorised officers with significant investigatory powers is common across a number of regulators.
- The use of authorised officers by the DPC to investigate complaints may represent a useful template for the relevant functional areas of the proposed Media Commission.

Function of Media Commission	Analysis of power to appoint authorised officers
• Strand 1: overseeing the operation of the national online safety system,	• In the context of the systemic approach the appointment of authorised officers represents a strong formal means of investigating the compliance or otherwise of regulated entities.
• Strand 2: regulating Video Sharing Platform Services,	• Based on the tiered risk based approach, appointment of authorised officers may be appropriate in relation to entities which are large or represent a high level of risk. • It may be seen from the above examination of the ways in which such powers are expressed in statute that such powers are appropriate in relation to large economic entities.
• Strand 3: regulation of On-demand Audiovisual Media Services, and,	• It is envisaged that there would be a measure of alignment of rules relating to ODAVMS and Television. • The proposed regime based on a non-contractual registration system will not result in the same close regulatory relationship as exists between broadcasters and the BAI

	with the current contract/licensing system. ○ As such, it appears that attributing such powers under this strand would be appropriate. • An important consideration in this regard is ensuring that a new regulatory regime does not prejudice a particular sector.
• Strand 4: regulation of Television Broadcasting Services.	• The maintenance of the close regulatory relationship between the current BAI and its regulated entities based on the licensing/contract regime suggests that investigatory/inquiry powers are appropriate to fulfil this function.

v. *Administrative Financial Sanctions*

The Law Reform Commission describes the power to impose administrative financial sanctions as "one of the most effective" in the regulatory toolkit.[203] The Commission discourages the use of the term "fine" as it has connotations of criminal sanctions and its use in civil proceedings is therefore misleading.

- BAI,
    - Under s. 55 of the Broadcasting Act, 2009, the BAI may impose a financial sanction where;
    - an investigating officer has determined that there has been a breach by a broadcaster subject to investigation or that the broadcaster has not co-operated with the investigation, and
    - the broadcaster has been served with a notification,[204] and

[203] Law Reform Commission, Report on Regulatory Powers and Corporate Offences Vol 1, (LRC-2008), at p. 99
[204] s. 54(4)(c)

- the broadcaster requests under s. 54(4)(b) that the Authority deal with the matter,
- the Authority may make a determination whether there has been a breach or a failure to co-operate with an investigation by the broadcaster and issue a statement to the broadcaster,[205]
- if the Authority determines that there has been a breach or a failure to co-operate with an investigation, the Authority may direct,[206] that the broadcaster shall pay the Authority a financial sanction[207] not exceeding the amount as proposed in a notification[208] given to the broadcaster in accordance with s. 54(4)(c), in respect of the breach or the failure to co-operate with an investigation.
    - The matters to be taken into account by the Authority in considering the amount (if any) of the financial sanction to be imposed;[209]
        - the appropriateness and proportionality of the sanction,
        - the seriousness of the breach,
        - turnover of the broadcaster in the year pervious to the breach, the ability of the broadcaster to pay the amount,
        - the co-operation or lack thereof with the investigation, any excuse for not co-operating with the investigation,
        - any gain made by the broadcaster arising from the breach,
        - the appropriateness of the time when the impugned material was broadcast,
        - the degree of harm caused,
        - audience expectations,
        - duration of the breach,
        - whether there were repeated breaches by the broadcaster,

[205] s. 55(2)
[206] Taking into account s. 56
[207] s. 55(3)
[208] s. 55(a)(ii) – the amount is not to exceed €250,000
[209] s. 56

- whether there was continuation of the breach,
- the extent to which management knew or ought to have known that a breach had or would occur,
- the extent to which a breach occurred as a result of a third party beyond control of the broadcaster,
- failures of internal controls or remedial steps,
- submissions of the broadcaster as to the appropriate amount of a financial sanction,
- whether the broadcaster had previously been subject to a financial sanction for similar conduct,
- if there was precedent with regard to previous breaches or failures to co-operate with an investigation.

- DPC,
    - Under the Data Protection Act, 2018, the Data Protection Commission may impose an "administrative fine".[210] The decision to impose such a fine and the amount of such a fine must be considered with regard to section 141 of the 2018 Act as well as Article 83 of the Data Protection Regulations.
    - Administrative fines may be up to €20,000,000 or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.[211]
    - In relation to an undertaking which is a public body or public authority but is not covered by the scope of the definition of undertaking contained in the Competition Act, 2002,[212] as amended, a fine shall not exceed €1,000,000.

[210] Simon Carswell, 'GDPR one year on: No fines but considerable amounts of dread' *The Irish Times* (Dublin, 25 May 2019), available online at: https://www.irishtimes.com/business/technology/gdpr-one-year-on-no-fines-but-considerable-amounts-of-dread-1.3903169 [accessed: 19/06/2019]
[211] It appears therefore that an individual could be liable to such a fine.
[212] An 'undertaking' means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings.

- Where the Commission decides to impose a fine it will notify the undertaking of this decision and the reasons for it.
- A data controller or processer will have 28 days from the date the decision concerned was given to appeal to the court against the decision.
- If a data controller or processor does not appeal, the Commission must make an application to the Court for confirmation of the decision.
- If the fine is below €75,000 the 'court' will be the Circuit Court, otherwise it will be the High Court.

- CRU,
  - As noted above, the CRU, pursuant to the Electricity Regulation Act, 1999, as amended, may decide to impose a 'major sanction'. S. 55 of the Act defines such a sanction as;
    - a direction to a regulated entity to pay a sum not exceeding €50,000,[213] constituting the whole or part of the cost to the Commission of an investigation of the regulated entity,
    - a direction to a regulated entity to pay a sum not exceeding 10 per cent of its turnover [of the financial year ending immediately before the financial year in which the improper conduct took place] as a financial penalty for improper conduct,[214]
  - or any combination of the above two sanctions.

- Discussion – general comments
  - The Law Reform Commission places significant weight on the importance of civil financial sanctions within the regulatory toolkit.
  - The existence of such powers among the BAI, DPC and CRU indicates their applicability to both market facing regulators and others.

[213] It may be necessary to consider costs of investigations for proposed regulator to provide realistic baseline
[214] Could constitute a serious penalty especially for a start up

- While not within the scope of this paper it may be noted that such sanctions are used by the Central Bank, which has levied 130[215] such sanctions following engagement by regulated entities and on foot of settlement agreements.
- Such agreements show engagement by regulated entities, however discounts for cooperation may not be met with approval by the public.[216]

- Calibration of the levels of such sections will need to be carefully balanced, taking into account all relevant factors.

Function of Media Commission	Analysis of power to impose administrative financial sanctions
• Strand 1: overseeing the operation of the national online safety system,	• An administrative financial sanction may be an appropriate sanction for a serious or sustained breach of a code of practice. • Such sanctions exist to encourage regulated entities to comply with relevant obligations.
• Strand 2: regulating Video Sharing Platform Services,	• Based on the tiered/risk based system it may be necessary to calibrate sanctions to reflect the size of a regulated entity or the level of risk.
• Strand 3: regulation of On-demand Audiovisual Media Services, and,	• Pursuant to the alignment of ODAVMS and broadcasting rules it would be appropriate that administrative financial sanctions

[215] Central Bank of Ireland, 'Press Release: Enforcement Action: J.P. Morgan Administration Services (Ireland) Limited reprimanded and fined €1,600,000 by the Central Bank of Ireland for regulatory breaches relating to the outsourcing of fund administration activities' 26 June 2019, available online at: https://www.centralbank.ie/news/article/press-release-enforcement-action-jp-morgan-26-june-2019 [accessed: 02/07/19]

[216] Ciarán Hancock, 'Record fine for PTSB but no heads roll', The Irish Times (Dublin, 31 May 2019) available online at: https://www.irishtimes.com/business/financial-services/record-fine-for-ptsb-but-no-heads-roll-1.3910011 [accessed: 20/06/19]

	would be in the Media Commission's "regulatory toolbox" to respond to serious breaches. • In relation to strands 1, 2, 3 - A significant challenge with regard to commercial entities is the possibility of litigation with associated costs and delays. For example, litigation in the High Court Commercial list, while efficient, is highly expensive, while the waiting period in the Court of Appeal for civil matters is currently approximately two years.
• Strand 4: regulation of Television Broadcasting Services.	• It is submitted that it is appropriate that such powers be retained. • Based on the limited evidence of the fine levied by the BAI on RTÉ as a result of the *Mission to Prey* investigation, it appears that such sanctions can be efficiently imposed where there is a close relationship between the regulator and regulated entity.

vi. Summary Prosecution

- DPC,
    - s. 147 of the Data Protection Act, 2018, empowers the Commission to prosecute summary offences committed under that act.

- ComReg,

- s. 43 of the Communications Regulation Act, 2002, as amended, grants the Commission the power to prosecute summary offences under that act or a related enactment,[217]
    - summary proceedings for a relevant offence may be instituted within 12 months from the date on which the offence was committed.[218]

- CCPC
    - s. 11(5) if the Competition and Consumer Protection Act, 2014, empowers the Commission to bring summary prosecutions for offences under that section.

- CRU
    - s. 6 of the Electricity Regulation Act, 1999, as amended, empowers the Commission to prosecute summary offences

- Discussion – general comments,
    - Four of the regulators considered have summary prosecution powers. While summary offences are specified in the Broadcasting Act, 2009, matters are not prosecuted by the BAI.
    - Further, the holding of such powers by the DPC allows that entity to enforce the myriad of data and privacy matters within its remit where other methods are not appropriate or are unsuccessful.

Function of Media Commission	Analysis of power to prosecute summary offences

[217] Relevant offences include those under ss. 13C(2), (5), 13D(2), (5), 13F(5), 24(3), 38C, 38D, 38E, 39(6), 45(2) of the 2002 Act, s. 13 of the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010, ss, 38 (7), 42 (4), 56 (1), (2), 57 (2), 58 of the Communications Regulation (Postal Services) Act 2011

[218] s. 43(3)(b)

Strand 1: overseeing the operation of the national online safety system, Strand 2: regulating Video Sharing Platform Services, Strand 3: regulation of On-demand Audiovisual Media Services, and, Strand 4: regulation of Television Broadcasting Services.	• Such powers would be appropriate across the Media Commission. • It is logical that if an offence is discovered that the regulator would then have the competence to pursue a summary prosecution where appropriate. • Prosecution powers are a significant tool for a regulator seeking to influence the manner in which a particular industry or sector behaves. • There is a danger associated with summary prosecution – the District court refusing jurisdiction, in such a circumstance the regulator will lose control of the prosecution, future progress of and disposal. • It may also be noted that prosecution powers requires significant in-house legal resources, therefore it would be logical for such powers to be held across the four functional strands.

vii. Licensing[219]

- BAI,
    - The BAI is responsible for licencing television services (aside from those provided by RTÉ, TG4, the Houses of the Oireachtas, the Irish Film Channel),[220]

[219] It may be noted that the public consultation found that there should be a direct regulatory relationship between ODAVMS in the State and the Media Commission and that similar content rules as those that apply to Television Broadcasting Services should apply to these services. This system would be based on a non-contractual registration system for ODAVMS. This will be an administrative function of the Media Commission under the third (ODAVMS) strand, which will be underpinned by regulatory enforcement and compliance powers.

[220] ss. 59, 60

- the BAI shall not authorise a broadcasting contractor to operate a broadcasting transmitter and provide a broadcasting service under a broadcasting contract unless and until the Communications Regulator has granted under this subsection to the Authority a licence ("broadcasting licence") under section 5 of the Act of 1926 in respect of the sound or television broadcasting transmitter to which the contract relates,[221]

- such licence is only valid as long as the broadcasting contract between the BAI and broadcasting contractor is in force,[222]

- broadcasting contracts must contain a condition requiring the broadcasting contractor to establish, maintain and operate the broadcasting transmitter concerned in accordance with such terms and conditions as the Communications Regulator attaches to the broadcasting licence to which the contract relates (including any variations made to it in accordance with s. 60), and so long as the terms and conditions are complied with, the contract has the effect of conveying the benefits of the licence to the broadcasting contractor and any such transmitter so established, maintained and operated shall be deemed to be licensed for the purposes of the Act of 1926.

    - ComReg may vary the terms of a licence if; it is necessary to do so for good radio frequency management, to give effect to an international agreement ratified by the state relating to broadcasting, if it is in the public interest to do so, if it is necessary for the safety or security of persons or property, on request from the Authority after consultation with a broadcasting contractor, or simply on request to the Authority from a broadcasting contractor.

- ComReg

    - ComReg is the body responsible for authorisation of Wireless Telegraphy equipment (excl Ship Radio Licensing). An authorisation may take the form of either a licence or a licence exemption.

    - A licence may be issued under the Wireless Telegraphy Act 1926 (s. 5), or under the Broadcasting Authority Act 1960, as amended (in the case of the

[221] s. 59(1)
[222] s. 59(2)

RTÉ Authority), or under a Radio and Television Act, 1988 (in the case of the Broadcasting Authority of Ireland).

- Under s. 4 (1) of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), any person intending to provide an electronic communications network or service shall, before doing so, notify the Regulator of his intention to provide such a service. Under s. 4 (6) any undertaking which fails to comply with s. 4 (1) or s. 4 (5) (notification of any changes to the information supplied) is guilty of an offence.
- The Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act, 2010, requires ComReg to regulate the premium rate service ("PRS") industry in Ireland. The Act requires that all parties who are involved in the provision of a PRS, and who receive a revenue share from each PRS interaction, must be licensed for every service that they are operating. This includes all network operators, aggregator providers and content providers.
- The Communications Regulation (Postal Services) Act 2011 ("the 2011 Act") requires that any person who is providing or intending to provide a postal service shall, before doing so, make a notification to ComReg. It is a criminal offence to fail to make a notification or to make a notification or a declaration which is false or misleading in any material respect and the offender is liable on summary conviction to a "class A" fine.

- CRU
  - The Commission has licensing powers, *inter alia*, in relation to;
    - the generation and supply of electricity,[223]
    - the distribution of liquefied petroleum gas.[224]

- Discussion – general comments,
  - Licensing powers are arguably among the most powerful regulatory powers given the corollary power of the revocation of a license.

[223] Electricity Regulation Act, 1999, as amended, s. 14
[224] Electricity Regulation Act, 1999, as amended, s. 9JE

- As noted the contract/licence system employed by the BAI gives that body a close relationship to and strong powers of scrutiny over regulated entities. Further, the licensing powers of the CRU and ComReg represent an important intervention into certain markets to protect consumers and the common good.

Function of Media Commission	Analysis of power licensing powers
• Strand 1: overseeing the operation of the national online safety system,	• It is submitted that licensing powers are not appropriate in these areas. • Licensing would amount to a significant intervention in the market would is difficult to justify.
• Strand 2: regulating Video Sharing Platform Services,	
• Strand 3: regulation of On-demand Audiovisual Media Services, and,	• It is proposed that ODAVMS would operate under a non-contractual registration system, this approach seeks to align provisions ODAVMS with Television while respecting the inherent differences in mediums. Therefore, licensing powers would not be applicable to this strand.
• Strand 4: regulation of Television Broadcasting Services.	• A continuation of the BAI's contract/licensing regime is desirable.

viii. Registration

- CRU,
    - The CRU holds statutory licensing powers in relation to electrical contractors and gas installers pursuant to ss. 9D and 9F of the Electricity Regulation Act, 1999, as amended.
    - The CRU is obliged to appoint a person or persons as designated bodies for the purposes of those sections.

- Safe Electric is the statutory regulatory scheme for electrical contractors and is operated by the Register of Electrical Contractors of Ireland ("RECI") on behalf of the CRU. RECI was appointed as the Electrical Safety Supervisory Body by the CRU and operates on a not-for-profit basis. RECI will operate under the CRU's Safe Electric brand for the duration of their appointment, 2016 – 2022.

- Safe Electric is responsible, *inter alia*, for:

    - The day-to-day operation of the Safe Electric scheme as set out in the Electricity Regulation Act, 1999, as amended and the Electrical Safety Supervisory Criteria Document Version 3.0 (CER/16/001). The Criteria Document sets out the detailed rules and the obligations for participants operating within the Safe Electric scheme (outlined below).

    - Processing registration applications from electrical contractors.

    - Ensuring that registered electrical contractors are assessed on a regular basis to ensure that they are operating in line with the appropriate national safety standards and the National Rules for Electrical Installations. The National Rules for Electrical Installations - ET 101 is issued by the NSAI.

    - Distributing and processing Completion Certificates that a registered electrical contractor must issue to a customer once the electrical works are complete.

    - Resolving queries and investigating complaints received from the public about registered electrical contractors.[225]

- The CRU is responsible for:

    - Policy decisions regarding electrical safety.

    - The overall operation of the Safe Electric regulatory scheme.

    - Enforcement actions including prosecutions against unregistered electrical contractors.

    - Review of appeals from applicants regarding registration decisions by Safe Electric.

[225] s. 9D(6)

- Review of appeals from complainants regarding complaint handling by Safe Electric.

- A designated body may not be a trade association or perform representative functions on behalf of persons working in the electrical industry.[226]

- The CRU must publish criteria on electrical safety supervision, the safety standards to be achieved and maintained by contractors and procedures to be operated by the designated body.

- The criteria must include procedures for the designated body on registration of members, procedures to be followed to apply for membership, the services the designated body will carry out on behalf of members, the standard of training and safety to be achieved and maintained by members, the monitoring of those standards by the designated body, inspection of work by the designated body, procedures for the suspension or revocation of membership by the designated body, the matters to be covered by completion certificates, the accounts to be kept by the designated body and the means of auditing same, publication of said accounts, and the records to maintained by the designated body or members.[227]

- The designated body may suspend the membership of a registered electrical contractor where such a contractor is subject to an investigation into whether their work is unsafe or otherwise unsatisfactory, the training of their employees of independent contractors is materially inadequate or they have contravened the criteria to a material extent.[228]

    - If the designated body is satisfied that any of these matters have occurred it may suspend or revoke the membership of the registered electrical contractor concerned.

    - The designated body must notify the CRU and the registered electrical contractor concerned of such a decision.

    - A registered electrical contractor may appeal such a decision.[229]

    - The CRU must appoint one or more Appeals Officers to consider and report in writing to the CRU on an appeal. The CRU must have "regard" to the report. The CRU must notify the designated body, the Appeals Officer and the registered electrical contractor of its decision

[226] s. 9D(3)
[227] s. 9D(5)
[228] s. 9D(6)(e)
[229] s. 9D(7)

to confirm, vary or set aside the decision of the designated body. Appeals may not be considered if they are outside the prescribed time limit, subject to litigation, etc.[230]

- The CRU may appoint a person, including an employee of the designated body to be an authorised officer to carry out inspection of electrical work.[231]
    - Reasonable assistance must be provided to an authorised officer by a registered electrical contractor and employees or independent contractors, and a person must not obstruct the work of an authorised officer/CRU.[232]
- Contraventions of certain provisions of s. 9D are punishable –
    - on summary conviction - a fine not exceeding €5,000, a term not exceeding 6 months imprisonment, or both, or
    - on indictment - a fine not exceeding €50,000, a term of imprisonment not exceeding 3 years, or both.[233]

- The Registered Gas Installer ("RGI") scheme is operated by the Register of Gas Installers of Ireland ("RGII") on behalf of the CRU. RGII was appointed as the Gas Safety Supervisory Body by the CRU and will operate on a not-for-profit basis for the duration of their appointment, 2016 – 2022.
- RGII is responsible for:
    - The day-to-day operation of the RGI scheme as set out in the Electricity Regulation Act, 1999, as amended, and the Gas Safety Supervisory Criteria Document Version 1.6 (CER/16/222). The Criteria Document sets out the detailed rules and the obligations for participants operating within the RGI scheme (outlined below).
    - Processing registration applications from gas installers.

[230] s. 9D(8)
[231] s. 9D(21)
[232] ss. 9d(23), (24)
[233] s. 9D(26)

- Ensuring that registered gas installers are assessed on a regular basis to ensure that they are operating in line with the appropriate national safety standards.
- Distributing and processing the Declaration of Conformance Certificates that a registered gas installer must issue to a customer once the gas works are complete.
- Resolving queries and investigating complaints received from the public about registered gas installers.

- The CRU is responsible for:
  - Policy decisions regarding gas safety.
  - The overall operation of the registered gas installer regulatory scheme.
  - Enforcement actions including prosecutions against unregistered gas installers.
  - Review of appeals from applicants regarding registration decisions by the RGII.
  - Review of appeals from complainants regarding complaint handling by the RGII.
- A designated body may not be a trade association or perform representative functions on behalf of persons working in the gas industry.[234]
- The CRU must publish criteria on gas safety supervision, the safety standards to be achieved and maintained by gas installers and procedures to be operated by the designated body.
- The criteria must include procedures for the designated body on registration of members, procedures to be followed to apply for membership, the services the designated body will carry out on behalf of members, the standard of training and safety to be achieved and maintained by members, the monitoring of those standards by the designated body, inspection of work by the designated body, procedures for the suspension or revocation of membership by the designated body, the matters to be covered by completion

[234] s. 9F(3)

certificates, the accounts to be kept by the designated body and the means of auditing same, publication of said accounts, and the records to maintained by the designated body or members.[235]

- The designated body may suspend the membership of a registered gas installer where such a contractor is subject to an investigation into whether their work is unsafe or otherwise unsatisfactory, or if they have acted in contravention to the criteria.
    - If the designated body is satisfied that any of these matters have occurred it may suspend or revoke the membership of the registered gas installer concerned.[236]
    - The designated body must notify the CRU and the registered gas installer concerned of such a decision.
    - A registered gas installer may appeal such a decision.[237]
    - The CRU must appoint one or more Appeals Officers to consider and report in writing to the CRU on an appeal. The CRU must have "regard" to the report. The CRU must notify the designated body, the Appeals Officer and the registered gas installer of its decision to confirm, vary or set aside the decision of the designated body. Appeals may not be considered if they are subject to litigation etc.[238]
    - The CRU may appoint a person, including an employee of the designated body to be an authorised officer to carry out inspection of gas installation work.[239]
    - Reasonable assistance must be provided to an authorised officer by a registered gas installer and employees or independent contractors, and a person must not obstruct the work of an authorised officer/CRU.[240]
    - Contraventions of certain provisions of s. 9F are punishable –

[235] s. 9F(5)
[236] s. 9F(6)
[237] s. 9F(7)
[238] s. 9F(8)
[239] s. 9F(20)
[240] s. 9F(22), (23)

- on summary conviction of a fine not exceeding €5,000, a term not exceeding 6 months imprisonment or both,
- or on indictment a fine not exceeding €50,000, a term of imprisonment not exceeding 3 years, or both.[241]

- Discussion – general comments,
  - Registration powers provide an effective means for a regulator to oversee a particular area or sector by putting in place policies and procedures to be abided by registered entities.
  - Such a system is appropriate where a licensing/contractual based relationship between the regulator and regulated entity would not be appropriate or desirable.
  - Registration powers are a clear example of how regulatory powers interact. Such powers would be complimented by codes of practice and underpinned by the ability to appoint authorised officers to investigate non-compliance and sanction powers such as the power to initiate summary proceedings.

Function of Media Commission	Analysis of registration powers
• Strand 1: overseeing the operation of the national online safety system,	• Registration powers are not appropriate under this function.
• Strand 2: regulating Video Sharing Platform Services,	• Registration powers are not appropriate under this function.
• Strand 3: regulation of On-demand Audiovisual Media Services, and,	• Pursuant to the alignment of ODAVMS and broadcasting rules it would be appropriate that registration powers would be afforded to the Media Commission under this functional area. • It may be appropriate that failure to comply with a registration system would result in sanctions such as summary prosecution.
• Strand 4: regulation of Television	• It is submitted that such powers

[241] s. 9F(25)

Broadcasting Services.	would not be appropriate under this strand. • It has been recommended that the current contract/licensing model be maintained, extension of a registration system into this area would be illogical and undesirable.

3. *Policy Options*

Based on the foregoing it is submitted that certain "core" regulatory powers are more appropriate than others to ensuring that the Media Commission can fulfil specific functions. The following will provide a number of hypothetical arrangements of regulatory powers for analysis.

- *Option 1*

None of the eight core powers identified in this paper would be assigned to the Media Commission.

	Strand 1 **(National Measures)**	**Strand 2** **(VSPS)**	**Strand 3** **(ODAVMS)**	**Strand 4** **(TV)**
Power to issue notices, warnings, etc.	✘	✘	✘	✘
Power to devise, implement, monitor and review codes of practice	✘	✘	✘	✘
Power to conduct investigations	✘	✘	✘	✘
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	✘	✘	✘	✘
Power to impose administrative financial sanctions and to enter into settlements	✘	✘	✘	✘
Power to prosecute summary offences	✘	✘	✘	✘
Licencing powers	✘	✘	✘	✘
Registration	✘	✘	✘	✘

- *Option 2*

A minimalist approach whereby the Media Commission would be required to devise and implement Codes of Practice across the four functional areas and would have the power to issue notices, warnings, etc., to regulated entities in the event of non-compliance.

	Strand 1 **(National Measures)**	**Strand 2** **(VSPS)**	**Strand 3** **(ODAVMS)**	**Strand 4** **(TV)**
Power to issue notices, warnings, etc.	✓	✓	✓	✓
Power to devise, implement, monitor and review codes of practice	✓	✓	✓	✓
Power to conduct investigations	✘	✘	✘	✘
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	✘	✘	✘	✘
Power to impose administrative financial sanctions and to enter into settlements	✘	✘	✘	✘
Power to prosecute summary offences	✘	✘	✘	✘
Licencing powers	✘	✘	✘	✘
Registration	✘	✘	✘	✘

- *Option 3*

A more interventionist approach whereby the Media Commission, in addition to powers relating to codes of practice and issuing notices, would also have the power to conduct investigations and impose administrative financial sanctions, with court approval.

	Strand 1 **(National Measures)**	**Strand 2** **(VSPS)**	**Strand 3** **(ODAVMS)**	**Strand 4** **(TV)**
Power to issue notices, warnings, etc.	✓	✓	✓	✓
Power to devise, implement, monitor and review codes of practice	✓	✓	✓	✓
Power to conduct investigations	✓	✓	✓	✓
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	✘	✘	✘	✘
Power to impose administrative financial sanctions and to enter into settlements	✓	✓	✓	✓
Power to prosecute summary offences	✘	✘	✘	✘
Licencing powers	✘	✘	✘	✘
Registration	✘	✘	✘	✘

- *Option 4*

A tailored approach whereby the Media Commission would be assigned each of the eight "core" powers but some would be limited to certain functional areas. The powers to impose notices, warnings, etc., devise, implement and monitor codes of practice, conduct investigations, impose administrative financial sanctions, and prosecute summary offences would be assigned to the four functional areas. The power conduct investigations (based on the Broadcasting Act, 2009 model) would be assigned to strand 4, the power to appoint authorised officers with significant investigatory powers would be assigned to strand 1, 2 and 3. Licensing powers would be assigned to strand 4 only while registration powers would be assigned to strand 3.

	Strand 1 **(National Measures)**	**Strand 2** **(VSPS)**	**Strand 3** **(ODAVMS)**	**Strand 4** **(TV)**
Power to issue notices, warnings, etc.	✓	✓	✓	✓
Power to devise, implement, monitor and review codes of practice	✓	✓	✓	✓
Power to conduct investigations	✘	✘	✘	✓
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	✓	✓	✓	✘
Power to impose administrative financial sanctions and to enter into settlements	✓	✓	✓	✓
Power to prosecute summary offences	✓	✓	✓	✓
Licencing powers	✘	✘	✘	✓
Registration	✘	✘	✓	✘

- *Option 5*

A maximalist approach whereby the eight "core" powers identified in this paper would be assigned across each of the four functional areas of the Media Commission.

	Strand 1 **(National Measures)**	**Strand 2** **(VSPS)**	**Strand 3** **(ODAVMS)**	**Strand 4** **(TV)**
Power to issue notices, warnings, etc.	✓	✓	✓	✓
Power to devise, implement, monitor and review codes of practice	✓	✓	✓	✓
Power to conduct investigations	✓	✓	✓	✓
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	✓	✓	✓	✓
Power to impose administrative financial sanctions and to enter into settlements	✓	✓	✓	✓
Power to prosecute summary offences	✓	✓	✓	✓
Licencing powers	✓	✓	✓	✓
Registration	✓	✓	✓	✓

4. Selection of Relevant Criteria

The following are the criteria against which the "core" regulatory powers will be considered in relation to each of the four functional areas of the Media Commission.

a. Cost/Efficiency

This criterion considers the relative cost of a particular option group as opposed to the efficiency of the powers within that option group to efficiently fulfil the Media Commission's four functional areas.

b. Effectiveness

This criterion considers the overall effectiveness of an option with regard to fulfilling the functions of the Media Commission.

c. Impact on Rights of Citizens

This criterion considers whether the particular option will be effective in vindicating the rights of citizens.

d. Impact on Vulnerable Groups

This will consider whether the powers contained in particular options are sufficient to protect groups which may be particularly vulnerable to harmful online content etc.

e. Public Acceptability

This criterion considers whether a particular option will satisfy the public's demand for action.

f. Technological Neutrality/Future Proofing

Whether a particular option reflects and respects the essential differences and characteristics of different platforms while also ensuring that there is scope for innovation in the face of advancing technology and consolidation within media.

g. Proportionality

Whether an option correctly balances the competing interests at play, such as; the state's desire to ensure the public good, the right of the public to free expression and privacy and the right of commercial operators to do business.

h. Risks

Whether there are significant issues associated with a particular option such as the possibility of entrenching dominance of certain platforms, overstepping in terms of rights balancing exercises etc.

5. Decision on how to assess criteria

Each of the criteria receives a score from 1 to 5 based on the following:

- Highly positive 5
- Moderately positive 4
- Neutral 3
- Moderately negative 2
- Highly negative 1

6. Assessment

Assessment of the options according to the criteria and marking, with a description/rationale in each case.

- *Option 1*

This option which is based on assigning none of the "core" powers to the Media Commission shows neutral to negative scoring across each of the criteria in respect of the four functional areas.

- This proposal, while inexpensive, would not be effective or efficient.
- This scenario would reflect the status quo in certain regards and therefore the impact on citizens' rights in general would be neutral, while there is a

moderately negative rating for the impact on vulnerable groups as positive action would be required to vindicate such rights.

- Public acceptability across the four functions is highly negative as the public demands action as evidenced in the public consultation.
- In relation to technological neutrality and future proofing this option shows neutral to highly negative scores, such a regulator would be ill-equipped to deal with challenges.
- This option scores negatively in relation to proportionality as the option is not proportionate in relation to the rights, interests and expectations of stakeholders.
- The risk category returns a negative result as the risks associated with such an option are high and may include EU sanctions as a result of the failure to properly implement the revised AVMSD.

	Cost/Efficiency	Effectiveness	Impact on rights of citizens	Impact on vulnerable groups	Public Acceptability	Technological neutrality/future proofing	Proportionality	Risks	Total
Strand 1 (National Measures)	1	1	3	2	1	3	3	1	15
Strand 2 (VSPS)	1	3	2	2	1	3	2	1	17
Strand 3 (ODAVMS)	1	2	1	1	1	1	1	1	9
Strand 4 (TV)	1	1	1	1	2	1	1	1	9

- *Option 2*

In this option the Media Commission would be assigned the power to devise, implement and monitor codes of practice and issue notices, warnings etc. in the event of non-compliance.

- While the cost of such a regime would be relatively low it would not be particularly efficient and in the case of the fourth strand would be less efficient than the current regime.
- Such an approach would not be effective, while a regulator could communicate its views to regulated entities in a formal way, the lack of sanctioning powers would render such notices ineffective.

- The rights of citizens would not be vindicated and the regulator would not have the power to meaningfully sanction entities for non-compliance.
- The lack of positive action to vindicate the rights of the vulnerable returns a highly negative score across the four functional areas.
- This approach would be unacceptable to the public who would likely balk at the prospect of the establishment of a regulator without meaningful sanctioning powers.
- A regulator with such limited powers would not be able to respond to unforeseen challenges posed by developments in technology.
- This option is not proportionate as it would fall too heavily in favour of corporate interests.
- There are significant risks associated with such a weak course of action.

	Cost/Efficiency	Effectiveness	Impact on rights of citizens	Impact on vulnerable groups	Public Acceptability	Technological neutrality/future proofing	Proportionality	Risks	Total
Strand 1 (National Measures)	2	2	2	1	1	2	3	2	15
Strand 2 (VSPS)	2	2	2	1	1	2	3	2	15
Strand 3 (ODAVMS)	2	2	2	1	1	2	2	2	14
Strand 4 (TV)	1	1	1	1	1	2	1	1	9

- *Option 3*

This option provides for lower level regulatory powers such as the development, implementation and monitoring of codes of practice with the ability to conduct investigations with limited investigatory powers as well as the power to implement administrative financial sanctions.

- This option provides a range of "core" powers including compliance and sanction powers. The limited interventions would hinder the efficiency of a regulator. This system is somewhat similar to the current regime in relation to strand four and goes beyond what is currently in place in relation to strand 3, therefore it returns moderately positive scores for both. A regulator with these powers would be able to take certain action however would likely be

significantly hampered by a lack of robust investigatory powers associated with the appointment of authorised officers.

- This regulatory regime would not be efficient in fulfilling the Media Commission's functions and so would not be very effective at vindicating the rights of citizens in general or vulnerable groups.
- In terms of public acceptability there is a moderately positive response in relation to strands three and four, given the similarity to aspects of the current regime, however is neutral in relation to strands one and two.
- These limited powers would provide a regulator with some scope for action but it is arguable that they would be insufficient to meet the challenges of future technological innovation.
- This option represents a somewhat proportionate regulatory response; however this is outweighed by the likelihood that such a regulator would be unable to challenge significant commercial entities.
- This option is somewhat negative in relation to risk; the lack of strong investigatory powers and the inability to pursue summary offences are significant weaknesses.

	Cost/Efficiency	Effectiveness	Impact on rights of citizens	Impact on vulnerable groups	Public Acceptability	Technological neutrality/future proofing	Proportionality	Risks	Total
Strand 1 (National Measures)	3	2	2	2	3	3	2	2	19
Strand 2 (VSPS)	3	2	2	2	3	3	2	2	19
Strand 3 (ODAVMS)	4	3	3	2	4	3	3	2	24
Strand 4 (TV)	4	3	3	2	4	3	3	3	23

- *Option 4*

This option provides a tailored allocation of regulatory powers for the Media Commission with certain powers assigned under each strand and others assigned selectively.

- This regime would require significant provision of resources but would enable the Media Commission to function efficiently.

- The tailored approach would allow for appropriate actions and responses under the four functions.
- Citizens' rights would be vindicated by a regulator which is equipped with powers appropriate for its functions.
- It is likely that this option would be acceptable to the public, however there is a danger that the tailoring of some powers to certain functions could cause confusion and may be misinterpreted as a failure to regulate some areas less stringently than others.
- This option provides a robust response and reflects challenges posed by each function.
- This option reflects a proportionate response across each of the four functions, maintaining existing regimes in relation to strand four, implementing appropriate provisions with regard to the envisaged registration scheme under strand three, and providing appropriate powers in relation to strands one and two.
- This approach addresses risks which are apparent to the establishment of a Media Commission from a regulatory powers perspective.

	Cost/Efficiency	Effectiveness	Impact on rights of citizens	Impact on vulnerable groups	Public Acceptability	Technological neutrality/future proofing	Proportionality	Risks	Total
Strand 1 (National Measures)	5	5	5	4	5	4	4	4	36
Strand 2 (VSPS)	4	5	4	4	5	4	4	4	34
Strand 3 (ODAVMS)	4	5	5	4	4	4	4	4	34
Strand 4 (TV)	4	5	5	4	4	4	4	4	34

- *Option 5*

This option assigns all seven "core" powers to each of the four functional areas of the Media Commission.

- The cost of implementing a licensing system in relation to strands one, two and three would be significant and the efficiency of such a system would be

questionable. Additionally, the co-existence of registration and licensing would be illogical and would cause significant confusion.

- This option would allow the Media Commission to fulfil its functions. However, the cost and likely negative industry response would likely undermine the Media Commission's effectiveness.
- The regulator would have the necessary range of powers to vindicate rights of citizens.
- Such an option may be acceptable to the public but not to industry.
- Such a regime would not represent a technologically neutral intervention into the relevant sectors and could cause economic damage.
- This option is not proportionate with regard to strands one, two and three.
- While a regulator with this full range of powers would likely be able to fulfil its functions, the possible damage caused by such wide ranging interventions and the costs of maintaining same would be significant risk factors. Further this type of 'scattergun' approach would increase the possibility of legislative lacunas such as identified by the Supreme Court in *CRH v. CCPC*.[242]

	Cost/Efficiency	Effectiveness	Impact on rights of citizens	Impact on vulnerable groups	Public Acceptability	Technological neutrality/future proofing	Proportionality	Risks	Total
Strand 1 (National Measures)	1	3	4	4	5	3	1	3	24
Strand 2 (VSPS)	1	3	4	4	5	3	1	3	24
Strand 3 (ODAVMS)	3	3	4	4	5	4	4	3	30
Strand 4 (TV)	3	3	4	4	5	4	4	3	30

[242] [2017] IESC 34

7. Assessment

The tailored approach as outlined in option 4 is the most appropriate allocation of regulatory powers for the Media Commission to effectively fulfil its functions.

It is recommended that the Media Commission be assigned each of the eight "core" regulatory powers with some limited to certain functional areas. The following powers would be assigned across the four functional areas; the power to impose notices, warnings, etc., the power to devise, implement and monitor codes of practice, the power to conduct investigations, the power to impose administrative financial sanctions, and the power to prosecute summary offences.

The power to appoint authorised officers with significant investigatory powers would be assigned under strand 1, 2 and 3. Licensing powers would be assigned to strand 4 and registration powers would be assigned to strand 3.

Appendix III – Issues for Legal Analysis

Exercise of powers	Legal advice will need to be sought on where powers may be exercised by an individual Commissioner or the Commission as a whole.
Investigatory powers	Legal advice will need to be sought on how investigatory powers ought to be expressed and exercised – specifically in relation to the interplay between BAI type investigations and investigations by authorised officers.
Court oversight	Legal advice will need to be sought in relation to the nature and extent of court oversight of sanctions imposed by the Media Commission, in particular administrative financial sanctions.

Appendix IV – Further considerations

As noted above, this exercise is somewhat academic in nature. This policy paper follows the response to the public consultation. However, while matters remain to be clarified this paper is based on significant assumptions, yet decisions on the matters which will underpin the approach to the proposed legislation require this kind of abstract input. This approach provides insight into specific aspects or features of regulatory powers. This paper examines powers and their expression in statute. Therefore, this paper is not informed by the practicalities and nuance of the actual exercise of these powers by regulatory bodies.

Considering the effectiveness of individual powers in relation to specific functions of a regulator and various criteria does not reflect the practical reality of regulation. As noted, fostering a culture of compliance should be the primary focus of a regulator, with enforcement action being a last resort. This perspective is typified by, by Ayers & Braithwaite's "responsive regulation" approach which recognises the wide range of actions and interventions used by regulators as well as the "behaviour based approach" of Hodges & Voet.

As such a more grounded approach to considering regulatory powers will be necessary for a full understanding of how the Media Commission will fulfil its functions. Also related matters such as appeals by service providers, cooperation with other bodies and the establishment of memoranda of understanding must be analysed. As outlined in the LRC report the issue or regulatory appeals is a complex and developing area with a variety of issues and challenges to be considered.

It may be noted that while there are significant challenges and gaps in knowledge, there is significant scope to build on existing expertise, for example by engaging with established regulators. It is submitted that by learning from other regulators about the interplay between their functions and powers, valuable lessons may be learned.

Online Safety & Media Regulation Bill

Policy Paper – Defining Harmful Online Content

1. Background

A key aspect of developing an Online Safety and Media Regulation Bill (the Bill) is deciding what types of online content will be considered "*harmful online content*" for the purposes of the national online safety system under Strand 1.

Related to this is the need, encompassed by Strand 2, to implement into Irish law the obligation set out in the revised Audiovisual Media Services Directive (AVMSD)[1] that Member States ensure that Video Sharing Platform Services (VSPS) take measures, some of which are listed in the revised Directive, to, in summary,

- Protect minors from audiovisual content[2] which may impair their mental, physical or moral development, and,

- The general public from content containing incitement to violence or hatred and content which is illegal to share under Union law, including child sex abuse materials[3], public provocation to commit a terrorist offence[4] and certain offences related to xenophobia and racism[5].

This obligation effectively defines, for the purposes of regulating VSPS, what the revised Directive considers "*harmful online content*". There will be significant overlap between this obligation and a definition of "*harmful online content*" adopted for the purposes of the national online safety system. Depending on the extent of the definition it may effectively encompass the protective elements of the obligation set out by the revised Directive.

If this is the case, then it will not be necessary to provide for the protective elements of this obligation in the Bill separately from a definition of "*harmful online content*". In any case, doing so would be an intensely complex process given the likely overlap between VSPS and services defined for the purpose of the national online safety system.[6]

It is also worth noting at this point that any national legislation in this area will need to be notified to the European Commission prior to its enactment, which will examine the

[1] Article 28b(1), revised AVMSD, Directive 2018/1808/EU
[2] This encompasses audiovisual commercial communications on VSPS, whether these are user-generated or placed by the VSPS
[3] Article 5(4), Directive 2011/94/EU
[4] Article 5, Directive 2017/541/EU
[5] Article 1, Framework Decision 2008/913/JHA
[6] The potential services in scope of Strands 1 & 2 are explored in a separate policy paper

proposed legislations compatibility with European law.[7] Therefore, it is vital that the national online safety system under Strand 1 is aligned to the greatest extent possible with the revised Directive.

Defining "*harmful online content*" is a highly complex, nuanced and emotive issue. There are many kinds of content which may be harmful or distressing to some that may not be appropriate to include in a definition of "*harmful online content*" from a rights balancing, legal or practical perspective. It will also be necessary to exclude certain categories of content from the definition of "*harmful online content*" in the Bill to ensure clarity. This will primarily relate to content that is dealt with under existing aspects of Irish and EU law, for example content the dissemination of which is a violation of data protection law.

In the same vein, the question of how a definition could be futureproofed to account for new or more prominent categories of potentially harmful online content will be difficult given the safeguards that would be required to allow for further categories to be dealt with by the regulator.

The purpose of this paper is to explore the various types of content that are suggested for inclusion in a definition and to recommend a definition of "*harmful online content*" for inclusion in the Bill.

The approach to regulating "*harmful online content*", including in relation measures to be taken by VSPS, is explored in a **separate policy paper**.

[7] Directive 20151535/EU

2. Decisions sought

Decisions are sought from the Minister regarding the following:

- Whether the approach of defining "*harmful online content*" in terms of a non-exhaustive number of specific categories of content is appropriate.

- Whether the categories of content proposed for inclusion in and exclusion from the definition of "*harmful online content*" are appropriate.

- Whether the procedure of including and excluding further categories of content from the definition of "*harmful online content*" is appropriate.

- Whether the approach of having a separate definition of "*inappropriate online content*" is appropriate.

Further detail is in the **recommended approach sections** of this paper. Rough drafts of provisions implementing the recommended approaches are available at **appendix 1**.

A non-exhaustive list of potential legal questions is available in the **next section**.

3. Potential Legal Questions

The following is a non-exhaustive list of potential legal questions relating to the issues raised and recommendations made in this paper.

These questions may, depending on their nature, be suitable for analysis by the Department's internal legal unit, the Office of the Attorney General, the Office of Parliamentary Counsel and external counsel.

1. Is the approach of defining "*harmful online content*" in terms of a non-exhaustive list of included and excluded categories of content sound?

2. Are the categories proposed for inclusion and exclusion from the definition of "*harmful online content*" sufficiently well defined?

3. Is the method by which further categories of content can be excluded from and included in the definition of "*harmful online content*" by order sound? Does this method contain sufficient safeguards given the questions of fundamental rights the definition raises?

4. Is the proposed definition of "*inappropriate online content*" suitably well-defined to allow the Media Commission to issue guidance in relation to content rating, age gating and other matters?

5. Are the criminal offences listed in the revised Audiovisual Media Services Directive transposed into or otherwise reflected in Irish law?

6. Does the proposed approach of defining "*harmful online content*" described above, providing for a method to add and remove categories from this definition, and providing for a definition of "*inappropriate online content*" sufficiently transpose the protective obligation set out in Article 28b(1) of the revised Audiovisual Media Services Directive?

4. Approach to defining harmful online content

a. Media Commission's objectives and functions

In deciding on an approach to defining "*harmful online content*" it is useful to first consider the objectives and functions of the proposed Media Commission. These objectives and functions are explored in a **separate policy paper on regulatory structures**. This paper was received by the Minister on 12 September 2019.

The following objectives and functions, which are relevant to the definition of "*harmful online content*", are drawn from that paper.

	Relevant objectives of the Media Commission
1.	Ensure that democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression are upheld.
2.	Subject to the provisions of this Act, ensure that appropriate regulatory arrangements and systems are in place to address, where appropriate, illegal and harmful online and audio-visual content
3.	Protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation.
4.	Provide a regulatory framework that takes account of the rapidly changing technological environment and that provides for rules to be applied in a proportionate, consistent and fair manner across all services regulated, having regard to the differing nature of those services.

The list of relevant functions below is non-exhaustive and not necessarily reflective of the eventual provisions of the Bill which may apply the chosen definition of "*harmful online content*".

	Relevant functions of the Media Commission
1.	To promote and protect the interests of the public in relation to audio-visual and online content
2.	To carry out an investigation, either on its own initiative or in response to a complaint

	made to it by any person, into any suspected breach of the relevant statutory provisions
3.	To enforce the relevant statutory provisions
4.	To encourage compliance with the relevant statutory provisions, which may include the publication of notices containing practical guidance as to how those provisions may be complied with
5.	The Commission shall prepare or make codes and rules to be observed by entities operating in the following categories: 1. Broadcasting 2. On demand services 3. Video sharing platform services 4. Online services [to be defined]
6.	The Commission shall establish or facilitate a complaints mechanism or mechanisms covering following categories: 1. Broadcasting 2. On demand services 3. Video sharing platform services 4. Online services [to be defined]
7.	Promote, where appropriate, the development of alternative dispute resolution procedures as a means of resolving complaints
8.	To promote public awareness, encourage research and conduct public information campaigns for the purpose of educating and providing information to the public in relation to: (i) online safety; (ii) media literacy
9.	Promote educational initiatives and activities relating to online safety and advise, when requested, the Minister or any other Minister of the Government, Departments of State or any public body whose activities are concerned with matters relating to any

	of the purposes of this Act, and any educational or training institution
10.	Conduct or commission research, studies and analysis on matters relating to the functions of the Commission and may publish, in the form and manner that the Commission thinks fit, such findings as it considers appropriate (which may consist of, or include, a study or analysis of any development outside the State)
11.	Co-operate with other authorities whether in the State or elsewhere charged with responsibility for the enforcement of laws relating to (i) illegal or harmful online content; (ii) the protection of children; (iii) the allocation for the frequency range dedicated to sound and television broadcasting
12.	Cooperate with other bodies outside the State which perform similar functions to the Commission
13.	The Commission shall have a statutory role in relation to the following: (i) reviewing existing online safety and audio-visual legislation and proposals for such legislation (ii) Undertaking a strategic review or reviews of the regulated sectors covering one or more of the following areas: (a) sectoral funding (b) technological and societal change (c) the protection of children (d) other relevant strategic areas as directed by the Minister
14.	Impose a levy on [insert relevant industry categories] to ensure it is sufficiently resourced to properly execute its statutory functions

As can be seen from the above, there are a wide range of potential objectives and functions of the proposed Media Commission that would interact, to varying degrees, with a definition of "*harmful online content*". Drawing from these objectives and functions it is clear that a definition of "*harmful online*" content may be applied in the Bill in provisions relating to the following:

- Systemic oversight over relevant online services, including VSPS, perhaps through codes, investigations and other means by the Media Commission in relation to the protection of users from "*harmful online content*",

- Complaints and dispute resolution procedures in relation to "*harmful online content*" operated by or facilitated by the Media Commission, and,

- Educational, cooperative, research and other similar initiatives that may be carried out by the Media Commission.[8]

The objectives and functions of the proposed Media Commission that relate to the National Online Safety System (Strand 1) broadly fall under the notion of the protection of users of designated online services from "*harmful online content*". In addition, those objectives and functions that relate to the regulation of VSPS (Strand 2) are reflective of the requirements of the revised Directive and the obligation placed on Member States to ensure that VSPS meet these requirements. As described earlier in this paper, depending on the extent of the definition of "*harmful online content*" it may effectively encompass the protective elements of the revised Directive's requirements.

The scope of services that will fall under Strand 1 is explored in a separate policy paper.

b. Approach to defining "*harmful online content*"

There are a number of considerations in devising a format for defining harmful online content. These include the following:

- Whether the format for a definition should comprise a list of categories of "*harmful online content*",

- Whether a list of categories of "*harmful online content*" should be limited or non-exhaustive, and,

- Whether categories of "*harmful online content*" should be defined according to the nature of the material, the material's potential impact, or both as appropriate.

Regardless of these considerations, certain categories of content will need to be excluded from the definition of "*harmful online content*" in the first instance in legislation. As noted earlier in this paper, this will primarily relate to content that is dealt with under existing aspects of Irish and EU law, for example content the dissemination of which is a violation of data protection law, consumer protection law, copyright law, among other things.

[8] The enforcement of provisions in this regard is explored in a separate policy paper on regulatory powers.

i. Recommended approach

Having regard to the above considerations, it's recommended that "*harmful online content*" be defined in terms of a non-exhaustive list of specific categories of content. It is further recommended that the categories of content should be a mixture of categories defined according to the nature of the material and the material's potential impact.

It is considered that this approach would provide the greatest amount of both flexibility and specificity in legislation and provide a robust basis for many of the functions of the regulatory framework to be carried out by the regulator.

In addition to this, it is recommended that there be a provision to allow the definition of "*harmful online content*" to be amended to take into account changing circumstances.

A high-level version of how this could be expressed in the Bill is as follows:

> "*Harmful online content includes but is not limited to:*
>
> - *Content the dissemination of which is a criminal offence under Irish or Union law,*
> - *Category X,*
> - *Category Y,*
> - *Etc.*
>
> *But does not include:*
>
> - *Category X,*
> - *Category Y,*
> - *Etc.*"
>
> "*Further categories of "harmful online content" may be designated in accordance with the following procedure…*"

5. Potential categories of harmful online content

There are a number of potential categories of "*harmful online content*", ranging from content the dissemination of which is a criminal offence to content that is likely to be harmful to a person exposed to it.

Determining what categories are appropriate to include in the definition of "*harmful online content*" is a difficult and subjective task. In this part, a number of potential categories are examined against a range of criteria to establish if they are appropriate to include in the definition.

Further to this, a number of categories of content are examined to see if it would be appropriate to explicitly exclude them from the definition of "*harmful online content*" in the legislation.

c. Criminal content

It is proposed that one of the categories of content that would be included in the definition of "*harmful online content*" in the Bill is content that it is a criminal offence to share or distribute. Under Irish and European Union law, this would include the following kinds of content:

- Child sexual abuse material[9],
- Content containing or comprising incitement to violence or hatred[10],
- Public provocation to commit a terrorist offence[11], and,
- Material relating to matters before the court where the court has place an injunction against its dissemination.

The nature of this reference means that any new offence involving the distribution of content would automatically fall under this category.[12] In this respect, this category would allow for the regulatory system to adapt to any changes in criminal law without the need to amend the Bill.

For example, the Harassment, Harmful Communications and Related Offences Bill 2017 proposes to make it a criminal offence to disseminate intimate images without consent. If this were to become an offence then it would automatically be included in this category and the regulatory system would be able to deal with this kind of content.

[9] Article 5(4), Directive 2011/94/EU; s. 12 Criminal Law (Sexual Offences) Act 2017
[10] Prohibition of Incitement To Hatred Act, 1989
[11] Article 5, Directive 2017/541/EU (not yet transposed into Irish law)
[12] There may be other kinds of content that fall under this broad category.

It is also worth noting that D/Justice is currently examining the Prohibition of Incitement to Hatred Act, 1989 on foot of criticism that the Act does not provide for sufficient particulars to allow for hate speech offences to be successfully prosecuted. If the D/Justice pursues amendments to this Act in the future, then these amendments would automatically be accounted for by the criminal content category in the Bill.

The approach taken by Germany in their Network Enforcement Act 2017 is somewhat similar to this approach. However, this Act's provisions relate only to an exhaustive list of certain "unlawful content" specified in the German federal criminal code.[13]

This approach to the inclusion of certain criminal content within the definition of "*harmful online content*" is narrow, flexible and adaptable to future changes in criminal law. Crucially, this approach would exclude content that may be related to criminal behaviour but is not itself criminal, e.g. content related to fraud.

It is considered that the online safety role of the proposed Media Commission under Strands 1 & 2 will relate solely to ensuring that service providers take appropriate measures in relation to "*harmful online content*". The investigation and prosecution of service users for disseminating criminal content or in engaging in online behaviour related to criminal activity, e.g. fraud, will remain solely within the remit of An Garda Síochána.

Furthermore, the regulator will not examine any notifications of specific criminal activity. It is intended that there will be a memorandum of understanding between the regulator and An Garda Síochána to allow both organisations to set out appropriate boundaries in their activities and to ensure an appropriate amount of cooperation in instances where their activities may overlap.[14] For example, if the regulator, in the course of its activities, becomes aware of potentially criminal behaviour it shall have a dedicated channel to allow for rapid escalation of any relevant information to the appropriate persons within An Garda Síochána.

d. Potentially harmful online content

There are a number of potential categories of non-criminal content that could potentially cause harm. The following table details a number of these categories, including the source of the suggested category if available. This table draws from suggestions made at a national level, the results of the recent public consultation on the regulation of harmful online content and the implementation of the revised AVMSD and international examples.

[13] France's recently passed online hate speech bill appears to take a similar approach, although the text of the bill is not available in English.
[14] Such memorandums between the regulator and other bodies are explored in further detail in separate policy papers.

The table does not include any suggestions for categories that are primarily behavioural rather than content based or categories which relate to clear criminality, which is explored in the previous section.[15]

Category	Definition (if available)	Source (if applicable)
Cyberbullying material	"*The material would be likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child*"[16, 17]	Enhancing Online Safety Act 2015 (Australia)[18]
Promotion of self-harm/suicide	"*Encouragement and incitement to suicide or self-harm*" [truncated]	Private Members Children's Digital Protection Bill 2018[19]
Promotion of nutritional deprivation	"*Encouragement of prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health*"	Private Members Children's Digital Protection Bill 2018
Promotion of nutritional overconsumption	N/A	Public consultation
Promotion of eating disorders & related behaviour	N/A	Public consultation
Homophobic &	N/A	Public consultation

[15] As such, many of the "harms" listed in, for example, the UK Online Harms White Paper are not explored in this table. Criminal content is explored in the previous section.
[16] This definition is limited to material relating to Australian children
[17] Many respondents to the public consultation suggested that this could be altered to refer to all persons and not just children
[18] Australian legislation that established the office of the Australian eSafety Commissioner
[19] Proposed by Senator Joan Freeman

transphobic bullying		
Promotion of practice harmful to individual or public health	N/A	Public consultation
Promotion of anti-scientific views	N/A	Public consultation
Alcohol marketing	N/A	Public consultation
Defamatory statements	"*defamatory statement means a statement that tends to injure a person's reputation in the eyes of reasonable members of society, and defamatory shall be construed accordingly*"	Public consultation; s. 2 Defamation Act 2009
Disinformation	N/A	Public consultation
Intimidation	N/A	UK Online Harms White Paper
Extremism	N/A	UK Online Harms White Paper
Violent content	N/A	UK Online Harms White Paper
Promotion of female genital mutilation	"*female genital mutilation means any act the purpose of which, or the effect of which, is the excision, infibulation or other mutilation of the whole or any part of the labia majora, labia minora, prepuce of the*	UK Online Harms White Paper; s. 2 Criminal Justice (Female Genital Mutilation) Act 2012

	clitoris, clitoris or vagina of a girl or woman"	

Prior to assessing these potential categories it is useful to examine them to see if they overlap or if they are dealt with in existing law.

For example, homophobic and transphobic bullying would fall under a broader category of cyberbullying material aimed at all persons. As such, it will not be assessed as an individual category. In addition, the categories of promoting nutritional deprivation, overconsumption & eating disorders overlap considerably and will be treated as one category for the purposes of the assessment.

Defamation is a civil law matter with a large body of legal precedent and a distinct relationship with Article 40.3.2 of the Irish Constitution. Further to this, the Department of Justice & Equality is currently undertaking a review of the Defamation Act 2009. On these bases, defamatory statements will not be assessed as a potential category for inclusion in a definition of "*harmful online content*".

Alcohol marketing is dealt with in the recent Public Health (Alcohol) Act 2018 and will not be assessed as a potential category for inclusion in a definition of "*harmful online content*".

e. Assessment of categories for inclusion

The following criteria will be used to assess these categories for inclusion in a definition of "*harmful online content*":

- Clarity – This refers to the ease of which the category can be understood.
- Certainty – This refers to the confidence that the category provides in understanding what content does or doesn't fall under it.
- Effectiveness – This refers to likelihood that the category can be effectively used within the regulatory system.
- Rights balancing – This refers to whether including the category would be appropriate when taking into account the range of fundamental rights that are required to be balanced against safety measures.
- Acceptability – This refers to whether the approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.

i. Cyberbullying material

This category is taken from the Australian Enhancing Online Safety Act and has been expanded on the suggestion of many respondents to the public consultation to refer not just to children but to all persons.

Cyberbullying material can be viewed as occurring on a spectrum between strong disagreement, open dislike and insult, defamation and harassment, with the latter two entailing potential legal consequences, including criminal prosecution, for the person who produces the material. As such, whether material is indeed cyberbullying material is subjective and context dependent.

Because of this degree of subjectivity, the inclusion of cyberbullying material, while easily understood and acceptable to most stakeholders, runs into difficulty on both a practical level and from a rights balancing perspective. Freedom of expression encompasses the freedom for a person to openly dislike and insult another person as well as the freedom to express truthful information about a person that they may not wish you to express[20].

On a practical level, determining whether material is or isn't cyberbullying material is intrinsically subjective and would often require far more contextual information than would be readily available. Furthermore, cyberbullying is typically an extension of offline bullying and encompasses a range of actions far broader than the production of insulting or derogatory material, including the exclusion of the targeted person from social groups. On this basis, there is a strong argument for limiting the scope of the regulator's involvement on cyberbullying issues to an education and research role.

However, there is a strong view in the public discourse that cyberbullying be subject to regulation despite the challenges associated with attempting to regulate such a nebulous category. Should cyberbullying material be included as a category within the definition of "*harmful online content*" the actions that the regulator could feasibly take or require relevant services to take will necessarily be limited to certain systemic measures, e.g. measures detailed in codes of practice or guidelines as appropriate.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
4/5	2/5	1/5	2/5	4/5	13/25

[20] This has a statutory basis in relation to defamation – s.16, Defamation Act 2009 (defence of truth)

ii. Promotion of self-harm/suicide

This category is taken from the proposed Private Members Children's Digital Protection Bill 2018. It includes material promoting self-harm and material promoting or inciting suicide.

This category of material is less subjective than, for example, cyberbullying material. However, there are nuances to be considered in relation to material around self-harm. While instructional materials are obviously likely to be harmful, it is not always clear whether material is likely to cause harm or not. For example, material that may seem to promote self-harm may in fact be material relating to self-disclosure and support among persons who have self-harmed or be of an academic or cultural nature.

In these instances, the balance of rights and probability of harm shifts and the regulatory system will need to account for this if this category is included in the definition of "*harmful online content*". The potential impact of such material may also need to be taken into account in these instances. Furthermore, this category should not be construed as preventing legitimate debate, including in relation to euthanasia and assisted suicide.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
3/5	3/5	3/5	4/5	4/5	17/25

iii. Promotion of nutritional deprivation, overconsumption and eating disorders

This category is an amalgamation of categories from the proposed Private Members Children's Digital Protection Bill and categories suggested by respondents to the public consultation.

Similarly to the category of material promoting self-harm/suicide, this category concerns material that promotes behavior that is likely to be harmful to an individual that engages in it. Whether or not material does or doesn't fall under this category is more subjective than in relation to self-harm/suicide. Eating disorders and related behaviors are complex psychological phenomena that are often composed of a number of subtle elements.

While the promotion of extreme behaviors, for example starvation, is obviously likely to cause harm it is contextual whether the promotion of other behaviors, for example exercise or weight loss/gain, relates to eating disorders.

Clarity	Certainty	Effectiveness	Rights	Acceptability	Total

			Balance		
3/5	2/5	3/5	3/5	4/5	15/25

iv. Promotion of practices harmful to individual or public health

This category was drawn from suggestions made by the respondents to the public consultation. These suggestions primarily concerned anti-vaccination materials and so-called "bogus cures", which may be likely to cause harm by being substituted for valid medical treatment.

At a broader level, this category could be construed as including material promoting self-harm/suicide or eating disorders as well as any other material which may promote behavior that may harm one's health. Due to the broadness and lack of specificity in this category, it is far less clear what it refers to and it is difficult to determine whether or not certain kinds of material does or doesn't fall under it. There are ongoing legitimate debates about whether certain behaviors are harmful to a person's health and in certain instances, even if they are, whether regulation is appropriate.

This lack of specificity and subjectivity will likely make the inclusion of this category in a definition of "*harmful online content*" less acceptable and the application of it far less practical. However, concerns over the amplification of such materials have been raised by the Department of Health, particularly with regard to vaccination and abortion services and they are examining these issues.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
1/5	1/5	2/5	2/5	3/5	9/25

v. Promotion of anti-scientific views

This category was drawn from suggestions made by the respondents to the public consultation. These suggestions primarily concerned anti-vaccination materials and materials promoting clearly anti-scientific views, such as the flat Earth conspiracy and climate change denial.

The scientific process is one of constant debate, disagreement and refinement. Determining, at any point in time, whether material is anti-scientific or not would be difficult, subjective, impractical and likely not acceptable to most stakeholders. Furthermore, the expression of

views that may be anti-scientific is an integral part of the rights to freedom of expression and freedom of religion.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
1/5	1/5	1/5	1/5	1/5	5/25

vi. Disinformation

This category was drawn from suggestions made by the respondents to the public consultation.

This inclusion of this category would run into a number of the same difficulties that arise in relation to the promotion of anti-scientific views as well as difficulties in relation to political expression and foreign policy.

Further to this, it is intended that the Department of Housing, Planning and Local Government will bring forward legislation to regulate the transparency of online political advertising in the near future. It is intended that the responsibility for this regulatory regime would be assigned to the Standards in Public Office Commission in the short term and an electoral commission, when established, in the medium term.

Moreover, many issues that are raised in the context of disinformation, including the misuse of user data, are the responsibility of the Data Protection Commission.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
1/5	1/5	1/5	1/5	2/5	6/25

vii. Intimidation

This category was drawn from the UK Online Harms White Paper.

While intimidation might be a relatively simple category to grasp it is unclear what differentiates it from threats and harassment, both which are potentially criminal offences. Further to this, if the material in question doesn't rise to the level of threats or harassment then it would be very difficult to decide if it contains a quality of intimidation that would warrant intervention.

While including this category might be acceptable to some stakeholders, the right to freedom of expression includes the right to insult and to disagree with a person in an uncivil manner, short of threats or harassment..

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
2/5	1/5	1/5	1/5	2/5	7/25

viii. Extremism

This category was drawn from the UK Online Harms White Paper.

It is generally considered that expressing extreme views falls within the rights to freedom of expression and freedom of religion. Where the expression of such views warrants intervention there will typically be an associated criminal offence or the intervention will be warranted on public order grounds[21].

Further to this, views that are considered extreme in one context may not be in another context, or, despite their extremity, they may be entirely innocuous and simply out of step with broader societal, moral or scientific consensus. This would make deciding when material is extreme a very subjective exercise.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
2/5	1/5	1/5	1/5	1/5	6/25

ix. Violent content

This category was drawn from the UK Online Harms White Paper.

The inclusion of violent content within a definition of "*harmful online content*" would be difficult. While it is relatively clear what violent content refers to, whether material containing violent content is harmful is largely contextual and dependent on the person exposed to it. For example, news reports often contain depictions of actual violence and entertainment often contains realistic or unrealistic depictions of violence. Whether being exposed to these depictions is harmful is less a matter of the substance of the material and depends on the circumstances of the person exposed to it, including, for example, their age.

[21] Criminal Justice (Public Order) Act, 1994

Furthermore, there is an overlap between violent content and other categories of content which are assessed here, including in relation to criminal content and, for example, materials promoting self-harm or suicide. In those instances, violent content would be dealt with in relation to those categories. Generally, it is considered that if the presence of violent content warrants action then it is likely to be a depiction of criminality which may entail a role for An Garda Síochána.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
3/5	2/5	2/5	2/5	3/5	12/25

x. Promotion of female genital mutilation

This category was drawn from the UK Online Harms White Paper. FGM is defined in Irish law in the Criminal Justice (Female Genital Mutilation) Act 2012, which criminalises the act of FGM and related activities. It does not, however, criminalise the promotion of FGM.

This is a very clear category with little room for misinterpretation. In certain instances, the promotion of FGM may amount to a criminal offence if it encompassed threats or harassment to an individual person. However, it is likely in most instances it would not.

The inclusion of the promotion of FGM in a definition of "*harmful online content*" would likely be supported by a wide range of stakeholders and in terms of rights balancing would generally fall firmly on the side of the right to be protected from harm.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
5/5	4/5	4/5	4/5	4/5	21/25

f. Recommendation – categories for inclusion

It is recommended that the following categories be included in a definition of "*harmful online content*" in the first instance:

- Content the dissemination of which is a criminal offence under Irish or Union law,
- Content that constitutes cyberbullying,

- Content promoting self-harm and/or suicide, except in relation to legitimate philosophical, medical and political debate, and,

- Content promoting eating disorders, including in relation to nutritional deprivation.

The assessment of the category of cyberbullying material is that including it in a definition of "*harmful online content*" would be a finely balanced matter. There are a large number of practical issues with this category and from an outcomes point of view dealing with cyberbullying related issues may be more appropriate to the Commission's general education and outreach functions.

However, as previously noted there is a strong view in the public discourse that cyberbullying be subject to regulation, which is reflected in its inclusion in the above. This inclusion is subject to the proviso that it is considered that the actions that the regulator could feasibly take or require relevant online services to take in relation to cyberbullying material will necessarily be limited to certain systemic measures.

In general the consideration of the category of violent content raises a lot of highly complex issues that may need to be revisited at a later stage. Many extreme kinds of so-called violent content would fall under other categories, especially in relation to criminal content. However, there are many other kinds of graphic or grossly offensive content, for example animal abuse or images of crime scenes/accidents, which are not necessarily illegal to share. This issue is certain to be raised in debates going forward so we are highlighting it here as an issue that is not included at present but the matter should be kept under review as the Bill progresses.

While the category of material promoting practices harmful to individual or public health is not recommended for inclusion in a definition of "*harmful online content*" at this time, its inclusion may be examined at a future date in light of any substantial policy developments on this issue by the D/Health.

While the assessment of the category of the promotion of female genital mutilation is relatively conclusive this is because it is clear that the dissemination of material promoting FGM should be considered a criminal matter. Therefore, it is not included in the categories recommended for inclusion as a criminal offence would be more appropriate.[22] If such criminal legislation is enacted, it would then come within scope.

g. Age related matters

The assessment of the category of violent content also highlights the potential for a broader category of content which comprises content which is likely to be inappropriate for minors. However, it is not proposed that such a category be included within the definition of

[22] This matter will be raised with D/Justice

"*harmful online content*". As such, it is recommended that a separate definition of "*inappropriate online content*" be considered to reflect these materials. Such a definition may encompass violent content, alcohol marketing and content of an explicit sexual nature among other things.

This would also further solidify the transposition of the protective obligation in Article 28b(1) of the revised AVMSD.

To ensure an appropriate level of clarity and balance of rights the application of this definition should be limited to certain areas, for example content rating and age gating, rather than, for example, content removal or minimisation. It may be useful to provide that the Media Commission engage with the Irish Film Classification Office and similar organisations to develop guidance in this area.

h. Potential excluded categories

To improve legal clarity, it is useful to consider excluding certain categories of content from the definition of "*harmful online content*" in the legislation. Excluding these categories would not mean that the regulatory system would be prevented from dealing with content that contains elements of both an excluded category and an included category. Instead, it would mean that excluded element could not be considered by the regulator. Where a relevant Memorandum of Understanding exists between the Media Commission and a relevant regulator, then the Media Commission would refer any relevant material brought to its attention to the relevant regulator.

Further to this, the explicit exclusion of certain categories would not mean that any non-excluded category of content is automatically included within the definition.

Potential categories of excluded content are as follows:

Category	Definition (if available)	Source (if applicable)
Distressing material	N/A	N/A
Defamatory statements	"*defamatory statement means a statement that tends to injure a person's reputation in the eyes of reasonable members of society, and defamatory shall be construed accordingly*"	Public consultation; s. 2 Defamation Act 2009

Material violating data protection & privacy law	N/A	Public consultation
Material violating consumer protection law	N/A	Public consultation
Material violating copyright law	N/A	Public consultation
Material relating to criminal behaviour where the dissemination of such content is not itself a criminal offence	N/A	Public consultation

i. Recommendation – categories for exclusion

It is recommended that the following categories be excluded from a definition of "*harmful online content*" in the first instance:

- Defamatory statements,
- Material violating data protection & privacy law,
- Material violating consumer protection law, and,
- Material violating copyright law.

It is not proposed that the category of distressing content be excluded from the definition of "*harmful online content*" in the first instance. This is due to the lack of clarity and certainty as to what content may fall under this category and the potential overlap with criminal content and certain categories of harmful content.

The assessment of these categories can be found at **appendix 2.**

6. Futureproofing

As expressed earlier in this paper, the question of how a definition could be futureproofed to account for new or more prominent categories of potentially harmful online content is a key issue.

For criminal content it is possible to account for new categories by wording the reference in legislation along the lines of "content the dissemination of which is a criminal offence". Then, any new or revised criminal offences would automatically be able to be dealt with by the regulatory system.

However, no such simple mechanism exists to allow for categories of non-criminal content to be added to the definition or excluded from it. If a new category was to be added then it would need to be added by primary legislation or statutory order, a more dynamic approach that would require explicit safeguards. A potential mechanism for the addition and exclusion of categories by order is as follows:

- The Online Safety Commissioner may propose to the Commission a further category to be included/excluded from the definition of "*harmful online content*".
- The Commission may publish this proposal and invite submissions on it.
- The Commission may recommend this category for inclusion/exclusion to the relevant Minister.
- The Minister shall consider the recommendation and consult with the relevant Joint Oireachtas Committee as part of their consideration.
- The Minister may
    - Propose to the Government that the suggested category be included/excluded, or,
    - Send the proposal back to the Commission for further consideration.
- In proposing to the Government that the suggested category be included/excluded, the Minister may not vary the Commission's proposal.
- If Government approval is received, the Minister may, by order, include/exclude the suggested category in/from the definition of "*harmful online content*".
- Orders made by the Minister shall be laid before the Houses of the Oireachtas, either of which may pass a resolution annulling the order.

While it is recommended that an approach along the lines outlined above be followed, the precise nature of the approach will be subject to extensive legal and drafting scrutiny.

7. Recommended approach

The following approach to defining "*harmful online content*" is recommended:

- That "*harmful online content*" will be defined as including but not limited to:
    - Content the dissemination of which is a criminal offence under Irish or Union law,
    - Content that constitutes cyberbullying,
    - Content promoting self-harm & suicide, except in relation to legitimate philosophical, medical and political debate, and,
    - Content promoting eating disorders, including in relation to nutritional deprivation.

  And that it will be defined as excluding:
    - Defamatory statements,
    - Material violating data protection & privacy law,
    - Material violating consumer protection law, and,
    - Material violating copyright law.
- That provision will be made to provide to allow for the inclusion/exclusion of further categories of content by order.
- That a definition of "*inappropriate online content*" be included in the Bill to deal with content that may be inappropriate for minors to access.

This approach would allow for the protective obligation in the revised AVMSD (Strand 2) to be incorporated into the approach to protecting users of relevant online services from "*harmful online content*". This is explored further in the separate policy paper on regulating "*harmful online content*".

A rough draft of provisions implementing this approach can be found at Appendix 1.

Appendix 1 – Draft Provisions

Words contained within [] require more detailed analysis

Provision – definition of "harmful online content"

"harmful online content" includes –

(a) material which it is an offence to disseminate under Irish [or Union law],

(b) material which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to which it is directed and which a reasonable person would conclude was the intention of its communication to said person,

(c) material which promotes, encourages and/or glorifies [eating disorders], and,

(d) material which promotes, encourages and/or glorifies [self-harm or suicide], except in relation to legitimate philosophical, medical and political debate.

but does not include –

(a) material [containing or comprising] a defamatory statement,

(b) material that violates [data protection or privacy law],

(c) material that violates [consumer protection law], and

(d) material that violates [copyright law];

Provision – futureproofing

x. – (1) The Online Safety Commissioner may bring proposals to include or exclude further categories of material from the definition of harmful online content to the Commission.

(2) the Commission may publish such proposals and invite submissions from interested parties, [including members of… advisory committees],and shall consider any submissions it receives and may amend proposals as it deems warranted.

(4) the Commission may bring proposals to the Minister and recommend they be adopted by the Government.

(5) the Minister shall consider proposals brought to them by the Commission and shall consult with the Joint Oireachtas Committee as part of this consideration.

(6) having considered a proposal, the Minister may:

(a) return the proposal to the Media Commission for further examination, or

(b) submit the proposal to the Government.

(7) when submitting a proposal to Government in accordance with subsection (6) (b) the Minister may not vary the proposal from that provided by the Commission.

(8) if a proposal submitted to the Government by the Minister in accordance with subsection (6) (b) is adopted then the Minister may, by order, amend the definition of harmful online content to include or exclude from the definition the categories of material contained within the proposal.

(9) every order made under this section shall be laid before the Houses of the Oireachtas as soon as may be after it is made, whereupon either House may pass a resolution annulling the order within 21 sitting days from the day on which the order was laid before it. Any annulment of an order shall not affect anything done under it prior to its annulment.

Provision – definition of "inappropriate online content"

["inappropriate online content" means material which may be unsuitable for exposure to minors]

Appendix 2 – Assessment of Categories for Exclusion

Assessment of categories for exclusion

The following criteria will be used to assess these categories for inclusion in a definition of "*harmful online content*":

- Clarity – This refers to the ease of which the category can be understood.
- Certainty – This refers to the confidence that the category provides in understanding what content does or doesn't fall under it.
- Effectiveness – This refers to the ease by which the category can be excluded from the definition.
- Rights balancing – This refers to whether excluding the category would be appropriate when taking into account the range of fundamental rights that are required to be balanced against safety measures.
- Acceptability – This refers to whether the approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.

For the sake of clarity, the higher the total in the assessments below the more suitable the category is for exclusion.

Distressing material

Distressing material is material that certain persons or even most people may find it difficult to be exposed to. It may be graphic, vulgar, insensitive, disturbing or provocative. However, the dissemination of such content is typically not a criminal offence nor can its dissemination be automatically classified as harmful, though it may be in some instances.

Content which could fall under this category includes graphic depictions of death, medical procedures, and details of violent, disturbing and/or criminal acts. There are legitimate reasons for such content to be disseminated, including simple curiosity.

However, this is a very difficult category to define and does overlap with criminal content and certain potential categories of harmful content, for example material promoting self-harm or suicide, in some instances.

Clarity	Certainty	Practicality	Rights	Acceptability	Total

			Balance		
1/5	1/5	1/5	3/5	2/5	8/25

Defamatory statements

This category was drawn from suggestions made by the respondents to the public consultation.

As noted above, Defamation is a civil law matter with a large body of legal precedent and a distinct relationship with Article 40.3.2 of the Irish Constitution.

There are existing legal procedures to deal with alleged defamation and it is not proposed that the regulator would have a role in these procedures.

Clarity	Certainty	Practicality	Rights Balance	Acceptability	Total
5/5	3/5	4/5	4/5	4/5	20/25

Material violating data protection & privacy law

This category was drawn from suggestions made by the respondents to the public consultation.

There are existing mechanisms in Irish and Union law for dealing with material that violates data protection and privacy law. The Data Protection Commission[23] is Ireland's lead regulator for matters in this area and it is not proposed that the Media Commission would operate in the same area.

Clarity	Certainty	Practicality	Rights Balance	Acceptability	Total
5/5	5/5	5/5	5/5	4/5	24/25

[23] It's proposed that the Media Commission will be required by legislation to seek Memoranda of understanding with the DPC and other relevant bodies.

Material violating consumer protection law

This category was drawn from suggestions made by the respondents to the public consultation.

There are existing mechanisms in Irish and Union law for dealing with material that violates consumer protection law. The Competition & Consumer Protection Commission is Ireland's lead regulator for matters in this area and it is not proposed that the Media Commission would have a role in this area.

Clarity	Certainty	Practicality	Rights Balance	Acceptability	Total
5/5	5/5	5/5	5/5	4/5	24/25

Material violating copyright law

This category was drawn from suggestions made by the respondents to the public consultation.

There are existing mechanisms in Irish and Union law for dealing with material which violates copyright law, including the recently adopted Directive on Copyright in the Digital Single Market[24]. It is not proposed that the Media Commission would have a role in this area.

Clarity	Certainty	Practicality	Rights Balance	Acceptability	Total
5/5	5/5	5/5	5/5	4/5	24/25

[24] Directive 2019/790/EU

Online Safety & Media Regulation Bill

Policy Paper – Regulating Harmful Online Content

1. Background

Deciding the appropriate approach to regulating "*harmful online content*" is a key part of developing an Online Safety and Media Regulation Bill (the Bill). It is integral to the creation of a national online safety system under Strand 1 and to the regulation of Video Sharing Platform Services (VSPS) under Strand 2.

In relation to Strand 2, the revised Audiovisual Media Services Directive (AVMSD)[1] obliges Member States to ensure that VSPS take measures, some potential ones of which are listed in the Directive, to protect their users, especially minors, from certain kinds of harmful and illegal content[2]. The revised Directive further obliges Member States to designate a national regulatory authority to assess the sufficiency of measures taken by VSPS to meet the protective obligation.

This is a systemic approach to regulating "*harmful online content*", meaning that the envisaged regulatory system is focused on improving systems to minimise potential harm to users of VSPS rather than dealing with individual pieces of potentially harmful material. This approach is primarily proactive rather than reactive and will enable the regulator to efficiently focus their resources on impact and outcomes.

A similar approach is envisaged under the national online safety system. Certain online services[3] would be obliged to abide by codes drawn up and overseen by the Media Commission, which may detail measures that these services must take to minimise the negative impact of "*harmful online content*" in relation to their activities.

Depending on the nature of the approach chosen to the regulation of harmful online content it may be possible to combine these two approaches into the one system.

It is envisaged that the national online safety system under Strand 1 would have a mechanism for taking into account user complaints. The revised Directive also envisages a dispute resolution mechanism between users and VSPS. What mechanisms would be most appropriate to take into account user complaints or disputes is explored in this paper.

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[1] Article 28b(1), revised AVMSD, Directive 2018/1808/EU
[2] What kind of content is covered by this obligation is examined in a separate policy paper on defining harmful online content, which was submitted to the Minister on 10 October 2019
[3] The kinds of online services that would be covered by the national online safety system under Strand 1 are examined in a separate policy paper, which is due to be submitted to the Minister during November 2019

The development of a regulatory system for "*harmful online content*" is highly complex issue that is fraught with numerous potential pitfalls and unintended side-effects. In developing a system we must blend both EU legislation and national legislation, balance a number of competing fundamental rights such as freedom of expression and focus on developing solutions that are both practical and effective.

The purpose of this paper is to explore these complexities and to recommend a balanced potential approach to regulating "*harmful online content*" to be included in the Bill.

There is scant international precedent for a holistic approach to online safety regulation, which demonstrates the complexity of the task. Certain existing regulatory approaches, including the Australian Office of the eSafety Commission and the German Network Enforcement Act, are limited in both their application and their flexibility, and don't contain code making provisions. This makes them ill-suited as templates for holistic regulation. Other proposed approaches, such as the one explored by the UK Online Harms White Paper, are far more holistic. However, this proposed approach presently suffers from a distinct lack of specificity in how it could be practically implemented.[4]

This is a new area of law and as such the recommendations put forward by this paper for decision are necessarily novel and untested and will attract significant scrutiny from the Offices of the Attorney General and the Parliamentary Counsel should they be reflected in a general scheme of this Bill.

Issues related to the regulation of "*harmful online content*", including what the definition of "*harmful online content*" should be and what services should be considered in scope of Strand 1 are examined in **separate policy papers**.

Note: *The Media Commission is referred to through this paper as it's considered that all online safety legislative references shall be to the Commission and that certain powers and functions in this regard shall be delegated to the Online Safety Commissioner.*

[4] The Department has and continues to engage with the relevant Australian, German and UK officials in relation to these approaches.

2. Decisions sought

Decisions are sought from the Minister regarding the following:

- Whether the extent of the Media Commission's code making and compliance powers are appropriate.

- Whether the extent of the Media Commission's investigation powers in relation to user complaints and disputes handling, including related compliance powers, are appropriate.

- Whether the approach of providing for the Media Commission to enter into voluntary arrangements with relevant online services not established in the State in relation to its codes or guidance material is appropriate.

Further detail is in the **recommended approach sections** of this paper. Rough drafts of provisions implementing the recommended approaches are available at **appendix 1**.

A non-exhaustive list of potential legal questions is available in the **next section**.

3. Potential Legal Questions

The following is a non-exhaustive list of potential legal questions relating to the issues raised and recommendations made in this paper:

1. Are the code making and related compliance powers recommended to be provided to the Media Commission sound?

2. Are the audit powers in relation to user complaints and disputes handling, including related compliance powers, recommended to be provided to the Media Commission sound?

3. Do the code making, complaints and disputes handling investigation and related compliance and sanction powers recommended to be provided to the Media Commission sufficiently transpose the relevant subsections of Article 28b of the revised Audiovisual Media Services Directive?

4. Do the matters recommend which the Media Commission shall have regard to when making codes and guidance materials provide set out sufficient principles and policies for the Commission to carry out its code making and guidance issuing functions?

5. Do the safeguards recommended for inclusion in the provisions relating to the Media Commission's code making, complaints and disputes handling audit and related compliance and sanction powers provide sufficient legal certainty to allow the Commission to exercise these powers with surety?

6. Is the approach recommended of providing for the Media Commission to enter into voluntary arrangements with relevant online services not established in the State in relation to its codes or guidance material sound?

7. Is the approach of investing all online safety related powers and functions in the Commission and delegating relevant functions and powers to the Online Safety Commissioner appropriate?

8. This paper recommends aligning Strands 1 & 2 by including VSPS as a category of designated online services and providing for the Media Commission to issue online safety codes that can apply to both VSPS and other designated online services. In drafting Online Safety Codes the Commission shall have regard to the definition of Harmful Online Content, which enumerates categories of harmful material. In doing so this definition encompasses many of the matters referred to in Article 28b(1) of the Directive and specifically enumerates matters that are not explicitly referred to in the revised Directive, for example the category of material regarding cyberbullying. Is

there sufficient legal basis in Articles 28b(1) and 28b(6) of the revised Directive for this approach?

    a. This relates to legal question no. 6 in the policy paper on defining harmful online content.

9. This paper recommends aligning Strands 1 & 2 by including VSPS as a category of designated online services and providing for the Media Commission to issue online safety codes that can apply to both VSPS and other designated online services, including in relation to commercial communications. Is there sufficient legal basis in Articles 28b(1) and 28b(6) of the revised Directive for this approach?

10. The paper recommends Auditing Complaints Handling as a primary means for the regulator to ensure that there are effective systems in place by service providers for handling user complaints. An outcome of this is that the Media Commission may direct a policy change by the service and may also require the removal of individual pieces of content. The question that arises is whether the uploaders of such individual pieces of content that the Commission directs should be removed, should have a right to make submissions to the Commission in advance of any compliance notice directing its removal or restoration taking effect? This would be in addition to any right of reply provisions in place by the service providers to uploaders/complaints on foot of their initial decision in respect of the piece of content.

4. Approaches to regulating harmful online content

a. Media Commission's objectives and functions

In deciding on an approach to regulating "*harmful online content*" it is useful to first consider the objectives and functions of the proposed Media Commission. These objectives and functions are explored in a **separate policy paper on regulatory structures**. This paper was approved by the Minister on 7 October 2019.

The following objectives and functions, which are relevant to the definition of "*harmful online content*", are drawn from that paper.

	Relevant objectives of the Media Commission
1.	Ensure that democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression are upheld.
2.	Subject to the provisions of this Act, ensure that appropriate regulatory arrangements and systems are in place to address, where appropriate, illegal and harmful online and audio-visual content
3.	Protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation.
4.	Provide a regulatory framework that takes account of the rapidly changing technological environment and that provides for rules to be applied in a proportionate, consistent and fair manner across all services regulated, having regard to the differing nature of those services.

The list of relevant functions below is non-exhaustive and not necessarily reflective of the eventual provisions of the Bill which may relate to the chosen approach to regulating "*harmful online content*".

	Relevant functions of the Media Commission
1.	To promote and protect the interests of the public in relation to audio-visual and online content
2.	To carry out an investigation, either on its own initiative or in response to a complaint

	made to it by any person, into any suspected breach of the relevant statutory provisions
3.	To enforce the relevant statutory provisions
4.	To encourage compliance with the relevant statutory provisions, which may include the publication of notices containing practical guidance as to how those provisions may be complied with
5.	The Commission shall prepare or make codes and rules to be observed by entities operating in the following categories: 1. Broadcasting 2. On demand services 3. Video sharing platform services 4. Online services [to be defined]
6.	The Commission shall establish or facilitate a complaints mechanism or mechanisms covering following categories: 1. Broadcasting 2. On demand services 3. Video sharing platform services 4. Online services [to be defined]
7.	Promote, where appropriate, the development of alternative dispute resolution procedures as a means of resolving complaints
8.	To promote public awareness, encourage research and conduct public information campaigns for the purpose of educating and providing information to the public in relation to: (i) online safety; (ii) media literacy
9.	Promote educational initiatives and activities relating to online safety and advise, when requested, the Minister or any other Minister of the Government, Departments of State or any public body whose activities are concerned with matters relating to any

	of the purposes of this Act, and any educational or training institution
10.	Conduct or commission research, studies and analysis on matters relating to the functions of the Commission and may publish, in the form and manner that the Commission thinks fit, such findings as it considers appropriate (which may consist of, or include, a study or analysis of any development outside the State)
11.	Co-operate with other authorities whether in the State or elsewhere charged with responsibility for the enforcement of laws relating to (i) illegal or harmful online content; (ii) the protection of children; (iii) the allocation for the frequency range dedicated to sound and television broadcasting
12.	Cooperate with other bodies outside the State which perform similar functions to the Commission
13.	The Commission shall have a statutory role in relation to the following: (i) reviewing existing online safety and audio-visual legislation and proposals for such legislation (ii) Undertaking a strategic review or reviews of the regulated sectors covering one or more of the following areas: (a) sectoral funding (b) technological and societal change (c) the protection of children (d) other relevant strategic areas as directed by the Minister
14.	Impose a levy on [insert relevant industry categories] to ensure it is sufficiently resourced to properly execute its statutory functions

As can be seen from the above, there are a wide range of potential objectives and functions of the proposed Media Commission that would interact, to varying degrees, with an approach to regulating "*harmful online content*". In summary, in relation to:

- Systemic oversight over relevant online services, including VSPS, perhaps through codes, investigations and other means by the Media Commission in relation to the protection of users from "*harmful online content*",

- Complaints and dispute resolution procedures in relation to "*harmful online content*" operated by or facilitated by the Media Commission, and,

- Educational, cooperative, research and other similar initiatives that may be carried out by the Media Commission.[5]

The objectives and functions of the proposed Media Commission that relate to the National Online Safety System (Strand 1) broadly fall under the concept of the protection of users of relevant online services[6] from "*harmful online content*". In addition, those objectives and functions that relate to the regulation of VSPS (Strand 2) are reflective of the requirements of the revised Directive and the obligation placed on Member States to ensure that VSPS meet these requirements.

As described earlier in this paper, depending on the approach to the regulation of "*harmful online content*" it may effectively encompass the systemic oversight elements of the revised Directive's requirements.

b. AVMSD – Systemic oversight (strand 2)

As previously noted, the revised Directive requires that Member States ensure that VSPS take measures to protect users of their services from certain content and to designate a national regulatory authority to assess the measures taken by VSPS[7].

This protective obligation has three elements, these being:

- Ensuring that VSPS take "*appropriate measures*" to protect users from certain harmful and illegal content,

- Ensuring that VSPS comply with a number of the rules and requirements[8] for Audiovisual Commercial Communications (**AVCC**) for those AVCC that are "*marketed, sold, or arranged*" by the VSPS itself, and,

[5] The enforcement of provisions in this regard is explored in a separate policy paper on regulatory powers.
[6] The scope of services that will fall under Strand 1 is explored in a separate policy paper.
[7] It's important to note that what services are and aren't VSPS is unclear. The European Commission is to issue guidance on this issue by end 2019
[8] Listed in Article 9(1) of the revised Directive

- Ensuring that VSPS take "*appropriate measures*" to ensure that their users comply with a number of the rules and requirements for AVCC in respect of those AVCC "*marketed, sold, or arranged*" on a VSPS by its users.

The first and third elements relate to user-generated content while the second relates to audiovisual commercial content placed on the service by the VSPS itself.

i. Appropriate measures

In relation to the first and the third elements, the revised Directive lists a number of potential "*appropriate measures*"[9] that may be taken, including in summary:

- Reflecting the three protective requirements for VSPS in their terms and conditions for users uploading content,

- Reflecting the requirements for AVCC that are not marketed, sold or arranged by the VSPS in their terms and conditions for users uploading content,

- Having a functionality for users who upload user-generated videos to declare whether such videos contain AVCC as far as they know or can be reasonably expected to know,

- Establishing and operating transparent and user-friendly mechanisms for users of a VSPS to report or flag content to the VSPS,

- Establishing and operating systems through which VSPS explain to users of video-sharing platforms what effect has been given to the reporting and flagging,

- Establishing and operating age verification systems for users of VSPS with respect to content which may impair the physical, mental or moral development of minors,

- Establishing and operating easy-to-use systems allowing users of VSPS to rate content,

- 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,

- Establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the VSPS in relation to the reporting or flagging systems, and,

[9] Article 28b(3), revised AVMSD, Directive 2018/1808/EU

- Providing for effective media literacy measures and tools and raising users' awareness of those measures and tools.

This is not a prescriptive list of measures to be taken by all VSPS. Rather, the revised Directive states that "*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*".[10]

The revised Directive further emphasises that *"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 [the eCommerce Directive]"*.[11]

When examined in the context of the revised Directive's encouragement that Member States use co-regulation in respect of the "*appropriate measures*"[12] it is clear that the revised Directive intends that the relevant regulatory authority in each Member State determine on a case by case basis in respect of individual or categories of VSPS which of these measures is necessary to achieve compliance. The revised Directive also explicitly permits Member States to apply further measures than those it lists, providing a great deal of flexibility in how a system for regulating VSPS may operate.[13]

Under our proposed approach, the Media Commission would fulfil this role through the drafting of codes, guidance materials and through various oversight, reporting and compliance provisions.[14]

ii. Non-user-generated AVCC

The second element of the protective obligation relates to AVCC "*marketed, sold, or arranged*" by the VSPS itself rather than those uploaded by its users. This is a prescriptive obligation that Member States ensure that VSPS abide by the following rules in relation to the selling of audiovisual advertising space:

- *"audiovisual commercial communications shall be readily recognisable as such; surreptitious audiovisual commercial communication shall be prohibited;*

[10] Ibid
[11] Ibid
[12] Ibid, Article 28(b)(4)
[13] Ibid, Article 28(b)(6)
[14] The core powers that should be provided to the Media Commission are explored in a separate policy paper. This paper was received by the Minister on 12 September 2019.

- *audiovisual commercial communications shall not use subliminal techniques;*

- *audiovisual commercial communications shall not:*

    - *prejudice respect for human dignity;*

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

    - *encourage behaviour prejudicial to health or safety;*

    - *encourage behaviour grossly prejudicial to the protection of the environment;*

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

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

- *audiovisual commercial communications 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;*

- *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."*[15]

The revised Directive does not specify who should be responsible in each Member States for overseeing the compliance of VSPS with these rules.

The Advertising Standards Authority of Ireland has a role in relation to online advertising in Ireland. However, this is on a voluntary self-regulatory basis and isn't likely to satisfy the requirements of the revised Directive or align with public expectation of moving away from self-regulation in the online space.

[15] Article (9)(1), revised AVMSD, Directive 2018/1808/EU

Furthermore, any role that the ASAI could have would only relate to non-user-generated AVCC and not user-generated AVCC which would likely create confusion among the public as to what standards apply to what content and which regulatory body is responsible for enforcing these standards. It may also lead to higher standards applying to user-generated AVCC and lower standards applying to non-user-generated AVCC as the latter would be subject to a non-statutory form of regulation.

Given these issues and the lack of an overall advertising regulator in Ireland, it is likely that the Media Commission would fulfill this role in the first instance[16]. This can be done through the drafting of codes, guidance materials and through various oversight, reporting and compliance provisions.

c. National online safety system – systemic oversight (strand 1)

It is envisaged that the national online safety system would have an element of systemic oversight of certain online services. Under this system, certain online services would be obliged to abide by codes drawn up and overseen by the Media Commission, which may detail measures that these services must take to minimise the negative impact of "*harmful online content*" in relation to their activities.

It is proposed that the Media Commission will have the power to designate individual and categories of online services from a wider pool of relevant online services to abide by any codes the Commission deems necessary. In designating online services, the Commission will be required to have regard to a number of factors, including the scale and nature of the service or category of services. For constitutional reasons, the Commission will only have the ability to designate those services located or otherwise legally established in Ireland.[17]

The proposed designation process and the pool of relevant online services are explored in a **separate policy paper** on the scope of services under Strand 1, which is due to be submitted to the Minister in November 2019.

The Commission will have the power to draw up codes and guidance materials[18] as it sees fit to address a range of issues relating to "*harmful online content*" that may be relevant to some or all designated online services. The Commission would also oversee the compliance of designated online services with any obligations arising from its codes and would have the ability to direct compliance and impose sanctions in cases of non-compliance.[19]

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[16] As the revised Directive encourages co-regulation this role could be fulfilled by another body if the procedures and oversight were sufficiently robust.
[17] Irish Constitution, Article 29(8)
[18] Codes are binding whereas guidelines give advice and direction
[19] The core compliance and sanction powers that should be provided to the Media Commission are explored in a separate policy paper.

d. Integrating strands 1 & 2 – systemic level

As can be seen from the above, the systemic oversight elements of both Strands 1 and 2 follow a similar framework. However, there are a number of important differences, including:

- The regulation of VSPS under Strand 2 will be on a one country, one regulator basis, meaning that any VSPS whose EU establishment is in Ireland will be subject to regulation in Ireland for the whole of the EU. In contrast, the regulation of designated online services under Strand 1 will be limited to their Irish operations and the pool of relevant online services will be limited to those with a legal establishment in Ireland.

- The VSPS provisions of the revised Directive include a specific provision relating to the regulation of non-user generated AVCC that the Media Commission will reflect through codes and guidelines.

- The VSPS provisions of the revised Directive includes a list of potential "*appropriate measures*" that the Media Commission may reflect through codes and guidelines.

- The national online safety system under Strand 1 is intended to relate to services designated by the Media Commission rather than a single category of services such as VSPS.

Therefore, in order to integrate, or at the minimum reflect in legislation, the two strands at a systemic level these must be aligned as much as possible. There are a number of potential approaches to this, including:

- **Option 1:** Excluding VSPS from the national online safety system under Strand 1 and operating a different system of regulation for VSPS than for designated online services.

- **Option 2:** Including VSPS as a category of designated online services and requiring the Media Commission to issue VSPS specific codes and guidelines, including in relation to AVCC.

- **Option 3:** Including VSPS as a category of designated online services and obliging them to follow the same online safety codes as any other designated online service. The only VSPS specific codes that the Media Commission would be required to issue would only be about Audiovisual Commercial Communications.

- **Option 4:** Including VSPS as a category of designated online services and obliging them to follow the same online safety codes as any other designated online service,

including in relation to commercial communications and not just audiovisual commercial communications.

e. Assessment of approaches

There are a number of upsides and downsides to each of these potential approaches. These will be assessed in terms of the following criteria:

- Clarity – This refers to the ease by which the regulatory approach can be understood.
- Effectiveness – This refers to the ease by which the regulatory approach can deliver the goal of minimising the negative effects of "*harmful online content*".
- Flexibility – This refers to the ability of the regulatory approach to adapt to changing circumstances.
- Sufficiency – This refers to whether the regulatory approach sufficiently fulfils the requirements of Strands 1 and 2.
- Acceptability – This refers to whether the regulatory approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.

i. Option 1

Excluding VSPS from the national online safety system under Strand 1 and operating a different system of regulation for VSPS than for designated online services.

Option 1 appears simple but has a great deal of underlying complexity. While it may seem desirable to simply separate out the regulation of VSPS and the national online safety system the reality is that many services, including very prominent services such as YouTube, would either fall under both systems or be excluded from the national online safety system. This is especially true given that the scope of the definition of a VSPS is unclear and the European Commission has not yet issued its interpretive guidance.[20]

As such, it will be unclear which services fall under which system and many services may end up having to comply with two overlapping and potentially contradictory or competing sets of codes and guidelines. This would also create an additional burden for the Media Commission which will have to manage two separate systems with a significant amount of overlap. This complex state of affairs may make regulatory enforcement by way of compliance directions and sanctions difficult.

[20] The European Commission is due to issue its interpretative guidance in respect of the definition of a VSPS by end 2019

While this option would meet the requirements of both Strands 1 & 2 in principle the resulting complexity and overlap would mean that it may not meet them in practice. Acceptability is also an issue with this approach as the separation of the regulation of VSPS and the national online safety system would likely be viewed as confusing and unnecessary, particularly by members of the public. However, regulators in other Member States may prefer a complete separation of VSPS regulation from online safety regulation more generally despite the underlying complexity of such an approach.

Clarity	Effectiveness	Flexibility	Sufficiency	Acceptability	Total
2/5	3/5	2/5	3/5	2/5	12/25

ii. Option 2

Including VSPS as a category of designated online services and requiring the Media Commission to issue VSPS specific codes and guidance materials, including in relation to Audiovisual Commercial Communications.

Option 2 does away with a large amount of the underlying complexity present in the two systems approach of Option 1 by including VSPS as a category of designated online services within the national online safety system.

However, this approach bears similarity to the approach under Option 1 in that the Media Commission will be required to issues codes and guidelines in respect of VSPS as a distinct category of designated online services. While being clearer and less confusing than Option 1, this approach would still treat the regulation of VSPS as separate from the regulation of other designated online services and has a number of the same downsides in that regard. However, it is worth noting that regulators in other Member States may appreciate such an approach.

Clarity	Effectiveness	Flexibility	Sufficiency	Acceptability	Total
3/5	3/5	3/5	3/5	3/5	15/25

iii. Option 3

Including VSPS as a category of designated online services and obliging them to follow the same online safety codes as any other designated online service. The only VSPS specific codes that the Media Commission would be required to issue would only be about Audiovisual Commercial Communications.

Option 3 is a more integrated version of the approach under Option 2. Under this approach the Media Commission could issue codes and guidance materials applicable to both designated online services that are VSPS and those that aren't. For example, if the Commission issues a code in relation to material promoting suicide it could specify that that code applies to all designated online services, including VSPS, and it would not have to issue a separate code about the same material just for VSPS.

As noted above, this approach is in line with the revised Directive which lists potential measures to be applied as appropriate and which allows Member States to introduce further measures.

This approach would provide both a significant degree of clarity and flexibility to the regulatory system, allowing for greater efficiency in its implementation and in its responsiveness to changing circumstances.

This approach would still have the Media Commission issue VSPS specific codes and guidance materials in relation to audiovisual commercial communications. However, it may not be acceptable to many stakeholders, especially members of the public, to introduce regulation of commercial communications for only one category of designated online service.

Clarity	Effectiveness	Flexibility	Sufficiency	Acceptability	Total
4/5	4/5	4/5	5/5	3/5	20/25

iv. Option 4

Including VSPS as a category of designated online services and obliging them to follow the same online safety codes as any other designated online service, including in relation to commercial communications and not just audiovisual commercial communications.

Option 4 is a fully integrated approach wherein the Media Commission may issue codes and guidelines applicable to both designated online services that are VSPS and those that aren't, including in relation to commercial communications. This means that all advertisements, regardless of whether they are audiovisual or static, on any designated online service, including VSPS, could be subject to a code if the regulator sees fit to issue one.

This more expansive approach would mean that the Media Commission could apply codes to VSPS regarding commercial communications that are not simply audiovisual, e.g. banner ads. While this approach is more expansive, it is not likely to entail a significantly greater regulatory burden and may even reduce the regulatory burden through a reduction in complexity as the regulator would not have to oversee two overlapping and potentially competing systems of regulation.

This approach would also likely be more acceptable to many stakeholders who may not appreciate an artificial distinction between AVCC and commercial communications more generally. Such an artificial distinction would likely create a legitimacy problem for the regulatory system.

Clarity	Effectiveness	Flexibility	Sufficiency	Acceptability	Total
4/5	4/5	5/5	5/5	4/5	22/25

f. Recommended approach

The approach described under Option 4 is recommended. This approach provides the most appropriate balance between the criteria described above and is the most robust of the options, particularly in relation to establishing the legitimacy of the regulatory regime in relation to the regulation of commercial communications on online services.

The implementation of this approach would require a number of provisions, including:

- A provision providing that the Media Commission shall make online safety codes in respect of "*harmful online content*" and that, in designating online services, the Commission may specify any codes that a designated online service or category of designated online services shall abide by in their operations. This provision will also provide a non-exhaustive list of matters that the Commission shall have regard to in drafting codes and guidelines, e.g. commercial communications.

- A provision that the Media Commission may issue guidance materials for both relevant and designated online services in respect of "*harmful online content*", "*inappropriate online content*"[21] and other issues relevant to its functions.

- A provision providing for oversight by the Media Commission of compliance by designated online services with any online safety codes made by the Commission.

- A provision providing for enforcement by the Media Commission of compliance by designated online services with any online safety codes made by the Commission, including sanctions for non-compliance.

- A provision providing that the Media Commission may enter into voluntary arrangements with relevant online services not established in the State in relation to its online safety codes or guidance material.

[21] Please see the policy paper on defining harmful online content

In relation to the last bullet point, the Media Commission would not be able to regulate online services not established in the State. However, it is recommended that provision be made for the Commission to enter into voluntary arrangements with services not established in the State. These arrangements would be public and specify the extent to which the any relevant online services agree to comply with online safety codes issued by the Commission.

Provision will be made to allow the Media Commission to request information and determine reporting schedules and to make findings of non-compliance and publish the fact of these findings and to revoke arrangements if deemed necessary.

Rough drafts of these provisions are available at appendix 1.

For the sake of clarity, the process by which the Media Commission shall designate services is described in a **separate policy paper** on the scope of services under Strand 1.

g. Complaints handling (strand 1)

It is envisaged that the national online safety system would have an element of complaints handling by the Media Commission.

It is important to note at this stage that any element of complaints handling would not extend to examining notifications of or investigating potential criminal activity. It is intended that there will be a memorandum of understanding between the regulator and An Garda Síochána[22] to allow both organisations to set out appropriate boundaries in their activities and to ensure an appropriate amount of cooperation in instances where their activities may overlap.[23] For example, if the regulator, in the course of its activities, becomes aware of potentially criminal activity it shall have a dedicated channel to allow for rapid escalation of any relevant information to the appropriate persons within An Garda Síochána.

However, the Commission will have a role in relation to examining the compliance of designated online services with online safety codes in relation to systemic measures taken regarding material the dissemination of which is a criminal offence.

There are a number of potential approaches to complaints handling under the national online safety system, as described below:

Approach	Description
Individual complaints	Under this approach the regulator would

[22] And other relevant bodies such as Hotline.ie
[23] Such memorandums between the regulator and other bodies are explored in further detail in separate policy papers.

	receive complaints about material on any designated online service that may be "*harmful online content*". The regulator would swiftly adjudicate on these complaints and may direct the relevant online service hosting the content to remove the material in question.
Super complaints	Under this approach nominated bodies, such as charities and other NGOs, could bring systemic issues to the regulator for consideration in specific and clearly evidenced circumstances based upon the experiences of users. The regulator would set out guidelines and criteria for this process. It's not envisaged that this approach would relate to individual pieces of content.
Trusted flaggers	Under this approach nominated bodies, such as charities and other NGOs, could bring complaints about individual egregious pieces of content to the regulator's attention. The regulator would swiftly adjudicate on these complaints and may direct the relevant online service hosting the content to remove the material in question.
Auditing complaints handling	Under this approach the regulator could periodically or on an ad-hoc basis audit complaints received by designated online services. The regulator may group complaints and adjudicate on the relevant issues arising. The regulator may direct a designated online service to remove or restore content. The regulator may also direct a designated online service to make specified changes to how it handles user complaints.

h. Assessment of approaches

There are a number of advantages and disadvantages to each approach, some of which are also described below. These will be assessed in terms of the following criteria:

- Clarity – This refers to the ease of which the complaints handling approach can be understood.

- Effectiveness – This refers to the ease by which the complaints handling approach can deliver the goal of minimising the negative effects of "*harmful online content*".

- Flexibility – This refers to the ability of the complaints handling approach to adapt to changing circumstances.

- Acceptability – This refers to whether the complaints handling approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.

- Rights balancing – This refers to whether the complaints handling approach would be appropriate when taking into account the range of fundamental rights that are required to be balanced against safety measures.

i. Individual complaints

This approach would see the regulator establishing a system where any individual could submit a complaint to the regulator about any piece of content on any designated online service.[24] The regulator would then examine the reported piece of content to determine if it is "*harmful online content*" and if so may direct the designated online service in question to remove the piece of content. It's envisaged in such a system that the complainant would have to exhaust any internal complaints mechanisms operated by a designated online service before bringing a complaint to the regulator.

The main advantages of this approach are its accessibility and the direct link between a complainant and any resulting action taken by the regulator in respect of the reported content. These features mean that this approach would likely enjoy high levels of acceptability among stakeholders, particularly members of the public and the political system. Commercial organisations may also find the approach acceptable as it shifts some of the burden of content moderation from them to the regulator. This approach is also relatively clear and would likely be easily understood by most stakeholders.

[24] As is considered standard and good regulatory practice, complainants would first have to engage with a designated online service's complaints systems

In terms of rights balancing, this approach may be appropriate if it contains appropriate rights related safeguards. These would include a right of reply of the uploader of the reported content and the right of appeal of the regulator's decisions to a court by the complainant, the uploader and the relevant online service.[25]

However, this approach would be highly reactive and resource intensive. Larger online services, particularly social media services, deploy thousands of trained content moderators and sophisticated machine learning and artificial intelligence tools to moderate content on their services. These services can receive in excess of a million complaints per day globally. It is unlikely that the regulator would have access to sufficient resources, including AI capacity, and expertise to deal with the scale of issues that may arise under this approach in a proportionate and effective manner. The regulator would also need to be both swift and transparent in its decision making and at times may need to authenticate the identities of often anonymous complainants and uploaders, which poses a number of challenges, practically, legally and ethically, particularly where there are children involved.

It would also potentially expose the State to large scale claims at a future date by staff and former staff of the regulator who could suffer damage to their mental health as a result of dealing on an ongoing basis with individual pieces of potentially harmful online content and being obliged to make quick and accurate decisions in relation to said content.

Furthermore, there is little precedent for a regulator dealing directly with user complaints in the online content space.[26] The Office of the eSafety Commission in Australia operates a cyberbullying complaints scheme. However, this scheme is difficult to access and requires the disclosure of a considerable amount of personal information by the complainant. This is in stark contrast to the ease by which users of popular online services can report potentially abusive content to the service in question and would likely reduce this approach's acceptability among stakeholders.[27]

Taking these issues into consideration, if the regulator operated an individual complaints scheme for "*harmful online content*" or certain categories of "*harmful online content*" the scheme would necessarily have to be limited in both its scope and application. This would raise questions about its value, both to complainants in a fast paced online world and in terms of the required resources for its operation.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
4/5	1/5	2/5	3/5	3/5	13/25

[25] Such issues are examined in more detail in the safeguards section of this paper
[26] As expressed earlier, this is separate to the issue of the notification of illegal content
[27] The German Network Enforcement Act has faced similar problems in terms of ease of access

ii. Super complaints

This approach was suggested in the UK's Online Harms White Paper as a potential way of incorporating complaints into a regulatory framework without setting up a system where the regulator would receive complaints from individuals. While the White Paper lacks details on how such a system would operate in practice, the idea is that certain nominated bodies could bring issues to the regulator for consideration in specific circumstances.

Given the lack of detail, certain key aspects about this potential approach lack clarity, for example, what issues could a designated body bring to a regulator for consideration and how would these bodies be nominated and by who? It is implied in the White Paper that the issues in question would not be based on individual complaints from users to those nominated bodies but rather to systemic issues that the designated bodies may identify about a relevant online service, whether as a result of user complaints or not.

There is also some concern about the potential for a pool of nominated bodies to become a vehicle for these bodies to lobby the regulator in relation to their own special interests. Related to this would be the difficulty of removing nomination status from a body if they are misusing or disengaged from the system. These issues highlight the potential for such a system to entail a relatively high operational cost to return ratio.

The potential benefits of this approach are mainly related to the possibility of tapping into a range of existing expertise and in a limited fashion crowdsourcing issues for the regulator's attention.

Since this approach is likely to relate to systemic issues rather than individual complaints then it would require fewer rights related safeguards than a system of individual complaints. It would also have a greater degree of flexibility than an approach based on individual complaints due the system encouraging proactivity rather than reactivity.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
3/5	3/5	3/5	3/5	4/5	16/25

iii. Trusted flaggers

This approach is derived from notification procedures that exist between law enforcement agencies, including An Garda Síochána, and online services in relation to criminal content. These procedures involve LEAs notifying online services of criminal content on their platforms which is then removed. These procedures form part of a suite of information sharing mechanisms that exist between LEAs and online services.

There may be difficulty importing this approach to deal with non-criminal "*harmful online content*". As with the super complaints option, there are issues with which bodies would have the relevant resources and expertise to use the system effectively and to add value to the regulator's work.

This approach is also reactive and doesn't allow the regulator much in the way of flexibility. Depending on how a system under this approach was set up it may also not provide for a direct link between user complaints and actions taken by the regulator.

The potential benefits of this approach are somewhat similar to those of the super complaints option, tapping into a range of existing expertise. Though, unlike the super complaints approach, this would only relate to individual pieces of content and would therefore be more restricted.

As with the approach of individual complaints, this approach would require necessary rights related safeguards, including a right of reply of the uploader of the reported content and the right of appeal of the regulator's decisions to a court by the complainant, the uploader and the relevant online service.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
3/5	2/5	2/5	2/5	3/5	12/25

iv. Auditing complaints handling

This approach would see the regulator being provided with the power to audit any user complaints and redress systems operated by designated online services and to direct a designated online service to take specified actions, including to remove or restore content and to make changes to the operation of their systems. This work could take place on a periodic or ad-hoc basis, providing a great deal of flexibility to the regulator.

One of the primary benefits of this option is that the regulator could take a highly proactive approach to identifying issues arising from user complaints to designated online services and would not be tied to developing responses to complaints by individual users or nominated bodies. Rather the regulator would be able to use its expertise to identify potential issues of concern, to consider them fully and to direct designated online services to take specified actions. In this way, there is a very clear link between the systemic issues that are of most concern to users and specified actions that designated online services may be directed by the regulator to take. However, unlike with a system of individual complaints, these issues are filtered through the lens of the regulator's expertise and then given broader effect through specified directions to designated online services.

This method of taking into account user complaints would provide a degree of assurance to users of designated online services and encourage the consistency among the various complaints mechanisms operated by those services. This approach is clear and likely to be acceptable to most stakeholders, including designated online services who may appreciate greater authoritative direction in relation to their content moderation activities.[28] The greater degree of discretion provided to the regulator under this approach would also promote effective use of its resources and organisational focus.

As with the approach of individual complaints, this approach would require necessary rights related safeguards if the regulator's directions result in the removal of content, including a right of reply of the uploader of the reported content and the right of appeal of the regulator's decisions to a court by the complainant, the uploader and the relevant online service.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
4/5	4/5	4/5	3/5	4/5	19/25

i. Recommended approach

The approach described under Option 4 is recommended as this approach provides the most appropriate balance between the criteria described above and is the most robust of the options. This approach also more clearly aligns with the systemic approach to regulation envisaged by the recommended approach of codes and oversight detailed earlier in this paper than the other options. This alignment will ensure a greater degree of synergy and consistency in the Media Commission's activities

This approach would also allow the regulatory system to take account of issues arising from user complaints in a proportionate and effective manner and use this knowledge to improve upon the systemic and codes focused elements of the regulatory system.

However, it is also recommended that the Media Commission be given the flexibility to operate a super complaints system under option 2 if they deem it appropriate.

This approach will need to be aligned with the requirements of the revised AVMSD. This process of alignment is discussed below.

j. Mediation requirement (strand 2)

The revised Directive requires that member states ensure that "*out-of-court redress mechanisms are available for the settlement of disputes between users and video-sharing*

[28] As demonstrated by Facebook's proposed Global Oversight Board for Content Moderation

platform providers". The revised Directive further states that such mechanisms shall relate to the protective obligation it sets out and the list of potential measures it provides.[29]

A crucial difference between the mediation requirement and any approach to complaints handling under the national online safety system under Strand 1 is that the mediation requirement is pan-EU. This means that any mediation system for VSPS will have a pan-EU remit and would mediate disputes from across the Union.

The European Commission has informally indicated that an acceptable interpretation of this provision is that such mechanisms could be limited to disputes relating to the protective obligations and the measures, i.e. disputes concerning systemic matters, rather than in relation to individual complaints. However, the Commission, while acknowledging the reluctance of Member States to establish systems of individual complaints, expressed the view that limiting the mechanisms only to disputes concerning the protective obligation and measures may not be in the spirit of the provision and that a proportionate middle ground may need to be found.

There are a number of potential methods of implementing this requirement, as described below:

Approach	Description
Individual complaints	Under this approach the regulator would receive complaints about material on VSPS that may violate the protective obligation. The regulator would swiftly adjudicate on these complaints and may direct the VSPS hosting the content to remove the material in question.
Auditing complaints handling	Under this approach the regulator could periodically audit complaints received by VSPS. The regulator may group complaints and adjudicate on the relevant issues arising. The regulator may direct a VSPS to remove or restore content. The regulator may also direct a VSPS to make specified changes to how it handles user complaints.

[29] As discussed earlier in this paper.

Designated persons	Under this approach the regulator would require that VSPS employ persons who would be designated in law as impartial decision makers in that organisation. These impartial decision makers would have a direct relationship with the regulator and act as a second stage decision maker on individual complaints within the service.
Industry funded mediation committee	Under this approach, VSPS would be obliged to coordinate to establish an independent mediation committee which would act as a second stage decision maker on individual complaints received by VSPS.

k. Assessment of approaches

There are a number of advantages and disadvantages to each approach, some of which are also described below. These will be assessed in terms of the following criteria:

- Clarity – This refers to the ease of which the complaints handling approach can be understood.
- Effectiveness – This refers to the ease by which the complaints handling approach can deliver the goal of minimising the negative effects of "*harmful online content*".
- Flexibility – This refers to the ability of the complaints handling approach to adapt to changing circumstances.
- Acceptability – This refers to whether the complaints handling approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.
- Rights balancing – This refers to whether the complaints handling approach would be appropriate when taking into account the range of fundamental rights that are required to be balanced against safety measures.

i. Individual complaints

The advantages and disadvantages of this approach for VSPS under Strand 2 are the same as those detailed for designated online services under the national online safety system earlier

in this paper. However, the disadvantages are compounded by the pan-EU scope of the mediation requirement.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
4/5	0/5	1/5	3/5	3/5	11/25

ii. Designated persons

This approach was suggested by the Broadcasting Authority of Ireland in their response to the public consultation on the regulation of harmful online content and the transposition of the AVMSD.

The BAI position this approach as an alternative to an expensive, costly and reactive individual complaints mechanism operated by the regulator. This approach envisages these designated persons being employed by VSPS but with statutory duties and protections provided in legislation to ensure their independence. It is also envisaged that the regulator would have a direct relationship with these decision makers and engage in regular audit and evaluation of their activities.

There are significant advantages to this approach, especially in providing a flexible process that may allow for the swift resolution of disputes. Embedding designated persons within VSPS would also allow the regulatory system to tap into existing complaints structures and would transfer some of the burden of costs from the regulator to the VSPS.

However, the approach is likely to be viewed as lacking transparency and ceding regulatory authority to persons employed by VSPS. Therefore, this approach may be viewed as less acceptable and with more potential for an inappropriate balance of rights in favour of the VSPS. Critically for the drafting of heads, providing for the appropriate safeguards in legislation to ensure the independence of these designated persons could potentially prove legally complex, particularly given the lack of precedent for such a system.

As with the approach of individual complaints, this approach would require necessary rights related safeguards if the designated persons directions result in the removal of content, including a right of reply of the uploader of the reported content and the right of appeal of the regulator's decisions to a court by the complainant, the uploader and the VSPS.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total

3/5	4/5	4/5	2/5	3/5	16/25

iii. Industry funded mediation

This approach would see VSPS obliged by legislation to coordinate with each other to set up an independent mediation committee that would act as a second stage decision maker in respect of individual complaints received by VSPS. The regulator would be provided with the power to review the activities of the mediation committee and direct changes to its operation.

This approach is somewhat similar to the option of auditing complaints handling and has many of the same advantages. One of the primary differences is that the issues and complaints reviewed would be decided by an independent structure established by the VSPS under this approach rather than the regulator under option 2. As with the option of designated persons within VSPS, this approach is likely to be viewed as lacking transparency and ceding regulatory power to VSPS. Therefore, this approach may be viewed as less acceptable and with more potential for an inappropriate balance of rights in favour of the VSPS.

As with the approach of individual complaints, this approach would require necessary rights related safeguards if the mediation committee's directions result in the removal of content, including a right of reply of the uploader of the reported content and the right of appeal of the regulator's decisions to a court by the complainant, the uploader and the VSPS.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
4/5	4/5	4/5	2/5	3/5	17/25

iv. Auditing complaints handling

The advantages and disadvantages of this approach for VSPS under Strand 2 are the same as those detailed for designated online services under the national online safety system earlier in this paper.

Clarity	Effectiveness	Flexibility	Acceptability	Rights Balance	Total
4/5	4/5	4/5	3/5	4/5	19/25

l. Recommended approach

The approach described under Option 4 is recommended as this approach provides the most appropriate balance between the criteria described above and is the most robust of the options. This approach clearly aligns with the systemic approach to regulation envisaged by the recommended approach of codes and oversight detailed earlier in this paper than the other options. This alignment will ensure a greater degree of synergy and consistency in the Media Commission's activities

This approach would also allow the regulatory system to take account of users' complaints in a proportionate and effective manner and may be considered an acceptable middle ground by the European Commission.

The alignment of this approach with the approach under the national online safety system is discussed below.

m. Integrating strands 1 & 2 – complaints

As can be seen from the above, similar complaints handling approaches are recommended in respect of the national online safety system under Strand 1 and the regulation of VSPS under Strand 2. Therefore, these approaches can be simply integrated within the Media Commission under the Media Commission.

The main difference in how the approach of investigating complaints would differ between Strands 1 and 2 is that the complaints audits under Strand 2 would take place on a pan-EU basis.

n. Recommended approach

It is recommended that the approach of the regulator having the power to investigate complaints received by designated online services and VSPS be adopted in respect of complaints handling.

The implementation of this approach would require a number of provisions, including:

- A provision providing that the Media Commission may periodically or on an ad-hoc basis audit the complaints handling systems of designated online services and VSPS. This could be supplemented by a provision that the Media Commission may appoint authorised officers to carry out this task.

- A provision providing that the Media Commission, on foot of a audit of a service's complaints handling system, may direct designated online services and VSPS to take specified actions to improve or alter their complaints handling system, including directions to remove or restore content.

- A provision providing for enforcement by the Media Commission of compliance by designated online services and VSPS with any directions made by the Commission, including sanctions for non-compliance.

- A provision providing that the Media Commission may establish a super complaints scheme.

5. Safeguards in regulating harmful online content

a. Potential safeguards

The regulation of "*harmful online content*" will necessarily call for the balancing of a number of competing fundamental rights[30], including but not limited to:

- Freedom of expression and information,
- Freedom of thought, conscience and religion,
- The right to security,
- Freedom of assembly and association,
- Freedom to conduct a business, and,
- Right to an effective remedy and to a fair trial.

The aim of protecting persons from exposure to "*harmful online content*" clearly falls under the right to security. However, any proposed regulatory system in this area must be examined to ensure that the right to security is appropriately balanced against other relevant rights, including those listed above. While a large element of this balancing process will happen during the application of the regulatory system on a day to day basis, certain safeguards will need to be directly expressed in legislation or expressed in legislation as elements to be considered by the Media Commission in drafting regulatory codes. The appropriate balance of safeguards may also differ depending on the nature of the services designated by the Media Commission.[31]

Potential safeguards include:

- Providing for an acknowledgement of the right of access to the court by users and designated online services affected by the Media Commission's decisions or directions,
- Providing that the Media Commission must take into account the fundamental rights of all relevant parties when drafting regulatory codes,

[30] Derived from the European Charter of Fundamental Rights
[31] The kinds of online services that would be in scope of the bill are examined in a separate policy paper, which is due to be submitted to the Minister in November 2019.

- Providing for the Media Commission to oblige designated online services through its regulatory codes to provide for a system of counter-notices and right of reply for uploaders of content which is removed, and,

- Providing for the Media Commission to oblige designated online services through its regulatory codes to explain their decisions to remove or not remove content.

In addition to these, further appropriate safeguards may come to light during detailed drafting in consultation with the Offices of the Attorney General and Parliamentary Counsel.

b. Complaints handling

There are a number of specific considerations that need to be taken into account in terms of safeguards in relation to complaints handling. These are further considerations to those of right of reply, right of access to courts, etc. and relate to the nature of specific kinds of material or specific attributes that some material may have or relate to.

In general, these specific considerations are matters for the Media Commission to take into account when drawing up, overseeing and reviewing regulatory codes. However, it may be useful to specify in the legislation that the Commission must have regard to these matters.

i. Context & nuance

As identified in the policy paper on defining harmful online content, there are many situations where the potential harm of a piece of material or type of material is determined not by its content but by its context. This is especially true in relation to certain categories of content like cyberbullying material.

Further to this there are many situations where the potential harm of a piece of content is mitigated by other factors, including political, academic and cultural context. For example, quotes from religious texts that may promote hatred or violence.

ii. Sensitive matters

Since in many cases the potential harm of a piece of material is contextual, dealing with complaints about these kinds of material may entail seeking information about that context. In many cases this information may be extremely sensitive to the parties involve and may also be considered personal data for the purposes of data protection law.

In dealing with this issue, designated online services and the Media Commission will need to have sufficient procedures in place to ensure that these matters are handled with the appropriate level of care.

iii. Public figures

In certain instances potentially harmful online content may be uploaded by or directed at a public figure[32]. In relation to material directed at a public figure, there are different expectations of privacy and civility for public figures than for private persons and therefore how such matters are dealt with may differ.

On the one hand, the argument could be made that there should be more leeway for material directed at a public figure as space must be given in the public discourse to hold such persons to account in their exercise of political, economic or social power. On the other hand, the argument could be made, particularly in relation to political figures, that allowing such leeway could create a chilling effect on political discourse and dissuade political figures from openly expressing their views.

However, many of the issues raised in this regard, especially in relation to the treatment of female political figures, are ultimately matters for law enforcement agencies as a great deal of this material would constitute threats or harassment. As noted earlier in this paper, matters relating to criminal conduct by individuals is not within the scope of the proposed regulatory regime.

In relation to material uploaded by public figures, many online services have recently taken the view that public figures, almost exclusively politicians, have more leeway in what they can upload to their services.[33] In general, they have taken this approach because they do not wish to arbitrate political debate. However, a state backed regulatory system such as one envisaged by this paper may lose a significant amount of credibility if it took this approach. In this case, the view would be that public figures should be subject to the exact same standards as any other person uploading material to a service.

There is also the question of how public figures would be defined, either in legislation or operationally by the Media Commission. While elected representatives are clearly public figures, where the line is to be drawn is very unclear. For example, are any members of a political party public figures? Are high-level civil servants public figures? Are YouTubers public figures? If different rules are to apply then an appropriate line will need to be drawn.

[32] In this context, public figure refers to politicians and other high profile persons.
[33] "*Facebook will not fact-check politicians*", https://www.bbc.com/news/technology-49827375

6. Recommended approach

The following approach to regulating "*harmful online content*" is recommended:

- That the Media Commission may make codes in respect of "*harmful online content*" that designated online services, including VSPS, shall abide by in their operations. The legislation will specify a number of matters that the Commission shall have regard to in drafting codes.

- That the Media Commission shall oversee the compliance of designated online services with any relevant codes, including in relation to enforcement and sanctions.

- That the Media Commission may issue guidance materials for relevant and designated online services in respect of "*harmful online content*", "*inappropriate online content*" and other online safety issues relevant to its functions.

- That the Media Commission may periodically or on an ad-hoc basis audit user complaints handling systems operated by designated online services.

- That a number of appropriate safeguards be included in legislation.

In relation to the above, it's recommended that VSPS be categorised in the Bill as a category of designated online services and that the Media Commission be provided with the same range of regulatory powers and functions in respect of both VSPS and other categories of designated online services. This approach is likely to sufficiently transpose the systemic regulation and complaints mediation requirements of the revised Directive in respect of VSPS.

A rough draft of provisions implementing this approach can be found at Appendix 1.

Appendix 1 – Draft Provisions

Words contained within [] require more detailed analysis

Provision – online safety codes

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

(2) the online safety codes [may] provide for a wide range of matters relating to [content delivery and content moderation] by designated online services, including:

> (a) measures that [may] be taken by designated online services or categories thereof to minimise the availability of harmful online content on their services,
>
> (b) measures that [may] be taken by designated online services or categories thereof in relation to [commercial communications] available on their services,
>
> (c) user complaint and/or issues handling mechanisms operated by designated online services or categories thereof, and,
>
> (d) reporting obligations for designated online services or categories thereof.

(3) in preparing online safety codes the Media Commission shall have regard to, [amongst other relevant issues], each of the following matters:

> (a) the definition of harmful online content in s. X,
>
> (b) article 28b of Directive (EU) 2018/1808,
>
> (c) articles 12-15 of Directive (EC) 2000/31,
>
> (d) the nature and scale of designated online services or categories thereof,
>
> (e) the necessity for transparency of decision making in respect of [content delivery and content moderation] by designated online services,
>
> (f) the impact of automated decision making in relation to [content delivery and content moderation] by designated online services,
>
> (g) the role of [public figures] in the public discourse, and,

(h) the [fundamental rights] of users and operators of designated online services.

(4) in preparing online safety codes the Media Commission may consult with any persons or bodies it sees fit, [including members of… advisory committees].

(5) a copy of any online safety code prepared under this section shall be presented to the Minister as soon as may be after it is made.

(6) [the Minister shall cause copies of any online safety code received by them to be laid before the Houses of the Oireachtas as soon as may be.

(7) the Minister may request in writing that the Media Commission review the operation of any online safety code, whereupon the Media Commission shall furnish a report to the Minister as soon as may be.

Provision – compliance of designated online services with online safety codes

x. – (1) The Media Commission may request information from any designated online service regarding their compliance with any online safety code and may require any designated online service to report to them regarding their compliance with any online safety code on a periodic basis.

(2) designated online services shall comply with information requests from the Media Commission.

(3) a designated online service which contravenes subsection (2) shall be guilty of an offence and shall be liable –

(a) on summary conviction, to a class A fine,

(b) on conviction on indictment, to a fine not exceeding [€???].

(4) the Media Commission may examine the compliance of designated online services with online safety codes on the basis of the information requests specified in subsection (1) and other information that Commission considers relevant.

(5) the Media Commission may appoint authorised officers, [in accordance with the procedure specified in s. X], to examine the compliance of any designated online service with any online safety code.

(6) upon completion of an examination the Media Commission may issue a compliance notice in accordance with s. X to a designated online service concerned specifying steps that

the designated online service shall take to comply with any online safety code, including the removal or restoration of material.

Provision – online safety guidance materials

x. – (1) The Media Commission may issue guidance materials in matters relevant to harmful online content and inappropriate online content.

(2) relevant and designated online services shall have regard to these guidance materials in their operations as appropriate.

(3) in preparing guidance materials the Media Commission shall have regard to, [amongst other relevant issues], each of the following matters:

(a) the definition of harmful online content in s. X,

(b) the definition of inappropriate online content in s. Y,

(c) article 28b of Directive (EU) 2018/1808,

(d) articles 12-15 of Directive (EC) 2000/31,

(e) the nature and scale of designated online services or categories thereof,

(f) the necessity for transparency of decision making in respect of [content delivery and content moderation] by designated online services,

(g) the impact of automated decision making in relation to [content delivery and content moderation] by designated online services,

(h) the role of [public figures] in the public discourse, and,

(i) the [fundamental rights] of users and operators of designated online services.

(4) a copy of any guidance materials prepared under this section shall be presented to the Minister as soon as may be after it is made.

(5) the Minister may request in writing that the Media Commission review any guidance materials produced by the Media Commission under this section, whereupon the Media Commission shall furnish a report to the Minister as soon as may be.

Provision – auditing handling of user issues regarding content moderation by designated online services

x. – (1) The Media Commission may [audit] user complaint and/or issues handling mechanisms operated by designated online services or categories thereof on a periodic or ad-hoc basis.

(2) upon completion of an audit the Media Commission may issue a compliance notice to a designated online service concerned specifying steps that the designated online service shall take to improve or otherwise alter the operation of their user complaint and/or issues handling mechanisms.

(3) the Media Commission may appoint authorised officers, [in accordance with the procedure specified in s. X], to carry out the audits referred to in subsection (1).

Provision – super complaints

x. – (1) The Media Commission may establish a scheme wherein it can receive notice of systemic issues with relevant and designated online services from nominated bodies.

(2) the Media Commission shall outline the functioning of such a scheme, including the process for nominating bodies, the process for removing such nominations and the process to be followed and standards to be met by nominated bodies in notifying the Commission of systemic issues with relevant and designated online services.

Provision – compliance & warning notices

x. (1) If the Media Commission is of the view that, following an information request under [s. X] or a audit under s. [X, Y, Z], that a designated online service is not in compliance with an online safety code or a direction of the Commission made under [s. X, Y, Z], they may issue a compliance notice.

(2) if the steps to be specified in a compliance notice concern the removal or restoration of material the Commission may, in advance of issuing a compliance notice, invite submissions from the uploader of said material or from a person who made a complaint to the designated online service about the material.

(3) such a compliance notice may state the view of the Commission, and how they formed that view, that the designated online service was or is not in compliance and may,

> (a) invite a response from the designated online service,
>
> (b) outline the steps expected to be taken by the designated online service to remedy its non-compliance, including the removal or restoration of material.

(4) if following [an appropriate period] the designated online service does not provide to the Media Commission a satisfactory justification in relation to the alleged non-compliance or a satisfactory outline of its actions to bring itself into compliance the Media Commission may issue a warning notice to the designated online service.

(5) such a warning notice will outline the view of the Media Commission regarding the alleged non-compliance and outline the steps that the Commission will take if the alleged non-compliance is not remedied.

(6) a warning notice will outline the steps which the Media Commission deems necessary for the designated online service to take to bring itself into compliance and the timescale in which those steps must be taken.

(7) the designated online service shall comply with the steps outlined in a warning notice issued by the Media Commission

(8) the Media Commission shall forward the any warning notice issued under this section to the Minister.

(9) the Media Commission may publish details relating to any warning notice it issues under this section.

(10) following a warning issued by the Media Commission under subsection (4) regarding alleged non-compliance by a designated online service and the expiry of the timescale specified in accordance with subsection (5), the Commission may take the view that the alleged non-compliance has not been remedied.

(11) a designated online service which contravenes subsection (7) shall be guilty of an offence and shall be liable –

> (a) on summary conviction, to a class A fine,
>
> (b) on conviction on indictment, to a fine not exceeding €500,000 and/or to comply with a remedy specified by the [High Court].

(12) notwithstanding subsection (11), should the Media Commission take the view that the alleged non-compliance has not been remedied, the Commission may determine that the designated online service concerned be subject to a sanction in accordance with s. X.

Provision – sanctions for non-compliance

x. – (1) If the Commission is of the view that a designated online service be subject to a sanction for failing to comply with a warning notice from the Media Commission under s. X, the Commission shall notify the designated online service of its intention to apply a sanction.

(2) the Commission shall specify in its notice to the designated online service of its intention to apply a sanction of the nature of the sanction.

(3) the Commission may publish details relating to any notice of intention to apply a sanction it issues under this section.

(4) the Commission shall forward any notice of intention to apply a sanction it issues under this section to the Minister.

(5) the Commission may seek to apply any of the following sanctions:

> (a) an administrative financial sanction in accordance with [the procedure set out in s. X],
>
> (b) to seek leave of (the High Court] to compel a designated online service subject to a warning notice under this section to take such steps that the Commission deems warranted to bring said service into a state of compliance, or,
>
> (c) to seek leave of [the High Court] to compel internet service providers to block access to a designated online service in the State.

(6) the Commission shall publish the outcome of any sanction sought in accordance with subsection (5) and shall forward this information to the Minister.

Provision – voluntary arrangements

x. – (1) The Media Commission may enter into voluntary arrangements with any relevant online service not established in the State.

(2) these voluntary arrangements shall specify the extent to which a relevant online service agrees to comply with any online safety code and/or online safety guidance materials issued by the Media Commission in accordance with s. X & Y and any reporting requirements.

(3) the Media Commission shall notify the Minister of any arrangements entered into under this section.

(4) the Media Commission shall publish the details of any relevant online service that enters into an arrangement under this section and the nature of the arrangement.

(5) the Media Commission may request information from a relevant online service which has entered into an arrangement under this section regarding their compliance with the specifics of the arrangement and may request such services to report to them regarding their compliance on a periodic basis.

(6) if the Media Commission is of the view that, following an information request under subsection (5), that a relevant online service party to an arrangement under this section is not in compliance, or that the a relevant online service has not complied with an information request made under subsection (5), they may publish this fact.

(7) if the Media Commission is of the view that, following an information request under subsection (5), that a relevant online service party to an arrangement under this section is not in compliance, they may revoke the arrangement.

(8) arrangements made under this section shall be reviewed on a periodic basis.

Online Safety & Media Regulation Bill

Policy Paper – Services covered by Strands 1 & 2 (Online Safety)

1. Background

Deciding which online services are in scope of regulatory regime for online safety is a key part of developing an Online Safety and Media Regulation Bill. It is integral to the creation of a national online safety system under Strand 1, to the regulation of Video Sharing Platform Services (VSPS) under Strand 2 and to their alignment in the Bill.

In relation to this, the revised Audiovisual Media Services Directive (AVMSD)[1] obliges Member States to keep an up to date list of VSPS established in their territory in accordance with the jurisdiction rules set down by Article 28a of the revised Directive. The European Commission is also due to issue guidance on the interpretation of the "*essential functionality*" criterion within the definition of VSPS by end-2019. However, due to handover period to the new European Commission this may not now issue until early 2020.

As recommended in the policy paper on the regulatory approach to harmful online content it is intended that VSPS will be specified in legislation as a category of designated online services and that the Media Commission will be given the power to designate further online services or categories thereof from a wider pool of relevant online services. A key consideration in this regard is how this wider pool of relevant online services will be defined.

Designated online services will be obliged to comply with any online safety codes issued by the Media Commission that the Commission deems it appropriate for them to comply with in accordance with their nature, scale and a number of other considerations.

This paper will examine potential approaches to defining the wider pool of relevant online services and to devising the designation procedure and whether certain categories of online services should be excluded from the possibility of being designated in the first instance in legislation, for example interpersonal communications services. It is necessary to consider whether certain categories of relevant online services should be excluded from the possibility of being designated because certain categories may raise particular practical or rights balancing issues.

This paper builds upon the recommendations of a number of previous policy papers, including:

- The policy paper on defining harmful online content, which was approved by the Minister on 18 October 2019,

[1] Article 28a(6), revised AVMSD, Directive 2018/1808/EU

- The two policy papers on the structures and functions of the Media Commission, which were approved by the Minister on 7 October 2019 and 6 December 2019,

- The policy paper on the core powers of the Media Commission, which was approved by the Minister on 7 October 2019, and,

- The policy paper on the approach to regulating harmful online content, which was submitted to the Minister on 12 November 2019.

As expressed in the policy paper on the approach to regulating harmful online content, this is a new area of law and as such the recommendations put forward by this paper for decision are necessarily novel and untested and will attract significant scrutiny from the Offices of the Attorney General and the Parliamentary Counsel should they be reflected in a general scheme of this Bill.

2. Decisions sought

Decisions are sought from the Minister regarding:

- Whether the approach to determining the range of services within scope of the regulatory regime for online safety is appropriate.

- Whether the definition of "*relevant online services*" is appropriate.

- Whether the categories of services proposed for exclusion from the possibility of being designated is appropriate.

- Whether it is appropriate that the Media Commission's code making powers in relation to interpersonal communications services and private online (cloud) storage services be explicitly limited to matters relating to content which it is a criminal offence to disseminate.

- Whether it is appropriate to provide that in designating services the Commission will take into account whether a relevant online service has had regard to guidelines issued by the Commission in its operations.

Further detail is in the **recommended approach sections** of this paper. Rough drafts of provisions implementing the recommended approaches are available at **appendix 1**.

A non-exhaustive list of potential legal questions is available in the **next section**.

3. Potential legal questions

The following is a non-exhaustive list of potential legal questions relating to the issues raised and recommendations made in this paper:

1. Is it sound to provide the Media Commission with the power to designate individual and categories of online services from a wider pool of relevant online services to abide by any online safety codes the Commission deems necessary?

2. Is it sound to specify in the Bill that video sharing platform services are a category of designated online services, thereby aligning Strands 1 and 2?

3. Is the definition of "*relevant online service*" sufficiently robust to provide for the wider pool of online services from which the Media Commission may designate services or categories of services?

4. Would specifying in legislation that video sharing platform services are a category of designated online services and providing that the Media Commission shall have regard to Article 28a of the revised AVMSD in designating services sufficiently transpose Article 28a?

5. Is it sound to explicitly limit the Media Commission's code making powers in relation to interpersonal communications services and private online (cloud) storage services to matters relating to content which it is a criminal offence to disseminate?

6. Is the process by which the Media Commission may designate relevant online services or categories thereof sound?

7. Is it sound to provide that in designating services the Commission will take into account whether a relevant online service has had regard to guidelines issued by the Commission?

4. Approach to defining the range of services in scope

a. Approach to the range of services in scope (Strand 1):

As expressed in the policy paper on regulating harmful online content, which was submitted to the Minister on 12 November, it is proposed that the Media Commission will have the power to designate individual and categories of online services from a wider pool of relevant online services to abide by any online safety codes the Commission deems necessary. In designating online services, the Commission will be required to have regard to a number of principles and policies based factors which are set out in the Heads of Bill, including:

- The definition of a video sharing platform in sX;
- Guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion within the definition of a video sharing platform service;
- The jurisdiction rules for video sharing platform services under article 28a of the Directive;
- The provisions of the eCommerce Directive;
- The nature and scale of the service or category of services,
- the likely prevalence and impact of harmful online content on the relevant online services or categories thereof;
- the nature of the user base of the service or category of services, including in particular, the extent to which minors are targeted or comprise the user base[2];
- The fundamental rights of users, other impacted individuals and operators of designated online services.

For constitutional reasons, the Commission will only have the ability to designate those services located or otherwise legally established in Ireland.[3]

This approach is proposed given the difficulty in formulating a broad descriptive conceptual principle-based definition of the range of services that it is desirable to be subject to the regulatory regime for online safety. This difficulty arises as any such definition would either be too broad to allow for the Commission to appropriately tailor its online safety codes or so

[2] While referring to vulnerable users in terms of the nature of a service's user base rather than just minors was considered it was determined that this would be extremely difficult for a service to determine in practice if a user was vulnerable.
[3] Article 29(8), Irish Constitution

specific that it may leave out a broad range of current and future services that it would be desirable to provide for the Commission to regulate.

Aside from this, there are a number of specific benefits to this approach, including that:

- It allows for the Media Commission to take a risk-based approach to the range of relevant online services that it regulates according to their nature and scale and the likely prevalence of harmful online content on their services,

- It allows for the Media Commission to tier the obligations that designated online services must abide by through providing it with the power to specify which online safety codes apply to which services, and,

- It allows for the Media Commission to bring future relevant online services within the scope of the regulatory regime if it deems it appropriate.

In order to provide for this approach in the Bill it will be necessary to provide an appropriate definition of "*relevant online service*". **This issue is discussed in section 5 of this paper.**

b. Approach to the range of services in scope (Strand 2):

As expressed in the policy paper on regulating harmful online content, it is proposed that Video Sharing Platform Services established in the State be specified in legislation as a category of designated online services that the Media Commission would regulate through its online safety codes on a pan-EU basis.

During the negotiations on the revised AVMSD it was not possible to reach a satisfactory definition of a VSPS, particularly in regard to the unclear criterion of "*essential functionality*" within the definition. As such, the European Commission was tasked with drafting guidelines to clarify the nature of the "*essential functionality*" criterion and those guidelines are now expected to be published in Q1 2020. It is understood that they will be relatively broad in nature.

i. Definition of VSPS

A VSPS is defined by the revised AVMSD as follows:

" 'video-sharing platform service' means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof, or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of an electronic communications networks

within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing;"[4]

Therefore, a service is a VSPS if it has all of the following elements:

- It provides programmes and/or user-generated videos to the general public, where,
    - This is the principal purpose of the service,
    - This is the principal purpose of a dissociable section of the service, or,
    - This is an essential functionality of the service.
- The programmes and/or user-generated videos provided by the service are not under its editorial control.
- The programmes and/or user-generated videos are provided by the service in order to inform, entertain or educate.
- The organisation of the programmes and/or user-generated videos is determined by the Video Sharing Platform Provider by any means.
- The service is provided by means of an electronic communications network.

While the definition is convoluted the majority of its elements are clear in their meaning. However, the meanings of a "*dissociable section*" or an "*essential functionality*" of a service are not clear on a first reading. The inclusion of these criteria implies that a very wide range of business models and services could be considered to be partly VSPS if a dissociable section or essential functionality of the service is a VSPS.

ii. Dissociable section

Some clues as to what a dissociable section of a service is can be found in the recitals of the revised Directive as follows:

> *"The principal purpose requirement should also be considered to be met if the service has audiovisual content and form which are dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity. A service should be considered to be merely an indissociable complement to the main activity as a result of the links*

[4] Article 1(aa), revised AVMSD, Directive 2018/1808/EU

between the audiovisual offer and the main activity such as providing news in written form."[5]

"Where a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive 2010/13/EU, only that section should be covered by that Directive, and only as regards programmes and user-generated videos. Video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs should not be covered by Directive 2010/13/EU. The definition of a video-sharing platform service should not cover non-economic activities, such as the provision of audiovisual content on private websites and non-commercial communities of interest."[6]

The recitals of the revised Directive provide some clarity in their exclusion of GIFS and non-commercial activities from the scope of the definition of a VSPS. However, they provide little concrete guidance as to what a dissociable section of a service is in respect of VSPS beyond that something is dissociable if it isn't "*indissociable*" as a result of "*links*" between it and the main activity of the service.

In the absence of further detail, the nature of "*links*" could be interpreted in a conservative or broad manner. It is in effect an interpretation of the presentation of the service rather that the nature of the service. This means that determining whether something is or isn't a dissociable section of a service and therefore a VSPS for the purposes of the revised Directive is something that will need to be done on a case by case basis.

This is a matter the Media Commission will need to have regard to when deciding if a relevant online service it intends to designate should be categorized as a VSPS or not.

iii. Essential functionality

Some discussion as to what an essential functionality of a service is can be found in the recitals of the revised Directive as follows:

"While the aim of Directive 2010/13/EU is not to regulate social media services as such, a social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service. The provision of programmes and user-generated videos could be considered to constitute an essential functionality of the social media service if the audiovisual content is not merely ancillary to, or does not constitute a minor part of, the activities of that social media service. In order to ensure clarity, effectiveness and consistency of implementation, the Commission should, where necessary, issue guidelines, after consulting the Contact Committee, on the practical application of

[5] Recital 3, revised AVMSD, Directive 2018/1808/EU
[6] Recital 6, revised AVMSD, Directive 2018/1808/EU

> *the essential functionality criterion of the definition of a 'video-sharing platform service'. Those guidelines should be drafted with due regard for the general public interest objectives to be achieved by the measures to be taken by video-sharing platform providers and the right to freedom of expression."*[7]

While this recital discusses essential functionality in terms of "*social media services*" the criterion in the definition provided in the articles of the revised Directive simply refers to services. No substantive guidance is provided by the recitals in defining or applying this criterion. However, the recital calls on the European Commission to issue guidelines on the practical application of the criterion.

Given the lack of information about what is an essential functionality this is not something that can be determined in the absence of guidance from the European Commission. The European Commission had committed to providing these guidelines by end-2019. However, due to handover period to the new European Commission these may not now issue until early 2020.

These guidelines will for part of determining whether or not a relevant online service is a VSPS will determine whether the online safety codes the Media Commission deems appropriate to apply to that service are applicable only in the State or throughout the EU. In essence, the categorization of relevant online service as a VSPS or not determines the jurisdictional reach of the Media Commission's regulatory oversight over that service.

These guidelines will need to be specified in the Bill as a matter to which the Media Commission shall have regard when designating and categorising relevant online services.

iv. VSPS jurisdiction

The jurisdiction regime applicable to "*information society services*", of which VSPS are a subset, established within the EU is set down by Article 3 of the eCommerce Directive. This Directive provides that Member States may not restrict the provision of these services from another Member State. This is qualified in the article by a derogation mechanism that a Member State may use on specific grounds and that requires notification and clearance by the Commission.

The revised Directive provides that the same regime is applicable to VSPS established within the EU. However, the revised Directive extends its jurisdictional scope to VSPS established outside the EU but which also provide their service within the EU. To do this the revised Directive provides that, for the purposes of the revised Directive, a VSPS is established in a Member State if it:

[7] Recital 5, revised AVMSD, Directive 2018/1808/EU

- Has a parent undertaking or a subsidiary undertaking that is established on the territory of a Member State, or,

- Is part of a group and another undertaking of that group is established on the territory of a Member State.

This is a cascading list of potential determiners of in which Member State the VSPS in question is established, i.e. in the absence of a parent undertaking, the Member State of establishment is where the subsidiary is established and so on. Where there are several subsidiaries or several other group undertakings in several other Member States, the revised Directive seems to provide that the VSPS in question is established in the Member State where the oldest of the subsidiaries or group undertakings is established.

The revised Directive does not extend its jurisdictional scope to VSPS which are established outside the EU, that provide their service in the EU, but who have no relationship with any other business which is established within the EU.

The revised Directive also provides that Member States keep up to date lists of those VSPS which are established under the regime described above in their territory and provide these lists to the Commission. The Commission will contact the relevant Member States if there are inconsistencies between lists provided. The revised Directive also makes provision for the Commission to look at disagreements between Member States about where a VSPS is established.

These provisions are complicated and will need to be applied on a case by case basis. In order to give effect to these provisions they will need to be specified in the Bill as a matter to which the Media Commission shall have regard when designating and categorising relevant online services as VSPS.

c. Integrating Strands 1 & 2

As previously mentioned, it is proposed that Video Sharing Platform Services established in the State be specified in legislation as a category of designated online services that the Media Commission would regulate through its online safety codes.

This approach was put forward in the policy paper on regulating harmful online content and is proposed to ensure the greatest possible alignment between national law and EU law, which will serve to ensure the legal certainty of the regulatory regime for online safety and allow it to take into account future changes in EU law.

d. Recommended approach

It is recommended that the Media Commission will have the power to designate individual and categories of online services from a wider pool of relevant online services to abide by any

online safety codes the Commission deems necessary. It is also recommended that VSPS be specified in legislation as a category of designated online services. This would not prevent the Media Commission from individually designating a relevant online service that is a VSPS in order to require it to abide by further online safety codes than those that apply to VSPS as a category in respect of its activities as a VSPS or more broadly.

Furthermore, as noted above several kinds of services will need to be excluded from the possibility of being designated by the Commission.

In designating relevant online services the Media Commission shall be required to have regard to a number of matters, including:

- The definition of a VSPS, which will be set out in the Bill,
- guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion within the definition of a video sharing platform service,
- article 28a of the revised AVMSD, which sets out the jurisdiction rules for VSPS,
- the likely prevalence and impact of harmful online content on the relevant online services or categories thereof in question,
- the nature and scale of relevant online services or categories thereof,
- the nature of the user base of the service or category of services, including in particular, the extent to which minors are targeted or comprise the user base, and,
- the [fundamental rights] of users and operators of relevant online services.

A high-level version of how this could be expressed in the Bill is as follows:

> *s. X. – (1) The Media Commission shall, from time to time, designate relevant online services or categories thereof.*
>
> *(2) in designating relevant online services or categories thereof the Media Commission shall have regard to:*
>
> > *(a) the definition of a video sharing platform service in s. X,*
> >
> > *(b) guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion within the definition of a video sharing platform service,*

(c) the jurisdiction rules for VSPS under article 28a of Directive (EU) 2018/1808,

(d) the nature and scale of relevant online services or categories thereof,

(f) the likely prevalence and impact of harmful online content on the relevant online services or categories thereof in question, and,

(g) the nature of the user base of the service or category or service, including in particular, the extent to which minors are targeted or comprise the user base, and,

(h) the [fundamental rights] of users and operators of relevant online services.

(3) video sharing platform services shall be considered a category of designated online services by the Media Commission.

(4) the Media Commission shall not designate a relevant online service that is:

(a) an audiovisual media service,

(b) a sound media service, and,

(c) etc.

In taking this approach it is necessary to define "*relevant online service*" and to consider whether the Media Commission should be prohibited from designating certain categories of "*relevant online services*". These issues are examined in the **sections 5 and 6 respectively**.

More detailed drafts of these provisions can be found at appendix 1

5. Approach to the defining relevant online service

In order to define relevant online service for the purposes of the Bill it is important to first outline what the intended function of the definition is. As expressed in the previous section, the purpose of this definition is to:

- Provide for the pool of online services from which the Media Commission can designate online services and oblige those designated online services to comply with online safety codes issues by the Media Commission, and,

- Provide legal certainty as to the range of online services that the Media Commission may designate.

Therefore, in order to meet this purpose any definition developed must have, among other matters, the following characteristics:

- It should be wide ranging in order to bring into scope for potential designation a range of services that it may desirable to be subject to the regulatory regime for online safety at present and in the future,

- It should provide for or be linked to explicit exemptions as appropriate, for example for Television Broadcasting Services, in order not to work at cross purposes to existing regulatory regimes and to indicate what kinds of online services are not within scope for potential designation,

- It should be, as far as possible, technologically neutral and agnostic as to the business models of online services beyond certain core features, for example content delivery and/or content moderation, and,

- It should be legally certain, both in terms of the range of services that may be subject to designation, its clarity, that it encompasses the definition of a Video Sharing Platform Service from the revised AVMSD and that it is compliant with EU law more broadly.

- It should allow for a risk based and proportionate approach to designation.

There are a number of existing and proposed approaches to defining various ranges of online services that may be adapted as part of a definition of relevant online service. These approaches are sourced internationally and where definitions exist these are also provided in the table below. It's important to note that it is unlikely that any of these approaches can be adopted wholesale in defining "*relevant online services*" and that it will be necessary to adapt preferred approaches or aspects of multiple approaches.

Approach	Definition(s) (if available)	Source
Information society services	*"Any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service."*[8]	eCommerce Directive 2000[9]
• **Hosting, sharing and discovery of user-generated content** • **Facilitation of public and private online interaction between service users**	N/A[10]	UK Online Harms White Paper 2019
Social networks	*"This Act shall apply to telemedia service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public (**social networks**). Platforms offering journalistic or editorial content, the responsibility for which lies with the service provider itself, shall not constitute social networks within the meaning of this Act. The same shall apply to platforms which are designed to enable individual communication or the dissemination of specific content.*	Network Enforcement Act 2017 (Germany)

[8] This definition explicitly does not include radio and television broadcasting services and a further indicative list of services not covered by the definition is contained in Annex V of Directive 98/34/EC
[9] Referring to Directive 98/34/EC as amended by Directive 98/48/EC regarding the provision of information in the field of technical standards and regulations
[10] No definition is provided by the UK Online Harms White Paper

	The provider of a social network shall be exempt from the obligations stipulated in sections 2 and 3 if the social network has fewer than two million registered users in the Federal Republic of Germany."[11]	
• **Relevant electronic service** • **Social media service** • **Designated internet service** • **Hosting service**	***"relevant electronic service** means any of the following electronic services: (a) a service that enables end-users to communicate, by means of email, with other end-users; (b) an instant messaging service that enables end-users to communicate with other end-users; (c) an SMS service that enables end-users to communicate with other end-users; (d) an MMS service that enables end-users to communicate with other end-users; (e) a chat service that enables end-users to communicate with other end-users; (f) a service that enables end-users to play online games with other end-users; (g) an electronic service specified in the legislative rules."* "*For the purposes of this Act, **social media service** means: (a) an electronic service that satisfies the following conditions: (i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end-users; (ii) the service allows end-users to link to, or interact with, some or all of the other end-users; (iii) the service allows end-users to post material on the service; (iv) such other conditions (if any) as are set out in the legislative rules; or (b) an electronic service specified in the legislative rules; but does not include an exempt service (as defined by subsection (4) or (5))."*	Enhancing Online Safety Act 2015 (Australia)

[11] This is translated

	"*For the purposes of this Act,* ***designated internet service*** *means: (a) a service that allows end-users to access material using an internet carriage service; or (b) a service that delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of an internet carriage service; but does not include: (c) a social media service; or (d) a relevant electronic service; or (e) an on-demand program service; or (f) a service specified under subsection (2).*" "*For the purposes of this Act, if: (a) a person (the* ***first person****) hosts stored material that has been posted on: (i) a social media service; or (ii) a relevant electronic service; or (iii) a designated internet service; and (b) the first person or another person provides: (i) a social media service; or (ii) a relevant electronic service; or (iii) a designated internet service; on which the hosted material is provided; the hosting of the stored material by the first person is taken to be the provision by the first person of a* ***hosting service****.*"	

Online platform service	"For the purposes of this Bill, an online platform service is a service provided using an electronic communications network and as a principal purpose of the service, or of a dissociable section thereof or as an essential functionality of that service (a) Organises and displays publicly or to a selected audience content provided by users of the service, whether or not created by the user; and (b) is not a service for which the provider has editorial responsibility for or editorial control over the content included in the service or is not a one-to-one telephony service; (c) for the purposes of this section: content includes text, music sounds and images whether still or moving, irrespective of length; an online platform service operator is a person or company that provides an online platform service to users in the UK	Carnegie Trust UK (unpublished Bill)

The definition of "*information society service*" is a European Union definition that covers the vast majority of services that operate online. It is a foundational part of EU law and many EU instruments refer to, adapt or otherwise incorporate it. Video Sharing Platform Services, as defined by the revised AVMSD, are explicitly a subset of information society services.[12]

The UK Online Harms White Paper does not propose a definition of the online services that may be in scope of its proposed regulatory regime. Instead, the paper indicates two broad kinds of services, those that facilitate access to user-generated content and those that

[12] Article 28a(1), revised AVMSD, Directive 2018/1808/EU

facilitate online interaction. The later broad category would appear to include private interpersonal communication services, for example WhatsApp , Skype and VOIP phone services.

The German Network Enforcement Act provides a relatively loose definition of "*Social Networks*". This definition would appear to provide that online services that facilitate the hosting and/or sharing of user-generated content that have over 2 million registered users in Germany are within its scope. Both editorial press publications and private interpersonal communications services appear to be excluded from its scope.

The Australian Enhancing eSafety Act has an unusually broad range of overlapping definitions. For example, many of the means listed under the definition of "*relevant electronic service*" would appear to greatly overlap with the "*conditions*" in the definition of "*social media service*". The definition of "*designated internet service*" appears to refer to internet service providers, for example Virgin Media broadband or eir broadband. The services covered by these definitions are then encompassed by a definition of "*hosting service*" which appears to refer to almost any online service that hosts user-generated content. The Act sometimes refers to all three underlying services or one or two of them and sometimes refers to "*hosting services*". For the purposes of the assessment below, the overarching "*hosting service*" definition will be examined.

What these approaches have in common, with the exception of the "*information society service*" approach, is their focus on user-generated content. While none of these approaches truly defines user-generated content, the revised AVMSD contains a definition of "*user-generated video*":

> *'user-generated video' means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video sharing platform service by that user or any other user;*

It is possible to adapt this definition to refer to user-generated content more broadly and tie it to a definition of "*relevant online service*", which will be useful in the assessment of the approaches below, as follows:

> *'user-generated content' means content constituting an individual item, irrespective of its length, that is created by a user and uploaded to relevant online service by that user or any other user and does not include content uploaded to relevant online service by the provider of that service;*

a. Assessment of approaches

There are a number of advantages and disadvantages to each approach, some of which are also described below. These will be assessed in terms of the following criteria:

- Clarity – This refers to the ease of which the approach can be understood.

- Legal certainty – This refers to the legal certainty which the approach provides, both in terms of the range of the online services in scope for potential designation and its compliance with EU law.

- Adaptability – This refers to whether the approach is sufficiently futureproof to allow for future online services to fall within its scope.

- Acceptability – This refers to whether the approach covers a sufficient range of services to be acceptable to stakeholders.

- Effectiveness – This refers to how well the approach facilitates the application of the proposed regulatory regime.

i. Information society services (EU)

As noted above, the definition of "*information society service*" is a foundational EU definition that covers the vast majority of services that operate online.

This definition has many of the characteristics that are desired in defining "*relevant online service*". It is wide-ranging, providing the pool of online services from which the Media Commission could designate online services or categories thereof and provides for a number of explicit exemptions, including for television broadcasting services.

Further to this, the definition is also technologically neutral and agnostic as to the business models of online services. Crucially its status as a foundational EU definition provides it with strong legal certainty and ensures that a definition of "*relevant online service*" would be compatible with EU law.

However, while it does encompass them the definition doesn't explicitly refer to certain core features of the business models that the online safety aspect of the Bill seeks to regulate; these being, roughly speaking, content delivery and content moderation. It is possible to address this issue by linking the definition to the definition of user-generated content adapted from the revised AVMSD, as follows:

> *"relevant online service" means an information society service established in the State that [facilitates the dissemination of or access to] user-generated content via an electronic communications network*[13]*;*

[13] The reference to electronic communications network is to more explicitly exclude offline information society services from the scope of the definition.

Linking these two definitions is unlikely to create any legal uncertainty as the definition from the revised AVMSD from which "*user-generated content*" is adapted is linked to the definition of a VSPS, which is explicitly a subset of "*information society services*".

However, the wording linking the two definitions will need to be examined in detail during formal drafting to ensure that it is appropriate and doesn't inadvertently exclude ranges of services from the scope of the definition. It will also need to be examined whether the interaction between the definition of "*user-generated content*" and the wording linking it to "*information society services*" implicitly excludes certain ranges of services, for example online search engines that do not host content uploaded by users yet facilitate access to it.

If it proves especially difficult to resolve these matters then it may be worthwhile decoupling the two definitions. In this case it may be appropriate to provide that the Media Commission shall have regard to whether a "*relevant online service*", defined simply as an "*information society service*", hosts or facilitates access to "*user-generated content*".

Clarity	Legal Certainty	Adaptability	Acceptability	Effectiveness	Total
4/5	5/5	4/5	4/5	4/5	21/25

ii. White Paper approach (UK)

As noted above, the UK Online Harms White Paper does not propose a definition of the online services that may be in scope of its proposed regulatory regime. Instead, the paper indicates two broad kinds of services that may be within its scope, these being:

- Services that allow the hosting, sharing and discovery of user-generated content online, and,

- Services that allow users to interact with each other online in both public and private ways.

In relation to the second point, it should be noted that the range of services under this point would also appear to be covered by the first point. For example, both a comment on an article on a news website and a WhatsApp message would appear to fall under the sharing provision of the first point. Therefore, the range of services that may be in scope of the regulatory regime proposed by the White Paper could be simplified to the first point.

In relation to private interpersonal communications services, these are examined as a potential category of services for exclusion in **section 6**.

As no definition is provided by the approach outlined in the White Paper it's not possible to determine if it possesses the characteristics that are desired in defining "*relevant online service*". While it would be possible to use the definition of user-generated content adapted from the revised AVMSD to help generate a definition it would still need to be tied to a range of services and, in any case, the White Paper doesn't provide enough detail about what it would consider these range of services to be to take this approach. Therefore, it's not possible to meaningfully asses this approach against the criteria laid out above.

Clarity	Legal Certainty	Adaptability	Acceptability	Effectiveness	Total
N/A	N/A	N/A	N/A	N/A	N/A

iii. Social networks (Germany)

As noted above, this definition is somewhat loose and refers to concepts such "*internet platforms*" and "*user-generated content*" without indicating their meaning. However, this definition is clear in its exclusions and both editorial press publications and private interpersonal communications services appear to be excluded from its scope.

In relation to editorial press publications, these are examined as a potential category of services for exclusion in **section 6**.

This definition also has a unique feature among the definitions examined here, a threshold. The definition excludes services from its scope which have fewer than 2 million registered users in Germany. It's not exactly clear what constitutes registration in this context, the status of services that can be accessed without registration, or why this threshold was chosen. These kinds of matters would need to be clarified if a threshold was included in the recommended approach. It is also the case that the size of the userbase is not the only factor to be considered in assessing risk, and the most harmful content may sometimes be more prevalent on smaller services. A blanket exclusion of services below a particular threshold is therefore not recommended.

The notion of a "*telemedia service provider*" appears to be a partial transposition of the definition of an "*information society service*" from the eCommerce Directive and preceding instruments, explicitly excluding broadcasting services and telecommunications services.[14] It therefore enjoys strong legal certainty.

[14] S. 1(1), Telemedia Act of 26 February 2007, Germany

While it would be possible to adopt a version of this definition that version would, in effect, be what is recommended by Option 1 (information society services), only arrived at through a rather circuitous route which may simply complicate its drafting. It would also involve creating a new notion in Irish law (telemedia service provider) rather than simply using the existing notion (information society service) and providing for explicit exclusions where appropriate.

Clarity	Legal Certainty	Adaptability	Acceptability	Effectiveness	Total
3/5	4/5	5/5	3/5	4/5	18/25

iv. Hosting services (Australia)

As noted above, the approach used by the Australian Enhancing Online Safety Act in arriving at a definition of hosting services is rather complex. The definition is comprised of references to three other definitions in the Act and qualified by the characteristic of "*stored material*" being "*posted*", both of which are also defined in the Act. Interestingly, these qualifications would appear to exclude certain categories for online services, for example online search engines as they do not host material uploaded by third parties.

In relation to online search engines, these are examined as a potential category of services for exclusion in **section 6**.

It would be difficult to establish a similar definition in Irish law as it would require assembling or adapting multiple other definitions to provide the appropriate equivalent references. Further to this, unlike the other approaches examined here this approach was developed outside the EU legal framework, which means that there is unlikely to be one to one analogues between definitional concepts. For example, EU law contains the notion of a hosting service provider[15] derived from Article 14 of the eCommerce Directive which would appear to be more expansive than the definition of "*hosting service*" in the Australian Enhancing Online Safety Act. This is likely to undermine the clarity and legal certainty of any definition based on this approach.

In this regard, it's worth noting that the range of online services covered by this definition through its reference to the three underlying definitions is encompassed by the approach described under Option 1 and mostly by the approach described under Option 3.

[15] Implicit in the eCommerce Directive and referenced in other EU instruments – the proposed Regulation on Terrorist Content proposes to make this definition explicit.

Unlike the approach of Social Networks in the German law this approach is not wholly clear in its exclusions. Reference must be had to each underlying definition and the qualifying characteristics to ascertain what online services might possibly be excluded.

Taking these issues into account, while it would be possible to adopt a version of this approach significant work would need to be undertaken to establish clarity, legal certainty and compliance with EU law among other issues. This is unlikely to be conducive to the drafting of the Bill.

Clarity	Legal Certainty	Adaptability	Acceptability	Effectiveness	Total
2/5	2/5	3/5	3/5	3/5	13/25

(v) Carnegie Trust UK

The **Carnegie Trust UK,** which made a submission to our public consultation, is developing a broad definition of online service in relation to their proposals which informed the UK Online Harms White Paper. As we understand it, their proposal involves broadening the definition of Video Sharing Platform Service from the revised AVMSD. This is similar in concept to our recommended approach, particularly as VSPS are a subset of "*information society services*" and has some merit. However, our recommended approach avoids the lack of certainty brought about by certain concepts contained with the definition of VSPS such as "*dissociable section*" or "*essential functionality*".[16]

Recommended approach

It is recommended that the wider pool of "*relevant online services*" from which the Media Commission may designate services or categories thereof be defined on the basis of the definition of "*information society service*" from the eCommerce Directive qualified by a definition of "*user-generated conten*t" adapted from the revised AVMSD, as follows:

> *"relevant online service means an information society service established in the State that [facilitates the dissemination of or access to] user-generated content via an electronic communications network"*

[16] The difficulties with these criteria is explored previously in section 4 of this paper.

Related to this, the following definition of use-generated content, derived from the definition of user-generated video in the revised Directive, is recommended:

> *"'user-generated content' means content constituting an individual item, irrespective of its length, that is created by a user and uploaded to relevant online service by that user or any other user and does not include content uploaded to relevant online service by the provider of that service;"*

This definition would have the following characteristics, including:

- That it is wide ranging and brings into scope for potential designation a range of services that it may desirable to be subject to the regulatory regime for online safety at present and in the future,

- That it contains explicit exemptions for certain categories of service, for example television and radio broadcasting services,

- That it is technologically neutral and focuses the core aspect of the business model of the online services that it is sought be within the scope of the regulatory regime, i.e. facilitating the dissemination of or access to user-generated content, and,

- That it is legally certain, explicitly encompassing the definition of a Video Sharing Platform Service from the revised AVMSD, and that it is compliant with EU law more broadly.

However, as noted above the wording linking the "*information society services*" with "*user-generated content*" and the interaction between the latter and the linking wording will need to be examined in detail during formal drafting to ensure that it is appropriate and doesn't inadvertently exclude ranges of services from the scope of the definition.

Further to this, the next section examines a number of categories of services that it may be appropriate to explicitly exclude in the Bill in addition to those which are excluded within the definition, e.g. television and radio broadcasting.

As noted above, this approach would bring a wide range of services into scope for potential designation. However, crucially, this does not imply that such services should or will be designated. The designation of services will be a matter for the Media Commission, which will be required by law to have regard to the legal limits of liability, the nature and scale of services and the fundamental rights of users and operators of services. This is a substantive check against any potential inappropriate designation by the Commission and provides a strong basis for the Commission to take a proportionate risk based approach to designation.

Kinds of services that this approach brings into scope for potential designation includes, but is not limited to:

- Social media services,
- Public boards and forums,
- Online gaming services,
- Ecommerce services, where they facilitate the dissemination of or access to user-generated content,
- Private communication services,
- Online dating applications[17]/subscription based services,
- Private online (cloud) storage services,
- Press publications, where they facilitate the dissemination of or access to user-generated content,
- Online search engines[18], and,
- Internet service providers
- Subscription based services/Services behind a paywall

A number of these services categories of services are examined in the next section to see if they should be excluded from the possibility of being designated by the Media Commission. The categories that are examined are ones that raise particular practical and rights-balancing issues.

[17] Which are primarily private communication services and typically operate mixed business models of based on advertising, pay to play and subscription.
[18] Online search engines, such as Google or Bing, are typically accessed through browsers such as Microsoft Edge, Firefox or Google Chrome. Browsers are not online search engines in and of themselves.

6. Potential excluded categories of services

As noted previously, it is necessary to consider whether certain categories of relevant online services should be excluded from the possibility of being designated by the Media Commission. The reason for this is that certain categories of online services raise particular practical issues from a regulatory perspective and/or imply an inherent difference in how rights balancing, especially in relation to privacy, should be considered.

a. Other regulatory systems

However, prior to considering these matters it must first be noted that there are several kinds of services that are to be subject to other regulatory regimes under the Bill, these being:

- Audiovisual media services, encompassing television broadcasting services and on-demand audiovisual media services, and,

- Sound media services, encompassing sound broadcasting services (radio) and on-demand sound media services (podcasts)[19].

While some of these services may be excluded by the definition of relevant online service recommended in Section 5, particularly by the reference to user-generated content, for the sake of clarity and surety it may be appropriate to explicitly provide that the Media Commission may not designate a relevant online service that is an audiovisual media service or sound media service.

b. Potential categories for exclusion from the possibility of being designated

There are a number of potential categories that may be excluded from the possibility of being designated by the Media Commission. These categories encompass a range of services that by their technical nature or actual use raise particular practical and/or rights balancing concerns.

It should be noted that the fact that a category is not excluded from the possibility of being designated does not mean that it will in fact be designated. In designating relevant online services or categories thereof the Media Commission will be obliged to consider, among many other important matters, the nature and scale of the service or services in question. This means that the Media Commission will be obliged to take a proportionate and risk-based approach in designating services, which may, on a de facto basis, exclude certain categories of services for the time being.

[19] Podcasts will not be subject to any explicit regulatory regime though the Bill will insert a definition

Further to this, the Media Commission will also be obliged to consider these same matters and take a proportionate and risk based approach when deciding which online safety codes it would be appropriate for services to abide by.

This table draws from suggestions made in response to the recent public consultation on the regulation of harmful online content and the implementation of the revised AVMSD and seeks to find relevant definitions where possible, drawing particularly from recent EU telecommunications law. It should be noted that these definitions tend to be linked to fundamental notions in EU law such as that of an "*electronic communications network*"[20], which is intrinsically linked to the definition of an "*information society service*" by the reference in the latter definition to "*by electronic means*" which should be partially interpreted by reference to the former definition.[21]

Category	Definition (if available)	Source of definition
Private communications services	*'interpersonal communications service' means a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service;*	Article 2(5), Electronic Communications Code 2018[22]
Private online (cloud)	N/A	N/A

[20] Article 2(1), Directive (EU) 2018/1972
[21] The reason for this is that the definition of electronic communications network was established in 2002 while the definition of an information society service was established in 2000
[22] Directive (EU) 2018/1972

storage services		
Press publications[23]	*'press publication' means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which: (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine; (b) has the purpose of providing the general public with information related to news or other topics; and (c) is published in any media under the initiative, editorial responsibility and control of a service provider. Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;*	Article 2(4), Copyright Directive, 2019[24]
Online search engines	N/A	N/A
Internet service providers (mere conduits[25])	*'internet access service' means a publicly available electronic communications service that provides access to the internet, and thereby*	Article 2(2), Regulation (EU) 2015/2120

[23] As previously noted, due to the proposed definition of "relevant online service", press publications could only be designated where they facilitate the dissemination of or access to user-generated content
[24] Directive (EU) 2019/790
[25] The notion of which is derived from Article 12 of the eCommerce Directive

	connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used;[26]	

c. Assessment of categories for exclusion

There are a number of advantages and disadvantages to each approach, some of which are also described below. These will be assessed in terms of the following criteria:

- Clarity – This refers to the ease of which the category can be understood.
- Certainty – This refers to the confidence that the category provides in understanding what services do or don't fall under it.
- Effectiveness – This refers to the ease by which the category can be excluded from the definition.
- Rights balancing – This refers to whether excluding the category would be appropriate when taking into account the range of fundamental rights that are required to be balanced against safety measures.
- Acceptability – This refers to whether the approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.

For the sake of clarity, the higher the total in the assessments below the more suitable the category is for exclusion.

i. Private communications services

Private communications service refers to any form of electronic service that allows a finite number of users to communicate directly with one another. A key feature of these services is that they enable interpersonal communication directly between users who control who they interact with. Material exchanged over these services within a particular communications channel, chat or conversation cannot be accessed by users who are not included in the said channel, chat or conversation.

Services which are considered interpersonal communications services include:

[26] BEREC's understanding of this definition is that it primarily encapsulates internet service providers, August 2016 Guidelines

- Voice calls over telephony services,
- Voice calls over IP services, e.g. Skype,
- Email services, e.g. Microsoft Outlook,
- SMS messaging services, and,
- Messaging and chat applications, e.g. WhatsApp, Facebook Messenger, Telegram.

Interestingly, the definition of an interpersonal communications service from the Electronic Communications Code excludes ancillary services that are intrinsically linked to another service. This exclusion is interpreted narrowly and a communications channel in an online game is given by the Code as an example.

While this category of services is clear, the range of services that fall within it are well-defined and it would not be unduly difficult to exclude this category from the possibility of being designated, whether or not to do so raises many thorny questions of rights balancing and acceptability.

In terms of rights balancing, private communications services inherently raise different rights balancing concerns than, for example, a social media platform acting as a public forum. Users of private communications services enjoy, among other things, an expectation of privacy that is not present in public facing services. This means, among other things, that it would be very difficult to justify requiring private communications services to take measures in relation to non-criminal harmful content that may be exchanged between users over these services. In a more general sense it would be difficult to justify a situation whereby private communications services may be incentivized to "look into" private conversations between users on their platforms in relation to non-criminal matters.

We understand that many private communications services, particularly popular messaging and chat applications, use the same kinds of hash databases that large social media companies use to identify the "*fingerprint*" of previously identified illegal material such as child sexual abuse and terrorism content, and remove it without actually examining the conversations between individuals. However, these kinds of metadata focused measures are not realistically transferable to non-criminal harmful content given issues of context and subjectivity.

Further to this, many private communications services are either strongly or weakly encrypted and, in the case of strongly encrypted services such as WhatsApp, the service has little to no insight as to what material is being exchanged between users over the service. While the use of hash databases is still possible in such scenarios in relation to illegal

content, there are no readily available measures that can be taken by such services in relation to non-criminal harmful content.

It is also useful in this regard to note that there exist specific criminal offences regarding the threatening use of telephony and SMS messaging services[27]. These are currently being examined as part of the development of amendments by Government to the private members Harassment, Harmful Communications and Related Offences Bill 2017 in order to potentially extend them to private communications services more generally regardless of technical medium.

However, despite these legal and practical limitations there is likely an expectation in the public discourse that private communications services will fall within the scope of the regulatory regime. Further to this, some stakeholders will argue that notwithstanding the practical difficulties, all communications, including non -criminal harmful content, should be within scope as their exclusion could provide a perverse incentive for services to encrypt more private communications services in order avoid additional oversight of non-criminal harmful content.

One potential option to balance the various expectations and perspectives is to include private communications services within the scope of the regulatory regime but to explicitly limit the Media Commission's code making powers in relation to these services to matters relating to content which it is a criminal offence to disseminate. This is particularly relevant to child sexual abuse materials and certain terrorist content.

However, if this is not feasible then it may be necessary to exclude private communications services from the possibility of being designated in order to limit the possibility of successful challenge to the regulatory regime.

Despite this, it's important to note that different kinds of private communication services may raise different rights balancing concerns due to their technical nature and the way they are typically used. For example, a one-to-one voice call over a telephony or IP service may entail a greater expectation of privacy than a one-to-one message, which in turn may entail a greater expectation of privacy than a one-to-many message. However, it is unclear where the balance tips along this spectrum, especially with regard to services that contain all the above functionalities.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
4/5	5/5	5/5	2/5	2/5	18/25

[27] S. 13, Communications Regulation (Amendment) Act 2007

ii. Private online (cloud) storage services

Private online (cloud) storage service refers to any form of electronic service that allows a user to store material on a locked portion of or allocation of space on a server or server cluster operated by the service. A key feature of these services is that only the user in question can access the material stored in the space allocated to them. Typically the user may share some or all of the materials stored in the space with a finite number of persons who they choose to share the material with.

Examples of private online (cloud) storage services include Google Drive and Dropbox. Private online (cloud) storage services share many features with large scale cloud computing services, such as Amazon's AWS service, that enable the provision of other services. For example, Netflix hosts its platform on Amazon's AWS service. For the purposes of this Bill it is necessary to distinguish these from each other in any definition.

There is no readily available definition of a private online (cloud) storage service. However, it may be possible to adapt elements of the definition of an interpersonal communications service from the Electronic Communications Code to generate a draft definition, as follows:

> *"Private online storage service means a service normally provided for remuneration that enables the non-local and non-temporary storage[28] of information by a person via an electronic communications network and does not include (a) services which enable the non-local and non-temporary storage of information merely as a minor ancillary feature that is intrinsically linked to another service and (b) services that enable the non-local and non-temporary storage of information for the purpose of enabling the provision of other services;"*

While this draft definition is relatively clear it will be necessary to examine it in detail during formal drafting to ensure that it is appropriate. It's also relatively certain the range of services that are intended to be covered by the draft definition. On that basis, it's unlikely that it would be unduly difficult to exclude this category from the possibility of being designated. However, similar to private communications services, whether or not to do so raises many thorny questions of rights balancing and acceptability.

In particular, on a practical level private online (cloud) storage services are unlikely facilitate the spread of non-criminal harmful online content due to their technical nature.

These questions are largely similar to those examined above in relation to private communications service, compounded by the technical nature of private online (cloud) storage services. In this regard, the same options emerge:

[28] Reversed wording of A. 13 of the eCommerce Directive

- Include private online (cloud) storage services within the scope of the regulatory regime but to explicitly limit the Media Commission's code making powers in relation to these services to matters relating to content which it is a criminal offence to disseminate, or,

- If the former is not feasible, exclude private online (cloud) storage services from the possibility of being designated by the Media Commission.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
4/5	3/5	5/5	2/5	3/5	17/25

iii. Press publications

Press publication refers to a service which offers journalistic content where said content is under the editorial control and/or responsibility of the service provider. In effect the range of services covered by this category are those services where the content is wholly or primarily uploaded by the provider of the service rather than the user of the service and where said content is of a journalistic nature.

Online services which can be considered press publications include online versions of newspapers and online only news portals such as the Journal.ie. Such services may also provide for publically visible user-generated comments on their websites and as such, need to be considered as services that could potentially be designated.

The definition of press publication from the Copyright Directive explicitly excludes academic and scientific journals from its scope and a recital[29] suggests that editorial blogs that are not under the control of a wider company are also not within its scope. The reason for this is that the Copyright Directive uses the definition of a press publication to confer a new copyright related right on services that fall within that category.

However, for the purposes of assessing this category of services for exclusion from the possibility of being designated it is necessary to consider press publications as services that offer editorial content in general.[30] This is because outside the rights sphere there's little reason to distinguish between editorial services offered by an organisation and those offered by an individual.

[29] Recital 56, Directive (EU) 2019/790
[30] It will therefore be necessary to adapt the definition from the Copyright Directive in this category is referenced as being excluded in the Bill.

In this regard the definition of press publications is somewhat clear, though complex, and the range of services that fall under its scope somewhat subjective towards its boundaries, which may make it somewhat difficult to exclude press publications from the possibility of being designated in a legally certain manner.

Furthermore, both in terms of rights balancing and acceptability it's unclear why press publications that provide for publically visible user-generated comments on their websites should be excluded from the possibility of being designated. Furthermore, while business models such as paywalls may limit the public availability of user-generated comments and may also reduce the risk of harmful user generated content given that subscribers could likely be identified, it would also be unclear in terms of rights balancing and acceptability to exclude press publications that operate such business models from the possibility of being designated. If such an approach was taken then users of press publications supported by advertising would enjoy greater protections from potential harm than users of press publications supported by subscriptions, which would be an unintended consequence.

Designation in this context would not mean that press publications would be required to abide by online safety codes produced by the Media Commission in relation to their editorial content though it would mean, if designated, that they would be obliged to abide by those codes in relation to any user-generated content that they allow on their service.

In any case, if press publications are not excluded from the possibility of being designated on an a priori basis it still would be within the discretion of the Media Commission to determine whether individual press publications or press publications as a category warrant designation. In making those determinations the Commission would be required to have regard to the nature and scale of the service or services in question, the the likely prevalence of harmful online content on the service or category of services and the fundamental rights of users and operators of the service or services. It's therefore unlikely that the Media Commission would designate individual press publications or press publications as a category.

It is, therefore, not considered appropriate to exclude press publications from the possibility of being designated for the following reasons:

- The complexity of developing such an exclusion,

- That designation would not impinge upon the editorial freedoms of those services, and,

- That, given the matters that the Media Commission is required to have regard to when designating services such as the nature and scale of services, it's unlikely that individual press publications or press publications as a category would be designated by the Commission in any case.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
3/5	3/5	3/5	2/5	2/5	13/25

iv. Online Search engines, including Browsers

Online search engines are services which index websites, web pages and other material available online and to list links to these sources that are relevant to user queries. As such, online search engines don't host material, user-generated or otherwise, and simply facilitate access to material and services online.

Although online search engines are subject to Irish and EU law, for example in relation to the General Data Protection Regulation, there is no specific definition of online search engines in Irish or EU law.In this case, it's necessary to draft a rough definition for the purposes of this assessment, as follows:

> *"online search engine means an information society service that provides lists of indexed material and services available via an electronic communications network where these lists are customised in accordance with the nature of queries made by persons using the service;"*

This definition is relatively clear as is the range of services intended to be covered by it. In this regard, it's unlikely that it would be unduly difficult to exclude this category from the possibility of being designated.

The main reason for potential excluding this category from the possibility of being designated is that online search engines don't host material, including user-generated content, and therefore shouldn't be subject to any regulatory regime that intends to minimise the negative impacts of harmful online content. However, online search engines facilitate both the dissemination of and access to harmful online content. In this regard, it would difficult to justify the exclusion of this category from a rights balancing and acceptability perspective.

Furthermore, it's important to note that the Media Commission will be required to have regard to the nature and scale services when considering designating them and when considering what online safety codes it would be appropriate for them to abide by.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
3/5	4/5	4/5	2/5	1/5	14/25

v. Internet service providers

Internet service providers are services that provide access to the internet as a whole, for example Virgin Media broadband or eir broadband. They are the "pipes" through which all other online services flow. Such services are considered "*mere conduits*" by Article 12 of the eCommerce Directive and are not liable for any information transmitted over them provided they do not interfere with the transmissions. Like online search engines, ISPs don't host material, user-generated or otherwise, and simply facilitate access to material and services online.

This "*mere conduit*" classification is the main reason for potentially excluding this category from the possibility of being designated. The idea being that these services cannot interfere with the material transmitted over their networks without being legally reclassified and that any obligation to do so would be at odds with EU law.

However, the eCommerce Directive provides that the "*mere conduit*" classification will not prevent the legal systems of Member States from requiring service providers from terminating or preventing infringements of the law, provided that the request does not amount to a general obligation to monitor the traffic on their services.[31] While this provision, alongside the nature of ISPs in general, would prevent the Media Commission from obliging ISPs to take certain measures[32], it would not prevent the application of measures compliant with the liability regime in accordance with the aims of the Bill.

For example, it's possible that an appropriate measure that could be taken by ISPs in relation to the Bill would be to block access in Ireland to a website that solely contains examples of how to commit self-harm or suicide when it is brought to their attention.

In fact, ISPs tend to take measures in accordance with relevant legal frameworks in relation to illegal material, particularly child sexual abuse materials. For example, the Internet Service Providers Association of Ireland part fund the Hotline.ie service, which they describe as "*the Government and An Garda Síochána sanctioned national reporting mechanism through which Internet users may report suspected illegal content online in a secure, anonymous and confidential way – recognised as a role model in Europe.*"[33, 34] Moreover,

[31] Article 12(3) & Article 15, Directive 2000/31/EC
[32] The Media Commission will be obliged to have regard to Articles 12-15 of the eCommerce Directive in designating services and obliging them to abide by any online safety codes
[33] https://www.ispai.ie/

many ISPs offer parental and other content filters to their customers, often on an opt-out basis.

From the above it's clear that there's no legal prohibition at an EU level against the possibility of ISPs being designated. Furthermore, the specific nature of ISPs is accounted for the in the proposed framework for both designation and obligations as the Media Commission will have to take into account, among other matters:

- articles 12-15 of Directive (EC) 2000/31,
- the nature and scale of relevant online services or categories thereof,
- the likely prevalence of harmful online content the relevant online services or categories thereof in question facilitate the dissemination of or access to, and,
- the [fundamental rights] of users and operators of relevant online services.

Therefore, while excluding ISPs from the possibility of being designated would not be unduly difficult, from a rights balancing and acceptability perspective it would be difficult to justify excluding them as a category.

Clarity	Certainty	Effectiveness	Rights Balance	Acceptability	Total
5/5	4/5	5/5	2/5	2/5	18/25

d. Recommended approach

It's recommended that services that are to be subject to other regulatory regimes under the Bill be excluded from the possibility of being designated, these being:

- Audiovisual media services, and,
- Sound media services.

In relation to the other categories examined above, on balance it is not recommended that any of these categories be excluded from the possibility of being designated. There are a number of reasons for this, including:

[34] The hotline.ie service is under review by the D/Justice in light of the proposed regulation on terrorist content and may be brought onto a public service footing

- that there's an expectation that many of these categories would be included within the scope of services subject to the regulatory regime, and

- that the Media Commission will be obliged to consider, among many other important matters, the nature and scale of the service or services in question, which means that the Media Commission will be obliged to take a proportionate and risk-based approach in both designating services, which may, on a de facto basis, exclude certain categories of services, and in deciding on the what online safety codes it is appropriate for a service to abide by.

However, in relation to two examined categories, private communications services and private online (cloud) storage services, it is recommended that the Media Commission's code making powers in relation to these services be explicitly limited to matters relating to content which it is a criminal offence to disseminate. The reason for this is that these services raise particular rights balancing issues, especially regarding the right to privacy, which make it difficult to justify giving the Commission to power to require them to take measures in relation to non-criminal harmful online content.

Furthermore, if this is not possible it's noted that these categories may need to be explicitly excluded from the possibility of being designated.

This recommended approach is incorporated into the draft heads in appendix 1.

7. Recommended approach

The following approach to establishing the range of services in scope of the regulatory regime for online safety is recommended:

- That the Media Commission be provided with the power to designate individual and categories of online services from a wider pool of relevant online services to abide by any online safety codes the Commission deems necessary,

- That video sharing platform services be specified in legislation as a category of designated online services,

- That the wider pool of "*relevant online services*" from which the Media Commission may designate services or categories thereof be defined on the basis of the definition of "*information society service*" from the eCommerce Directive qualified by a definition of "*user-generated conten*t" adapted from the revised AVMSD, as follows:

    - *"relevant online service means an information society service established in the State that [facilitates the dissemination of or access to] user-generated content via an electronic communications network"*,

- That services that are to be subject to other regulatory regimes under the Bill be excluded from the possibility of being designated, these being audiovisual media services and sound media services, and,

- That the Media Commission's code making powers in relation to interpersonal communications services and private online (cloud) storage services be explicitly limited to matters relating to content which it is a criminal offence to disseminate.

This recommended approach builds upon the recommendations of previous policy papers, aligns the requirements of both Strands 1 and 2 and provides legal certainty regarding the range of services in scope of the regulatory regime for online safety to be established by the Online Safety and Media Regulation Bill.

Appendix 1 – Draft Provisions

Words contained within [] require more detailed analysis

Provision – online service definitions and related matters

To insert into Head 2 (Interpretation)

"relevant online service" means an information society service established in the State that [facilitates the dissemination of or access to] user-generated content via an electronic communications network;

"'user-generated content" means content constituting an individual item, irrespective of its length, that is created by a user and uploaded to relevant online service by that user or any other user and does not include content uploaded to relevant online service by the provider of that service;

"designated online service" means a relevant online service designated by the Media Commission in accordance with section x;

"interpersonal communications service" has the meaning provided for by Directive (EU) 2018/1972;

["Private online storage service" means a service normally provided for remuneration that enables the non-local and non-temporary storage of information by a person via an electronic communications network and does not include (a) services which enable the non-local and non-temporary storage of information merely as a minor ancillary feature that is intrinsically linked to another service and (b) services that enable the non-local and non-temporary storage of information for the purpose of enabling the provision of other services;]

Provision – designation of relevant online services

s. X. – (1) The Media Commission shall, from time to time, designate relevant online services or categories thereof.

(2) in designating relevant online services or categories thereof the Media Commission shall have regard to:

(a) the definition of a video sharing platform service in s. X,

(b) guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion within the definition of a video sharing platform service,

(c) the jurisdiction rules for video sharing platform services under article 28a of Directive (EU) 2018/1808,

(d) articles 12-15 of Directive (EC) 2000/31, which sets out the legal liability regime for relevant online services established in the Union and sets limits on measures that such services can be required to take,

(e) the nature and scale of relevant online services or categories thereof,

(f) the necessity for transparency of decision making in respect of {content delivery and content moderation] by relevant online services,

(g) the impact of automated decision making in relation to [content delivery and content moderation] by relevant online services,

(h) the likely prevalence and impact of harmful online content the relevant online services or categories thereof facilitate the dissemination of or access to,

(i) the protection of minors and the general public from harmful online content,

(j) the risk posed by harmful online content to the users of relevant online services whereon it may be disseminated,

(k) the likelihood of users of relevant online services being unintentionally exposed, by their own actions, to harmful online content,

(l) the nature of the user base of the service or category of services, including in particular, the extent to which minors are targeted or comprise the user base,

(m) whether a relevant online service or category thereof has had regard to guidelines issued by the Commission in accordance with s. X, and,

(n) the [fundamental rights] of users and operators of relevant online services.

(3) video sharing platform services shall be a category of designated online services.

(5) the Media Commission shall not designate a relevant online service that is:

(a) an audiovisual media service, or,

(b) a sound media service.

(6) the Media Commission shall inform a relevant online service that it is considering designating its service/s and may request information from said relevant online service to inform these considerations.

(7) relevant online services shall comply with information requests from the Media Commission made in accordance with subsection (6).

(8) a relevant online service which contravenes subsection (7) shall be guilty of a category 1 offence.

(9) if the Media Commission is considering designating a category of relevant online services it shall consult, as it considers appropriate, with services within said category and may issue information requests to said services in accordance with subsection (6).

(10) in designating relevant online services or categories thereof the Media Commission may consult with any persons or bodies it sees fit, [including members of… advisory committees].

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

(12) the Media Commission may vary, following any compliance procedures in sections X-Y, consultation with any persons or bodies the Commission sees fit to consult, [including members of advisory committees], and/or consultation with the designated online service or services within a category of designated online services, the online safety codes that said service or category of services shall abide by.

(13) the Media Commission may not oblige a designated online service or category thereof to abide by an online safety code that relates to content which it is not a criminal offence to disseminate if said service or services are:

(a) an interpersonal communications service, or,

(b) a private online storage service.

(14) the Media Commission shall maintain a readily accessible, publically available and up to date list of designated online services and categories thereof and the relevant online safety codes that apply to said services and shall periodically provide this list to the Minister.

Online Safety & Media Regulation Bill

Policy Paper – Funding of the Media Commission

1. Background

It is envisaged that a multi member Media Commission will be responsible for the four strands of regulation contained in the Online Safety and Media Regulation Bill ("OSMRB"). The Media Commission will have regulatory functions across divergent industries and sectors which are rapidly changing. As outlined in the previous policy paper, **Media Commission Structures and Functions: Paper 1**, there will be separate commissioners responsible for: broadcasting services; on-demand audio visual media services and designated online services.

A key issue to be addressed is the manner in which the Media Commission is to be funded. It has been decided (**Media Commission Structures and Functions: Paper 1**, at page 20) that a function of the Media Commission will be the imposition of levies to fund its statutory functions.[1] The purpose of this paper is to confirm that decision and to examine the legal provisions underpinning the levy powers of other regulatory bodies to identify relevant issues for consideration during the detailed drafting of the provision in the OSMRB to provide the Media Commission with levy powers.

The Memorandum to Government on the OSMRB sought approval for the establishment of a Media Commission, a function of which would be:

> "To impose a levy on regulated media services and designated online services in order to ensure it is sufficiently resourced to properly execute its statutory functions."

On the 9th January the Government approved the general scheme of the OSMRB and it was noted that:

> "additional Heads relating to the funding of the Media Commission by industry levies, the regulatory regime for audiovisual media services, on-demand audiovisual media services and broadcasting services, including matters relating to the latter that stem from the transposition of the revised Audiovisual Media Services Directive, will be brought to Government shortly."

[1] Head 10(xxii) "The Commission shall impose a levy on [regulated media services and designated online services] to ensure it is sufficiently resourced to properly execute its statutory functions;"

It is submitted that the imposition of levies on regulated entities to fund the statutory functions of the Media Commission is an appropriate approach to funding. This is the norm in terms of how sectoral regulators such as the Broadcasting Authority of Ireland ("BAI"), Commission for Regulation of Utilities ("CRU"), and to a lesser extent Commission for Communications Regulation ("ComReg"), are funded[2] and is appropriate to ensure the independence of the Media Commission.

In relation to funding and independence, article 30.1 of the revised Audio Visual Media Services Directive ("AVMSD") states,

> "Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.
>
> …
>
> Member States shall ensure that national regulatory authorities or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA (the European Regulators Group for Audiovisual Media Services). Member States shall ensure that national regulatory authorities or bodies are provided with their own annual budgets, which shall be made public."

In relation to the costs of regulation it may be noted that the OECD has recommended that to promote efficient administration "regulatory charges should be set according to cost recovery principles, not to yield additional revenue".[3] This principle is widely demonstrated among regulatory and compliance bodies in Ireland.

Among the market facing regulatory bodies which were identified as comparators in the **Regulatory Powers Policy Paper**, there are two main funding structures: industry

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[2] It may be noted that the CAR and CRR derive approx. 94% and 74% of their respective income from levies (See; Commission for Aviation Regulation, *Annual Report 2018*, at page 31, available online at: https://www.aviationreg.ie/_fileupload/CAR%20Annual%20Report%202018%20English%20FINAL%20for%20Web.pdf [accessed: 07/02/2020], and Commission for Railway Regulation, *Annual Report 2018*, at page 4, available online at: https://www.crr.ie/assets/files/pdf/crr_2018_annual_report_final.pdf [accessed: 07/02/2020])

[3] OECD, Recommendation of the Council on Regulatory Policy and Governance, at page 18, available at: https://www.oecd.org/gov/regulatory-policy/49990817.pdf [accessed 11/11/2019]

funding (levies and/or licensing fees) and direct funding from the Oireachtas (outlined below in **Appendix 5 - Comparator Funding Models**).

Specific responsibilities of the Media Commission which would require funding by the imposition of levies are: regulation of television and radio broadcasting services, on-demand audiovisual media services, and designated online services. The Media Commission will hold other functions which, *inter alia*, include: promotion and protection of the interests of the public in relation to audio-visual, audio and online content; promotion of educational initiatives and activities relating to online safety; and, conducting, commissioning and publication of research, studies and analysis on matters relating to the functions of the Commission. These functions will be funded by levy as is currently the case with regard to the BAI.

It must be emphasised that this paper does not concern levies for content production funds but rather concerns levies to fund the operation of the Media Commission.

It is noted in **Media Commission Structures and Functions: Paper 2** that exchequer funds will be required to defray the Media Commission's initial establishment costs. Such funding will likely be necessary until the levy regime is in place to cover the costs of the Commission. However, this is a separate question to providing the Media Commission with the power to levy the entities it regulates to fund its operations.

2. Decision Sought

A decision is sought in relation to the following matters:

1. To confirm that the Media Commission shall be funded by means of a levy on regulated entities (to include the existing broadcasting levy) as envisaged in the Memorandum brought to Government on the 9th January, 2020.

2. That the levy should operate based on Option 1(B) outlined at Section 7 (see also the draft head at **Appendix 1**), that is a single legislative provision to provide for levy powers in relation to: broadcasting services, on-demand audio visual media services and designated online services. This will be subject to discussion with the Office of the Attorney General.

3. That the recommendations in section 8 as regards the detail of levy provisions to be included in the Heads is appropriate.

3. Legal Issues

Legal advice may be required with regard to the following;

- Is the recommended approach, Option 1(B), as outlined at Section 7, of repealing section 33 of the Broadcasting Act, 2009, and replacing it with a provision granting the Media Commission the power to impose levies on all entities subject to its regulation, sound?

- Do the proposed draft heads (set out in **Appendix** 1) contain sufficient principles and policies to provide enough legal certainty to make levy order regulations?

4. Envisaged Regulatory Regime

There are three distinct types of service that will be subject to regulation:

Television and Radio Broadcasting Services

The Media Commission will take on the powers and functions currently exercised by the BAI pursuant to the Broadcasting Act, 2009, as amended. The BAI has been in existence since 2010. Legislation to amend the 2009 Act (the Broadcasting (Amendment) Bill, 2019) was awaiting committee stage prior to the dissolution of the Dáil. As that Bill has now lapsed, it may be decided that that Bill, or certain elements thereof, may be brought forward as part of the Online Safety and Media Regulation Bill (discussed below at **Section 6 – Current Levy Power of the Broadcasting Authority of Ireland**).

Within the Media Commission the powers and functions of the BAI will be maintained and will come within the ambit of the commissioner for linear/broadcasting services.

On-demand audiovisual media services

The current AVMSD applies in a limited way to non-linear services such as on-demand audiovisual media services. On-demand audiovisual media services are currently subject to a co-regulatory Code of Conduct overseen by the On-Demand Audiovisual Services Group ("ODAS"), established under the auspices of IBEC. The Code of Conduct applies to all on-demand audiovisual service providers operating in the state and provides for a complaints mechanism in relation to content on on-demand services.

The BAI's Compliance Committee acts as an appeals body, where a complainant is not satisfied with the decision of the on-demand audiovisual media service provider, on complaints relating to content. A Memorandum of Understanding is in place between the BAI's Compliance Committee and ODAS. The revision of the AVMSD will require an increase in the level of oversight by Member States of on-demand audiovisual media services.

The form that the regulation of on-demand audiovisual media services will take will be outlined in another policy paper that is currently being prepared. It is envisaged that this regime will be based on a registration system.

Designated Online Services

It is intended that the Online Safety and Media Regulation Bill will provide a mechanism whereby certain online services are designated to be subject to measures such as:

- creation of codes of conduct by the Media Commission which may relate to measures to be taken by designated online services or categories thereof to minimise the availability of harmful online content on their services;

- granting of power to the Media Commission to request information from any designated online service regarding their compliance with any online safety code;

- appointment of authorised officers to examine the compliance of any designated online service with any online safety code;

- auditing of complaint and/or issues handling mechanisms operated by designated online services;

- and issuing of appropriate sanctions in cases of non-compliance.

In addition, it may be noted that the Media Commission will be responsible for a range of other related matters such as education and research in relation to the media and online safety. These functions are detailed in Head 10 of the general scheme of the OSMRB.

5. Regulatory Funding Models

As previously outlined, there are two main means by which regulators are funded: industry funding (levies and/or licensing fees) and direct funding from the Oireachtas (outlined below in **Appendix 5 - Comparator Funding Models**).

These funding models reflect the characteristics, functions and roles of the comparator regulators.

Exchequer funding

The DPC and the CCPC are primarily funded by grants from the Oireachtas (approx. 89% and 82%, respectively).

Advantages	Disadvantages
Stability - it is likely that such funding will be relatively stable and will not significantly fluctuate on a year by year basis.	Lack of adaptability - it is apparent that it can be difficult for regulators to adapt to changing circumstances, growing responsibilities or market realties. This is because scarcity of resources dictates that provision of funding from government must be balanced across all the areas of government expenditure.
Acceptability - such a funding method would likely be welcomed by industry.	Acceptability – it may be difficult to justify such a funding method being borne by the taxpayer.
Simplicity – such a funding method is relatively straight forward and easily understood.	Perception of a lack of independence - the provision of government funding has implications in relation to independence or perceived independence of a regulator. While an entity may have independence in day to day operations a reticence on the part of government to satisfy a regulator's funding requests may give rise to an impression that the regulator is not functionally independent. As noted, Article 30.1 of the revised AVMSD requires the national regulatory authorities

	to be "functionally independent of their respective governments" and that they "have adequate financial and human resources and enforcement powers to carry out their functions effectively".

Industry funding (levy)

The BAI and the CRU are primarily funded by levies on the respective industries/sectors subject to their regulation (approx. 86% and 97%, respectively).

The ComReg is less dependent than the other comparators on a single income source. ComReg is funded by licensing fees (approx. 51%), spectrum income (approx. 37%[4]), and levy income (approx. 11%).

Advantages	Disadvantages
Flexibility – by delegating responsibilities in relation to levies to regulators these powers may be exercised as the regulator deems appropriate (within the bounds of the principles and policies in legislation).	Complexity – levy powers and especially the ways in which they are calculated can be complicated and this may cause confusion for regulated entities.
Future proofing – levy orders may be amended or replaced to provide new means of calculation etc., to reflect changing realities and market conditions.	Funding cliff – because levies are typically based on estimates derived from previously incurred costs, situations may arise where expectation and reality diverge leaving a regulator with a shortfall in funding, often referred to as a "funding cliff".
Acceptability – such a funding method would likely satisfy the public and certain stakeholders who would regard it as appropriate that industry should bear the cost of regulation.	Acceptability- industry may not be agreeable to the imposition of levies.
Independence – by obtaining funding from	Independence – Article 30.1 of the revised

[4] This can vary significantly year to year depending on the auction process and timeframes

industry a regulator is not reliant on government for funding.	AVMSD requires that national regulatory authorities be functionally independent of "governments and of any other public or private body". If a small number of entities are responsible for the bulk of the regulators funding this may lead to the impression, whether warranted or not, that the regulator is beholden to such entities.

Conclusion

As previously noted, on the 9th January the Government approved General Scheme of the Online Safety and Media Regulation Bill which provides for the establishment of a Media Commission, a function of which is:

> "To impose a levy on regulated media services and designated online services in order to ensure it is sufficiently resourced to properly execute its statutory functions."

Based on the foregoing it is apparent that industry funding by means of a levy is the most appropriate funding model for the Media Commission. This approach is in line with the existing funding model of the BAI and other similar sectoral regulators in Ireland. Furthermore, funding based on levies provides the appropriate balance between adequate provision of resources and independence of the regulator as required by the revised AVMSD.

The Minister is therefore asked to confirm that the Media Commission shall be funded by means of levies on regulated entities and that a provision shall be drafted to provide the Media Commission with the power to administer such levies.

6. Current Levy Power of the Broadcasting Authority of Ireland[5]

Legislative Basis

Section 33 of the Broadcasting Act, 2009, requires the BAI to recoup the expenses properly incurred by the BAI and its statutory committees in the performance of their functions through the imposition of a levy on public service broadcasters and broadcasting contractors. The terms of this Levy, including the method of calculation, are set out in S.I. No.7 of 2010, Broadcasting Act 2009 (Section 33) Levy Order 2010.

It had been proposed to amend s. 33 in the Broadcasting (Amendment) Bill, 2019. However, this has lapsed with the dissolution of the Dáil. The Bill as published provided that section 33 of the Act would be significantly amended to provide that, *inter alia*, the BAI may hold working capital (discussed below).

Key provisions of s33 of the Broadcasting Act, 2009

As noted, s. 33 of the 2009 Act is the legislative basis for the levy powers of the BAI. These powers are given effect through the 2010 Levy Order. Section 33 sets out:

- the entities subject to the levy (public service broadcasters and broadcasting contractors),
- the purpose of the levy to be imposed,
- an obligation on entities with a levy liability to pay same,
- delegation of power to the BAI to make separate levy orders,
- an outline of matters which should be contained in a levy order:
    - method of calculation,
    - times of payment,

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[5] The current section 33 of the Broadcasting Act, 2009 is at **Appendix 3** tab (i), the draft heads proposed for inclusion in the OSMR Bill are at **Appendix 1**, a codified version of section 33 of the Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, is at **Appendix 4**.

- how payment would be made,
- keeping and inspection of records relating to the levy, and
- exemptions deferrals and refunds of the levy.

(Note: the legislation merely calls for the levy order to provide for the above matters, it doesn't elucidate these matters)

- how to deal with a surplus of levy income,
- the legal form of recovery of a levy liability, and
- a requirement to lay regulations (levy orders) before the Oireachtas by means of a motion to annul.

The 2010 Levy Order takes the delegation of powers and the principles and policies contained within s. 33 of the 2009 Act and outlines the calculation and operation of the levy in practice. Schedule 1 of the Levy Order outlines in detail the means of the calculation of the levy while Schedule 2 outlines the basis of the calculation of the levy based on "Qualifying Income".

This example serves to illustrate the fact that the legislative basis of a levy power provides a broad outline of how that power should be exercised, while the levy order spells out the details of the process.

Key Features

The BAI budgets on both a three-year and annual basis. The levy is collected in arrears. The levy is designed to ensure full recovery of the costs incurred by the Authority and committees in the period for which the levy is raised. The levy incorporates a regressive sliding scale. This reflects the view that regulation costs of larger broadcasters, expressed as a percentage of their total turnover, are less than those of smaller broadcasters. The current levy also incorporates a *de minimis* rule, which ensures that all broadcasters make some contribution towards their cost of regulation. This is provided for in the levy order and not in the present legislation.

The BAI has engaged PwC to administer the levy collection process.

Qualifying Income

The levy is calculated using the budgeted operating costs of the BAI for the levy year and the estimated qualifying income of the relevant broadcasters for their immediate proceeding calendar year. Qualifying income includes: grants from government and public bodies, funds paid under s. 123 of the Broadcasting Act, 2009, to RTÉ or TG4, earnings from commercial communications, non-cash considerations for commercial communications, and interactive incomes. Excluded income includes; money paid by the BAI under the Broadcasting Fund scheme, commercial communications from public announcements and/or charity appeals broadcast free of charge, and income from non-linear services. Detailed information on qualifying income is contained in Schedule 2 of the Levy Order.

What counts as qualified income is determined by the BAI in consultation with the radio and television broadcasters who pay the levy.

Levy Collection Process

The BAI publishes its budgeted operating costs for each levy year no later than February. In February relevant broadcasters must submit estimates or audited confirmations of their qualifying income for the immediately preceding calendar year (where estimates of qualifying income are submitted in February, audited confirmations of qualifying income must be submitted by August of the same year). The levy is calculated using the BAI's budgeted operating costs and the total qualifying income from all relevant broadcasters. Invoices are issued on a quarterly basis in arrears. The payment terms are thirty days. Broadcasters paying the *de minimis* amount are issued one invoice. Interest is charged on late payments and VAT is payable on the levy.

Once BAI audited accounts for each year are available and all the audited statements showing the qualifying income of relevant broadcasters are received, the budget to actual reconciliation occurs and debit or credit notes are issued to relevant broadcasters with the next invoice.

Current Levy Rates

A broadcaster whose base qualifying income is not more that €250,000 must pay the *de minimis* levy amount of €750 in the levy year. A table setting out bands and levy rates

(subject to yearly calculation) is contained in the S.I. The estimated levy rates for 2018 are as follows:[6]

Base year qualifying income	Percentage Levy
€1 to €1,000,000	2.12%
€1,000,001 to €10,000,000	1.87%
€10,000,001 to €20,000,000	1.62%
€20,000,001 to €45,000,000	1.37%
Over €45,000,000	0.37%

Amendments to section 33 of the Broadcasting Act, 2009, pursuant to the Broadcasting (Amendment) Bill, 2019

As the Broadcasting (Amendment) Bill, 2019, has lapsed with the dissolution of the Dáil, certain elements of that Bill may be brought forward with the Online Safety and Media Regulation Bill. However, no decision has yet been made in that regard.

The 2019 Bill effectively sought, on the advice of the drafter assigned by the Office of Parliamentary Counsel, to insert much of the content of the current Levy Order[7] into section 33 of the 2009 Act. This included:

- an explicit provision to require certain entities to provide information to assist the calculation of their levy liability,
- a prescriptive list of matters to have regard to in making a levy order,
- the concept of "qualifying income" is imported from Schedule 2 of the levy order,
- method of recalculation of the levy where further information is provided,

[6] Broadcasting Authority of Ireland, *Levy Calculation Table 2018 Estimate*, available at: https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/04/20180423_Levy_Calculation__Table_Eng_2018-Estimate.pdf [accessed 22October 2019]

[7] Broadcasting Act 2009 (section 33) Levy Order

- an obligation to serve a notice on those subject to the levy,

- a non-prescriptive list of matters to have regard to in relation to conferring exemptions, and

- a *de minimis* amount in relation to the qualifying income of entities which may be subject to the levy.

Further, under the current provisions, the levy imposed by the BAI is to meet 'expenses properly incurred'. In operational terms, this leaves the BAI without adequate working capital at certain points in the levy cycle and subsequently the BAI has applied for a borrowing facility each year under s. 35(1) of the Broadcasting Act, 2009. The amendment aims to allow the BAI to impose the levy, not only to meet expenses incurred, but to facilitate adequate working capital.

Further, the 2019 Bill also contained a number of other key amendments which may be summarised as follows:

- Content Provision Contracts / Section 71 Licences: Section 71 of the Act provides that holders of a 'content provision contract' can supply a compilation of programme material for certain purposes. The section 71 process was established in the 2009 Act as a means of encouraging new market entrants, and particularly with regard to new forms of audiovisual media that might have a smaller audience appeal. As such, this process does not require a ComReg 'Broadcasting Licence', is not subject to 'must carry/must offer' obligations under s. 77 of the Act, and content provision contract holders are not subject to paying the BAI Levy. Section 71 is the only section under which new entrants seeking to establish in Ireland can obtain the right to engage in television broadcasting in Ireland.

  In light of the UK Referendum result to leave the EU and the potential for broadcasters currently based in the UK to locate in Ireland, s. 33 is being amended so as to apply to content provision contract holders, to ensure that they can be included under the scope of the BAI levy, where necessary. Amendments to s. 33 also provide for criteria on which levy exemptions or deferrals can be granted by the BAI to ensure that s. 71 continues to accommodate the type of audiovisual services for which it was originally designed (i.e. new forms of audiovisual media that might have a smaller audience appeal).

- Funding the levy from TV Licence Receipts: The insertion of s. 3A (c) in s. 33 is connected to the amendment of s. 123 of the Act, which provides that BAI expenses can be part funded by monies from the TV licence receipts.[8]

- It was also intended that community broadcasters with qualifying income up to €500k would be completely exempt from levy obligations.

- The revised levy provisions in the Broadcasting Bill, 2009, relate to broadcasting services only. On the advice of the legal drafter in the Office of the Attorney General, they contain very detailed principles and policies in comparison with the levy provisions of other regulators. A summary of the legislative basis and key features of levy arrangements for a range of other regulators is included at **Appendix 2** for the purpose of comparison.

Applicability to the Media Commission

Given that the Media Commission will regulate three very different types of services, these being broadcasting services; on-demand audio visual media services and designated online services, it is considered that the provisions of the Broadcasting (Amendment) Bill, 2019, are overly prescriptive and contain elements which are not appropriate or relevant to on-demand audio visual media services and designated online services. Therefore, it is submitted that there are two appropriate options in providing the Media Commission with levy powers:

- a single provision to provide for a levy on broadcasting services; on-demand audio visual media services and designated online services;

- two separate levy provisions:

    - one for broadcasting services only;

    - and a second for on-demand audio visual media services and designated online services.

[8] See: Broadcasting (Amendment) Bill, 2019, *Explanatory Memorandum*, available at: https://data.oireachtas.ie/ie/oireachtas/bill/2019/64/eng/memo/b6419d-memo.pdf [accessed 27/11/2019]

7. Analysis

Proposed approach to the levy in the Draft Heads (see Appendix 1)

Having examined the legislative provisions underpinning both the BAI's levy powers and those of relevant comparators (see **Appendix 2**) certain elements can be extracted from those provisions which serve as points of reference for analysis (see the 'Overview of elements of levy provisions' table at **Appendix 6**).

While legislative provisions in relation to levy powers vary significantly there are elements which are common, while other provisions are more specific to particular regulators. Whether identified elements are relevant to drafting a provision to provide the Media Commission with levy powers is examined below.

7.1 Purpose of levy – to meet the expenses of a regulatory body in the performance of its functions

The language used to describe the purpose of levy powers is almost identical across the comparators. This demonstrates that the purpose of levy powers is to ensure that regulatory bodies may recoup their costs from the entities which are subject to their regulation.

Interestingly, s. 32D of the Central Bank Act, 1942, as amended, does not contain such an overall statement of purpose. Sections 32D(3A) and (4) which concern levies in relation to the functions of the resolution authority under the European Union (Bank Recovery and Resolution) Regulations 2015[9] and credit unions, respectively, do state that the total amount of the levy collected should not exceed the costs incurred.

It may be noted that individual provisions must be interpreted in line with the overall context of the legislation, and reading the Central Bank Act in such a manner gives a clear indication of its purpose and aims.

Recommendation:

The inclusion of a statement of purpose in the levy provision in the OSMRB will provide clear guidance to the Media Commission in relation to the purpose and limits of the power being delegated.

[9] S. I. No. 289 of 2015

7.2 Entities subject to levy

There are two general approaches to identifying entities which may be subject to a levy. They may either be specified in the primary legislation (for example the BAI, ComReg, CRU and in certain circumstances the Central Bank). Alternatively the identification of entities may be contingent, this may be done with reference to certain legislation (as is the case with the CCPC and the Central Bank) or the regulator may itself identify the entities subject to levy by means of regulation (as is the case with the CAR and the CRR).

It may be noted that irrespective of the option chosen, the services which are to be subject to levy under the legislation are:

- audiovisual services (including television and on-demand audiovisual media services),
- sound media services (including radio broadcasters), and
- designated online services.

In the context of the proposed legislation, neither approach, whether 'specified' or 'contingent' confer significant additional powers on the Media Commission.

(i) Entities subject to levy - Specified

These are relatively common provisions which explicitly state which entities will be subject to levies imposed.

- BAI - s. 33(1) of the Broadcasting Act, 2009, specifies that "public service broadcasters and broadcasting contractors" are subject to the levy.
- BAI - s. 33(1) of the Broadcasting Act, 2009, as it would have been amended by the Broadcasting (Amendment) Bill, 2019, specifies that "public service broadcasters, community broadcasters, broadcasting contractors and holders of content provision contracts" would be subject to the levy.
- ComReg - s. 30(1), (1A), (2) and (2A) of the Communications Regulation Act, 2002, specifies that a levy may be imposed on "providers of electronic communications services and on providers of electronic communications networks", "on postal service providers providing postal services within the scope of the universal postal service", and "on premium rate service providers".

- CRU - para. 16 and 16A of Schedule 1 of the Electricity Regulation Act, 1999, specifies that a levy may be imposed on "electricity undertakings, natural gas undertakings, holders of LPG safety licences and petroleum undertakings".

- Central Bank - s. 32D (3A) and (4) of the Central Bank Act, 1942, refer to levies imposed in relation to the resolution authority under the European Union (Bank Recovery and Resolution) Regulations, 2015, and credit unions, respectively.

- FSPO – s. 43(2) of the Financial Services and Pensions Ombudsman Act, 2017, states that "financial service provider[s]" are liable to pay the financial services industry levy in respect of the services provided by the Ombudsman to the industry.

A key challenge in the context of the OSMRB is the dynamic nature of the online sector. A prescriptive provision outlining specifically defined entities subject to levies may constrain the Media Commission, particularly given the rapid change which typifies this area. While specific reference to "designated online services" being subject to levies would likely capture relevant entities, it is submitted that the below "contingent" approach is, on balance, more suitable.

An example of wording under a 'specified' approach would be:

> "In this section 'regulated entity' and cognate words will include audiovisual media services, sound media services and designated online services."

(ii) Entities subject to levy - contingent

Such provisions, rather that explicitly stating the entities or classes of entities which will be subject to a levy refer indirectly to entities subject to certain enactments (as is the case with the CCPC and Central Bank) or else confer the power to identify who is subject to their levy on the regulatory bodies themselves (as is the case with the CAR and CRR). The ability to designate entities to be subject to a levy is a significant power for a regulatory body, however such a power is not absolute and is constrained by the overall context of the relevant legislation.

- CCPC – s. 24B (1) of the Consumer Protection act, 2007, provides that levies may be imposed on those "who are subject to regulation under the designated enactments and designated statutory instruments" [as set out at Schedule 2 of the Central Bank Act, 1942].

    - This matter is addressed in the CCPC levy order where it is specified that the levies are payable by "regulated entities" and the levy order defines this term.

- Central Bank – s. 32D(1) of the Central Bank Act, 1942,provides that levies may be imposed on those "who are subject to regulation under the designated enactments and designated statutory instruments" [as set out at Schedule 2 of the Central Bank Act, 1942].

- CAR – s. 23(1) of the Aviation Regulation Act, 2001 provides that levies may be imposed on "such classes of undertakings as may be specified by the Commission in [its] regulations"

    - The CAR levy order states that "(t)hese Regulations apply to the classes of undertakings set out in the Schedule". Similarly the CRR levy order states that "this order shall apply to the railway organisations set out in the Schedule to this Order."

- CRR – s. 26(1) of the Railway Safety Act, 2005, provides that levies may be imposed on "such classes of railway undertakings as may be specified by the Commission in [its] regulations".

Recommendation:

It is submitted that placing certain matters in primary legislation, such as entities subject to levy powers may pose difficulties for a regulator such as the Media Commission tasked with regulating a fluid and dynamic sector. There is an apprehension that by pursuing the 'specified' approach may result in legislation which will quickly find itself out of step with the sector which it seems to regulate, this could have serious negative implications for the funding of the Media Commission.

It is submitted that the approach taken by the Consumer Protection act, 2007, whereby entities subject to regulation are caught by the levy provision, is appropriate and prudent in the context of the OSMRB.

It must be noted that in any case a 'contingent' provision must be considered in the wider context of the legislation and is constrained by the fact that the entities which are envisaged to be regulated under the OSMRB are: audiovisual media services, sound media services and designated online services. Therefore it is submitted that this kind of 'contingent' approach is objectively justifiable.

An example of the wording under a 'contingent' approach would be:

"In this section 'regulated entity' and cognate words will include all persons or undertakings who are subject to regulation under this Act and relevant Statutory Instruments."

7.3 Obligation to pay is stated

A number of statutes explicitly state that there is an obligation on a regulated entity to pay its levy liability.

The legislative bases of the levy powers of ComReg, CCPC and the Central Bank have no such provisions. This suggests that the drafters of those statutes considered such a requirement to be implied. The CCPC levy order states that "(a)ll persons who are, or have been, regulated entities as categorised in the Schedules to these Regulations shall pay the required levy contribution to the Agency for each levy period in which they are, or have been, subject to regulation by the Bank." The schedule to the Central Bank levy order uses the phrase "shall pay" in relation to the "(b)asis of calculation of levy contribution" of each type of regulated entity .

Recommendation:

The inclusion of such a provision in the OSMRB is prudent and would not pose legal or drafting difficulties.

7.4 Option to make separate orders

Placing the option for a regulatory body to make separate levy orders in respect of different classes of entities is only explicitly stated in s. 33 of the Broadcasting Act, 2009 (as well as the previously envisaged amendment of the Act).

It may be noted that in spite of not being explicitly conferred with such power by statute, ComReg has made separate levy orders in respect of electronic communications, postal services and premium rate services while the CRU has made separate levies in respect of electricity, gas, LPG, petroleum and water. This reflects the *ad hoc* development of section 30 of the Communications Regulations Act, 2002, and Schedule 1 of the Electricity Regulation Act, 1999, which have been amended on numerous occasions.

*Recommendation***:**

It may be concluded that the power to create separate orders is implied in the power to impose levies. Therefore, the inclusion of an express provision to provide for the creation of separate orders is not a legal necessity

(*Note: a statutory instrument such as a regulation containing a levy order requires a distinct legislative basis, therefore if option 2 [detailed below] is pursued it would follow that separate regulations would be created in respect of the two separate legislative provisions*).

7.5 General statement of what may be contained in a levy order

Such provisions are a common feature of levy legislation. These provisions provide general guidance to regulatory bodies in relation to the expected content of their secondary legislation.

Such a statement provides principles and policies to direct the regulator in giving effect to legislative intent without unduly fettering the discretion of the regulator to effectively address matters which may emerge which are not envisaged by the legislature.

Recommendation:

The inclusion of such a provision in the OSMRB is desirable and would not pose legal or drafting difficulties.

7.6 Recovery of unpaid levy liability as a simple contract debt

This is a standard type provision which provides clarity to a regulated entity as to the means and venue (court) of recovering unpaid levy liabilities. Such provisions are included in each of the pieces of legislation considered in this paper except the provision underpinning the CRU's levy powers, the reason or rationale for this omission is not clear.

*Recommendatio*n:

The inclusion of such a provision in the OSMRB is deemed prudent and would not pose legal or drafting difficulties.

7.7 Regulations to require the approval of Minister(s)

Levy orders made by the CCPC, Central Bank, FSPO and CRR require the consent/approval by the relevant Minister(s).

Levy orders made by the BAI do not require the consent/approval of a Minister (but do need to be laid before the Houses of the Oireachtas, see below).

As required by Article 30.1 of the revised AVMSD, the Media Commission will be an independent regulator therefore it is appropriate for the legislature to exercise oversight.

Recommendation:

The inclusion of such a provision in the OSMRB would not be appropriate. As noted below, the correct approach would be a provision to require regulations to be laid before the Houses of the Oireachtas.

7.8 Amendments to or revocation of regulations to require the approval of Minister(s)

Amendment or revocation of levy orders issued by the CCPC and the Central Bank require the consent of the relevant Minister(s).

Amendments/revocations of levy orders made by the BAI do not require the consent/approval of a Minister.

Recommendation:

As above, it is submitted that it is more appropriate to lay regulations before the Houses of the Oireachtas. Further, it is likely the Media Commission will issue regulations (levy order) on a yearly basis, making interim amendments unlikely or where they do occur they will likely be minor in nature.

7.9 Regulations to be laid before the Houses of the Oireachtas

Levy orders issued by the BAI and the CAR must be laid before the Oireachtas subject to a Motion to Annul.

Recommendation:

The requirement to lay regulations before the Oireachtas provides the legislature with a role in the oversight of an body such as the Media Commission. However, on balance, based on the constraints which exist in relation to the operation of the Media Commission it is not proposed to include such a provision.

7.10 Power to amend or revoke levy orders

ComReg and the CRU have the power amend or revoke their levy orders (without ministerial consent).

Recommendation:

As noted above, given the likelihood of the Media Commission issuing levy orders on a yearly basis, it is not envisaged that interim amendments will be a significant issue. It could be

argued that it would be prudent to explicitly state in the OSMRB that the Commission may amend regulations (levy orders) by order.

7.11 Payment of surplus to Exchequer

Provision is made for ComReg and the CRR to pay surplus funds to the exchequer, subject to ministerial direction. It is unclear how such provision can be aligned with the basis of levies being to meet the expenses incurred by regulators in the performance of their functions.

Recommendation:

The inclusion of such a provision in the OSMRB would not be appropriate.

7.12 Ringfencing

ComReg is explicitly obliged to only impose a levy on providers of:

- electronic communications, in respect of its regulatory functions in relation to such providers,
- postal services, in respect of its regulatory functions in relation to such providers, and
- premium rate services in relation to the discharge of its functions in relation to such services.

This would appear to indicate that ComReg is required to account for such matters separately. However, such a requirement is implicit in the basis of levy powers to meet expenses properly incurred by regulators in the exercise of their functions.

Ringfencing, understood as the keeping separate of income derived from different categories or classes of regulated entities subject to levies, is not explicitly stated in the legislative basis of any of the levy powers considered in this paper.

Recommendation:

It is submitted that it is not legally necessary to include a provision in relation to ringfencing in the OSMRB. However, it may be desirable during detailed drafting to seek accounting advice in relation to this matter and in particular the accounting practices of extant regulators.

7.13 Exemptions

The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, provides that a levy order made under the Act may outline exemptions from levy obligations. Where deciding whether to grant exemptions the BAI would have regard to the size and scale of the entity, the nature of the service it operates, the desirability of promoting new or innovative services, whether it is in receipt of public funding, whether it is in receipt of commercial funding, and its qualifying income.

The Communications Regulation Act, 2002, provides that ComReg may make a determination that certain postal service providers may be exempt from a levy order. However, the ComReg levy orders are silent as to the issue of exemptions.

Section 32D of the Central Bank Act, 1942, is silent on this issue. The Central Bank levy order provides that the Bank may "at its discretion waive or reduce a levy contribution or part thereof" in exceptional circumstances. Similarly, s. 26 of the Railway Safety Act, 2003 does not provide guidance on exemptions, however the CRR levy order provides for an exemption for heritage railways.

Regulators may effectively exclude certain entities depending on the manner in which levy obligations are calculated or the choice of criteria governing such calculations.

Recommendation:

It may be concluded from the above comparator examples that the power to grant exemptions is implied in the power to make levy orders. Nevertheless, it would be prudent to include a provision in the OSMRB similar to that envisaged by the Broadcasting (Amendment) Bill, 2019, to provide that a levy order may outline exemptions from levy obligations.

7.14 Requirement to publish details of levy administrations costs

ComReg must, in relation to levy orders, publish an annual overview of administrative costs and levies collected. It may be noted that public bodies are obliged to publish annual reports detailing their income, expenditure and operating costs etc. No other comparator regulator, including the BAI, is subject to such a requirement

Recommendation:

It is submitted that such a provision is unnecessary as the Media Commission will be required to lay its regulations (levy orders) before the Houses of the Oireachtas, to publish annual reports and will be subject to audit by the Comptroller and Auditor General.

7.15 Instruction in relation to overcharging/undercharging, surplus/deficit

- BAI - the Broadcasting Act, 2009, provides that surplus levy income may be retained by the BAI to offset future levy liabilities or be refunded proportionately to levy payers.

- ComReg - the Communications Regulation Act, 2002, provides that surplus levy income may be retained by ComReg to offset future levy liabilities or refunded proportionately to levy payers. Further, the Act provides that where there has been over charging or undercharging the Commission will make appropriate repayments or in the case of undercharging to make additional charges.

    - The Electronic Communications Levy order provides that;

        - where there is an underpayment the regulated entity must pay the balance as directed by ComReg,

        - where there is an overpayment, ComReg will prepay the excess

    - The Postal Levy order provides that where there is an underpayment the regulated entity must pay the balance as directed by ComReg.

- CCPC - the Consumer Protection Act, 2007, provides that the CCPC may refund the whole or a part of a levy payment.

- CRU - the Electricity Regulation Act, 1999, provides that surplus levy income may be retained by the CRU to offset future levy liabilities. Where there is undercharging, the shortfall may be recovered in a subsequent year.

    - The Electricity Levy order provides that;

        - where there is an underpayment the relevant undertaking concerned shall pay to the CRU the balance of the amount payable on the last day of the first month of the following quarter (subject to compounded monthly interest of 2%p/a above the Euribor rate),

        - where there is an overpayment the CRU shall make an adjustment to the amount payable by the relevant undertaking in the following quarter.

    - The Gas, LPG, Petroleum and Water Levy orders provides that where there is an underpayment, any amount falling to be paid within the period for specified will be subject to subject to compounded monthly interest of 2% p/a above the Euribor rate

- Central Bank - the Central Bank Act, 1942, provides that the Bank may refund the whole or a part of a levy payment.

    - The Central Bank Levy order provides that where a levy payment is not made by the due date the outstanding amount shall be subject to interest.

- FSPO - the FSPO Levy order provides that where a levy payment is not made by the due date the outstanding amount shall be subject to interest.

- CRR - the CRR Levy order provides that if a levy payment is not made within 14 days of the due date, it shall be subject to subject to compounded monthly interest of 2% p/a above the Euribor rate.

Recommendation:

It would be prudent to include such a provision to provide guidance on such matters in the OSMRB. Such a provision is not likely to pose difficulty to drafters.

7.16 Provision of Oireachtas funds to regulator for performance of functions

The Electricity Regulation Act, 1999, provides for the provision of Oireachtas funds to the CRU for the purposes of expenditure by the Commission in the performance of its functions.

Recommendation:

Such a provision is not relevant to the Media Commission, therefore should not be included in the OSMRB.

7.17 Minimisation of costs

The Aviation Regulation Act, 2001, requires the CAR to ensure that its own costs of operations are kept to a minimum and are not excessive. However, no such provision is included in relation to other regulators examined.

It may be noted that public bodies generally are required to minimise their costs and are subject to oversight, *inter alia*, by the Comptroller and Auditor General.

Recommendation:

It is submitted that such a provision is not necessary and should not be included in the OSMRB.

7.18 Provision of working capital

This is a novel provision which appears to be unique to the amendments to s. 33 of the Broadcasting Act, 2009, by the Broadcasting (Amendment) Bill, 2019. The rationale for this amendment stemmed from cash flow difficulties encountered by the BAI which were remedied through a borrowing facility with the NTMA.

It is unclear whether other regulators experience such difficulties. A strict reading of the "costs incurred" basis of most levies to fund the cost of regulation would seem to preclude the inclusion of a contingency amount in levy calculations. It may be noted that the BAI, ComReg, CCPC, CRU, CAR and CRR may borrow money with ministerial consent.

Recommendation:

Provisions in relation to working capital are not standard in the comparator legislation considered in this paper. The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill 2019 is the only comparator legislative provision which addresses this issue. As noted the purpose of levy provisions typically refer to recouping 'expenses properly incurred' in the exercise of regulators' functions. In the case of the BAI, it was left without adequate working capital at certain points in the levy cycle and applied for a borrowing facility each year under s. 35(1) of the 2009 Act.

As such, given that such provisions do not exist within the comparator legislation it is not proposed to include such a provision.

7.19 Provision of information

The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, provided an explicit legislative basis for the provision of information to the BAI which would be required to calculate the liability of entities subject to the levy.

The CCPC, Central Bank and FSPO Levy orders require regulated entities to keep full and true records of all transactions that affect their levy liability under those orders.

The CRU's Gas Levy order requires Gas Networks Ireland to supply the CRU with the information required to calculate the relevant percentage for gas shippers. Where such

information is not provided the CRU may make calculations based on the figures from the last quarter in which information was available.

Recommendation:

It would appear that the provision of information to a regulator is implicit within the power to impose levies. Indeed, it is in a regulated entity's interest to be forthcoming with information to ensure that levy obligations are calculated accurately. Nevertheless, it may be prudent to include such a provision in the OSMRB.

7.20 Issues to be considered in creating levy order

Uniquely, the Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, would require the BAI to have regard to the following in making a levy order:

- the most recent estimates of income and expenditure of the BAI submitted to the Minister,
- the actual income and expenditure of the BAI in the previous financial year, and
- the amount paid to the BAI under section 123 of the Act.

These considerations were drawn from the extant BAI Levy order.

As noted, Article 30.1 of the revised AVMSD requires the designated national regulatory authority, in this case the Media Commission, to be "legally distinct from the government and functionally independent" and to "have adequate financial and human resources".

Therefore, it is appropriate and practical for the issues to be considered in creating a levy order to be determined by the Media Commission in the creation of regulations. The inclusion of a provision setting out the issues to be considered in creating a levy order would pose particular challenges in relation to levies on ODAVMS and Designated Online Services as it has yet to be determined how levies on such entities will be calculated. Furthermore, unlike with the Broadcasting (Amendment) Bill, 2019, there are no existing levy orders in relation to ODAVMS and Designated Online Services to draw upon to draft such a provision.

It is therefore t is deemed appropriate, and in line with the majority of legislative provisions providing regulators with levy powers, that the calculation of levies will be a matter within the discretion of the regulator. Therefore it is difficult to identify the salient issues which should be considered and to specify same in primary legislation.

Recommendation:

The Media Commission will likely engage expert advice in relation to this question, therefore it is unadvisable to unduly fetter the discretion or impinge on the independence of the regulator with a prescriptive provision which sets out issues which a regulator must consider in creating a levy order beyond the policies and principles provided by the levy provision as a whole.

7.21 Basis on which levy is to be calculated

The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, effectively incorporated the basis of the qualification of the current BAI levy order and the concept of "qualifying income" into the primary Act. It may be noted that this is highly unusual in the context of statutory provisions underpinning levy orders. The practical implications of the inclusion of the basis on which a levy obligation is to be calculated is that while it provides clear and unambiguous principles and policies for the purposes of creation of secondary legislation (levy order regulations), it means that the ability of the regulator to respond to changing market conditions and structures is highly circumscribed.

Furthermore, this proposed amendment was formulated on the basis of an existing levy order issued by the BAI in relation to broadcasting services. In the absence of existing levy orders for on-demand audio visual media services and designated services it would be very difficult to include such a provision in legislation, particularity where such legislation concerns the regulation of entities for the first time.

The legislation underpinning the other regulators examined in this paper leaves the manner in which their respective levies are calculated to the levy orders made by those regulators.

Recommendation:

It is appropriate and practical for such issues to be determined by a regulator in the creation regulations. It is submitted that such a provision is undesirable and would constrain the Media Commission's capacity to respond to changing market conditions. If such a provision were included in the OSMRB it could result in a situation where it would be necessary to amend primary legislation to update a levy order. This would be time consuming and inefficient and could conceivably lead to a situation where the Commission would experience significant cash flow difficulties.

Nevertheless, it may be deemed appropriate to provide certain guidance in primary legislation such as in relation to the relevant turnover of regulated entities and whether this is to be reckoned on a national, European of global basis. It will be necessary for this matter to be examined on conjunction with the OAG in the course of detailed drafting.

7.22 Recalculation of levy

The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, provides that the BAI may recalculate a levy obligation where relevant information to levy calculation is provided. This amendment is drawn from the extant BAI levy order.

Recommendation:

It is submitted that the inclusion of such a provision is not a legal necessity, it would however be prudent to do so and is therefore recommended.

7.23 Obligation to issue a notice and content of notice

The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, provides that the BAI must serve a notice on all entities subject to the levy stating that a levy is payable, its amount, the date and manner in which it is to be paid. A revised notice must be served where a levy recalculation is made.

The Postal Levy order requires the ComReg to issue a written information notice to the universal postal service provider in relation to any increase in turnover percentage used to calculate levy liability.

The CCPC, Central Bank and FSPO levy orders require those bodies to issue a levy notice in writing to regulated entities indicating, *inter alia*, their levy liability and the payment date.

Recommendation:

It is submitted that the inclusion of such a provision is not a legal necessity, it may however be prudent to do so and is therefore recommended.

7.24 Specific *de minimis* amount

The Broadcasting Act, 2009, as it was to be amended by the Broadcasting (Amendment) Bill, 2019, provides that the BAI may determine in its levy order a minimum level of qualifying income, not exceeding €250,000 (it was however intended for this figure to be raised to €500,000 in the 2019 Bill), below which liable entities are exempt from levy obligations.[10] While this provision is expressed in the conditional ("may"), it in effect will require the BAI

[10] This provision appears to be based on the 2010 Levy Order which stated "A broadcaster whose base year qualifying income is not more than €250,000 must pay a levy of €750 in the levy year."

to use this as a default *de minimis* amount as it is expressed in primary legislation and it would be difficult to sustain an attempt to place a different figure in a levy order.

Regulators who utilise a class/category structure in relation to entities subject to their levies, such as the Central Bank and the FSPO include *de minimis* amounts in the schedule to their levy orders.

It is submitted that the inclusion of a specific *de minimis* amount in primary legislation is not appropriate in the context of the OSMRB. This is particularly so in the context of ODAVMS and Designated Online Services as the basis upon which the levy liabilities of such entities will be calculated has not been determined, therefore the inclusion of a *de minimis* amount for such services would be entirely arbitrary. Further, the AVMSD requires that the Media Commission be functionally independent. Such a provision could be said to impinge on the independence and discretion of the Media Commission.

Recommendation:

Decisions in relation to specific *de minimis* amounts are best left to the regulator to be made in the course of deciding on the basis of levy obligations and calculation of same and it is recommended that the legislation explicitly states this.

7.25 Appeals

While the CCPC, Central Bank and FSPO Levy orders provide for appeals in relation to the levy amounts, their respective grounding Acts are silent on this matter.

This demonstrates that implicit in the power to implement a levy by a regulator is the power also to create a system and processes for the operation of such a levy and to provide for fair procedures in those systems to give effect to the policies and principles in their underpinning legislation.

Recommendation:

It is submitted that the inclusion of such a provision is not a legal necessity, it may however be prudent to do so.

Summary of elements examined

	Necessary	**Not legally necessary**	**Not Appropriate**
Purpose of levy – to meet the	✔		

expenses of a regulatory body in the performance of its functions			
Entities subject to levy - specified			✔
Entities subject to levy – contingent	✔		
Obligation to pay is stated	✔		
Option to make separate orders		✔	
General statement of what may be contained in a levy order	✔		
Recovery of unpaid levy liability as a simple contract debt	✔		
Regulations to require the approval of Minister(s)			✔
Amendments to or revocation of regulations to require the approval of Minister(s)			✔
Regulations to be laid before the Houses of the Oireachtas			✔
Power to amend or revoke levy orders		✔	
Payment of surplus to Exchequer			✔
Ringfencing		✔	

Exemptions	✔		
Requirement to publish details of levy administrations costs			✔
Instruction in relation to overcharging/undercharging, surplus/deficit	✔		
Provision of Oireachtas funds to regulator for performance of functions			✔
Minimisation of costs			✔
Provision of working capital	✔		✔
Provision of information		✔	
Issues to be considered in creating levy order			✔
Basis on which levy is to be calculated		✔	
Recalculation of levy		✔	
Obligation to issue a notice and content of notice		✔	
***Specific De minimis* amount**			✔[11]
Appeals		✔	

[11] As stated above, it's recommended that the legislation explicitly state that decisions in relation to specific *de minimis* amounts are best left to the regulator to be made in the course of deciding on the basis of levy obligations and calculation of same

Discussion of elements examined

From the foregoing it is apparent that there is no single approach across the regulatory landscape to devising a legislative provision to underpin the creation of levy order regulations. The purpose of such legislative provisions is to provide policies and principles to allow a regulator to craft regulations which are sufficient, appropriate and legally robust.

From a policy perspective it is desirable to have a minimal legislative provision which empowers a regulator with significant scope to formulate a levy order. Nevertheless, there is a legal desire for certainty and robustness of secondary legislation. Therefore, the primary legislation underpinning such secondary legislation must contain sufficient policies and principles to avoid the charge of excessive delegation of legislative power and potential unconstitutionality. What precisely constitutes sufficient policies and principles is the question that must be answered in drafting a levy provision.

The policies and principles test was enunciated by the Supreme Court in *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381. In that case, the Court (O'Higgins C.J.) held that an excessive delegation of legislative power to a regulatory body is where such delegation is "*more than a mere giving effect to principles and policies*" contained in primary legislation. The corollary of this is that the simple delegation of any legislative power to a regulatory body does not in and of itself constitute an excessive delegation of such power.

The question then arises as to how restrictive does the primary legislation need to be in order for it to contain sufficient policies and principles to allow a regulator to make levy orders that are legally robust and don't constitute the excessive delegation of legislative power.

The amendments to section 33 of the Broadcasting Act, 2009, as envisaged in the Broadcasting (Amendment) Bill, 2019, are an example of a relatively prescriptive approach. In that Bill, matters which typically are delegated to regulators to decide would have been set in legislation, for example, the basis on which the levy is set and the setting of a *de minimus* amount.

It is important to note that many of these proposed amendments were derived from the existing levy order drawn up by the BAI and that there are no such existing orders for on-demand audiovisual media services and designated online services on which to base similar provisions. Further to this, the envisaged regulatory framework for designated online services would see the Media Commission determining which relevant online services would be subject to regulation. This would create significant difficulties in including similar provisions in respect of designated online services.

In contrast, less restrictive approaches are common in the various pieces of legislation underpinning the comparator regulators examined in this paper. These pieces of legislation typically leave a wide range of matters for the regulators to deal with and expand on in their levy orders, including:

- the manner in which levy obligations are calculated,

- the frequency at which levies must be paid, in general levies are payable: annually, quarterly, monthly or as appropriate,

- whether levies are collected on a projected costs or incurred costs basis. Of the entities considered in this paper the Central Bank is the only regulatory body moving towards such a model, budgeting on an incurred costs basis requires significant working capital,

- whether supplementary levies will be imposed. Of the entities considered in this paper only the Central Bank imposes supplementary levies, for example credit institutions are subject to a supplementary levy in respect of the tracker mortgage examination, and

- procedures in relation to appeals of levy obligations.

It is necessary to decide how prescriptive the legislative provision(s) underpinning the levy power of the Media Commission will be. Based on the overview in **Appendix 2** and the above analysis, it is submitted that the comparator bodies may be divided into two broad camps. Certain bodies, such as ComReg and the BAI follow a more prescriptive approach whereby significant aspects of their levy process are set out in legislation, whereas the other bodies such as the CAR and CCPC levy provisions are less detailed, allowing those bodies more flexibility in the creation of their levy orders.

In determining the appropriate balance to be struck between the competing desires of legal certainty and providing flexibility to the Media Commission it is necessary to consider the context of the establishment of the Media Commission. The revised AVMSD requires that national regulatory bodies such as the Media Commission be "functionally independent" and have "adequate financial… resources". Both of these important considerations come into play when constructing a provision to provide for the Commission's levy powers. It is arguable that a provision which unduly fetters the discretion of the Commission would reduce both its independence as well as its ability to appropriately secure funding through the imposition of levies. Further, it may be noted that the industry funding model is both accepted and common across the Irish regulatory landscape (see **Appendix 5 – Comparator Funding Models**).

Selection of Relevant Criteria

The following are the criteria against which the three options for the basis of levy powers will be considered.

a. Complexity

This criterion assesses the relative complexity or simplicity of the options.

b. Clarity

This criterion assesses how easily comprehended each of the options are.

c. **Regulatory Burden**

This criterion assesses whether the options will place specific or undue burdens on the regulated entities with regard to the imposition of levies and the collection of same.

d. Expertise

This criterion assesses whether the options will require specific expertise to be implemented.

e. Future Proofing

This criterion considers whether the options provide the flexibility which the Media Commission will require with regard to its funding through the imposition of levies.

f. Legal Justification

Whether there is a sound legal basis for the chosen options.

g. Legal robustness

Whether there are sufficient principles and policies in the chosen option to ensure it stands up to legal scrutiny.

Decision on how to assess criteria

Each of the criteria receives a score from 1 to 5 based on the following:

- Highly positive 5

- Moderately positive 4
- Neutral 3
- Moderately negative 2
- Highly negative 1

Assessment

Option 1:

Provide for a single non-prescriptive levy provision (set out at Appendix 1)which would cover all services subject to the regulation of the Media Commission.

Option 1 (A) - A minimalist approach where only matters which are absolute legal requirements are contained in the provision.	**Option 1 (B) - An expanded approach where matters which are not legally required but which provide further principles and policies to the regulator in the creation of regulations are included.**
➢ This is a simple approach which would provide the Media Commission with the ability to issue regulations which can be easily updated as the Commission sees fit. ➢ The burden on regulated entities which this option would entail would be no more onerous than could reasonably be expected by regulated entities and would be in line with similar levy regimes. ➢ The principle that regulated entities pay the cost of their regulation is in line with the independence and resourcing requirements enunciated by	➢ This approach shares may of the characteristics of Option 1 (A), including, among other things, that: ○ It would provide the Media Commission with the ability to issue regulations which can be easily updated as the Commission sees fit, ○ The burden on regulated entities which this option would entail would be no more onerous than could reasonably be expected by regulated entities and would be in line with

Article 30.1 of the revised AVMSD. ➢ The BAI possesses institutional knowledge and experience in relation to the imposition of levies on linear services. It would be expected that the Media Commission would avail of specific expertise in matters such as the calculation and basis of calculation of levy rates, especially in relation to ODAVMS and designated online services. ➢ This option provides significant scope to the Media Commission to adapt and adjust the key features of its levy order as necessary. ➢ There is legal justification for this approach as demonstrated in the above analysis as well as the assessment of comparator levy powers in **Appendix 2** which demonstrates that this approach is relatively standard.	similar levy regimes, ○ The principle that regulated entities pay the cost of their regulation is in line with the independence and resourcing requirements enunciated by Article 30.1 of the revised AVMSD, and, ○ There is legal justification for this approach as demonstrated in the above analysis as well as the assessment of comparator levy powers in **Appendix 2** which demonstrates that similar approaches, though typically less prescriptive, are relatively standard. ➢ A key difference is that this provision is somewhat more prescriptive than Option 1(A). It could be argued that this more prescriptive approach will impinge on the discretion of the Media Commission to a greater extent than Option 1(A). ➢ However, this option provides further principles and policies to the Media Commission in the creation of regulations. Therefore, this option may be deemed to be more legally robust.

Option 2:

Provide for two provisions, one prescriptive section which will cover broadcasting services (section 33 of the Broadcasting Act, 2009, as it would have been amended by the Broadcasting (Amendment) Bill, 2019, (see the codified section at **Appendix 4**)), as well as a less-prescriptive provision to cover ODAVMS and designated services (see **Appendix 1**).

- This option would result in divergent levy provisions and would give rise to complexity especially for entities which would be subject to both regimes (e.g. RTÉ would be subject to the levy on their broadcasting services as well as a separate levy on ODAVMS).

- This option would place a significant burden on regulated entities, and as above, this is especially true for entities subject to both levies. It may be noted that the CRU and ComReg operate multiple levy regimes, this reflects those regulators' wide ranging responsibilities but also the piece meal way in which their grounding legislation has developed.

- This option, which features a prescriptive levy provision in relation to broadcasting services would provide a strong argument in favour of retaining an arrangement similar to that which currently exists whereby the BAI has engaged PwC to administer the levy collection process. It would be expected that the Media Commission would avail of specific expertise in the creation of initial levy orders, especially in relation to ODAVMS and designated online services.

- This option would bind the Media Commission to the envisaged regime in the amended section 33 of the Broadcasting Act, 2009, while allowing the Commission scope to adapt its levy regime in relation to ODAVMS and designated online services as required.

- The drafting of levy provisions poses a significant challenge. This is especially true in the case of a multiple provision approach including a provision of significant complexity such as the provision in relation to linear services which reflects the approach taken by the Broadcasting (Amendment) Bill, 2019. Given the complexity of this approach extremely careful drafting will be required. A lack of precision in drafting resulting in a defective provision could have significant and negative consequences for the funding of the Commission.

- It is submitted that this option is legally sound, provides significant principles and policies to guide the creation of levy orders and is in line with Article 30.1 of the revised AVMSD. However, divergent levy regimes are likely to undermine the stated intention of aligning regulation of linear and non-linear services.

	Option 1(A)	Option 1(B)	Option 2
Complexity	5	4	2
Clarity	5	5	2
Regulatory Burden	4	4	3
Expertise	4	4	2
Future Proofing	5	4	2
Legal Justification	4	5	4
Legal Robustness	3	5	3
Total	30	31	18

8. Recommendation

It is recommended that Option 1(B), a single relatively non-prescriptive levy provision containing strong principles and policies to provide direction to the Media Commission in the exercise of its powers and covering all services subject to the regulation of the Media Commission, represents a suitable course of action.

This provision would repeal section 33 of the Broadcasting Act, 2009, which was due to be substantially amended by the Broadcasting (Amendment) Bill, 2019. A new expanded provision would provide for the imposition of levies on on-demand audio visual media services and designated online services. Furthermore, it draws from comparators legislative provision to provide suitable wording for certain matters.

This option delegates responsibility in relation to the content of the levy order (examples of matters typically contained in levy orders are listed above in **Section 7**) to the Media Commission. This option includes robust principles and policies to provide guidance to the Media Commission in the creation of regulations. This sets clear limits on the extent of the regulator's powers and will ensure this approach is legally sound.

The rationale for this recommendation may be summarised as follows;

- *Reduction in Complexity*

  A single levy provision would provide the Media Commission with the option of producing a single levy order in relation to multiple classes or categories of regulated entities and would provide a simple and transparent approach.

  The amended section 33 of the Broadcasting Act, 2009, provides a prescriptive approach to the imposition of levies on broadcasters. If this were to be supplemented by a separate section in relation to other entities such as on-demand audio visual services and designated online services, the divergent approaches would be placed in stark contrast.

- *Less Burdensome*

  Regulated entities may be subject to multiple classes or categories of levies. As such, a single levy order setting out those levies would place less of a burden on regulated entities than navigating separate and divergent regimes.

- *Existing Expertise*

The BAI currently imposes a levy on broadcasters. The BAI has institutional knowledge, notwithstanding the outsourcing of certain matters relating to the levy collection process, of the creation of levy orders, calculation of levy obligations and engagement with stakeholders in relation to levy processes. As such it is submitted that the current broadcast levy regime should be maintained (and expanded to include other regulated entities). This will provide clarity and continuity to entities subject to the levy and the existing expertise of the BAI in relation to levies will be of benefit to the Media Commission. This is consistent with the desire as outlined in the **Regulatory Functions and Structures Paper 2** to encourage the development of in-house expertise within the new regulator and to avoid over reliance on external consultants.

- *Future proofing*

A non-prescriptive levy provision grounding the levy making powers of the Media Commission would allow the Commission latitude to recognise and react to changes in the sectors/industries subject to its regulation. If the Media Commission was to be bound by a prescriptive legislative provision, it would effectively need primary legislation to be amended to significantly change its levy order. This would be unworkable and undesirable, particularly given the pace of change and innovation in the sectors to be regulated. It is submitted that Option 1(B) provides a suitable balance between the desire for flexibility and the need for sufficient principles and policies to ensure that regulations created by the Media Commission are robust.

- *Legal justification*

There is a legal justification for the proposed approach of a single provision in relation to the imposition of levies on entities subject to the regulation of the Media Commission. For example, the Central Bank and the Commission for Aviation Regulation regulate divergent entities yet their respective legislative provisions (s. 32D of the Central Bank Act, 1942, as amended and s. 23 of the Aviation Regulation Act, 2001), are simple non-prescriptive provisions (as illustrated in the table at **Appendix 6**) which underpin complex levy regimes which operate effectively. The inclusion of additional provisions provides significant principles and policies to guide the Media Commission in the creation of regulations.

Further, Article 30.1 of the revised AVMSD calls on Member States to establish independent and adequately resourced regulatory authorities. This requirement would be well served by a flexible and robust levy power.

- *Will not impact existing BAI levy order*

Regulators are afforded significant latitude in relation to the development of levy orders. It is not necessary for there to be a significantly detailed legislative provision underpinning a levy regime. This is clearly demonstrated by the examples set out in the table in **Appendix 6** and the comparators outlined in **Appendix 5**.

This approach will not interfere with the legal justification for or application of the broadcasting levy, which is currently levied by the BAI on broadcasters to pay for the cost of their regulation. The sole difference is that the levy order will be drawn up by the Media Commission rather than the Authority, which is to be dissolved.

Appendix 1 – Draft Heads

Option 1: a single section to provide for the power to impose levies on all entities subject to the regulation of the Media Commission

B. An expanded approach to the draft provision where matters, =which are not legally required but which provide further principles and policies to the regulator in the creation of regulations are included

Levy.

(1) The Commission shall make regulations prescribing a levy be paid by regulated entities, to meet the expenses properly incurred by the Commission in the discharge of its functions under this Act.

(2) Whenever a levy order is made under subsection (1) there shall be paid to the Commission by each regulated entity to which the levy order applies such amount as shall be appropriate having regard to the terms of the levy order.[12]

(3) The Commission may make separate levy orders, as it sees fit, in respect of different classes or categories of regulated entities obliged by subsection (1) to pay a levy.

(4) A regulation made under this section may be amended or revoked by the Commission.

(5) In particular, regulations under subsection (1) may provide for any of the following matters:

(a) the regulated entities, or classes of regulated entities, who are required to pay specified kinds of levies;

(b) the amounts of the levies to be imposed on particular regulated entities or classes of regulated entities;

(c) the means by which levies are to be calculated;

(d) the periods for which, or the dates by which, specified levies are to be paid

(e) procedures to be taken where a regulated entity has under paid in respect of their levy obligation(s);

[12] Derived from para. 17 Schedule 1 of the Electricity Regulation Act, 1999

(f) penalties payable by a regulated entity who does not pay a levy on time;

(g) the keeping of records, and the making of returns to the Commission, by regulated entities who are liable to pay a specified levy;

(h) matters relating to exemptions from, or deferrals of payment of, the levy or payment of a reduced levy, and the application process for exemptions, deferrals, refunds or reduced levy;

(i) matters relating to the refund of the whole or a part of a levy paid or payable under regulations in force under this section;

(j) matters relating to the appeal by a regulated entity of the levy obligation specified in a notice received pursuant to subsection (11);

(k) thresholds below which regulated entities will be obliged to pay a nil amount or a minimal contribution.

(6) The Commission shall ensure that where levy obligations are based on multiple classes or categories of regulated entities it will ensure that expenses in respect of such classes or categories will be assessed separately.

(7) Entities subject to levy obligations shall provide to the Commission the information required by the Commission to calculate the liability of each regulated entity obliged to pay the levy referred to in subsection (1).

(8) The Commission may recalculate the levy payable by a regulated entity liable to pay the levy where further information, referred to in subsection (7) or other information which is relevant to the calculation of the levy, is provided to it by that regulated entity.

(9) A levy shall be payable to the Commission in the manner or form prescribed having regard to the terms of the regulations.

(10) Any surplus of levy income which remains at the end of a financial year after the working capital requirements of the Commission and the expenses properly incurred by the Commission in the performance of its functions in that financial year have been met, shall, as the Commission considers appropriate—

(a) be retained by the Commission to be offset against any liability to pay the levy imposed on a regulated entity, or

(b) be refunded proportionately to the regulated entities on whom the levy has been imposed.

(11) The Commission shall serve a notice on each regulated entity liable to pay a levy stating—

(a) that a levy is payable,

(b) the amount of the levy,

(c) the date by which the levy shall be paid, or, where a levy may be paid by instalments, the number of instalments, the amount of each instalment and the date on which each instalment is to be paid.

(12) The Commission may, by proceedings in a court of competent jurisdiction, recover as a simple contract debt an amount of levy payable under regulations in force under this section.

(13) In this section 'regulated entity' and cognate words will include all persons or undertakings who are subject to regulation under this Act and relevant Statutory Instruments."

Explanatory note:

A provision to grant the Media Commission the power to impose on regulated entities levies to provide for the cost of exercising the Commission's functions.

The above provision incorporates matters that, while not deemed legally necessary, do provide significant principles and policies to guide the Media Commission in the creation of regulations.

This approach will not interfere with the legal justification for or application of the broadcasting levy, which is currently levied by the Broadcasting Authority of Ireland on public service broadcasters and broadcasting contractors to pay for the cost of their regulation. The sole difference is that this levy order will be drawn up by the Media Commission rather than the Authority, which is to be dissolved.

Online Safety & Media Regulation Bill

Policy Paper – Funding of the Media Commission

Annex 1: Appendices 2-6

Appendix 2 – Comparator Levy Powers

The following regulatory and compliance bodies fund specific regulatory activities through the imposition of levies.

a. Commission for Communications Regulation

Legislative Basis

Section 30 of the Communications Regulation Act, 2002, as amended, (at **Appendix 3**, tab c) requires ComReg to recoup the expenses properly incurred by the Commission in the discharge of its functions in relation to electronic communications, postal services and premium rate services by means of levies. Levy income in respect of each category is ring-fenced (s. 30(11)). Surplus levy income may be paid to the Exchequer (s. 30(7)). The Commission has the power to amend or revoke a levy order (s. 30(4)).

The terms of these levies, including the method of calculation, are set out in; S.I. No. 346/2003 - Communications Regulation Act, 2002 (Section 30) Levy Order, 2003, S.I. No. 181/2013 - Communications Regulation Act 2002 (Section 30) Postal Levy Order 2013, S.I. No. 339/2010 - Communications Regulation Acts 2002 to 2010 (Section 30) Premium Rate Services Interim Levy Order 2010.

Key Features

Electronic Communications Levy

The levy is payable on a quarterly basis. Where the relevant turnover of an entity is €500,000 or more the levy will be equivalent to 0.2 per cent of relevant turnover. Entities subject to the levy must submit within 2 months of the end of the relevant financial year audited statement of their relevant turnover in that financial year. Relevant income means the gross revenue, excluding VAT paid or payable, of the provider, in respect of electronic communications services or networks. Where there is under payment of the levy the balance must be paid to ComReg. Where there is an over payment of the levy obligation, the amount may be retained by ComReg to offset obligations for the subsequent year or refunded to the entity.

Postal Levy

The levy is payable on a quarterly basis. The universal postal service provider (An Post) must pay a levy representing the aggregate of 0.4% of relevant turnover arising from the provision of the universal postal service and 0.4% of relevant turnover from the provision of non-universal postal services falling within the scope of the universal postal service. Entities other than the universal postal service provider must pay a levy representing 0.4% of the

relevant turnover arising from the provision of postal services falling within the scope of the universal postal service subject to a minimum charge of €5,000 (provision is made in the levy order to increase the turnover percentage where the turnover arising from the provision of the universal postal service declines). Entities subject to the levy must submit within 21 days of the end of the relevant financial year audited statement of their relevant turnover in that financial year. The universal postal service provider (An Post) must distinguish between postal services provided within the scope of the universal postal service and postal services provided outside of the universal postal service. Relevant turnover is the gross revenue, excluding VAT paid or payable, of the provider, in respect of the provision of postal services in the State. Where a surplus of levy income is collected by ComReg it may be retained to offset obligations or the subsequent year or refunded.

Premium Rate Services Levy

The levy is payable monthly in arrears. The levy is to be applied to the total revenues relating to calls to applicable services and is divided equally between relevant applicable providers and terminating network operators. The levy rates to be imposed are: 0.5% in respect of 1520 numbers, 0.5% in respect of 1512 numbers, and 1.8% in respect of all other premium rate numbers or short codes. Any surplus of levy income may be retained by ComReg or refunded proportionately.

b. Competition and Consumer Protection Commission

Legislative Basis

The levies imposed by the CCPC relate to the functions (personal finance - consumer information and education) transferred previously to the National Consumer Agency from the Financial Regulator (now Central Bank).

The CCPC makes levies in accordance with s. 24B of the Consumer Protection Act, 2007 (as inserted by the Central Bank Reform Act, 2010). Section 24B does not specify which entities are to be subject to the levy, rather it states the levy is "to be paid by persons who are subject to regulation under the designated enactments and designated statutory instruments". Those designated enactments and designated statutory instruments are set out at Schedule 2 of the Central Bank Act, 1942.

The Consumer Protection Act 2007 (National Consumer Agency) Levy Regulations 2011 (S.I. No. 560 of 2011) outlines the form of the levy, this regulation is amended on a yearly basis to insert an updated schedule with rates and means of calculation of the levy for different sectors, the most recent update being the Consumer Protection Act 2007 (Competition and Consumer Protection Commission) Levy Regulations 2019.

Key Features

The CCPC issues levy notices in the fourth quarter of each year to cover the cost of the relevant functions during that year. The levy amount is payable within 28 days. An entity may appeal to the Chairperson of the CCPC in relation to the amount being levied. If successful the Chairperson may direct the CCPC to reimburse the entity.

The legislation giving the power to impose the levies states that the levies are to be upon entities that are subject to regulation by the Central Bank. Those entities are authorised and regulated based on the nature of the financial services they provide.

The CCPC uses proxy measures to ensure an equitable distribution among the categories of firms subject to the levy. The calculation of the levy applicable to each firm takes into account the relative size of firms, their authorisation status and relevant activities (where data is available).

Levy Rates

The outcome of the most recent calculation exercise indicated that over 85% of the resources required for the performance of the functions are accounted for by;

- Credit Institutions, including those that operate in Ireland on a branch basis,
- Insurance firms, including Life Insurance and Non- Life Head Office firms and firms which operate in Ireland on a branch basis.

The remaining 15% (approx.) is accounted for by:

- Credit Unions,
- Stock Exchange Member firms,
- Moneylenders,
- Retail Credit Firms, and

- Investment (MiFID) Firms.[1]

	Basis	Rate	Minimum levy	Percentage share out of total levy
Category A – Irish Authorised Credit institutions and those operating in Ireland on a branch basis.	Number of retail customers at the end of 2018	€0.17604 per retail customer	€500 by each firm	50.19%
Category B(a) – Life undertakings with Irish head office, life undertakings operating in Ireland on a branch basis	Total net premium on Irish risk business of each firm for the year 2018	0.00191% of that premium income	€500 by each firm	9.74%
Category B(b) – Non-life insurance undertakings with Irish head office (other than those designated as 'captives' by the Central Bank of	Total net premium on Irish risk business of each firm for the year 2018	0.01473% of that premium income	€500 by each firm	24.01%

[1] Competition and Consumer Protection Commission, *Guide to the Competition and Consumer Protection Commission (CCPC) levy on financial service providers in 2019*, available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2019/10/2019-Guide-to-Competition-and-Consumer-Protection-Commission-Levy.pdf [accessed 08/11/2019]

Ireland) and non-life insurance undertakings operating in Ireland on a branch basis				
Categories D2, D3, D4 – Investment (MiFID authorised firms)	Number of retail clients each firm had at the end of 2018	€4.208 per retail client	€50 by each firm	2.55%
Category D5 – Stock Exchange Member firms	Number of retail clients each firm had at the end of 2018	€0.32433 per retail client	€50 by each firm	2.55%
Category F – Credit Unions	Total assets as at end September 2018	0.001076% of total assets	€50 by each firm	7.36%
Category G - Moneylenders			Flat rate levy per firm of €533	0.81%
Category M1 – Retail Credit firms	Value of each firm's outstanding loans as at 31 December 2018	0.000761% of each firm's outstanding loans figure	€50 by each firm	3.89%

c. Commission for Regulation of Utilities

Legislative Basis

In accordance with Section 39 of the Electricity Regulation Act 1999, as amended, the CRU is responsible for the calculation and administration of the PSO levy on an annual basis to help ensure that the scheme is administered appropriately and efficiently. As the PSO levy is a

subsidy charged to all electricity customers in Ireland designed to support government policy objectives related to renewable energy and indigenous fuels, and not a levy imposed for the purposes of covering the cost of regulation it falls outside the scope of this paper.[2]

Paragraphs 16 of Schedule 1 to the Electricity Regulation Act, 1999, as amended, empowers the CRU to impose a levy on electricity undertakings, natural gas undertakings, holders of LPG safety licences and petroleum undertakings and in respect of different classes of such undertakings for the purposes of meeting expenses properly incurred by the CRU in the discharge of its functions under the Act. Paragraph 20(1) provides that any excess revenue of the CRU over its expenditure in any year shall be applied to meet its expenses in the following year and the levy for that year shall take into account such excess. Paragraph 20(2) provides that expenses incurred by the CRU which are not recovered by the levy in a particular year may be recovered by the levy in a subsequent year.

Paragraphs 16A of Schedule 1 to the Electricity Regulation Act, 1999, as amended, empowers the CRU to impose a levy on Irish Water for the purposes of meeting expenses properly incurred by the CRU in the discharge of its functions under the Water Services (No. 2) Act 2013.

The terms of these levies, including the method of calculation, are set out in; S.I. No. 528/2018 – Electricity Regulation Act 1999 (Electricity) Levy Order 2018, S.I. No. 514/2018 – Electricity Regulation Act 1999 (Gas) Levy Order 2018, S.I. No. 517/2018 – Electricity Regulation Act 1999 (LPG Safety Licence) Levy Order, 2018, S.I. No. 515/2018 – Electricity Regulation Act 1999 (Petroleum Safety) Levy Order, 2018, S.I. No. 516/2018 – Electricity Regulation Act 1999 (Water) Levy Order, 2018.

Key Features

Electricity

[2] On the 28th of July 2017, the CRU published a decision paper setting out the PSO levy to apply to electricity customers from 1st October 2017 to 30th September 2018. The decision paper confirmed that the PSO levy for the 2017/18 PSO period equated to €471.9 million, which was approximately a 20% increase in the PSO levy (relative to 2016/17). The increase in the 2017/18 PSO levy is in part attributed to increased renewable generation and an increase R-factor arising from the 2015/15 PSO period. From a customer impact perspective, the 2017/18 PSO levy will result in a monthly charge of €7.69 and €26.55 for domestic and small commercial customers respectively.

The levy is chargeable on a quarterly basis. The levy is payable by each relevant undertaking separately for each activity of generation, transmission, distribution or supply, as the case may be, that is carried out by that relevant undertaking in Ireland.

Generators and suppliers must submit a statement of the relevant quantity for that quarter to the CRU on the first day of each quarter. If they do not do so the amount payable for that quarter shall be 115% of the relevant quantity for the previous quarter.

Within 25 working days of the end of each quarter generators must submit to the CRU a statement certified by the Single Electricity Market operator or the Meter Registration System Operator as appropriate, of the actual quantity for the relevant undertaking in the previous quarter. Within 25 working days of the end of each quarter suppliers must submit to the CRU a statement certified by the Single Electricity Market operator of the actual quantity for the relevant undertaking in the previous quarter.

Where there is underpayment the relevant undertaking must pay to the CRU the balance of the amount payable on the last day of the first month of the following quarter. Where there is overpayment the CRU will make an adjustment to the amount payable by the relevant undertaking in the following quarter.

Levy Rates

Undertaking	Rate
Transmission system operator, licensed under section 14 (1) (*e*) of the Act	a fixed payment of €236,171
Transmission system owner, licensed under section 14 (1) (*f*) of the Act	a fixed payment of €236,171
Distribution system operator, licensed under section 14 (1) (*g*) of the Act	a fixed payment of €425,108
Distribution system owner, licensed under section 14 (1) (*k*) of the Act	a fixed payment of €47,234
A generator connected to the transmission or distribution system and where the generating units are registered under the Code	6.6cent per MWhr at the Trading Boundary, rounded to the nearest euro, payable on the relevant quantity for that quarter plus the difference between the actual quantity and the relevant quantity for the previous

	quarter;
a generator with generating units below the *de minimis* threshold of 10MW which the relevant generator is not required to register under the Code and which are not so registered	6.6cent per MWhr at the Trading Boundary, rounded to the nearest euro, payable on the relevant quantity for that quarter plus the difference between the actual quantity and the relevant quantity for the previous quarter
a supplier	6.6cent per MWhr of aggregated demand at the Trading Boundary, rounded to the nearest euro, payable on the relevant quantity for that quarter plus the difference between the actual quantity and the relevant quantity for the previous quarter
an interconnector operator, licensed under section 14 (1) (i) of the Act	a fixed payment of €18,894

Gas

The levy is chargeable on a quarterly basis. The levy is payable by each relevant undertaking separately for each activity of transmission, distribution, or shipping of natural gas, as the case may be that is carried out by the relevant undertaking in Ireland.

On or before the last day of the first month of each quarter Gas Networks Ireland must supply the CRU with the information required to calculate the relevant percentage for each Shipper in respect of the immediately preceding quarter. If Gas Networks Ireland fails to supply any of the information required the CRU may calculate the relevant percentage for any shipper in respect of the last quarter for which such information was available.

Where a levy amount is not paid in the time available, interest (2% per annum above the Euribor rate) will be charged on the outstanding amount.

Levy Rates

Undertaking	Rate
Gas Networks Ireland, in respect of such transmission activities	a fixed payment of €336,165

Gas Networks Ireland, in respect of such distribution activities	a fixed payment of €336,165
a Shipper	the relevant percentage of €336,165

LPG

The levy is payable quarterly by relevant undertakings holding an LPG safety licence during the preceding year. Where a levy amount is not paid in the time available, interest (2% per annum above the Euribor rate) will be charged on the outstanding amount.

Levy Rate

The levy is charged at a rate of €2.73 per customer during the previous levy year.

Petroleum

The levy is payable quarterly. The purpose of the levy is to recover the CRU's costs for the operation of the safety framework pursuant to the Petroleum (Exploration and Extraction) Safety Act, 2010. Where a levy amount is not paid in the time available, interest (2% per annum above the Euribor rate) will be charged on the outstanding amount.

Levy Rate

The rate of the levy is calculated pursuant to the Schedule to S.I. No. 515/2018 – Electricity Regulation Act 1999 (Petroleum Safety) Levy Order. Different types of infrastructure are attributed a weighting to correspond with the different levels of safety regulation by the CRU. This is used to calculate levy obligations to cover the operational costs for the levy year.

Water

The levy is payable on a quarterly basis. The relevant undertaking subject to the levy is Irish Water. Where a levy amount is not paid in the time available, interest (2% per annum above the Euribor rate) will be charged on the outstanding amount.

Levy Rate

The levy order sets a yearly total (€2,426,524) which is paid in quarters (€606,631).

d. Central Bank

Legislative Basis

Section 32D of The Central Bank Act, 1942, as inserted by the Central Bank Reform Act, 2010, confers on the Central Bank the power, with the approval of the Minister for Finance, to make regulations prescribing an annual industry funding levy to be paid by relevant regulated financial service providers. Section 32D states the levy is "to be paid by persons who are subject to regulation under the designated enactments and designated statutory instruments". Those designated enactments and designated statutory instruments are set out at Schedule 2 of the Act. Section 32D(3A) and 4 relate specifically to levies on collected pursuant to the European Union (Bank Recovery and Resolution) Regulations 2015 and credit unions, respectively.

Section 24B does not specify which entities are to be subject to the levy, rather it states the levy is "to be paid by persons who are subject to regulation under the designated enactments and designated statutory instruments". Those designated enactments and designated statutory instruments are set out at Schedule 2 of the Central Bank Act, 1942.

The most recent regulations are S.I. No. 445/2018 - Central Bank Act 1942 (Section 32D) Regulations 2018.

Key Features

The Central Bank has wide ranging levy powers in relation to entities subject to its regulation. The Central Bank is currently engaged in a reform process whereby levies will cover the full cost of regulation, and the Bank is moving towards an incurred costs basis rather than a budgeted cost basis.[3]

Due to the wide range of entities which fall under its regulation the Central Bank levies are based on categories. The Central Bank determines the appropriate category or categories which apply to an entity for assessing the levy contribution and, where appropriate, supplementary levy contribution, for example Credit Institutions are subject to a supplementary levy in relation to the tracker mortgage examination.

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[3] See, Central Bank of Ireland, *Funding Strategy and Guide to the 2018 Industry Funding Regulations*, available at: https://www.centralbank.ie/docs/default-source/regulation/how-we-regulate/fees-levies/industry-funding-levy/guidance/funding-strategy-and-guide-to-the-2018-industry-funding-regulations.pdf?sfvrsn=4 [accessed 08/11/2019]

An entity may appeal a levy contribution and or supplementary levy contribution within 21 days following the due date. Where it is the reasonable opinion of the Central Bank that payment of the levy contribution or supplementary levy contribution would lead to insolvency or bankruptcy, the obligation may be waived. Further a levy contribution and or supplementary levy contribution may be waived in exceptional circumstances. The Central Bank will advise the entity of its decision and reasons for same.

Where a levy contribution and or supplementary levy contribution is not received by the due date, interest will accrue.

Levy Rates

Type of regulated entity	Basis of calculation of levy contribution	Minimum amount
Category A: Credit Institutions		
A1a - Significant supervised entities within the meaning of the SSM Framework Regulation (Regulation (EU) No. 468/2014 of the European Central Bank (ECB/2014/17)) — which were admitted to the Eligible Liabilities Guarantee Scheme 2009	Minimum amount + variable amount Variable amount (V) – V = ((S+G)*50%*C S = the credit institution's percentage share of the sum of total assets for category A1 G = the credit institution's percentage share of the sum of total risk exposure for category C = the proportion of total variable amount for category A1 relevant to this sub-category A1a.	€393,194
The values of S, G and C relevant to their levy calculations will be communicated directly by the Central Bank to each credit institution.		

Credit institutions in sub-category A1a will continue to be liable to pay separate supplementary levies to the Central Bank for the purposes of providing sufficient funds:

(i) for the conduct of investigations relating to inquiries that may be held by the Central Bank under Part IIIC of the Central Bank 1942, and

(ii) to enable it to conduct its broad examination of tracker mortgage related issues, as commenced in 2015 and notified to each relevant lender.

These supplementary levies will be set out in separate levy invoices sent to relevant credit institutions.

A1b - Irish authorised Credit Institutions that are outside the scope of sub-category A1a	Minimum amount + variable amount Variable amount (V) – V = ((S+G)*50%*C	€314,555

The values of S, G and C relevant to their levy calculations will be communicated directly by the Central Bank to each credit institution.

Since 2017, credit institutions in sub-category A1b have been liable to pay a supplementary levy to the Central Bank for the purposes of providing the Central Bank with sufficient funds to enable it to conduct its broad examination of tracker mortgage related issues, as commenced in 2015 and notified to each relevant lender.

In 2018, credit institutions in sub-category A1b will also be liable to pay a supplementary levy to the Central Bank for the purposes of providing the Central Bank with sufficient funds to enable it to consider significant changes to the activities of that institution.

These supplementary levies will be set out in levy invoices sent to each relevant credit institution.

A2a - Non-retail subsidiaries of Significant Institutions, non high-priority Less Significant Institutions, relevant Credit Institutions authorised pursuant to	Minimum amount + variable amount Variable amount (V) – V = ((S+G)*50%*C	€20,117

<table>
<tr><td>Section 9A of the Central Bank Act 1971</td><td></td><td></td></tr>
<tr><td colspan="3">The values of S, G and C relevant to their levy calculations will be communicated directly by the Central Bank to each credit institution.

Since 2017, credit institutions in sub-category A2a have been liable to pay a supplementary levy to the Central Bank for the purposes of providing the Central Bank with sufficient funds to enable it to conduct its broad examination of tracker mortgage related issues, as commenced in 2015 and notified to each relevant lender.

In 2018, credit institutions in sub-category A2a will also be liable to pay a supplementary levy to the Central Bank for the purposes of providing the Central Bank with sufficient funds to enable it to consider significant changes to the activities of that institution.

This supplementary levy will be set out in a levy invoice sent to each relevant credit institution.</td></tr>
<tr><td>A2b - Credit Institutions authorised in another EEA state operating in Ireland on a branch basis</td><td>Flat rate levy</td><td>€20,117</td></tr>
<tr><td>A3 - Credit Institutions authorised in another EEA state operating in Ireland on a cross border basis</td><td>Flat rate levy</td><td>€20,117</td></tr>
<tr><td colspan="3">Since 2017, credit institutions in sub-category A3 have been liable to pay a supplementary levy to the Central Bank for the purposes of providing the Central Bank with sufficient funds to enable it to conduct its broad examination of tracker mortgage related issues, as commenced in 2015 and notified to each relevant lender.</td></tr>
<tr><td colspan="3">Category B: Insurance Undertakings</td></tr>
<tr><td>B1 - Life undertakings with Irish head office and life undertakings authorised in another non-EEA state operating in Ireland</td><td colspan="2">Such institutions are liable to pay the levy contribution corresponding to its impact category.
<table>
<tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr>
</table></td></tr>
</table>

<table>
<tr><td>B4 - Non life undertakings with Irish head office

B7 - Reinsurance undertakings with Irish head office</td><td><table>
<tr><td>€3,329,855</td><td>€1,510,922</td><td>€345,472</td><td>€68,678</td><td>€20,192</td></tr>
</table></td></tr>
<tr><td>B2 - Life undertakings authorised in another EEA state operating in Ireland on a branch basis</td><td>All entities with the relevant gross premium income written on Irish risk business shall pay a flat rate levy.<table>
<tr><td>Gross Premium written on Irish risk business</td><td>> €100 million</td><td>€0 - €100 million</td></tr>
<tr><td>Levy</td><td>€172,736</td><td>€15,144</td></tr>
</table></td></tr>
<tr><td>B3 - Life undertakings authorised in another EEA state operating in Ireland on a cross border basis</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category.<table>
<tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr>
<tr><td>N/A</td><td>N/A</td><td>N/A</td><td>N/A</td><td>€15,144</td></tr>
</table></td></tr>
<tr><td>B5a - Non life insurance undertakings authorised in another EEA state operating in Ireland on a branch basis that write motor insurance in Ireland</td><td>All entities with the relevant gross premium income written on Irish risk business shall pay a flat rate levy.<table>
<tr><td>Gross Premium written on Irish risk business</td><td>> €50 million</td><td>€0 - €50 million</td></tr>
<tr><td>Levy</td><td>€172,736</td><td>€34,339</td></tr>
</table></td></tr>
<tr><td>B5b - Non life insurance undertakings authorised in another EEA state operating in Ireland on a branch basis that is not included in B5a</td><td>Flat rate levy</td><td>€15,144</td></tr>
</table>

<table>
<tr><td>B6 - Non life undertakings authorised in another EEA state operating in Ireland on a cross border basis</td><td colspan="2">Such institutions are liable to pay the levy contribution corresponding to its impact category.
<table>
<tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr>
<tr><td>N/A</td><td>N/A</td><td>N/A</td><td>N/A</td><td>€15,144</td></tr>
</table></td></tr>
<tr><td colspan="3">Category C: Intermediaries and Debt Management Companies</td></tr>
<tr><td>Intermediaries and Debt Management Companies</td><td>Minimum amount + variable amount

(A – B) x C

A = total of firm’s ‘Income from Fees’ and ‘Income from Commissions’ as reported in the firm’s On-Line Regulatory Return for the 2017 financial year. If a 2017 return has not been submitted, the most recent previous report will be used;

B = threshold level of total ‘Income from Fees’ and ‘Income from Commissions’ of €200,000;

C = variable levy rate of 0.32%.</td><td>€1,020</td></tr>
<tr><td colspan="3">Intermediaries and debt management companies that have failed to submit their On-Line Regulatory Return in accordance with regulatory requirements shall be liable to a default levy amounting to €3,600.

This default levy will be cancelled, however, and replaced with a levy calculated in accordance with the entity’s reported income from fees and income from commissions following submission of its On-Line Regulatory Return.</td></tr>
</table>

<table>
<tr><td colspan="2">Category D: Securities and Investment Firms</td></tr>
<tr><td>D1 – Designated Fund Managers

D2 – Receipt and Transmission of Orders and/or Provision of Investment Advice

D3 – Portfolio Management; Execution of Orders

D4 – Own Account Trading; Underwriting on a Firm Commitment Basis

D6 – Firms authorised under the Investment Intermediaries Act, 1995 that are not captured in any other levy category</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€480,317</td><td>€95,485</td><td>€9,999</td></tr></table></td></tr>
<tr><td>D5 – Stock Exchange Member Firms</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€480,317</td><td>€95,485</td><td>€9,999</td></tr></table></td></tr>
<tr><td>D9 – High Volume Algorithmic Trading Firms</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€480,317</td><td>€95,485</td><td>€9,999</td></tr></table></td></tr>
<tr><td>D10 – Market Infrastructure</td><td>Such institutions are liable to pay the levy contribution</td></tr>
</table>

<table>
<tr><td>Firms</td><td>corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€480,317</td><td>€95,485</td><td>€9,999</td></tr></table></td></tr>
<tr><td>D1 – D10</td><td>Firms in D1 to D10 above that are subject to the Client Asset Requirements shall pay a supplementary levy to the Central Bank corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€93,262</td><td>€18,540</td><td>€2,599</td></tr></table>

Investment Firms within the meaning of Regulation 3 of the European Union (Bank Recovery and Resolution) Regulations, 2015 shall pay a supplementary administration levy to the Central Bank corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€74,585</td><td>€14,827</td><td>N/A</td></tr></table></td></tr>
<tr><td>D11 - Investment firms authorised in another EEA state operating in Ireland on a branch basis</td><td>Flat rate levy</td><td>€9,999</td></tr>
<tr><td colspan="3">Category E1: Investment Funds, Alternative Investment Fund Managers and other Investment Fund Service Providers</td></tr>
<tr><td>E1a - Authorised UCITS; Authorised Unit Trusts; Authorised Investment Companies (Designated and</td><td colspan="2">All funds authorised by the Central Bank shall be liable to pay a minimum levy of €3,390. Umbrella funds will also pay a contribution per sub-fund of €250 up to ten sub-funds and a further levy of €155 on sub-funds numbers greater than</td></tr>
</table>

<table>
<tr>
<td>Non Designated); Authorised Investment Limited Partnerships; Authorised Common Contractual Funds; Authorised Irish Collective Asset management Vehicles

E1b - UCITS Self-Managed Investment Companies (SMICs); Authorised Designated Investment Companies (Internally Managed Alternative Investment Funds); Authorised Irish Collective Asset-management Vehicles (Internally Managed Alternative Investment Funds); Authorised Irish Collective Asset-management Vehicles (UCITS SMICS)</td>
<td>ten, to a maximum of twenty sub-funds, resulting in a maximum contribution for umbrella funds of €7,440.
<table>
<tr><th></th><th>No. of sub funds</th><th>Levy per sub fund</th><th>Total levy</th></tr>
<tr><td rowspan="10">Up to 10 sub funds</td><td>2</td><td>€250</td><td>€3,890</td></tr>
<tr><td>3</td><td>€250</td><td>€4,140</td></tr>
<tr><td>4</td><td>€250</td><td>€4,390</td></tr>
<tr><td>5</td><td>€250</td><td>€4,640</td></tr>
<tr><td>6</td><td>€250</td><td>€4,890</td></tr>
<tr><td>7</td><td>€250</td><td>€5,140</td></tr>
<tr><td>8</td><td>€250</td><td>€5,390</td></tr>
<tr><td>9</td><td>€250</td><td>€5,640</td></tr>
<tr><td>10</td><td>€250</td><td>€5,890</td></tr>
<tr><td rowspan="10">11 – 20 sub funds</td><td>11</td><td>€155</td><td>€6,045</td></tr>
<tr><td>12</td><td>€155</td><td>€6,200</td></tr>
<tr><td>13</td><td>€155</td><td>€6,355</td></tr>
<tr><td>14</td><td>€155</td><td>€6,510</td></tr>
<tr><td>15</td><td>€155</td><td>€6,665</td></tr>
<tr><td>16</td><td>€155</td><td>€6,820</td></tr>
<tr><td>17</td><td>€155</td><td>€6,975</td></tr>
<tr><td>18</td><td>€155</td><td>€7,130</td></tr>
<tr><td>19</td><td>€155</td><td>€7,285</td></tr>
</table>
</td>
</tr>
</table>

<table>
<tr><td></td><td></td><td>20</td><td>€155</td><td>€7,440</td></tr>
<tr><td colspan="5">Category E2: Fund Service Providers</td></tr>
<tr><td>E2a - AIF Management Companies

E2b - Administrators; UCITS Managers (Non Delegating); Depositories; Alternative Investment Fund Managers

E2c - UCITS Managers (Delegating)</td><td colspan="4">An Investment fund service provider falling within any of the above sub-categories and which has been authorised by the Central Bank shall be liable to pay the levy contribution corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€480,317</td><td>€95,485</td><td>€9,999</td></tr></table></td></tr>
<tr><td>E2d - UCITS managers and alternative investment fund managers authorised in another EEA state operating in Ireland as such on a brand new basis</td><td colspan="2">Flat rate levy</td><td colspan="2">€9,999</td></tr>
<tr><td colspan="5">Category F: Credit Unions</td></tr>
<tr><td>Credit Unions</td><td colspan="4">A Credit Union is liable to pay a levy of 0.01 per cent of total assets as reported in its annual return setting out its balance sheet as at 30 September 2017.</td></tr>
<tr><td colspan="5">Category G: Moneylenders</td></tr>
<tr><td>Moneylenders</td><td colspan="2">Determined by the firms' turnover reported to the Central Bank, amount of the levy will be calculated according to the following formula:

Minimum levy + variable amount</td><td colspan="2">€1,561</td></tr>
</table>

<table>
<tr><td></td><td>(A - B) x C

A = firms' turnover reported to the Central Bank in section 6.2 of the most recently received Renewal Application for the entity

B = threshold level of total 'Turnover' of €60,000;

C = variable levy rate of 0.957%.</td><td></td></tr>
<tr><td colspan="3">Category H: Approved Professional Bodies</td></tr>
<tr><td>Approved Professional Bodies</td><td colspan="2">Such institutions are liable to pay the levy contribution corresponding to its impact category.
<table>
<tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr>
<tr><td>N/A</td><td>N/A</td><td>N/A</td><td>N/A</td><td>€11,176</td></tr>
</table></td></tr>
<tr><td colspan="3">Category J1: Bureaux de Change</td></tr>
<tr><td>Bureaux de Change</td><td colspan="2">Such institutions are liable to pay the levy contribution corresponding to its impact category.
<table>
<tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr>
<tr><td>N/A</td><td>N/A</td><td>N/A</td><td>N/A</td><td>€1,009</td></tr>
</table></td></tr>
<tr><td colspan="3">Category L: Default Assessment</td></tr>
<tr><td>Default Assessment</td><td>Flat rate levy</td><td>€3,600</td></tr>
<tr><td colspan="3">Category M: Retail Credit Firms, Home Reversion Firms and Credit</td></tr>
</table>

<table>
<tr><td>M1 – Retail Credit Firms

M3 – Credit Servicing Firms</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>N/A</td><td>N/A</td><td>€42,603</td></tr></table>
In addition, retail credit firms subject to the Tracker Mortgage Examination shall pay a supplementary levy to the Central Bank.</td></tr>
<tr><td colspan="2">M2 – Home Reversion Firms</td></tr>
<tr><td>Home Reversion Firms</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td><td>Low</td></tr><tr><td>N/A</td><td>N/A</td><td>N/A</td><td>N/A</td><td>€3,740</td></tr></table></td></tr>
<tr><td colspan="2">Category N: Payment Institutions and E-Money Institutions</td></tr>
<tr><td>Payment Institutions and E-Money Institutions</td><td>Such institutions are liable to pay the levy contribution corresponding to its impact category and impact score.<table><tr><td>Ultra High</td><td>High</td><td>Medium High</td><td>Medium Low</td></tr><tr><td>N/A</td><td>N/A</td><td>€660,518</td><td>€181,204</td></tr></table>
<table><tr><td>Impact Category</td><td colspan="3">Low</td></tr><tr><td>Impact</td><td>≥ 100.1</td><td>51.1 – 100.0</td><td>≤ 51.0</td></tr></table></td></tr>
</table>

	Score			
	Levy	€146,450	€16,230	€3,245

e. Commission for Aviation Regulation

Legislative Basis

Section 23 of the Aviation Regulation Act, 2001 empowers the CAR to make regulations providing for the imposition, on relevant undertakings, of a levy to meet those costs and expenses properly incurred in the discharge of its functions. The levy is to be imposed "as specified in the regulations on such classes of undertakings as may be specified by the Commission in the regulations." Section 23(7) obliges the CRU to "ensure that its own costs of operations are kept to a minimum and are not excessive."

The most recent levy order is S.I. No. 675 of 2019 - Aviation Regulation Act 2001 (Levy No. 20) Regulations 2019.

Key Features

The CRU imposes levies to meet the costs and expenses properly incurred in the discharge of its functions with regard to the regulation of certain aspects of the aviation and travel trade sectors in Ireland. The current cost-recovery methodology was established in December 2007 following a consultation process.

Levies in respect of airport charges and the central levy (a levy charged to all airport authorities) is paid quarterly in advance. Levies in respect of slot allocation charges and consumer protection charges are payable in one instalment in advance. Other levies are payable as appropriate in advance.

Levy Rates

Classes of Undertaking(1)	Appropriate Portion€(2)	Matters to which the levy relates(3)
An airport authority having vested in it a State Airport subject to the regulation of airport charges	1,770,359	Regulation of airport charges

An airport authority having vested in it a “coordinated airport” or a “schedules facilitated” airport	123,603	Slot allocation
An airport authority	0. 01173 per passenger	Consumer Protection
An airport authority	0. 04660 per passenger	Central Levy
Irish registered air carriers	123,603	Slot allocation
Applicants for groundhandling services approval	1,841 per application	New applications for groundhandling services approval
Holders of groundhandling services approvals	1,841	Annual monitoring fee
Holders of groundhandling services approvals	2,045	Late provision of audited accounts
Holders of groundhandling services approval	818 per amendment or series of amendments applied for at the same time	Amendment of groundhandling services approval
Applicants for an air carrier operating licence	7,670 per application (Category A licence)2,557per application (Category B licence)	New applications for operating licences
Holders of an air carrier operating licence	7,670 per carrier (Category A licence)2,557per carrier (Category B licence)	Annual monitoring fee
Holders of an air carrier operating licence	2,045	Additional approval fee for substantial changes in licensed activity
Holders of an air carrier operating licence	2,045	Late provision of annual audited accounts

Applicants for a travel agent's licence	2,045	Where an application for a travel agent's licence is received less than eleven weeks but more than two months prior to the date on which the licence is required to commence
Applicants for a travel agent's licence	4,091	Where an application for a travel agent's licence is received less than two months prior to the date on which the licence is required to commence
Applicants for a travel agent's licence	2,045	Failure to submit financial statements or monthly management accounts as required
Applicants for a tour operator's licence	2,045	Where an application for a tour operator's licence is received less than eleven weeks but more than two months prior to the date on which the licence is required to commence
Applicants for a tour operator's licence	4,091	Where an application for a tour operator's licence is received less than two months prior to the date on which the licence is required to commence
Applicants for a tour operator's licence	4,091	Failure to submit financial statements or monthly management accounts as required

f. Financial Services and Pensions Ombudsman

Legislative Basis

Section 43 of the Financial Services and Pensions Ombudsman Act 2017 provides that financial service providers are liable to pay a levy in respect of the services provided by the FSPO to the financial services industry. The term "financial services industry" is not defined in the Act. As the investigation of complaints by consumers in relation to "financial services" by "financial service providers" (both terms defined) it may be concluded that section 43 is contingent on those definitions.

The most recent regulation is S.I. No. 201/2019 - Financial Services And Pensions Ombudsman Act 2017 [Financial Services And Pensions Ombudsman Council] Financial Services Industry Levy Regulations 2019.

Key Features

The Financial Services Industry Levy funds the operations of the FSPO with regard to complaints made in relation to financial services. The purpose of the levy is to meet the expenditure incurred or reasonably expected to be incurred by the FSPO in relation to complaints received by in relation to financial service providers.

The FSPO has completed an interdependent review and public consultation in relation to the levy methodology with a view to simplifying the process to ensure that it can be updated on a yearly basis.[4] Financial services providers subject to the levy are categorised on the basis of the authorisations held by each entity with the Central Bank.

A financial service provider may appeal to the Ombudsman may appeal the amount of the levy charged.

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[4] Petrus Consulting, *Review of the Levy paid by Financial Service Providers*, available at: https://www.fspo.ie/documents/FSPO%20Levy%20Administration%20Report.pdf [accessed 11/11/2019]

Levy Rates[5]

Type of regulated entity	Basis of calculation of levy contribution	Minimum amount
Category A – Credit Institutions		
A(i) - Each credit institution as registered under Section 1 of the Credit Institutions Register	€0.494 cent per consumer	€375
A(ii) - Each credit institution as registered under Section 2 (b) of the Credit Institutions Register (and where a complaint has been lodged against the institution in the previous financial year)	Flat rate levy	€375
A(iii) - Any other credit institution not registered under the above headings	€0.494 cent per consumer	€375
Category B - Insurance Undertakings		
B1	A sum no greater than 0.0126% of its total net premiums (excluding Class VII premium income) written on Irish risk business	€375

[5] S.I. No. 201/2019 - Financial Services And Pensions Ombudsman Act 2017 [Financial Services And Pensions Ombudsman Council] Financial Services Industry Levy Regulations 2019, See also: Financial Services and Pensions Ombudsman, *Understanding the Financial Services Industry Levy*, available at: https://www.fspo.ie/documents/02.09.19-FINAL_Understanding-the-Financial-Services-Industry-Levy.pdf [accessed: 11/11/2019]

B4	A sum no greater than 0.0614% of its total net premiums earned written on Irish risk business	€375
B8	A sum no greater than 0.022% of its total net premiums earned derived from accident and health risk insurance business	€375
Category C - Intermediaries and Debt Management Firms		
Intermediaries (including Investment Product Intermediaries and Mortgage Intermediaries who hold authorisations under the Consumer Credit Act 1995 and Mortgage Credit Intermediaries who hold authorisations under the European Union (Consumer Mortgage Credit Agreements) Regulations 2016); Insurance/Reinsurance Intermediaries registered under the EC (Insurance Mediation) Regulations 2005; Debt Management Firms authorised under the Central Bank Act, 1997	A sum no greater than 15% of the levy payable to the Central Bank in 2018	€125
Category D - Investment Firms (other than Investment Product Intermediaries)		
D5 - Member Firms of the Irish Stock Exchange which have been authorised as an Investment Firm under	A sum no greater than 18.172% of the annual industry funding levy payable to the Central Bank	€375

Regulation 11(1) or deemed authorised under Regulation 6(2) of the European Union (Markets in Financial Instruments) Regulations 2007 or any amending or replacing legislation.		
Category F - Credit Unions		
	A sum no greater than 0.00064% of its total assets listed in the last audited accounts	€375
Category G - Moneylenders Approved by the Bank		
	A sum no greater than 3.4% of the annual industry funding levy payable to the Central Bank	€375
Category H - Approved Professional Bodies		
	A sum no greater than 15% of the annual industry funding levy payable to the Central Bank	€375
Category J - Bureaux de Change		
	Flat rate levy	€375
Category L - Default Assessments		
	Flat Rate Levy	€3,600
Category M - Retail Credit Firms, Home Reversion Firms and Credit Servicing Firms		
	Flat Rate Levy	€375

Category N - Payment Institutions and E-Money Institutions		
	Flat Rate Levy	€375
Category O - Pawnbrokers		
	Flat Rate Levy	€375
Category P - Business Transfers		
	The transferee financial service provider shall be liable to pay that portion of the levy payable by the transferor regulated entity, which has not been paid	
Category Q - Creditors		
	Flat Rate Levy	€375
Category R - Owners of Goods Subject to Hire Purchase		
	Flat Rate Levy	€375
Category S - Owners of Goods Subject to Consumer Hire		
	Flat Rate Levy	€375
Category T - Mortgage Lender		
	Flat Rate Levy	€375
Category U - Credit Intermediaries		
	Flat Rate Levy	€125

g. Commission for Railway Regulation

Legislative Basis

Section 26 of the Railway Safety Act, 2005, empowers the CRR to make regulations for the imposition of a levy to meet the expenses properly incurred in the discharge of its functions. The classes of railway undertakings to be subject to the levy may be specified by the CRR. Such regulations require the consent of the Ministers for Transport and Finance. The CRR may be directed by the Minister for transport with the consent of the Minister for Finance to pay funds to the Exchequer where the gross income received by the CRR in a year exceeds the gross expenditure incurred in the administration of its office in that year.

The most recent regulation is S.I. No. 191/2019 – Railway Safety Act 2005 (Section 26) Levy Order 2019.

Key Features

The levy is allocated based on the level of authorisation and/or supervision that each entity will be subject to in a levy year.[6] The levy is payable in three equal instalments with any amounts not paid accruing interest at the Euribor rate. Any excess funds not paid to the Exchequer may be retained to offset levy obligations in the subsequent year or be proportionately refunded.

Levy Rates

Iarnród Éireann		TII (Luas Cross City)	Transdev (Luas)	Balfour Beatty	Rhomberg Sersa	Translink NIR
Infrastructure Manager	Railway Undertaking					
€779,176	€579,071	€233,913	€138,362	€49,942	€123,142	€121,960

[6] Commission for Railway Regulation, *Annual Report 2018*, at page 4, accessed: 11/12/2019 [available at: https://www.crr.ie/publications/crr-2018-annual-report-final/]

Appendix 3 – Legislative basis of levy powers

i. Broadcasting Act, 2009

Levy.

33.— (1) For the purpose of meeting expenses properly incurred by the Authority, the Contract Awards Committee and the Compliance Committee in the performance of their functions, the Authority shall make an order imposing a levy on public service broadcasters and broadcasting contractors.

(2) Whenever a levy order is made there shall be paid to the Authority by public service broadcasters and each broadcasting contractor such amount as shall be appropriate having regard to the terms of the levy order.

(3) The Authority may make separate levy orders for public service, commercial and community broadcasters and for particular classes of broadcasting contractors.

(4) A levy order shall provide for the collection, payment and administration of a levy, including all or any of the following—

(*a*) the method of calculation of the levy,

(*b*) the times at which payment will be made and the form of payment,

(*c*) the keeping, inspection and provision of records relating to the levy, and

(*d*) any exemptions, deferrals or refunds of the levy.

(5) Any surplus of levy income over the expenses incurred by the Authority in the discharge of its functions relevant to that levy in a particular financial year shall either—

(*a*) be retained by the Authority to be offset against levy obligations for the subsequent year, or

(*b*) be refunded proportionately to the providers of broadcasting services on whom the levy is imposed.

(6) The Authority may recover as a simple contract debt in any court of competent jurisdiction a levy from any person by whom it is payable.

(7) (*a*) A levy order shall be laid before each House of the Oireachtas by the Authority as soon as may be after it is made.

(*b*) Either House of the Oireachtas may, by resolution passed within 21 sitting days after the day on which a levy order was laid before it in accordance with *paragraph (a)* , pass a resolution annulling the order.

(*c*) The annulment under *paragraph (b)* of a levy order takes effect immediately on the passing of the resolution concerned but does not affect anything that was done under the order before the passing of the resolution.

(8) In this section "levy order" means an order imposing a levy under *subsection (1)* .

ii. Data Protection Act, 2018

Expenses

5. The expenses incurred by the Commission and any Minister of the Government in the administration of this Act shall, to such an extent as may be sanctioned by the Minister for Public Expenditure and Reform, be paid out of moneys provided by the Oireachtas.

Fees

28. The Commission may, with the consent of the Minister, prescribe the fees to be paid to it—

(a) for the performance of its functions under Article 57(1)(r) and (s), and

(b) in relation to requests that are manifestly unfounded or excessive in accordance with Article 57(4).

General Data Protection Regulation (GDPR)

Article 57

1. Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

…

(r) authorise contractual clauses and provisions referred to in Article 46(3);

(s) approve binding corporate rules pursuant to Article 47;

...

4. Where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may charge a reasonable fee based on administrative costs, or refuse to act on the request. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

Article 46

3. Subject to the authorisation from the competent supervisory authority, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

(a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or

(b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.

Article 47

1. The competent supervisory authority shall approve binding corporate rules in accordance with the consistency mechanism set out in Article 63, provided that they:

(a) are legally binding and apply to and are enforced by every member concerned of the group of undertakings, or group of enterprises engaged in a joint economic activity, including their employees;

(b) expressly confer enforceable rights on data subjects with regard to the processing of their personal data; and

(c) fulfil the requirements laid down in paragraph 2.

2. The binding corporate rules referred to in paragraph 1 shall specify at least:

(a) the structure and contact details of the group of undertakings, or group of enterprises engaged in a joint economic activity and of each of its members;

(b) the data transfers or set of transfers, including the categories of personal data, the type of processing and its purposes, the type of data subjects affected and the identification of the third country or countries in question;

(c) their legally binding nature, both internally and externally;

(d) the application of the general data protection principles, in particular purpose limitation, data minimisation, limited storage periods, data quality, data protection by design and by default, legal basis for processing, processing of special categories of personal data, measures to ensure data security, and the requirements in respect of onward transfers to bodies not bound by the binding corporate rules;

(e) the rights of data subjects in regard to processing and the means to exercise those rights, including the right not to be subject to decisions based solely on automated processing, including profiling in accordance with Article 22, the right to lodge a complaint with the competent supervisory authority and before the competent courts of the Member States in accordance with Article 79, and to obtain redress and, where appropriate, compensation for a breach of the binding corporate rules;

(f) the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union; the controller or the processor shall be exempt from that liability, in whole or in part, only if it proves that that member is not responsible for the event giving rise to the damage;

(g) how the information on the binding corporate rules, in particular on the provisions referred to in points (d), (e) and (f) of this paragraph is provided to the data subjects in addition to Articles 13 and 14;

(h) the tasks of any data protection officer designated in accordance with Article 37 or any other person or entity in charge of the monitoring compliance with the binding corporate rules within the group of undertakings, or group of enterprises engaged in a joint economic activity, as well as monitoring training and complaint-handling;

(i) the complaint procedures;

(j) the mechanisms within the group of undertakings, or group of enterprises engaged in a joint economic activity for ensuring the verification of compliance with the binding corporate rules. Such mechanisms shall include data protection audits and methods for ensuring corrective actions to protect the rights of the data subject. Results of such verification should be communicated to the person or entity referred

to in point (h) and to the board of the controlling undertaking of a group of undertakings, or of the group of enterprises engaged in a joint economic activity, and should be available upon request to the competent supervisory authority;

(k) the mechanisms for reporting and recording changes to the rules and reporting those changes to the supervisory authority;

(l) the cooperation mechanism with the supervisory authority to ensure compliance by any member of the group of undertakings, or group of enterprises engaged in a joint economic activity, in particular by making available to the supervisory authority the results of verifications of the measures referred to in point (j);

(m) the mechanisms for reporting to the competent supervisory authority any legal requirements to which a member of the group of undertakings, or group of enterprises engaged in a joint economic activity is subject in a third country which are likely to have a substantial adverse effect on the guarantees provided by the binding corporate rules; and

(n) the appropriate data protection training to personnel having permanent or regular access to personal data.

3. The Commission may specify the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

iii. Communications Regulation Act, 2002, as amended

Levies and fees.

30.—(1) For the purpose of—

(*a*) meeting expenses properly incurred by the Commission in the discharge of its functions in relation to electronic communications,

(*b*) enabling the Minister to pay contributions or other membership charges to international telecommunications organisations, and

(c) ...

the Commission may make an order imposing a levy on providers of electronic communications services and on providers of electronic communications networks which are

deemed to be authorised under Regulation 4 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations 2003 (S.I. No. 306 of 2003).

(1A) For the purposes of *subsection (1)*, the expenses of the Commission in relation to the discharge of its functions in relation to electronic communications shall —

> (*a*) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme, the licensing scheme for the licence concerned, the schemes for the grant of rights of use for numbers and specific obligations, and may include costs for international co-operation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of any orders under section 3(6) (inserted by section 11(c) of the Wireless Telegraphy Act 1972) of the Wireless Telegraphy Act 1926 or regulations under section 6 of that Act relating to apparatus for wireless telegraphy for the provision of an electronic communications network or service and administrative decisions, such as decisions on access and interconnection, and
>
> (*b*) be imposed by the Commission on an individual undertaking in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.

(2) Subject to *subsection (11A)*, for the purpose of meeting expenses properly incurred by the Commission in the discharge of its functions relating to postal services the Commission may make an order imposing a levy on postal service providers providing postal services within the scope of the universal postal service.

(2A) For the purpose of meeting expenses properly incurred by the Commission in the discharge of its function in relation to premium rate services, the Commission may make an order imposing a levy on premium rate service providers.

(3) Whenever a levy order is made there shall be paid to the Commission by each provider of postal services referred to in *subsection (2)* or each provider of electronic communications services or premium rate services or electronic communications networks referred to in *subsection (1)* as the case may be such amount as shall be appropriate having regard to the terms of the levy order.

(4) A levy order, including a levy order made under the Act of 1996, may be amended or revoked by the Commission.

(5) Any surplus of levy income over the expenses incurred by the Commission in the discharge of its functions relevant to that levy in a particular financial year shall either—

(*a*) be retained by the Commission to be offset against levy obligations for the subsequent year, or

(*b*) be refunded proportionately to the providers on whom the levy is imposed.

(6) Subject to *subsections (7)* and *(8)*, the Commission is entitled to retain for its own use all fees and levies paid to or recovered by it under this Act, a related enactment or any other enactment that expressly provides for a fee or levy to be paid to the Commission.

(7) The Minister may, with the consent of the Minister for Finance, direct the Commission to pay into the Exchequer such sum as he or she may, subject to *subsection (8)*, specify being a sum that, subject to *subsection (8)*, represents the amount by which the aggregate sum received by the Commission in each financial year exceeds the aggregate costs incurred in the administration of its office in that year, less the sum of any surplus referred to in *subsection (5)* and any interim payments made in accordance with *subsection (9)*.

(8) The method of calculation of the surplus referred to in *subsection (7)* shall be such method as may be determined by the Minister, with the consent of the Minister for Finance, after consultation with the Commission, taking into account any reasonable requirements of the Commission for funds to meet expenses.

(9) Where the Commission receives substantial licence fee income, the Minister may, after consultation with the Commission and with the consent of the Minister for Finance, direct the Commission to pay into the Exchequer, such sum which represents an interim payment of the sum referred to in *subsection (7)*.

(10) The Public Offices Fees Act, 1879, does not apply in respect of fees payable to the Commission pursuant to this Act.

(11) The Commission shall not impose a levy on providers of—

(*a*) electronic communications for the purpose of meeting expenses properly incurred by the Commission in the discharge of its functions in respect of postal services or premium rate services,

(*b*) postal services for the purpose of meeting expenses properly incurred by the Commission in the discharge of its functions in respect of electronic communications services or premium rate services, or

(*c*) premium rate services for the purposes of meeting expenses properly incurred by the Commission in the discharge of its functions in respect of postal services or electronic communications services.

(11A) (*a*) A levy imposed pursuant to *subsection (2)* shall be imposed in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges to the Commission.

(*b*) For the purposes of *paragraph (a)* and having regard to—

(i) its objectives under *section 12(1)(c)*,

(ii) the impact of the levy on postal service providers, and

(iii) the need to minimise any distortion or restriction of competition in the market for the provision of the postal services concerned,

the Commission may make a determination that such class or classes of postal service provider referred to in *subsection (2)* are exempt from an order made under that subsection.

(12) The Commission may recover as a simple contract debt in any court of competent jurisdiction from the person by whom it is payable any amount due and owing to it under this section.

(12A) The Commission shall, in relation to a levy order, cause to be published, whether in its annual report and accounts referred to in *section 32* or otherwise, an annual overview of its administrative costs and of the total sum of the charges collected under *subsection (1)*.

(12B) The Commission shall, in the case of charges imposed on an annual basis, make appropriate repayments or compensation in the case of overcharging or additional charges in the case of undercharging by a person to whom a charge is imposed in the light of any difference between the total sum of the administrative charges collected under *subsection (1)* and the administrative costs incurred.

(13) In this section "levy order" means an order imposing levy under this section.

iv. Consumer Protection Act, 2007

Power to impose levies.

24B . — (1) The Agency may make regulations prescribing levies to be paid by persons who are subject to regulation under the designated enactments and designated statutory instruments (within the respective meanings given by the **Central Bank Act 1942**).

(2) A levy prescribed under *subsection (1)* shall relate only to the Agency' s performance of its functions referred to in **section 10** (3)(j) of the Competition and Consumer Protection Act 2014.

(3) In particular, regulations under *subsection (1)* may provide for any of the following matters:

(*a*) the activities, services or other matters for which specified kinds of levies are payable;

(*b*) the persons, or classes of persons, who are required to pay specified kinds of levies;

(*c*) the amounts of specified kinds of levies;

(*d*) the periods for which, or the dates by which, specified levies are to be paid to the Agency;

(*e*) penalties that are payable by a person who fails to pay a levy on time;

(*f*) the keeping of records, and the making of returns to the Agency, by persons who are liable to pay a specified levy;

(*g*) the collection and recovery of levies.

(4) Regulations made under this section do not take effect until approved by the Minister with the consent of the Minister for Finance.

(5) *Section 3(2)* does not apply to regulations made under *subsection (1)* .

(6) The Agency may refund the whole or a part of a levy paid or payable under regulations in force under this section.

(7) The Agency may amend or revoke a regulation made under this section.

(8) An amendment or revocation of regulations made under this section does not take effect until approved by the Minister with the consent of the Minister for Finance.

(9) The Agency may, by proceedings in a court of competent jurisdiction, recover as a debt an amount of levy payable under regulations in force under this section.

Competition and Consumer Protection Act, 2014

Functions of Commission

10. (3) Without prejudice to the generality of subsection (1), in performing its functions under this Act, the Commission—

...

(j) shall promote the interests of consumers by—

(i) providing information in relation to financial services, including information in relation to the costs to consumers, and the risks and benefits associated with the provision of those services, and

(ii) promoting the development of financial education and capability,

v. Electricity Regulation Act, 1999

Public service obligations.

39.—(1) The Minister, following consultation with the Minister for the Environment and Local Government, shall by order direct the Commission to impose on the Board and holders of licences or authorisations, or holders of a permit under *section 37* of the Principal Act, public service obligations which may include obligations in relation to—

(*a*) security of supply,

(*b*) regularity, quality and price of supplies,

(*c*) environmental protection, including energy efficiency and climate protection, and

(*d*) use of indigenous energy sources.

(2) Notwithstanding the generality of *subsection (1)*, an order made by the Minister under this section may require the Commission to impose on the Board, the holder of a licence, the holder of an authorisation or the holder of a permit under *section 37* of the Principal Act a requirement to make such arrangements as are necessary to ensure that, in any specified period, there shall be available to the Board, the holder of a licence, the holder of an authorisation or the holder of a permit under *section 37* of the Principal Act from—

(*a*) generating stations which use as their primary energy fuel source peat harvested within the State provided that the amount of peat used in any calendar year to generate that electricity may not exceed 15 per cent. of the overall primary energy necessary to produce the electricity consumed in the State that year, and

(*b*) generating stations chosen as a result of a competitive process established by the Minister, the Commission or the Commission of the European Communities, as the case may be, which use as their primary fuel source such renewable, sustainable or alternative forms of energy as may be specified in the order or which operate as combined heat and power plants.

(3) Notwithstanding the generality of *subsection (1)*, an order made under this section may provide for—

(*a*) the imposition of a public service obligation on the Board, the holder of a licence, the holder of an authorisation or the holder of a permit under *section 37* of the Principal Act in respect of electricity which is produced using indigenous fuel or renewable, sustainable or alternative forms of energy as their primary source or which operate as combined heat and power plants as a result of a competitive process established by the Minister or the Commission of the European Communities prior to this enactment, and

(*b*) measures designed to encourage effective and efficient use of electricity and to reduce demand for electricity.

(4) The Minister shall send a copy of an order made under this section, to the Commission of the European Communities not later than 28 days after the making of the order.

(5) Subject to *subsection (6)*, an order under this section shall provide for—

(*a*) the recovery, by way of a levy on final customers, of the additional costs including a reasonable rate of return on the capital represented by such costs, where appropriate, incurred by the Board or holders of a licence or an authorisation or holders of a permit under *section 37* of the Principal Act in complying with an order

under this section including costs incurred after the variation or revocation of such an order,

(*b*) the collection and recovery of payments in respect of the levy —

(i) from final customers by the Board or the holder of a licence or an authorisation or the holder of a permit under *section 37* of the Principal Act,

(ii) from the Board or such holders of a licence, authorisation or permit by the distribution system operator or the transmission system operator, and

(iii) from the distribution system operator by the transmission system operator,

(*c*) the making, out of such payments so collected, of payments to the Board and holders of licences or authorisations, or holders of permits under *section 37* of the Principal Act as appropriate.

(5A) (*a*) The levy referred to in paragraph (*a*) of *subsection (5)* shall be imposed on final customers in respect of a levy period in such a manner that —

(i) the levy is apportioned between each category of electricity accounts specified in *paragraph 1* of *Schedule 2* on the basis of the maximum demand attributable to that category of accounts as a proportion of the aggregate of the maximum demand attributable to each of the three categories of accounts, and

(ii) each holder of an electricity account who is a final customer is charged and liable to pay the levy in respect of each electricity account on the basis set out in *paragraph 2* of *Schedule 2* .

(*b*) The attribution of the maximum demand in respect of each category of electricity account shall be carried out by the distribution system operator with the approval of the Commission in respect of each levy period.

(*c*) In this subsection " levy period " means a calendar year or such shorter period as may be specified in the order.

(6) An order made under this section which, in accordance with *subsection (5)*, provides for the recovery of additional costs referred to in that subsection shall provide that such costs shall be recovered in respect of a specified period and that the amount to be paid in respect

of each year or part of a year in that period to the Board or to a holder of a licence or an authorisation or the holder of a permit under *section 37* of the Principal Act shall be the amount of the additional costs certified by the Commission as having been incurred by the Board or such holder of a licence or an authorisation or the holder of a permit under *section 37* of the Principal Act in accordance with the order.

(7) An order made under this section may—

(*a*) impose requirements (whether as to the furnishing of records or other information or the affording of facilities for the examination and testing of meters or otherwise) on the Board and on holders of licences or authorisations,

(*b*) provide for the times at which payments are to be made (whether payments by way of levy or payments to the Board and holders of licences or authorisations), and

(*c*) require the amount of any overpayment or underpayment which is made by or to any person to be set off against or added to any subsequent liability or entitlement of that person.

(8) The Minister shall exercise the powers conferred by this section so as to ensure that the sums realised by the levy or otherwise are sufficient (after the payment of the administrative expenses, as certified by the Commission, of the Board and holders of licences or authorisations or holders of permits under *section 37* of the Principal Act incurred in the collection of the levy) to pay to the Board and holders of licences or authorisations or holders of permits under *section 37* of the Principal Act the payment required to be made by the order.

(9) The Minister may by order, amend or revoke an order made under this section including an order made under this subsection but such amendment or revocation shall be without prejudice to the continued operation of the order in respect of additional costs of the type referred to in *subsection (5)* which the Commission certifies in respect of each year or part thereof of the unexpired part of the specified period of years to have been reasonably incurred notwithstanding the amendment or revocation.

(10) A draft of the order proposed to be made under this section shall be given by the Minister to the person or persons upon whom the obligation is to be imposed one month before the order is made.

(11) For the purposes of orders made under this section, “public service obligation” means an obligation placed on electricity undertakings which takes account of general social, economic and environmental factors.

(12) In making an order under this section, the Minister shall have regard for the need for public service obligations to be imposed in a non-discriminatory and transparent manner.

Schedule 1

The Commission for Electricity Regulation

...

16. For the purposes of meeting expenses properly incurred by the Commission in the discharge of its functions under this Act, the Commission may make an order (in this Act referred to as a " levy order ") imposing a levy to be paid each year on such class or classes of —

(*a*) energy undertakings,

(*b*) petroleum undertakings, or

(*c*) holders of LPG safety licences,

as may be specified by the Commission in the order and separate orders may be made under this paragraph in respect of electricity undertakings, natural gas undertakings, holders of LPG safety licences and petroleum undertakings and in respect of different classes of such undertakings.

16A. For the purposes of meeting expenses properly incurred by the Commission in the discharge of its functions under the Water Services (No. 2) Act 2013 the Commission may make an order (in this Act referred to as a " levy order ") imposing such levy to be paid each year by Irish Water as may be specified by the Commission in the order.

17. Whenever a levy order is made under paragraph 16 there shall be paid to the Commission by each undertaking to which the levy order applies such amount as shall be appropriate having regard to the terms of the levy order.

18. A levy order made under *paragraph 16* or *16A* may be amended or revoked by the Commission by order.

19. An amendment to a levy order made under *paragraph 16* or *16A* which provides for an increase in the levy may only take effect in the year after the year in which the amendment is made.

20.(1) Any excess of the revenue of the Commission over its expenditure in any year shall be applied by the Commission to meet its expenses in the following year and the levy for that year shall take into account such excess.

(2) Any expenses incurred by the Commission which are not recovered by the levy payable for a particular year may be recovered by the Commission on foot of a levy order in a subsequent year.

(3) In making a subsequent levy order the Commission shall, in so far as is reasonably practicable, apply the amount of the excess of revenue in a particular year or the amount of expenses not recovered in a particular year to the class of undertaking to which it most closely relates.

21. The Minister may from time to time, with the consent of the Minister for Finance, advance to the Commission out of moneys provided by the Oireachtas such sums as the Minister may determine for the purposes of expenditure by the Commission in the performance of its functions.

vi. Central Bank Act, 1942, as amended

General adaptation of references to the Commission.

18.— Every mention of or reference to the Commission which is contained in any enactment (other than the Currency Acts, 1927 and 1930) in force on the appointed day shall, on and after that day, be construed and have effect as a mention of or reference to the Bank.

Power to impose levies.

32D. — (1) The Commission may make regulations prescribing levies to be paid by persons who are subject to regulation under the designated enactments and designated statutory instruments.

(2) In particular, regulations under subsection (1) may provide for any of the following matters:

(*a*) the activities, services or other matters for which specified kinds of levies are payable;

(*b*) the persons, or classes of persons, who are required to pay specified kinds of levies;

(*c*) the amounts of specified kinds of levies;

(*d*) the periods for which, or the dates by which, specified levies are to be paid to the Bank;

(*e*) penalties payable by a person who does not pay a levy on time;

(*f*) the keeping of records, and the making of returns to the Bank, by persons who are liable to pay a specified levy;

(*g*) the collection and recovery of levies.

(3) Regulations made under this section do not take effect until approved by the Minister.

(3A) A levy prescribed in relation to the functions of the resolution authority under the European Union (Bank Recovery and Resolution) Regulations 2015 (S.I. No. 289 of 2015) or the SRM Regulation is to be fixed so that the total amount of levy collected or recovered does not exceed the total costs incurred by the resolution authority, within the meaning of those Regulations, in performing its functions and exercising its powers under those Regulations.

(4) A levy prescribed in relation to credit unions is to be fixed so that the total amount of levy collected or recovered from credit unions does not exceed the total costs incurred by the Bank in performing its functions and exercising its powers under the Credit Union Act 1997.

(5) The Bank may, by proceedings in a court of competent jurisdiction, recover as a debt an amount of levy payable under regulations in force under this section.

(6) The Bank may refund the whole or a part of a levy paid or payable under regulations in force under this section.

(7) The Commission may amend or revoke a regulation made under this section.

(8) An amendment or revocation of regulations made under this section does not take effect until approved by the Minister.

(9) In this section ‘ levy ’ does not include a fee.

vii. Aviation Regulation Act, 2001

Levy.

23.—(1) For the purpose of meeting expenses properly incurred by the Commission in the discharge of its functions under this Act, the Commission shall make regulations imposing a levy ("levy"), to meet but not to exceed the estimated operating costs and expenses of the Commission, to be paid each year beginning with such year as specified in the regulations on such classes of undertakings as may be specified by the Commission in the regulations.

(2) Levy shall be payable to the Commission at such time and at such rates as may be prescribed in regulations by the Commission and different rates may be prescribed in respect of different classes of undertaking liable to pay levy.

(3) The Commission may make regulations to provide for the following—

(*a*) the keeping of records and the making of returns by persons liable to pay levy,

(*b*) the collection and recovery of levy, and

(*c*) such other matters as are necessary or incidental to the procurement of the payment of levy.

(4) An increase in levy may only take effect in the year after the year in which the increase is made in regulations.

(5) The Commission may recover, as a simple contract debt in any court of competent jurisdiction, from the person by whom it is payable any amount due and owing to it under this section.

(6) Every regulation made by the Commission under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(7) The Commission shall ensure that its own costs of operations are kept to a minimum and are not excessive.

viii. Financial Services and Pensions Ombudsman Act, 2017

Financial services industry levy

43. (1) In this section, "Council regulations" means regulations made by the Council, with the consent of the Minister, under *subsection (4)*.

(2) Each financial service provider shall be liable to pay an annual charge (in this Act referred to as the "financial services industry levy") in respect of the services provided by the Ombudsman to the financial services industry.

(3) The financial services industry levy shall be paid to the Office on or before the date prescribed by the Council in regulations, in respect of the period concerned and in the manner specified by the Council.

(4) The Council shall, with the consent of the Minister, prescribe by regulation the financial services industry levy to be paid having regard to the expenditure incurred or reasonably expected to be incurred by the Office in relation to complaints received by the Office in relation to financial service providers.

(5) The Council regulations may, having had regard to the number and type of complaints received by the Ombudsman, prescribe a different financial services industry levy under *subsection (4)* in respect of different financial service providers or different classes of financial service providers.

(6) The amount of the financial services industry levy prescribed under *subsection (4)* shall not exceed those sums necessary to fund the operation of the Office having regard to the income and expenditure mentioned in section 19.

(7) The Council regulations may prescribe—

(a) having had regard to one or more of the following:

(i) the amount of the outstanding levy or annual charge;

(ii) the length of delay in payment of the outstanding levy or charge;

(iii) a pattern, if any, of failure to pay, or to pay on time, the levy or charge,

the penalties that shall be payable in cases of failure to pay the financial services industry levy or failure to pay the annual charge on time,

(b) requirements in relation to the keeping of records and making of returns to the Office by persons who are liable to pay the financial services industry levy,

(c) requirements in relation to the collection and recovery of the financial services industry levy by the Office,

(d) general or special exemptions from the payment of the financial services industry levy (wholly or partly) in different circumstances,

(e) a reduction in the financial services industry levy having regard to the method of payment of the charge, and

(f) the financial service providers and different classes of financial services required to pay the financial services industry levy.

(8) The financial services industry levy shall be recoverable by the Office as a simple contract debt in any court of competent jurisdiction.

ix. Railway Safety Act, 2005

Levy

26.—(1) Subject to subsection (2), for the purpose of meeting expenses properly incurred by the Commission in the discharge of its functions under this Act, the Commission, with the consent of the Minister and the Minister for Finance, may make regulations imposing a levy ("levy") to be paid each year by such classes of railway undertakings as may be specified by the Commission in the regulations.

(2) The Commission shall not impose levy before 31 December 2007.

(3) Regulations made under subsection (1) may provide for the following—

(a) rates of levy payable,

(b) the keeping of records and the making of returns by persons liable to pay levy,

(c) the collection and recovery of levy,

(d) exemption from levy, and

(e) such other matters as are necessary or incidental to the procurement of the payment of levy.

(4) Levy shall be payable to the Commission at such time and at such rates as may be prescribed in regulations made by the Commission under subsection (1) and different rates may be prescribed in respect of different classes of railway undertakings liable to pay levy, and such regulations may provide for an exemption from payment of levy for railway undertakings whose operating revenue is below a threshold prescribed in the regulations.

(5) Any increase in levy may only take effect in the year after the year in which the increase is made in regulations.

(6) The Minister may, with the consent of the Minister for Finance, direct the Commission to pay into the Central Fund or the growing produce thereof, such sum as he or she may specify, being a sum that represents the amount by which the gross income received by the Commission in each financial year exceeds the gross expenditure incurred in the administration of its office in that year.

(7) The Commission may recover, as a simple contract debt in any court of competent jurisdiction, from any person by whom it is payable any amount due and owing to it under this section.

Appendix 4 – section 33 of the Broadcasting Act, 2009, as amended by the Broadcasting (Amendment) Bill, 2019

Levy

(1) For the purposes of providing for the working capital requirements of the Authority and meeting expenses properly incurred by the Authority, the Contract Awards Committee and the Compliance Committee in the performance of their functions, the Authority shall make an order imposing a levy (in this Act referred to as a "levy order") on public service broadcasters, community broadcasters, broadcasting contractors and holders of content provision contracts.

(1A) The amount of the levy referred to in subsection (1) shall be calculated in such manner that the levy imposed in respect of a particular financial year provides for the working capital requirements of the Authority and meets the expenses properly incurred by the Authority, the Contract Awards Committee and the Compliance Committee in the performance of their functions in the particular financial year.

(1B) Public service broadcasters, community broadcasters, broadcasting contractors and holders of content provision contracts shall provide to the Authority the information required by the Authority to calculate the liability of each public service broadcaster, community broadcaster, broadcasting contractor and holder of a content provision contract to pay the levy referred to in subsection (1).

(2) Whenever a levy order is made there shall be paid to the Authority by a public service broadcaster, community broadcaster, broadcasting contractor or holder of a content provision contract such amount as is appropriate having regard to the terms of the levy order.

(3) The Authority may make separate levy orders for public service broadcasters, community broadcasters, broadcasting contractors or holders of content provision contracts or particular classes of public service broadcasters, community broadcasters, broadcasting contractors or holders of content provision contracts.

(3A) For the purposes of ensuring that the Authority has sufficient funds to provide for its working capital requirements and to meet expenses properly incurred by the Authority, the Contract Awards Committee and the Compliance Committee in the performance of their functions in the particular financial year in respect of which the levy is imposed, the Authority, in making a levy order, shall have regard to—

(a) the most recent estimates of income and expenditure of the Authority submitted to the Minister under section 37(1),

(b) the actual income and expenditure of the Authority in the previous financial year, and

(c) the amount paid to the Authority under section 123 in respect of the particular financial year in respect of which the levy is imposed or, if none was paid in that financial year, in the previous financial year in which an amount was paid to the Authority under that section.

(4) (a) The Authority, in making a levy order shall calculate in accordance with this subsection the amount of the levy which public service broadcasters, community broadcasters, broadcasting contractors or holders of content provision contracts are required to pay based on a percentage of the qualifying income of those public service broadcasters, community broadcasters, broadcasting contractors or holders of content provision contracts in the base year.

(b) (i) The levy order shall provide for what is to be included in income of a person or body liable to pay the levy for the purposes of the calculation of the amount of the levy, in this subsection referred to as "qualifying income", including, but not limited to, the following:

(I) public funding from sources including, but not limited to, income from television licence fees or grants;

(II) income from commercial communications;

(III) an amount estimated by the Authority to represent the value of non-cash consideration for commercial communications;

(IV) interactive income, excluding the value or cost of prizes awarded to participants borne by the broadcaster.

(ii) Qualifying income shall not include the following income:

(I) income received from the broadcasting funding scheme under section 154;

(II) income from a non-linear service.

(c) The Authority shall—

(i) provide in the levy order for the method of calculation of the levy, and

(ii) request from a person or body liable to pay the levy the information referred to in paragraph (d)

(iii) and such other information, if any, as may be specified in the levy order.

(d) A levy order shall provide for the collection, payment and administration of a levy, including all or any of the following—

(i) the times at which payment shall be made, including whether it may be made in one payment or by instalments, and the form of payment,

(ii) exemptions from, or deferrals of payment of, the levy or payment of a reduced levy, and the application process for exemptions, deferrals, refunds or reduced levy,

(iii) the information required to be provided to the Authority as determined by the Authority for the purpose of the calculation of the levy, by a person or body liable to pay the levy, which shall include but is not limited to—

(I) annual accounts and financial statements of the person or body audited in accordance with the Companies Act 2014 or, if exempt from audit under that Act, the annual accounts and financial statements laid before the company at the company's annual general meeting, in each case, for the base year,

(II) management accounts of the person or body prepared since the most recent annual accounts and financial statements referred to in clause (I) for a financial period ending not earlier than 28 days before the date on which such management accounts are to be provided to the Authority, and

(III) a statement setting out the estimated qualifying income of the person or body in the base year, and

(iv) the form of the information referred to in subparagraph (iii) and the period within which it is required to be furnished to the Authority.

(4A) (a) The Authority may recalculate the levy payable by a person or body liable to pay the levy where further information, referred to in subsection (4)(d)(iii) or other information which is relevant to the calculation of the levy, is provided to it by that person or body and, where such a recalculation is made, subsections (3A), (4), (4B) and (5) shall apply to the

recalculation of the levy as they apply to the calculation of the levy, with any necessary modifications.

(b) The Authority shall serve a notice on each person or body liable to pay a levy stating—

(i) that a levy is payable,

(ii) the amount of the levy,

(iii) the date by which the levy shall be paid, or, where a levy may be paid by instalments, the number of instalments, the amount of each instalment and the date on which each instalment is to be paid.

(c) Where the Authority recalculates the levy under paragraph (a), the Authority shall serve a revised notice on each person or body liable to pay a levy to whom the recalculation applies replacing the notice under paragraph (b).

(d) Where a levy is imposed on a person or body liable to pay a levy and the Authority recalculates the levy under paragraph (a), the Authority shall—

(i) where the amount of the recalculated levy is greater than the amount of the levy notified under paragraph (b) to the person or body and that person or body has paid the amount so notified, deduct that amount from the amount of the recalculated levy which is payable, or

(ii) where the amount of the recalculated levy is less than the amount of the levy notified under paragraph (b) to the person or body and that person or body has paid the amount so notified, refund that person or body the amount of the levy so paid in excess of the amount of the recalculated levy.

(e) Where a person or body liable to pay a levy on whom a levy has been imposed fails to pay the levy on or before the date on which the levy is due or, where the levy is payable by instalments, on or before the date on which an instalment is due, that person or body shall be liable to pay interest on the amount of the levy so payable from the date the levy fell due until the date of payment at an annual rate of 3 per cent over the three month Euribor rate, and where the failure continues for a period or periods of more than 3 months the interest on the amount of the levy so payable shall be calculated by reference to the three month Euribor rate applicable at the date of the start of each such period of 3 months.

(4B) (a) Without prejudice to the generality of subsection (4)(d)(ii), a levy order may provide for the granting of exemptions from, or deferrals of payment of, a levy or payment of a

reduced levy, in respect of any class or classes of community broadcaster, broadcasting contractor or holder of a content provision contract.

(b) The Authority shall, in deciding whether to grant an exemption from, or deferral of payment of, a levy or payment of a reduced levy, have regard to any or all of the following—

(i) the size and scale of a community broadcaster, broadcasting contractor or holder of a content provision contract or class of community broadcaster, broadcasting contractor or holder of a content provision contract,

(ii) the nature of the broadcasting service or services being offered such as radio, television or digital audio broadcasting,

(iii) the desirability of promoting new or innovative services,

(iv) whether or not a community broadcaster, broadcasting contractor or holder of a content provision contract or class of community broadcaster, broadcasting contractor or holder of a content provision contract is in receipt of public funding from sources including, but not limited to, income from television licence fees or the broadcasting funding scheme under section 154, and the level of that funding or income,

(v) whether or not a community broadcaster, broadcasting contractor or holder of a content provision contract or class of community broadcaster, broadcasting contractor or holder of a content provision contract is in receipt of commercial revenue, income or funding from commercial sources and the level of that revenue, income or funding, and

(vi) the qualifying income of a community broadcaster, broadcasting contractor or holder of a content provision contract in the base year in respect of which the levy is calculated.

(c) (i) The Authority may determine, in the levy order, a minimum level of qualifying income, which level shall not exceed €250,000, below which a community broadcaster, broadcasting contractor or holder of a content provision contract shall be exempt from payment of the levy.

(ii) Where the Authority has not made a determination referred to in subparagraph (i), and the qualifying income of a community broadcaster, broadcasting contractor or holder of a content provision contract does not exceed €250,000, the community broadcaster,

broadcasting contractor or holder of a content provision contract concerned shall be exempt from payment of the levy.

(d) The levy order may, for the purposes of this subsection, provide for the following matters:

> (i) the procedure to be followed by a community broadcaster, broadcasting contractor or holder of a content provision contract in making an application to the Authority for an exemption from, or deferral of payment of, a levy or for payment of a reduced levy;
>
> (ii) the information and supporting documentation which shall be provided with an application referred to in subparagraph (i); (iii) the period for which an exemption from, or deferral of payment of, a levy or payment of a reduced levy shall apply;
>
> (iv) such other matters as the Authority may consider relevant for the purposes of this section.

(5) Any surplus of levy income which remains at the end of a financial year after the working capital requirements of the Authority and the expenses properly incurred by the Authority, the Contracts Award Committee and the Compliance Committee, in the performance of their functions in that financial year, have been met, shall, as the Authority considers appropriate—

> (a) be retained by the Authority to be offset against any liability to pay the levy imposed on a community broadcaster, broadcasting contractor or holder of a content provision contract for the subsequent year, or
>
> (b) be refunded proportionately to the community broadcaster, broadcasting contractor or holder of a content provision contract on whom the levy has been imposed.

(6) The Authority may recover as a simple contract debt in any court of competent jurisdiction a levy from any person by whom it is payable.

(7) (a) A levy order shall be laid before each House of the Oireachtas by the Authority as soon as may be after it is made.

(b) Either House of the Oireachtas may, by resolution passed within 21 sitting days after the day on which a levy order was laid before it in accordance with paragraph (a) , pass a resolution annulling the order.

(c) The annulment under paragraph (b) of a levy order takes effect immediately on the passing of the resolution concerned but does not affect anything that was done under the order before the passing of the resolution.

(8) In this section—

'annual general meeting' shall be construed in accordance with section 175 of the Companies Act 2014;

'base year' in relation to a year in which a levy is payable means the year preceding that year or, where a person or body liable to pay the levy has been in operation for part only of the year preceding such year, that part of that year;

'commercial communication' means images with or without sound and radio announcements which are designed to promote, directly or indirectly, the products, services or image of a person pursuing an economic activity and which accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes, and forms of audiovisual commercial communication include advertising, sponsorship, teleshopping and product placement but do not include public service announcements or charity appeals broadcast free of charge;

'financial statement' in relation to a person or body liable to pay the levy means a summary (as at a particular date) of the assets, liabilities and financial position of the person or body together with the profit or loss, since the date of the previous financial statements and shall comprise—

(a) a balance sheet as at the end of the financial year,

(b) a profit and loss account for the financial year, and

(c) any other additional statements and information attached to the balance sheet and profit and loss account and forming part of them;

'financial year' (other than in the definition of 'financial statement') means a period of 12 months ending on 31 December in any year;

'interactive income' means income generated by a broadcaster from listener or viewer response to a broadcast including, without limitation, telephony income and income from online payments;

‘non-linear service’ means a service provided by a broadcaster whereby a person may view or listen to programmes at the moment chosen by the user and at his or her individual request on the basis of a catalogue of programmes selected by the broadcaster;

‘qualifying income’ shall be construed in accordance with subsection (4)(b);

‘three month Euribor’ means the Euro Interbank Offered Rate with a maturity date of three months as published by the European Banking Federation.

Appendix 5 – Comparator Funding Models

Among the comparator bodies considered in the **Regulatory Powers Policy Paper** the main funding sources are; direct funding in the form of Oireachtas Grants and industry funding in the form of Levy Income and Licencing Fees (outlined below).

The BAI and the Commission for Regulation of Utilities ("CRU") are primarily funded by levies on the respective industries/sectors subject to their regulation (approx. 86% and 97%, respectively).

The Data Protection Commission ("DPC") and the Competition and Consumer Protection Commission ("CCPC") are primarily funded by grants from the Oireachtas (approx. 89% and 82%, respectively).

The Commission for Communications Regulation ("ComReg") is less dependent than the other comparators on a single income source. ComReg is funded by licensing fees (approx. 51%), spectrum income (approx. 37%), and levy income (approx. 11%).

a. Broadcasting Authority of Ireland

The BAI's 2017 income is as follows;[7]

- Levy - €4,683,000;
- Licencing Fees - €23,000;
- Other Income - €729,000.

Fig. 1 BAI 2017 Income Breakdown (total gross income - €5,435,000)

[7] See Broadcasting Authority of Ireland, Annual Report 2017, from page 64, available at: https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/11/20181011_BAI_AR_2017_English_vFinal_SH.pdf [accessed 21 October 2019]

The BAI is funded primarily through a levy paid by public service broadcasters and broadcasting contractors at a level required to meet the expenses of the BAI in carrying out its functions.

The BAI is responsible for the awarding of contracts for television and radio services on a variety of platforms. In general, the BAI enters into two kinds of contracts with broadcasting operators: Broadcasting Contracts and Content Provision Contracts. Licensing fees may be payable by applicants for contracts and by contractors to the BAI. In 2017 the BAI recorded income from "licensing fees" of €23,000.

Other income relates to expenditure incurred by the BAI and which is recharged to the Broadcasting Fund. This includes salaries of €444,382 (2016: €439,140), general overheads of €181,568 (2016: €181,169), BFS sponsorship contribution of €72,862 (2016: €70,160), IT licence fees and IT support fees of €17,018 (2016: €53,480) and investment advice €13,000 (2016: €13,000).[8]

b. Data Protection Commission

The DPC's 2017 income is as follows;[9]

- Oireachtas Grant - €6,173,768;[10]
- Fees - €754,739

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[8] Broadcasting Authority of Ireland, *Annual Report 2017*, from page 64, available at: https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/11/20181011_BAI_AR_2017_English_vFinal_SH.pdf [accessed 21 October 2019]

[9] See Data Protection Commission, *Accounts of Receipts and Payments for the Period from 25 May 2018 to 31 December 2018*, from page 13, available at: https://www.dataprotection.ie/sites/default/files/uploads/2019-09/DPCdoclaid090919-2%20ENGLISH.pdf [accessed 21 October 2019]

[10] The allocation for the DPC was €11.6 million, reflecting increased workload related to the coming into force of the GDRP (full year accounts for 2018 are not available), see Data Protection Commission, *Annual Report*, available at: https://www.dataprotection.ie/sites/default/files/uploads/2018-11/DPC%20annual%20Report%202018_0.pdf [accessed: 21 November 2019]

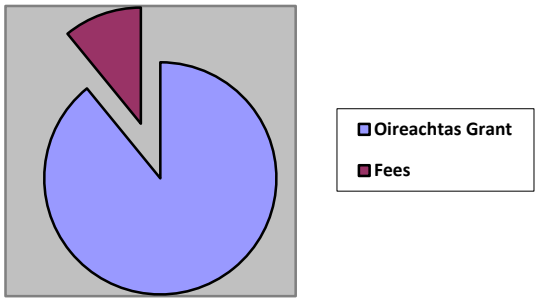

Fig. 2 DPC 2017 Income Breakdown (total gross income €6,928,507)

The DPC is primarily funded directly through the exchequer. Section 5 of the Data Protection Act, 2018, (the 2018 Act) states:

> "The expenses incurred by the Commission and any Minister of the Government in the administration of this Act shall, to such an extent as may be sanctioned by the Minister for Public Expenditure and Reform, be paid out of moneys provided by the Oireachtas."

Further, pursuant to section 28 of the 2018 Act, DPC may proscribe the fees to be paid to it in respect of certain activities.[11] In 2018 income from such fees amounted to €208,455.

c. Commission for Communications Regulation

The ComReg's 2018 income is as follows;[12]

- Levy - €9,355,000
    - Electronic Communications - €6,946,000
    - Post - €1,900,000
    - Premium Rate Services - €509,000
- Licensing Fees (Electronic Communications) - €44,217,000

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[11] This includes the performance of activities under Article 57(1)(r) and (s) and in relation to requests that are manifestly unfounded or excessive in accordance with Article 57(4).

[12] Commission for Communications Regulation, *Annual Report 2017 – 2018*, from page 63, available at: https://www.comreg.ie/media/2019/08/COMREG-AR-2018-Final-1.pdf [accessed 31 October 2019]

- 2G & 3G Radio Licensing Fees - €7,936,000
- Liberalised Use Licensing Fees - €22,478,000
- Other Radio Licensing Fees - €13,803,000

- Spectrum Income (Electronic Communications) - €32,150,000
  - 3G Spectrum Income - €30,900
  - 26GHz Spectrum Income - €1,250,000

- Other Income - €858,000[13]

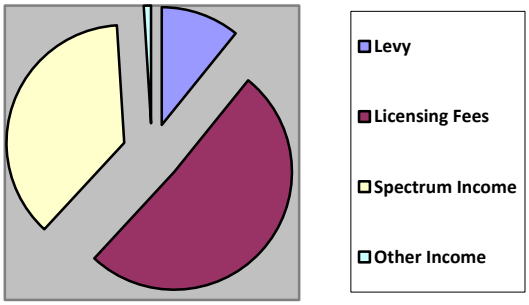

Fig. 3 ComReg 2018 Income Breakdown (total gross income €86,580,000)

ComReg receives income from a number of sources. Levies are imposed on certain providers to fund the cost of regulation. The relevant levies are as follows:

- Electronic Communication levy - is imposed on providers of electronic communications services.

[13] This figure is inclusive of; a payment of €250,000 in July 2017 by Vodafone Ireland Limited after an investigation found that the manner in which Vodafone had signed up Pay As You Go customers to its "Red Roaming" package was in breach of Regulation 14(4) of the Universal Service Regulations and ComReg Decision D13/12 on Contract Change Notifications; a payment of €575,000 in October 2017 by Three Ireland (Hutchison) Limited to ComReg following investigations into the manner in which Three implemented contract changes in March and April 2017, and into conditions and procedures put in place by Three in respect of proposed contract changes that had the effect of disincentivising customers from changing service provider; figure also includes various amounts payable to the Commission on foot of compliance and enforcement activities conducted in the period. Where such activities were concluded by legal settlement, they may be subject to a confidentiality clause.

- Postal Levy - is imposed on postal service providers providing postal services within the scope of the universal postal service.

- Premium Rate Services (PRS) are goods and services that you can buy by using your landline, mobile phone, the Internet, interactive digital TV or fax. The PRS Levy is paid equally by PRS services providers and network operators.

Licencing Fees are charged in respect of Radio Communication licensing.

Spectrum Income - represents fee income paid to the Commission for the right to use radio spectrum.

Other income - Other income includes bank and NTMA interest on deposits and amounts payable to the Commission on foot of compliance and enforcement activities.

d. Competition and Consumer Protection Commission

The CCPC's 2017 income is as follows;[14]

- Oireachtas Grant - €8,456,424

- Income from Levy - €1,860,054

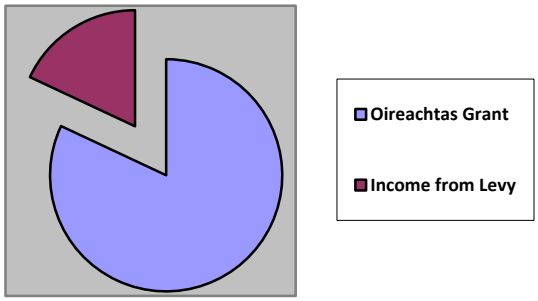

Fig4. CCPC 2017 Income Breakdown (total gross income - €10,316,478)

The CCPC is funded primarily by an Oireachtas Grant. The CCPC has the power to impose levies on regulated financial service providers under the powers conferred on it by section

[14] See Competition and Consumer Protection Commission, *Financial Statement 2017*, from page 15, available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2019/05/2017-Financial-Statements.pdf [accessed 31/10/2019]

24B of the Consumer Protection Act 2007 (as inserted by the Central Bank Reform Act 2010). Levies were imposed by regulations made under this section. The relevant provision is S.I. No. 423 of 2017 – Consumer Protection Act (Competition and Consumer Protection Commission) Levy Regulations 2017.

e. Commission for Regulation of Utilities ("CRU")

The CRU's 2017 income is as follows;[15]

- Levy – 15,279,000
    - Electricity - €9,613,000[16]
    - Gas - €2,739,000
    - LPG - €72,000
    - Petroleum - €957,000
    - Water - €1,898,000
- Licensing Fees - €30,000
    - Electricity - €20,000
    - Gas - €10,000
- Other income - €450,000

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[15] See Commission for Regulation of Utilities, *Annual Report 2017*, from page 77, available at: https://www.cru.ie/wp-content/uploads/2019/02/Commission-for-Regulation-of-Utilities-Annual-Report-2017-Final.pdf [accessed 31 October 2019]

[16] It appears that this figure is inclusive of the Public Service Obligation (PSO) levy. The PSO is a subsidy charged to all electricity customers in Ireland. It is designed by the Irish Government and consists of various subsidy schemes to support its national policy objectives related to renewable energy and indigenous fuels (peat). The CRU Annual Report does not contain a breakdown of income derived from the PSO levy and the levy imposed on electricity undertakings to meet the expenses properly incurred by CRU in relation to their regulation pursuant to S.I. No. 528/2018 – Electricity Regulation Act 1999 (Electricity) Levy Order 2018.

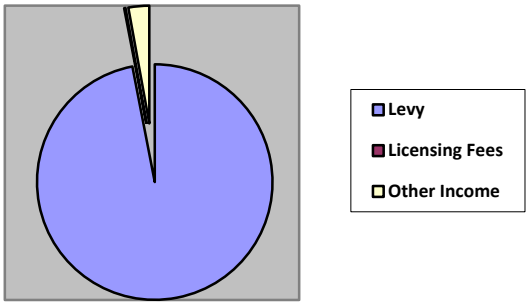

Fig. 5 CRU 2017 Income Breakdown (total gross income - €15,759,000)

For the purpose of meeting its expenses under the Electricity Regulation Act, 1999 as amended, the CRU may impose a levy on the relevant energy, safety, petroleum extraction and exploration undertakings and Irish Water. The CRU imposed a levy on the relevant energy undertakings for each activity of transmission, distribution, generation, supply or shipping that is carried out in Ireland.

Income is derived from licensing fees in relation to authorisations to construct, generate and supply energy.

Other income relates to the Petroleum Safety Framework.

Appendix 6 - Overview of elements of levy provisions

	BAI (s. 33 of the Broadcasting Act, 2009)	BAI (s. 33 of the Broadcasting Act, 2009, as amended)	ComReg (s. 30 of the Communications Regulation Act, 2002)	CCPC (s. 24B of the Consumer Protection Act, 2007)	CRU (Schedule 1, Electricity Regulation Act, 1999)	Central Bank (s. 32D Central Bank Act, 1942)	CAR (s. 23 Aviation Regulation Act, 2001)	FSPO (s. 43 FSPO Act, 2017)	CRR (s. 26 Railway Safety Act, 2005)
Purpose - meet expenses incurred in performance of functions	✔ (s. 33(1))	✔ (s. 33(1))	✔ (s. 30(1))	✔ (s. 24B(2))	✔ (para. 16)		✔ (s. 23(1))	✔ (s. 43(2, 6))	✔ (s. 26(1))
Entities subject to levy specified	✔ (s. 33(1))	✔ (s. 33(1))	✔ (s. 30(1, 1A, 2, 2A))		✔ (para. 16, 16A)	✔ (s. 32D(3A, 4))		✔ (s. 43(2))	
Entities subject to levy - contingent				✔ (s. 24B(1))		✔ (s. 32D(1))	✔ (s. 23(1))		✔ (s. 26(1))
Obligation to pay stated	✔ (s. 33(2))	✔ (s. 33(2))			✔ (para. 17)		✔ (s. 23(2))	✔ (s. 43(3))	✔ (s. 26(1))
Option to make separate orders	✔ (s. 33(3))	✔ (s. 33(3))							

General Statement of what may be included in order	✔ (s. 33(4))	✔ (s. 33(4)(c)(d))		✔ (s. 24B(3))		✔ (s. 32D(2))	✔ (s. 23(3))	✔ (s. 43(7))	✔ (s. 26(3, 4))
Recovery as simple contract debt	✔ (s. 33(6))	✔ (s. 33(6))	✔ (s. 30(12))	✔ (s. 24B(9))		✔ (s. 32D(5))	✔ (s. 23(5))	✔ (s. 43(8))	✔ (s. 26(7))
Regulations /amendment/revocation to require consent of Minister(s)				✔ (s. 24B(4, 8))		✔ (s. 32D(3, 8))		✔ (s. 43(4))	✔ (s. 26(1))
Regulation to be laid before the Oireachtas	✔ (s. 33(7))	✔ (s. 33(7))					✔ (s. 23(6))		
Power to amend or revoke order			✔ (s. 30(4))		✔ (para. 18)				
Provision of working capital		✔ (s. 33(1, 1A))							
Payment of surplus to Exchequer			✔ (s. 30(7))						✔ (s. 26(6))
Ring-fencing explicitly			✔ (s. 30(11))						

stated									
Exemptions		✔ (s. 33(4B))	✔ (s. 30(11A))						
Requirement to publish annual overview			✔ (s. 30(12A))						
Overcharging/undercharging (surplus/deficit)	✔ (s. 33(5))	✔ (s. 33(5))	✔ (s. 30(5, 12B))	✔ (s. 24B(6))	✔ (para. 20)	✔ (s. 32D(6))			
Provision of Oireachtas funds for performance of functions					✔ (para. 21)				
Minimisation of costs							✔ (s. 23(7))		
Provision of information		✔ (s. 33(1B))							
Issues to be considered in creating order		✔ (s. 33(3A))							
Basis on which levy to be calculated		✔ (s. 33(4))							

Recalculation of levy		✔ (s. 33(4A))							
Obligation to issue notice and content of notice		✔ (s. 33(4A)(b))							
De minimis amount		✔ (s. 33(4B)(c))							

Online Safety and Media Regulation Bill

Policy paper on regulating audiovisual media services

Contents

Section 1 – Introduction

The purpose of this paper is to explore the policy and legislative implications of the revised Audiovisual Media Services Directive (AVMSD) on the regulation of linear and on-demand services in Ireland. The paper will examine the following issues and set out recommendations and draft Heads of Bill for the Minister's consideration:

1. Regulation of On-Demand Audiovisual Media Services;
2. Alignment, where proportionate, of linear and on-demand regulation in legislation;
3. Impact of the AVMSD on the regulation of advertising minutage;
4. New European Works requirements for on-demand services;
5. Prominence and discoverability of public service content;
6. Potential introduction of a transnational content production levy;
7. Obligations on Media Service Providers regarding treatment of news and current affairs content.

Is it the intention to transpose the areas highlighted in this paper as part of the Online Safety and Media Regulation Bill (OSMR Bill), which was approved by the Government on 9th January 2020. In broad terms, the proposed Bill seeks to provide for:

- the establishment of a multi-person Media Commission, including an Online Safety Commissioner;
- the dissolution of the Broadcasting Authority of Ireland and the assignment of all the present functions of the Authority to the Media Commission;
- the transposition of the revised Audiovisual Media Services Directive, including those provisions of the Directive relating to the regulation of video sharing platform services;
- the establishment of a framework for the regulation of online safety to address the proliferation of harmful online content, to be administered by an Online Safety Commissioner as part of the Media Commission; and
- the provision to the Media Commission of appropriate compliance and sanction powers, including the power to seek the imposition of administrative financial sanctions.

The Government noted that additional Heads relating to the funding of the Media Commission by industry levies and the matters addressed in this paper would be subsequently brought to Government for approval. Accordingly, it is intended to bring a Memorandum to Government following the Minister's consideration of this paper and the paper on the funding of the Media Commission by industry levies.

Legislative context

The 2010 Audiovisual Media Services Directive (AVMSD) was agreed in 2008 and contains rules and requirements that form the minimum standards that audiovisual media services

must follow in the EU. The objective of the 2010 AVMSD is to ensure the free movement of audiovisual media services in the EU, protect consumers, and promote cultural diversity and media freedom. The Directive contains a minimum regulation of audiovisual media services; i.e. television broadcasts and on-demand audiovisual media services. The Directive is based on the following main elements:

- Home country control over providers of audiovisual media services (the country of origin principle).
- Freedom to receive and retransmit audiovisual media services from other Member States (the principle of freedom of reception/mutual recognition).
- Minimum harmonisation of rules on, inter alia, audiovisual commercial communications (advertisements, sponsorship, product placement, etc.), promotion of European audiovisual productions, and the protection of minors.
- Administrative cooperation between Member States and their regulatory authorities in order to ensure application of the Directive in practice.

In November 2018 the revised Audiovisual Media Services Directive was adopted. The revised AVMSD was drafted to reflect the rapid changes that the video media market was and is experiencing. The revised directive expands the scope of the 2010 Directive to include regulation of video-sharing platform services. Within the meaning of the Directive, video-sharing platform services are services which organise audiovisual content but do not have editorial responsibility for the content. Therefore, services such as YouTube and, potentially, audiovisual content shared on social media services such as Facebook, are covered by the revised Directive.

Key elements of the revised Directive:

- Regulation of video-sharing platform services as regards harmful or illegal content and audiovisual commercial communications (advertisements, sponsorship, product placement, etc.).
- Alignment, where proportionate, of the rules and requirements for Television Broadcasting Services and On-Demand Audiovisual Media Services.
- Rules on the protection of minors in relation to harmful content on television and on-demand services.
- Introduction of European content quotas for on-demand audiovisual media services, analogous to the existing rules for television.
- More flexible rules on audiovisual commercial communications for television (permitted advertising time and product placement)

- Stricter requirements for providers of television and on-demand audiovisual media services to make content accessible to persons with disabilities.

As the Directive is a minimum harmonisation directive, Member States may require providers of television and on-demand audiovisual media services under their jurisdiction to comply with more detailed or stricter provisions in the areas that are coordinated by the Directive.

What is an On-Demand Audiovisual Media Service?

Audiovisual media services comprise two key elements: Television Broadcasting Services and On-Demand Audiovisual Media Services (e.g. RTÉ Player, Netflix).

An On-Demand Audiovisual Media Service (ODAVMS) is defined by the revised AVMSD as follows:

"*'On-Demand Audiovisual Media Service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;*"

There are two primary elements that distinguish an On-demand Audiovisual Media Services from a Television Broadcasting Service. These elements are that a user can choose which programme to view and at what time and that these programmes are available from a catalogue maintained by the provider of the On-Demand Audiovisual Media Service. This is unlike a Television Broadcasting Service, where neither the programme nor its viewing window is chosen by the user and where the programmes are made available from a programme schedule rather than through a catalogue.

There are a number of different types of On-Demand Audiovisual Media Services. The two main distinctions are based on how the service is delivered and how the user pays for the service, if at all. These distinctions are as follows**:**

Delivery

- Streaming based, and,
- Download based.

Payment

- Subscription,
- Pay per view,
- Purchase (transactional), and,

- Free to access.

While there are examples of overlap between each delivery method and each payment method, certain payment methods tend to cluster around one delivery method. For example, On-Demand Audiovisual Media Services operating subscription or pay per view business models tend to stream their content. On the other hand, On-Demand Audiovisual Media Services operating transactional business models tend to allow users to temporarily or permanently download their content.

However, these categories are not absolute and two delivery or payment methods could operate within the same service. For example, a streaming On-Demand Audiovisual Media Service may have a download based “watch offline” function.

Furthermore, a service provider may operate several different types of On-Demand Audiovisual Media Services at the same time and on the same platform. For example, a number of Television Broadcasting Service providers also provide their users with access to streaming “catch-up” services and transactional film and box set library services.

Summary of decisions sought

Issue	Recommendation/Matters for decision
Regulatory system for On-Demand Audiovisual Media Services	It is recommended that a system of registration for on-demand audiovisual media services (ODAVMS) is implemented. This system will be administered by the Media Commission. It is recommended that refusal to register when directed to do so by the Commission shall be an offence and that the Commission may bring prosecutions in this regard at its discretion. The Minister is asked to consider the following: (a) Should a threshold for registration be introduced in the legislation? This purpose of this would be to exclude smaller ODAVMS from regulation, based on factors such as audience size. While legally permissible, hard wiring thresholds into the legislation risks excluding smaller services that may have the potential to cause harm; **or** (b) Should all ODAVMS be required to register with the Media Commission? While smaller services would be required to register unlike option (a), all services that have a potential to cause harm would be captured under the regulatory regime. Furthermore, from the perspective of a small scale ODAVMS, an offence would only be committed in cases where they have been identified by the regulator and consequently refuse to register. It is not the intention to penalise individuals who unwittingly create small scale ODAVMS, where the risk of harm from such services remains low. This in effect creates a *de facto* threshold as smaller services which are not causing harm will, in practice, not have any regulatory burden imposed. This approach has been confirmed as legally permissible and is viewed as more desirable from a policy perspective.
Common provisions for	In order to mirror the revised Directive, it is recommended

linear and on-demand regulation	that, insofar as possible, that the linear and on-demand strands of regulation are aligned the legislation. In particular, this includes the introduction of common provisions in relation to codes and complaints processes. It should be noted that the creation of common provisions for linear and on-demand does not necessarily mean that the Media Commission must take precisely the same approach to services in both categories. The Media Commission may, for example, choose to create codes and rules which differentiate between linear and on-demand services and impose different levels of regulatory obligations on services in each category, taking into account the nature of the service, size of audience and other relevant factors.
Advertising Minutage	It is recommended that the additional flexibility provided for in the revised AVMSD is implemented for commercial broadcasters. It is not recommended that any change is made to RTÉ's minutage arrangements at this juncture.
European Works	It is recommended that: (a) On-Demand Services shall be subjected to the minimum 30% European Works requirement as stipulated in the Directive (b) The regulator shall be responsible for formulating prominence rules for on-demand services (c) The regulator shall be responsible for determining the specific criteria for exemption from European Works requirements.
Prominence of Public Service Content	As this is a complex issue with potentially wide ranging impacts on stakeholders, it is recommended that further research, analysis and consultation into the potential impact on the Irish market should be carried out prior to introducing any provision. It is recommended that the Media Commission should undertake a review and bring forward recommendations to the Minister regarding legislative change.
Content production levies	It is recommended that the Media Commission is directed to undertake a review of this matter once established.

	The key issues requiring the Minister's decision are as follows: 1. Should a content production levy be introduced? 2. If so, should it be put into effect immediately or only after further research is carried out by the Media Commission? The recommended approach to this issue is that further research should be carried out before a levy is implemented. 3. If the Minister decides that the levy should only be put into effect after further research is carried out, should a provision be included in the legislation to be activated at a later date, or should a legislative amendment be brought forward at a future date? The assumption with this option is that research shows that the introduction of a levy is viable. 4. If the Minister decides that a levy should be included in the legislation to be activated at a later date, the Minister is asked to consider an appropriate approach for implementation if research shows that content levies are a viable option. The options are: a. Commence provision at a later date; b. Commence provision immediately but any levy made is subject to Ministerial approval.
Obligations on Media Service Providers regarding the provision of news and current affairs content	It is proposed that media service providers falling under any of the three categories below shall ensure that any news and current affairs content provided on any on-demand audiovisual media service operated by that media service provider adhere to the same standards required of linear broadcasting services. The three categories are as follows: a) a broadcasting corporation (i.e. RTÉ and TG4); or b) hold a broadcasting contract under Part 6 of the current Act (e.g. Virgin Media, local radio stations); or c) a media business for the purposes of the Part 3A of the Competition Act 2002 (as amended) (e.g. online news outlets such as the Irish Times or thejournal.ie)

	The purpose of this requirement is to ensure that on-demand news and current affairs content provided by media service providers with public service characteristics, such as public service broadcasters and other licenced broadcasters comply with the same standards as linear broadcasting. More generally, operators of media business in the State as defined by the Competition Act 2002 (as amended) are also subject to these requirements as they play an important role in the dissemination of news and current affairs content to the public.
Compliance and Enforcement Powers	The Commission requires appropriate regulatory powers in order to enforce compliance with the proposed ODAVMS provisions. The powers outlined in this section are consistent with those approved by Government for the online safety elements of the OSMR Bill.
Section 76 – MMD systems	It is recommended that this section is deleted.

Summary of legal advice required

Policy paper section	Issue	Question
Section 1	Offences for on-demand services	Is the proposed approach to create an offence for non-registration of on-demand audiovisual media services but allow the regulator discretion in applying the offence legally sound?
Section 4	Approach to investigation of complaints	Legal advice is required to confirm if the draft provision adequately captures the policy intent.
Section 6	Provision on prominence of public service content	Is the proposal and associated definitions legally robust?
Section 8	Ministerial oversight of levy order	Is the proposed approach legally sound?
Section 8	Cross border nature of a potential levy	Do the provisions of Article 13 of the Directive give the Commission sufficient grounds to legally compel a media service provider established in another Member State to comply with Irish law and pay any levy that is imposed?
Section 9	Obligations on Media Service Providers regarding treatment of news and current affairs content.	Is the proposed provision regarding on-demand audiovisual media services legally sound?

Section 2 – Regulatory regime for on-demand audiovisual media services (ODAVMS)

The draft head in respect of the amendments proposed below is attached at Head 58 in Appendix 1.

The purpose of this section is to examine the regulatory regime for ODAVMS. The revised AVMSD has increased the amount of regulation required by Member States for ODAVMS and introduces reporting obligations. In this context it is necessary to re-examine the

current regulatory regime for ODAVMS and examine new options to determine the most appropriate regulatory regime.

Current regulatory structure

The revised AVMSD includes provisions which increase the level of regulation required in relation to On-Demand Audiovisual Services (ODAVMS). This includes European works quotas and prominence obligations, stricter rules for the protection of users and commercial communications, and increasing levels of accessibility. Therefore it is necessary to consider what form of regulatory regime is most appropriate considering the additional obligations introduced by the revised AVMSD. This section considers the viability of the available options for the regulatory regime for ODAVMS.

This current regulatory regime for ODAVMS is provided for by S.I. 258 of 2010. Currently, ODAVMS are regulated, on a co-regulatory basis, by the On-Demand Audiovisual Media Services Group (ODAS). The secretariat of ODAS is provided by the business representative group Ibec. The ODAS Group is comprised of industry representatives, membership of ODAS, as of April 2019, is as follows:

- Advertising Standards Authority for Ireland (ASAI)
- Association of Advertisers in Ireland (AAI)
- An Lár TV
- Ceann Nua Ltd
- Eir
- eir Sports
- Element Pictures
- Institute of Advertising Practitioners in Ireland (IAPI)
- RTÉ
- South East Television Ltd
- TG4
- Virgin Media Television
- Vodafone Ireland

The ODAS Group operates a code of practice which reflects the provisions of the 2010 AVMS Directive, applicable to ODAVMS, and sets out the complaints process in relation to ODAVMS. While ODAS acts as a mechanism to assess complaints made about commercial communications and content on ODAVMS, ODAS operates within an open system[1] as media service providers are able to operate without any obligation to obtain a licence or a legal requirement to register with an authority or to comply with the Code.

EU Practices

The table below shows what regulatory system is in place in each of the other 27 member states in relation to ODAVMS[2].

Country	Notification[3]	Open system	Licensing
Austria	X		
Belgium	X		
Bulgaria	X		
Croatia			x
Cyprus			x
Czech Republic	X		
Denmark		x[4]	
Estonia	X		
Finland	X		
France	X	X	x
Germany		X	
Greece		X	
Hungary	X		

[1] An open system is any system in which service providers can have access to the market with no obligation of any kind to signal its existence to any competent authority.
[2] Mapping of licensing systems for audiovisual media services in EU-28
European Audiovisual Observatory, Strasbourg 2018
[3] Notification is the term used in the report however this term is interchangeable with registration.
[4] While it currently operates an open system, Denmark is proposing to introduce a registration system as part of the implementation of the revised AVMSD.

Italy	**X**	**X**	
Latvia	**X**		
Lithuania	**X**		
Luxembourg	**X**		
Malta	**X**	**X**	
Netherlands	**X**		
Poland		**X**	
Portugal	**X**		
Romania	**X**		
Slovakia	**X**		
Slovenia	**X**		
Spain	**X**		
Sweden	**X**		
United Kingdom	**X**		
Total	21	7	3

The following is an overview of each of the systems usage for ODAVMS across member states, as can be seen in the table above.

- **Open**

An open system is used by 7 out of the other 27 member states, namely Denmark, France, Germany, Greece, Italy, Malta and Poland.

The open system is the only system used by Denmark, Germany, Greece and Poland.

Italy and Malta use the open and the notification systems.

France uses all 3 systems.

- **Notification / Registration**

The notification/registration system is used by 21 out of the other 27 member states. The notification system is the only system used by 18 of these 21. France, Italy and Malta use the notification system in conjunction with one or more of the other systems.

The member states which don't currently use the notification system are Croatia, Cyprus, Denmark, Germany, Greece and Poland.

Notably, Denmark which currently operates an open system for ODAVMS is proposing to introduce an "obligation for providers of on-demand audiovisual media services and video-sharing platform services under the purview of Danish authorities to register with the Radio and Television Board". This proposal is part of Denmark's implementation of the revised AVMSD.

- **Licensing**

The Licensing system is used by 3 out of the other 27 member states, namely Croatia, Cyprus and France. Croatia and Cyprus use only the licensing system, France uses all three systems.

The options for the regulatory regime for ODAVMS are as follows:

1. Maintain the ODAS group by updating the ODAS code (thereby maintaining the current open system);
2. Requirement to notify or register with the regulator if operating an ODAVMS ;
3. Requirement to obtain a licence from the regulator.

In considering which option is most suitable regard should be given to the existence of different types and scales of ODAVMS. It would be most effective to introduce the model which can include all the variations of ODAVMS. The advantages and disadvantages to each option are considered below along with what is best practise across other member states.

The possible options for a regulatory regime for ODAVMS will be compared under the following four criteria:

- Fulfil the requirements of the revised AVMSD;
- Enable the regulator to ensure consumer protection in the market;
- Alignment with practises across other Member States;
- Proportionate in terms of regulatory burden.

Option 1: Maintain the current structure and regulatory approach

The first option to be considered is maintaining the current co-regulatory regime. This would involve updating the underpinning legislation and updating the ODAS code to incorporate the new provisions set out in the revised AVMSD.

However, there are a number of issues which arise from this option. Firstly, the current regulatory model is light touch, reflecting the graduated approach to regulation seen in the 2010 Directive. The revised Directive, however, aligns most of the rules and requirements for Television Broadcasting Services and On-Demand Audiovisual Media Services. This means that the rules and requirements for On-demand Audiovisual Media Services in the revised Directive are more prescriptive than is currently the case. This includes quota and prominence obligations, the potential for national and transnational levies, stricter rules on the protection of users, and reporting obligations.

The ODAS code was written specifically to fulfil the ODAVMS requirements of the AVMSD 2010, once the revised AVMSD is in effect this code will be obsolete.

These more definitive rules and requirements mean that the light touch regulatory model currently in place will no longer be suitable in meeting the requirements of the AVMSD once the revised version comes into force in September 2020. It is noted that in its response to the 2019 public consultation, the ODAS group itself noted that "the current system is not capable of implementing the obligations of the revised Directive". The Department has subsequently met the ODAS secretariat and this position has been reiterated.

The European Commission has also informally expressed concern with the current approach and has advised that infringement proceedings would be initiated as the current system is not in line with the 2010 Directive. Therefore it is imperative that Ireland moves away from the current approach to on-demand regulation.

Furthermore, a number of issues have been observed with the current operation of the ODAS regime:

- Lack of enforcement powers;
- Incomplete membership of key players e.g. Apple;
- Lack of public awareness;
- Very low volume of complaints;
- The ODAS group convenes infrequently.

Recommendation

Given the above considerations, it is not recommended that the current regulatory regime for ODAVMS is maintained. The following two options would see ODAVMS come under direct regulation of the regulator.

Option 2: Requirement to notify or register with the regulator if operating an ODAVMS

The next option to be considered is requiring any ODAVMS providers to notify / register with the regulator prior to commencing operation or within a set time period if operating before the implementation of the AVMSD. The registration would include signing up to the relevant codes and rules laid out by the regulator for compliance with EU and national law.

The registration system would allow the formation of a regulatory relationship between the provider and the regulator. It would allow the regulator to monitor the compliance of the provider and use its statutory powers to compel the provider to remedy instances of non-compliance.

Requiring entities to register with the Regulator fulfils the obligations under the revised AVMSD to maintain an up-to-date list of media service providers under Irish jurisdiction. However, it is more business friendly and efficient than a licensing system. Furthermore, registration would give the regulator the access and powers to ensure consumer protection in the ODAVMS market.

Registration would provide the regulator with the means to regulate the relevant entities and provides those entities with assurance and clarity regarding what regulations they need to comply with.

Stakeholder engagement to date has indicated that notification / registration of services to a regulator would be welcomed by industry and the bodies representing them and this approach is in line with responses to the 2019 public consultation.

It is proposed that the option of creating an offence for non-registration will be considered below as a means to promote compliance. A mechanism to communicate this requirement would need to be implemented, as certain ODAVMS providers, particularly those which operate over video sharing platforms, may be unaware that they fall within scope of this registration system. To this effect, the draft Head provides that the Commission shall make guidelines in relation to the registration process and the criteria to be met in order to be deemed an ODAVMS.

Recommendation

It is recommended that this option is implemented as it fully meets the requirements of the revised AVMSD and is considered the most proportionate and effective approach. A draft provision in respect of registration can be found under Head 58 in Appendix 1.

Option 3: Requirement to obtain a licence from the regulator

The final option to be considered is to introduce a licensing system for ODAVMS, which would align the regulatory regime for ODAVMS with linear services.

In the State, the BAI has responsibility for licensing television services in addition to those designated in law as public service broadcasters. The BAI operates different licensing processes, provided for in the Broadcasting Act 2009, depending on the type of service provided.

However, there are a number of issues with this option. ODAVMS are considered to be information society services and therefore Member States cannot require service providers to apply for authorisation before commencing to provide services. Therefore, the implementation of a licencing process for ODAVMS would be contrary to EU law.

The current licensing processes operated by the BAI are lengthy in time and give rise to substantial regulatory and administrative costs, and even if such an option was permissible under EU law, this could likely create a barrier to entry to smaller ODAVMS from entering the market, thus impacting on innovation and consumer choice.

While the introduction licensing system is not possible, it is necessary to increase regulation of ODAVMS. The registration system discussed in option 2 would be more appropriate while maintaining the ability for the regulator to ensure consumer protection.

Recommendation

ODAVMS are considered to be information society services and therefore Member States cannot require service providers to apply for authorisation before commencing to provide services. Therefore it is not recommended to implement a licencing system for ODAVMS.

Comparative analysis

The following table marks each option against the relevant criteria based on the above examination.

	Fulfil the requirements of the revised AVMSD	Enable the regulator to ensure consumer protection in the market	Alignment with practices across other Member States	Proportionate
Option 1: Maintain the current structure and regulatory approach	✘	✘	✘	✘
Option 2: Requirement to notify or register with the regulator if operating an ODAVMS	✓	✓	✓	✓
Option 3: Requirement to obtain a licence from the regulator.	✘	✓	✘	✘

As can be seen in the table above, option 2, the requirement to register, is the only option which complies with each of the relevant criteria. Continuing with the current regulatory approach is not a viable option as it would hinder compliance with the requirements of the revised AVMSD. Implementing a licensing regime for ODAVMS would cause an undue regulatory burden on businesses without adding significant benefits for consumers. Therefore, it is recommended that the regulatory regime for ODAVMS consist of a mandatory notification / registration system. This recommendation is in line with the most common practice for ODAVMS across the EU.

Interaction between regulatory regimes for ODAVMS and VSPS

A common question that arises is around the interaction of the ODAVMS and VSPS regimes, considering that ODAVMS can be provided over a VSPS, for example, an ODAVMS operating over YouTube.

Firstly it should be noted that all audiovisual material uploaded to a VSPS by its users is user-generated content. Therefore, VSPS will have to take measures in respect of that material to comply with online safety codes under our proposed regulatory framework. However, the activities of some users of VSPS and the material they upload can also constitute an ODAVMS. This is the case where users exercise editorial control over the content they make available on the catalogue which is provided over the VSPS. There are no clearly defined rules established by the revised Directive for when this happens. This means that certain audiovisual material will be subject to the measures that VSPS take to comply with online safety codes and be regulated as part of the on-demand audiovisual media services regime in their own right.

In terms of proportionality, the fact that certain audiovisual material on VSPS which could also be considered to be an ODAVMS is subject to measures arising from online safety codes could lessen the risk-profile of that ODAVMS.. However, the revised Directive does not allow us to absolve ourselves of responsibility to regulate such services as ODAVMS simply because they are hosted on VSPS which are regulated under another regime. The ODAVMS regulatory regime imposes specific responsibilities on ODAVMS services as required under the revised Directive. These requirements are set out in the below table.

Regulatory Obligation
Individual complaints – complaints handing process Unlike VSPS, the Media Commission will be empowered to assess individual complaints regarding ODAVMS. The Media Commission will have the option to refer these individual complaints in the first instance to the relevant ODAVMS. As a result, ODAVMS will be required to develop codes of practice for complaints handling.
Compliance with regulatory codes ODAVMS will be required to abide by a range of applicable regulatory codes drawn up by the Media Commission, based on the relevant articles of the Directive that are applicable to audiovisual media services. These codes will, in certain instances, overlap with requirements for linear broadcasters.
European Works requirements The revised Directive provides that ODAVMS are required to ensure that content of a European origin makes up at least 30% of their catalogue.
Accessibility

ODAVMS will be required to abide by rules regarding accessibility.
Retention of programme material ODAVMS will be required to retain copies of programme material for a period as the Media Commission shall determine.
News and current affairs standards Certain ODAVMS will be required to adhere to the same news and current affairs standards at linear broadcasting services. This is discussed in detail in section 9 of this paper.

While some ODAVMS that are located in Ireland will be operating over VSPS established in Ireland, some will be provided over VSPS established elsewhere in EU and VSPS established outside the EU. For ODAVMS operating on VSPS located outside the EU in particular, it is possible that those platforms will experience a greater proliferation of harmful or inappropriate content in contrast to VSPS regulated within the EU. This may have a knock on impact on the risk profile of ODAVMS operating on such platforms and the Media Commission may wish to focus more compliance efforts on those particular ODAVMS as a result.

For any users uploading user generated content on a VSPS, it is the responsibility of the platform to ensure user generated content abides by the Commission's VSPS codes. From a user perspective any requirements imposed by the Media Commission's VSPS codes will be reflected in the community standards/T&Cs of the VSPS. Therefore, from a regulatory burden perspective, while operating an ODAVMS over a VSPS technically places the user under two separate regimes, in practical terms the operators of ODAVMS over a VSPS will not have to be concerned about compliance with VSPS codes as the VSPS itself is responsible for compliance with that particular regulatory strand.

Thresholds and Offences

This section will consider whether it is appropriate to include an offence for non-registration in the legislation and whether it is appropriate to implement a threshold (for example, audience numbers) for registration.

Thresholds

There is an option to introduce a threshold for the obligation to register. Under such an approach, any service not reaching a certain level of viewership would not be required to register with the regulator. The intention of such an approach would be to exclude very small ODAVMS which would not have the capacity to engage in any meaningful way with a

regulatory system. There are a number of concerns with implementing a threshold for registration which will be considered below.

There are a number of obvious services operated by large companies under Irish jurisdiction which fall under the scope of registration including Google Play, Apple TV, and the iTunes store. From stakeholder engagement on the matter, it is not envisaged that any of the obvious and large ODAVMS under Irish jurisdiction will have any issue with the registration process.

However, there are a range of other services which are more complicated to categorise, particularly concerning ODAVMS which are operated over a video-sharing platform such as YouTube. YouTube is both a Video Sharing Platform Service (VSPS) and an ODAVMS under Irish jurisdiction, due to providing a platform for user-generated content as well as its own original movies and TV shows. The definition of an ODAVMS doesn't exclude any services based on the platform of delivery.

The following are examples of ODAVMS operated over a VSPS which are located in Ireland.

- JackSepticeye is a gaming and lifestyle channel operated by Seán William McLoughlin on Youtube that has 23m subscribers. In the 30 day period up to 28 January 2020, JackSepticeye had 148.7m video views.

- PowerkidsTV by DQE World is a children's programming channel on Youtube that has 6.5m subscribers. In the 30 day period up to 28 January 2020, PowerkidsTV had 277.5m video views.

- The Happy Pear is a cookery channel operated by David and Stephen Flynn on Youtube with 380K subscribers. In the 30 day period up to 28 January 2020, The Happy Pear had 1.3m video views.

In order to provide context to the figures quoted above the RTÉ Player had an average of 5.2m monthly streams over the period January to November 2018. While not a direct comparison as we don't have data from the same time period, the figures above can act as an indicator of the reach of some of these ODAVMS services operated on VSPS.

If a threshold were to be introduced it could encompass ODAVMS over VSPS which are of a similar scale as those mentioned above. It is worth noting that channels with much smaller viewership are often very similar in format and content to the larger channels. Setting a threshold for registration could have the unintended consequence of excluding a higher risk service from regulation. A small ODAVMS operated over a VSP could come to the attention of the regulator, and if so the regulator would need to be able to regulate such a service, however, if that service had been precluded from the obligation to register it would be left in a lacuna in the regulatory system. If the threshold were to be introduced, the only

regulation which the smaller channels would fall under would be the rules set out by the VSP in line with the regulation of VSPS.

Furthermore, there may be issues in terms of the practical implementation of such a threshold. For example, any criteria set out in legislation may quickly become outdated as the media environment evolves. Another potential issue that arises is around the availability of data to determine audience share of an ODAVMS. While in the linear world there are well established systems to capture audience share (e.g. Nielsen), the on-demand sector relies on ODAVMS to self report subscriber/audience figures. Therefore, if threshold/exemption were to be implemented based on audience share, it may be very difficult for the regulator to determine if figures reported by an ODAVMS were accurate. While it is not envisaged that this would be a concern regarding larger entities, this factor could potentially lead to certain smaller operators under reporting subscriber numbers in order to avoid regulation.

While the implementation of thresholds for registration is viewed as legally permissible, a clear set of criteria would need to be included in the legislation to guide the regulator on the exemption of certain services. As the regulatory regime has not yet been implemented there may be unintended consequences from hard wiring a number of exemption criteria into the legislation.

Offences

An alternative to putting in place thresholds for registration, would be to take a proportionate approach to the prosecution of failure to register and to the obligations imposed on services that register.

Creating an offence for refusal to register when directed to do so by the regulator would incentivise those within scope to register. Creating such an offence requires examining the potential unintended consequences of creating such an offence, bearing in mind that the key to better regulation is that the regulation of services should be appropriate, proportionate and risk based.

Instead of the creation of a general offence for non-registration, it is proposed to only create an offence where there has been persistent and continuous refusal from a service to register when directed to do so by the regulator. The reason for this is that wide scale enforcement of a general offence for non-registration could be a deterrent to the production of new independent content, particularly on VSPs. Furthermore, given the myriad of small ODAVMS that are likely to exist on platforms such as YouTube, it would not appear to be proportionate to penalise a minor who has unknowingly created an ODAVMS (e.g. a YouTube channel) for failing to register with the regulator.

As noted in the preceding section, thresholds for registration may be difficult to implement, so the regulator must have the ability to require services to register without also being

required to enforce offences against minors or low-risk, low-audience services which may not even be aware they operate an ODAVMS.

IBEC has noted that the lack of sanctions available for failure by large players to sign up to the co-regulatory regime that it has operated to date meant that the regime was effectively toothless. In line with the principle of proportionality, the intent of the creation of a criminal offence is to deter non-compliance where there is a clear risk of harm to the public interest. This could be in instances where, for example, a service with a large audience in the State knowingly and willingly refuses to register with the regulator. The overall intent of the registration system is to bring services within scope of the regulatory regime that could have an adverse impact on the public interest if left unregulated. As such, it will not be an offence for small scale ODAVMS to fail to register, unless they are directed to do so by the regulator.

It should be noted that under the definition of ODAVMS set out in the Directive, there are potentially thousands of ODAVMS established in Ireland, ranging from large scale services such as RTÉ Player to small scale YouTube channels edited by private individuals. As it would be practically unworkable for the regulator to dedicate enough resources to ensure that each and every ODAVMS in the State is registered, it is therefore intended that the focus of the regulator will be on ensuring that large services and services which are providing content which may harm the public interest are registered. It is not intended that the regulator will pursue individuals or entities that are operating innocuous, small scale ODAVMS.

For the reasons outlined above it is deemed that creating an offence for refusal to register is necessary. Proposed wording for inclusion under the Head on Registration (Head 58) to give effect to the proposed approach is set out below:

(x) The Commission may direct an unregistered service to register,

(x) It shall be an offence to fail to comply with [preceding subsection],

(x) Summary proceedings in relation to an offence under this section may be brought by the Commission.

This approach has been confirmed as being legally permissible.

UK approach in relation to thresholds and offences

The UK operates a notification system for ODAVMS, which is analogous to the registration system recommended in this paper. While there is no statutory offence for failing to notify the regulator, Ofcom can request any service that comes to its attention to immediately notify itself to Ofcom and thus fall under Ofcom's regulatory remit. Furthermore, the UK does not impose threshold requirements for the notification of ODAVMS to the regulator.

Preliminary views of the European Commission

The Department liaised with the European Commission on the issues raised in this paper regarding the regulation of small scale ODAVMS. The Commission's preliminary views are set out as follows:

- In relation to the Department's query regarding the feasibility of thresholds to exclude smaller services from the scope of regulation, the Commission expressed a preliminary view that this approach was not preferred, as there is a risk of excluding smaller services that may be producing harmful content from the scope of regulation.
- In relation to the Department's query around the regulation of small scale ODAVMS, the Commission expressed a view that smaller services should not be subject to the same level of regulation as larger entities.
- The Commission further advised that they would not be in a position to provide formal guidelines on this issue as the revised Directive does not provide for this. The Commission expressed a preliminary view that it would ultimately be up to each Member State to devise an appropriate approach to regulation of ODAVMS.

Conclusion

Taking account of the factors discussed above, it is recommended that an offence is created for cases where an ODAVMS persistently refuses to register with the regulator. In respect of thresholds, there are a number of reasons why such an approach may lead to unintended consequences and as such, it may be prudent to simply oblige all ODAVMS to register instead. As discussed above, it is not the intent to penalise small, innocuous ODAVMS, so in cases where an individual unknowingly creates an ODAVMS that is not providing harmful content and fails to register with the regulator, they will not be penalised for doing so. It has been confirmed that there is no legal impediment to such an approach.

Summary of approach to the regulation of ODAVMS/Matters for Ministerial decision

In summary, it is proposed that the regulatory system for ODAVMS will encompass the following elements:

- The creation of a registration system for ODAVMS;
- A statutory obligation to register with the Commission;
- The Commission has the power to produce guidelines for registration. The guidelines will clearly set out the criteria that have to be met to be considered an ODAVMS;
- Persistent refusal to register with the Commission will be an offence. Prosecutions may be brought by the Commission at its discretion and in line with the principle of proportionality.
- The Commission has a range of regulatory powers for enforcing compliance (see section on compliance and enforcement for more detail). In terms of proportionality, the provisions contained in Head 62(3) take account of the fact that a range of differing services will fall under the remit of the regulatory codes developed by the Media Commission. Head 62(3) allows the Media Commission to, for example, create codes and rules which differentiate between services and that take account the nature of the service, size of audience and other relevant factors. This matter is discussed further in section 4(a) of this paper (pg. 32)

Having regard to the above recommendations, the Minister is asked to consider the following:

(a) Should a threshold for registration be introduced in the legislation? This purpose of this would be to exclude smaller ODAVMS from regulation, based on factors such as audience size. While legally permissible, hard wiring thresholds into the legislation risks excluding smaller services that may have the potential to cause harm; **or**

(b) Should all ODAVMS be required to register with the Media Commission? While smaller services would be required to register unlike option (a), all services that have a potential to cause harm would be captured under the regulatory regime. Furthermore, from the perspective of a small scale ODAVMS, an offence would only be committed in cases where they have been identified by the regulator and consequently refuse to register. It is not the intention to penalise individuals who unwittingly create small scale ODAVMS, where the risk of harm from such services remains low. This in effect creates a *de facto* threshold as smaller services which are not causing harm will, in practice, not have any regulatory burden imposed even if they fail to register. This approach has been confirmed as legally permissible and is viewed as more desirable from a policy perspective.

Section 3 – Compliance and Enforcement Powers in relation to ODAVMS

As described earlier in this paper, on-demand services operating in the State are regulated by the ODAS group. This self-regulatory system is not considered fit for purpose as there is no legal mechanism to available under this system to require services to register, nor can the current system take enforcement action against media service providers in cases of non-compliance with codes.

In line with the proposals set out in the policy paper on Core Regulatory Powers of a Media Commission it is proposed to vest the regulator with a range of powers in order to encourage and enforce compliance with the rules. The table below sets out the powers to be conferred on the Commission in respect of ODAVMS. These powers are discussed in detail in the policy paper on Core Regulatory Powers of a Media Commission. The below table also includes a reference to the Head in Appendix 1 or the OSMR Bill where the powers have been conferred:

Power	**Head reference**
Power to issue notices, warnings, etc.	Head 59
Power to devise, implement, monitor and review codes of practice.	Head 62
Power to conduct investigations/inquiries	Head 61
Power to appoint authorised officers with significant investigatory powers to conduct investigations.	Head 15A
Power to impose administrative financial sanctions and to enter into settlements	Head 16A
Power to prosecute summary offences	Head 17
Registration powers	Head 58

Investigations

In order to effectively investigate complaints, the Commission will need appropriate powers of investigation. It is proposed that authorised officers would be appointed and vested with the appropriate investigatory powers in line with Heads 15A to E of the OSMR Bill as approved by the Government.

Compliance notices

It is proposed that where the Media Commission is of the view that a service is not in compliance with a code or rule, it may issue a compliance notice. It is proposed that

provision is made to allow to regulator to specify the actions that the media service provider must take to bring itself into compliance. For ODAVMS, the following remedies are considered appropriate:

(i) the removal of specified programme material;

(ii) restriction of access to specified programme material (for example, age gating);

(iii) provision of additional information, (for example, age ratings) to users of the service prior to the selection of specified programme material by the user for viewing.

Sanctions

In line with the approach to the regulation of designated online services, it is proposed that the Media Commission may seek to apply a range of sanctions to an on demand audiovisual media service where it is of the view that the service has failed to comply with a warning notice issued by the Commission and the procedure for the application of such sanctions.

These sanctions include:

- Imposition of an administrative financial sanction;
- Compelling compliance;
- Removal of the service from the register of regulated services;
- Blocking access to on-demand service.

The application of each of these sanctions requires court approval whereupon the media service provider in question will have the opportunity to dispute its application. The procedure for administrative financial sanctions is set out in head 16A of the OSMR Bill approved by Government on 9 January 2020.

It is proposed that the Media Commission shall have the discretion to determine the sanction it may seek under this section having regard to the nature of the non-compliance of the on demand audiovisual media service.

Recommendation

The Commission requires appropriate regulatory powers in order to enforce compliance with the proposed ODAVMS provisions. The powers outlined in this section are consistent with those approved by Government for the online safety elements of the OSMR Bill.

Section 4 – Proposed amendments to Parts 3 and 4 of the 2009 Act

Common provisions for linear and on-demand regulation

Under the 2010 AVMSD, linear and non-linear audiovisual media services are subject to differing levels of regulatory obligations, with the requirements placed on Member States with regard to non-linear services being less stringent than those for linear services. The revised AVMSD aligns the majority of the rules and requirements for Television Broadcasting Services and On-Demand Audiovisual Media Services. The alignment of regulation for linear and non-linear is also in line with responses to the 2019 public consultation. Accordingly, it appears appropriate to align, insofar as practical, the two strands in the OSMR Bill. In this instance, alignment means creating common legislative provisions that cover both on-demand and linear services. This mirrors the approach taken in the revised Directive.

It should be noted that the creation of common provisions for linear and on-demand does not necessarily mean that the Media Commission must take precisely the same approach to services in both categories. The Media Commission may, for example, choose to create codes and rules which differentiate between linear and on-demand services and impose different levels of regulatory obligations on services in each category, taking into account the nature of the service, size of audience and other relevant factors.

The areas of where common provisions could be introduced are identified and discussed below. The creation of common provisions will have implications for a number of sections in Parts 3 and 4 of the current Broadcasting Act.

a. Codes

Current approach

i. Broadcasting

As provided for by section 42 of the Broadcasting Act 2009, the BAI implements a range of detailed broadcasting codes and standards to be followed by broadcasters. The purpose of the broadcasting codes, as provided by section 42, is to protect the interests of the public by requiring broadcasters to adhere to a number of principles, including:

- The provision of impartial news and current affairs content;
- Prohibition of any material likely to incite crime or undermine the authority of the State;
- That audiences, particularly minors, are protected from harmful or offensive material;
- That any advertising material protects the interests of the audience, with particular reference to minors.

The BAI publish a range of codes and standards, as set out in the following table:

Code	**Description**
Access Rules	The BAI Access Rules determine the levels of subtitling, sign language and audio description that broadcasters licensed in Ireland will be required to provide
General Commercial Communications Code	The General Commercial Communications Code deals with advertising, sponsorship, product placement and other forms of commercial promotion.
Code of Fairness, Objectivity & Impartiality	This code deals with matters of fairness, objectivity and impartiality in news and current affairs content.
Code of Programme Standards	The main aims of the Code of Programme Standards is to promote responsible broadcasting and to advise viewers on the standards they can expect from broadcasting services and to enable viewers and listeners to hold broadcasters to account in the event they believe that a broadcaster has behaved irresponsibly.
Children's Commercial Communications Code	The Children's Commercial Communications Code deals with advertising, sponsorship, product placement and other forms of commercial promotion aimed at children or broadcast in or around children's programming. It includes rules on the promotion to children of food that is high in fat, salt or sugar.
Rules on Adverts and Teleshopping	This code sets the limits on the level of two types of commercial content broadcast on Irish services; for advertising and teleshopping. Broadcasters are obligated to abide by the time limits set by the BAI.
Short News Code	This Code of Practice defines the modalities and conditions regarding the provision of short news extracts and fulfils the BAI's obligation to develop a code of practice further to the AVMS Regulations
Guidelines applying to coverage of	To ensure responsible coverage around these

suicidal behaviour, mental health and wellbeing	issues in the broadcast media.

If a member of the public considerers a programme to have breached a section or sections of a BAI code, they can bring a complaint in the first instance to the broadcaster, and if not satisfied with the response, to the Compliance Committee of the BAI.

ii. On-Demand

On-demand complaints are addressed by the On-Demand Audiovisual Media Services Group (ODAS), which is administered by the business representative group IBEC. In line with the provisions of S.I. 258 of 2010, ODAS operates a code of practice which reflects the provisions of the current Directive. The operation of the ODAS system is discussed in detail in section 1 of this paper.

Recommended approach

In consideration of the fact that (a) the convergence in technology results in need for consistency in the regulation of content provided by linear and on-demand services and (b) the intent of the revised AVMSD, it is proposed to introduce a common provision in the legislation entitled "Media Codes". This provision will enable the Commission to formulate a code or codes to address both strands of regulation. Having a common provision for both linear and on-demand is in line with the trend towards the regulation of content rather than any specific form of technology. The Commission will have the power to appoint authorised officers to investigate alleged breaches of codes and to take compliance and enforcement action as appropriate.

It is therefore proposed that the section 42 of the 2009 Act is amended to incorporate the following measures in the revised directive:

Revised AVMSD Measures to be implemented in Media Codes			
Measure	AVMS reference	OSMR Reference	Comment
Prohibition of incitement to hatred/terrorism	Article 6(1)	Head 62(2)(c)	
Protection of minors - television and on-demand AV	Article 6a (1)	Head 62(2)(f)(ii)	

services			
Signal integrity	Article 7b	Head 62(2)(J)	As with 2009 Act, these provisions will be 'signposted' i.e. the relevant directive provision will be cross-referenced in the Media Codes provision.
Audiovisual commercial communications rules	Article 9	Head 62(2)(J)	As above
Sponsorship	Article 10	Head 62(2)(J)	As above
Product placement	Article 11	Head 62(2)(J)	As above

In addition to the above measures, the measures already in place through the 2010 AVMS will continue to be provided for by the head on Media Codes. As noted in the above table, certain elements of the revised AVMSD will be 'signposted' in the Head on Media Codes. This is a standard approach for the transposition of a directive and is in line with the approach taken in the Broadcasting Act 2009.

It is expected that the Media Commission would update the existing BAI codes listed above in line with the requirements of the legislation and, if it deems appropriate, develop additional codes to address any specific matters relating to on-demand services and on the additional requirements introduced by the revised AVMSD.

A draft provision is attached at Head 62 in Appendix 1. This head is primarily based on section 42 of the Broadcasting Act and has been amended as appropriate to reflect the requirements of the revised AVMSD and the fact that the Media Commission will be regulating both linear and on-demand services.

Proportionality of Codes

The provisions contained in Head 62 take account of the fact that a range of differing services will fall under the remit of the Media Codes, from large broadcasters such as RTÉ to individuals operating small ODAVMS with relatively low audiences. Head 62 allows the Media Commission to, for example, create codes and rules which differentiate between linear and on-demand services and impose different levels of regulatory obligations on services in each category, taking into account the nature of the service, size of audience and other relevant factors.

The relevant provisions of the Head which allow the Media Commission flexibility in this respect are as follows:

(3) In preparing or revising a media code, the Commission shall have regard to each of the following matters—

> *(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description,*
>
> *(b) the likely size and composition of the potential audience for programmes included in audiovisual media services and sound media services generally, or in audiovisual media services and sound media services of a particular description,*
>
> *(c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of a programme's content can be brought to the attention of potential members of the audience,*
>
> *(d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content,*
>
> *(e) the desirability of securing that the content of an audiovisual media or sound media service identifies when there is a change affecting the nature of the service that is being watched or listened to and, in particular, a change that is relevant to the application of the codes set under this section, and*
>
> *(f) the desirability of maintaining the independence of editorial control over programme content.*

The above provisions are based on the existing provisions contained in section 42 of the Broadcasting Act 2009.

Legal advice is required to confirm that this approach provides the Media Commission with sufficient flexibility in making its codes to (a) differentiate between linear and on-demand services and (b) when making codes for the aforementioned categories, take account, *inter*

alia, of the nature of the services, the degree of harm or risk likely to be caused and the size of the audience viewing the service.

b. Complaints processes

Current process

i. Broadcasting

Part 4 of the Broadcasting Act 2009 set out a highly prescriptive process for addressing broadcasting complaints. Such an approach is administratively burdensome on the BAI with elongated timeframes for decisions on complaints due to the requirements of the legislation and the part time nature of the Compliance Committee.

The Compliance Committee of the BAI evaluated 73 complaints in 2018 (latest available data). The number of broadcasting complaints submitted to the BAI is on a downward trend, as can be seen in the below table. This is likely due to the decline in viewership of linear channels over the past number of years.

Year	**Number of complaints**[5]
2014	152
2015	159
2016	132
2017	109
2018	73

ii. On-Demand

As discussed earlier in this paper, the current on-demand regulatory regime is not fit for purpose. The ODAS group is self-regulatory, and as such has no powers in relation to compliance or enforcement. It is further considered that there is a lack of public awareness regarding the role of ODAS in relation to the regulation of on-demand services.

Multi-criteria analysis

The options for the implementation of a complaints process for linear and on-demand services will be assessed against the following criteria:

- Clarity – This refers to the ease by which the regulatory approach can be understood.

[5] Figures are taken from the relevant BAI annual reports and represent the number of valid complaints accepted for consideration by BAI.

- Effectiveness – This refers to the ease by which the regulatory approach can deliver the goals of the revised AVMSD.
- Flexibility – This refers to the ability of the regulatory approach to adapt to changing circumstances.
- Sufficiency – This refers to whether the regulatory approach sufficiently fulfils the requirements of both linear and on-demand regulation.
- Acceptability – This refers to whether the regulatory approach is acceptable to stakeholders, including the political system, members of the public, NGOs and commercial organisations.

Option 1 – Separate processes for complaints

The first option entails maintaining the current broadcasting complaints process along with introducing a separate process in the legislation to address on-demand complaints.

As highlighted in the section above, the current process and timeframes for decision are not conducive to the effective resolution of complaints from a consumer protection perspective.

Given the overlap between linear and on-demand services and the intent of the AVMS in relation to alignment of these areas, it would not appear to be prudent to introduce a new on-demand complaints provision to run alongside the existing broadcasting complaints process set out in section 48 of the 2009 Act. For example, it could be confusing from a consumer perspective as to why an item of content shown live on RTÉ and later made available on RTÉ Player would be subject to separate complaints processes.

Clarity	Effectiveness	Flexibility	Sufficiency	Acceptability	Total
1/5	**2/5**	**1/5**	**3/5**	**2/5**	**9/25**

Option 2 - Common provision for complaints

The revised AVMS brings the opportunity not only to streamline both the linear and on demand complaints processes but also to align the two processes given the convergence in technology since the 2010 AVMSD. Considering that it proposed to introduce a common provision for media codes it is therefore appropriate to also align the complaints processes for both strands under the one provision.

It is therefore proposed that a streamlined common provision be introduced for both linear and on-demand complaints. It is proposed that the streamlined process would feature the following elements:

No.	Item	Comment
1	The Commission would have the power to investigate complaints in relation to linear and on-demand services either on foot of a complaint or of its own volition. In carrying out an investigation the Commission shall have regard, as it deems appropriate, to any relevant provisions of its codes or rules.	Currently the BAI can only initiate an investigation on foot of a member of the public submitting a complaint alleging a breach of a specific section of a code. It cannot take action on a breach which has not been specified in a complaint. This is a significant flaw in the process as the regulator's investigation is constrained to the content of the complaint. For example, if the BAI identifies a breach during its investigation which was not specified in the complaint then it cannot take any further action. The new provision allows leeway for the regulator to assess programme material for breaches of any aspect of its codes and rules. The new provision also gives the regulator the power to initiate an investigation of its own volition, a course of action which was not available under the 2009 Act. Legal advice is required to confirm if the draft provision adequately captures the policy intent.
2	Complaints would have to be submitted not more than 30 days after programme material ceased to be available	This is in line with the timelines for submission of complaints in a section 48 of the Broadcasting Act 2009
3	The Commission, would, at its own discretion, have the option to refer the complaint in the first instance to the media service provider for consideration in accordance with a code of practice prepared in accordance with the Head on Code of Practice for Complaints Handling.	This is in line with section 48 of the Broadcasting Act 2009
4	The Commission would have to	As above

	ability to decide not to investigate a complaint, or to discontinue an investigation of a complaint, on the grounds that the complaint is frivolous or vexatious or was not made in good faith or that the subject-matter of the complaint is trivial.	
5	The Commission would have the option make preliminary inquiries for the purpose of deciding whether a complaint should be investigated and may in writing request the complainant or the media service provider to provide further information within a period specified by the Commission in the request. Furthermore, the Commission would not be obliged to continue an investigation if the complainant did not provide additional information if requested.	As above
6	The Commission would be required to inform the complainant and the media service provider in writing of its decisions.	As above
7	The Commission would have the power to instruct media service providers found in breach of a code or rule to broadcast, or in the case of on-demand services, make available, the Commission's decision on the breach.	As above
8	The Commission would have the power to appoint authorised officers, in accordance with the procedure specified in Head 15 of the OSMR Bill to carry out the investigations. This would include the authorised officer having the	This is a new feature – section 48 of the 2009 Act does not provide for an authorised officer to investigate complaints.

	power to obtain any relevant documents and records.	
9	It is proposed that the Commission would have a period of 60 working days to decide on a complaint.	There is currently no time limit for the compliance committee of the BAI to make a decision under the current legislation. The period of 60 working days is based on Ofcom's timelines for decision in relation to audiovisual complaints.

The approach would be clearer and more logical from a consumer perspective and less administratively burdensome from the regulator's perspective. As the complaints process would be administered by the Media Commission, there would be no further role for the ODAS group in relation to on-demand complaints.

Clarity	Effectiveness	Flexibility	Sufficiency	Acceptability	Total
5/5	**4/5**	**4/5**	**5/5**	**4/5**	**22/25**

A draft provision setting out a streamlined complaints process is attached at Head 61 in **Appendix 1.**

Further changes to related Part 3 and 4 Provisions of Broadcasting Act 2009

Along with the proposed changes in terms of the alignment of codes and complaints processes, other elements of Parts 3 and 4 of the Broadcasting Act 2009 also require amendment to ensure consistency with the overall Bill and the requirements of the revised AVMSD. Proposed amendments to these sections are discussed below.

a. Part 3 – Duties, Codes and Rules

Draft heads in respect of the amendments proposed below are attached at Heads 62, and 68 to 76 in Appendix 1.

i. Section 39 – Duties of Broadcasters

In order to align this section with the overall Bill, it is necessary to broaden the application of the section to media service providers.

ii. Section 40 - Recording of broadcasts

It is proposed to broaden the application of this section to audiovisual media services. This will capture both linear and ODAVMS as a result. The purpose of this section is to ensure that media service providers retain copies of all programme material so that it can be inspected by the regulator in the event of an investigation.

iii. Section 41 – Advertisements

It is proposed to broaden the application of this section to audiovisual media services as advertisements on ODAVMS are not captured under the current regulatory framework, in line with the current rules for linear broadcasters, the implications of this are that ODAVMS would be prohibited from showing advertisements that:

Are directed towards a political end or which has any relation to an industrial dispute

Address the merits or otherwise of adhering to or becoming a member of any particular religious faith.

The Commission will have the power to address audiovisual commercial communications in general through its code making powers set out in the Head on Media Codes.

iv. Section 43 – Broadcasting rules

This section currently provides for the BAI to make rules around advertising minutage (i.e. the number of minutes of advertising allowed in a given period) and accessibility. It is proposed to broaden the application of this section, where appropriate, to cover ODAVMS. Certain aspects of the provision in relation to advertising minutage are not applicable to

ODAVMS. The proposed changes to the advertising minutage provisions are addressed in section 5 of this paper.

v. Accessibility

The BAI Access rules, published pursuant to section 43 (1)(c), determine the levels of subtitling, sign language and audio description that broadcasters licensed in Ireland will be required to provide.

Article 7 of the revised AVMSD sets out additional measures for in relation to accessibility to audiovisual media services for persons with disabilities. These measures and the proposed approach to transposition are set out in the below table:

	Measure	**Implementation**
1	Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures.	This was also a requirement under the 2010 AVMSD and section 43 already implements this.
2	Member States shall ensure that media service providers report on a regular basis to the national regulatory authorities or bodies on the implementation of the measures referred to in paragraph 1	It is proposed to include a requirement for the Commission to submit a report to the Minister every 3 years
3	Member States shall encourage media service providers to develop accessibility action plans in respect of continuously and progressively making their services more accessible to persons with disabilities. Any such action plan shall be communicated to national regulatory authorities or bodies.	This measure will be included under the general 'signpost' provision in the Head on Media Rules. The Media Commission shall include this as a requirement for media service providers in the updated Access rules.
4	Each Member State shall designate a single, easily accessible, including by persons with disabilities, and publicly available online point of contact for providing information and receiving complaints regarding any accessibility issues referred to in this Article.	It is proposed to include a provision under Head 61 (Complaints Process) to allow the submission of complaints. Currently the Broadcasting Act 2009 does not allow the submission of complaints regarding non-compliance with BAI's accessibility rules.

5	Member States shall ensure that emergency information, including public communications and announcements in natural disaster situations, which is made available to the public through audiovisual media services, is provided in a manner which is accessible to persons with disabilities.	BAI's access rules currently cover this provision. This measure will be included under the general 'signpost' provision in the Head on Media rules.

In order to reflect the new accessibility requirements brought in by the AVMSD the Media Commission will be required to update the Access Rules.

vi. Section 44 – Inspection of draft broadcasting codes and rules

It is proposed to broaden the application of this section to cover audiovisual media services.

vii. Section 45 - Presentation of Codes and Rules to Minister

This section stipulates that the regulator shall review codes once every 4 years. There is no flexibility in the provision to review codes and rules as the need arises. Accordingly, it is proposed to amend this provision to allow the regulator to review media codes and rules as it sees fit, or at the direction of the Minister.

It is noted that BAI have consistently been of the view that there needs to be more flexibility in this section.

viii. Section 46 – Cooperation with other parties – standards and self-regulation

This provision enables the regulator to cooperate with self-regulatory bodies such as the ASAI. It is not proposed to substantially amend this provision.

b. Part 4 - Redress

ix. Section 47 – Code of Practice for Complaints Handling

Currently this section only covers broadcasters. It is proposed to modify this provision in order to broaden the scope so that it includes linear and on-demand providers. This is in line with the proposal to introduce a common streamlined complaints process. The proposed provision would require media service providers to produce codes of practice for complaints handling setting out the process and timelines for submission of complaints in relation to linear and on-demand content.

x. Section 48 - Broadcasting complaints process

Given that a consolidated, streamlined provision is being produced to cover both linear and on-demand services, this section will be repealed and replaced as a result.

xi. Section 49 - Right of Reply

The BAI have advised that this provision has never been used since the enactment of the 2009 Act. However, Article 28 of the AVMSD requires Member States to have a provision in place for this. Accordingly, it is not proposed to substantially amend or repeal this section.

Section 5 – Advertising Minutage Flexibility

The draft head in respect of the amendments proposed below is attached at Head 71 in Appendix 1.

Background

The AVMSD 2010 imposed a limit on television advertising and teleshopping spots to 20% of broadcast time per clock hour. Currently the BAI make the rules for commercial broadcasters regarding the daily time limits and hourly minutes for advertising and teleshopping spots under section 43(1) of the Broadcasting Act 2009, which is as follows:

43*.—(1) The Authority shall, subject to the requirements of section 41(2) and, in accordance with subsection (4), prepare, and from time to time as occasion requires, revise rules ("broadcasting rules") with respect to—*

(a) the total daily times that shall be allowed for the transmission of advertisements and teleshopping material on a broadcasting service, in respect of a contract under Part 6,

(b) the maximum period that shall be allowed in any given hour for the transmission of advertisements and teleshopping material (within the meaning of section 42(8)) on such a broadcasting service, and the Authority may make different such rules with respect to different classes of broadcasting service,

In the revised AVMSD the limit for television advertising and teleshopping spots remains at 20% of broadcasting time. However the revised AVMSD allows broadcasters more flexibility across certain hours. The revised AVMSD limits the broadcasting time which can be used for advertising and teleshopping spots to 20% over the periods running from 06.00 to 18:00 and from 18:00 to 24:00. This change means, under the revised AVMSD, if a broadcaster wishes they can use more than 20% in one hour and make up for in it another hour, provided the overall amount of broadcasting time doesn't exceed 20% within the relevant period. It also means there is no limit, under the revised AVMSD, to the amount of advertising or teleshopping spots between 24:00 and 06:00.

While the AVMSD sets out the minimum regulatory requirements, it allows member states to impose stricter rules. Therefore no change is required by the AVMSD, however it provides the opportunity to allow broadcasters to choose more freely when to advertise throughout the day.

The options for consideration in this matter are as follows:

1. Maintain current provisions
2. Amend section 43(1)(b) to reflect the flexibility allowed for in the revised AVMSD

The possible options for a regulatory regime for ODAVMS will be compared under the following criteria:

- Fulfil the requirements of the revised AVMSD
- Allow the full flexibly of the revised AVMSD to be implemented
- Empower the regulator to determine the appropriate flexibility

Option 1: Maintain current provisions

This option requires minimum change and fulfils the requirements of the revised AVMSD as Member States are permitted to impose stricter measures than those in the AVMSD.

However, the wording of this section will inhibit the Media Commission from amending their rules to allow broadcasters the flexibility afforded by the revised AVMSD. Maintaining the provision in its current form will not give full effect to the relevant provision of the Directive. As such, this option is not recommended.

Option 2: Amend section 43(1)(b) to reflect the flexibility allowed for in the revised AVMSD

This option would amend 43(1)(b) to reflect the flexibility granted under article 23 of the revised AVMD while giving the regulatory the power to determine how much of that flexibility if any should be granted under e.g.

"The commission shall… prepare…rules with respect to…

the maximum proportion of time that shall be allowed to be allocated to advertising and teleshopping spots within the period of 6.00 and 18:00 and the period of 18.00 and 24:00".

This option does not automatically grant the flexibility to broadcasters but gives the regulator the ability to revise the current "Rules on Adverts and Teleshopping" to allow broadcasters to avail of the flexibility within set time frames afforded by the revised AVMSD.

Comparative analysis

The following table marks each option against the relevant criteria based on the above examination.

	Fulfil the requirements of the revised AVMSD	Allow the full flexibly of the revised AVMSD to be implemented	Empower the regulator to determine the appropriate flexibility
Option 1: Maintain current provisions	✓	✗	✗
Option 2: Amend section 43(1)(b) to reflect the flexibility allowed for in the revised AVMSD	✓	✓	✓

As can be seen in the table above, option 2, to amend section 43(1)(b) to reflect the flexibility allowed for in the revised AVMSD, is the only option which complies with each of the relevant criteria.

Public Service Broadcasters' advertising minutage

The rules regarding advertising minutage for commercial broadcasters are made by the regulator under section 43(1) of the Broadcasting Act. However the rules for advertising minutage for the public service broadcasters are determined by the Minister for Communications, Climate Action and Environment under section 106 (3) of the Broadcasting Act 2009.

The advertising minutage limits on public service broadcasters have been in place since 1993 and are as follows:

- up to 10% of programme transmission hours may be devoted to advertising;
- a maximum of 7.5 minutes in any one hour to be offset by a corresponding lower level in another hour; and
- a balancing arrangement of up to 15 minutes of advertising across two hours to facilitate programme flow and flexibility.

In 2010 RTÉ requested an increase in minutage. Following consultation with the BAI, the Department determined that an increase was not appropriate at the time. RTÉ have recently written to the Minister requesting more flexibility regarding minutage as part of its revised Strategy. The BAI has been consulted, as is required by the 2009 Act, and has indicated that

it may need to conduct research to identify any market implications. Accordingly, a decision has not yet been made on this matter.

Considering the increased flexibility granted by the revised AVMSD it may be prudent to examine whether it is appropriate to harmonise the rules pertaining to commercial and public service broadcasters in a future review of the Broadcasting Act.

Furthermore, another issue raised by this section is whether it is appropriate to continue having the Minister determine the allocation of PSB advertising minutage. The possibility of moving this function to the Media Commission should also be addressed in future review of the Broadcasting Act.

Recommendation

The regulator makes rules regarding the advertising mintage for commercial broadcasters. The regulator should be empowered to undertake a review of these rules with scope for providing flexibility, as laid out in the revised AVMSD, following such a review if it should see fit. The decision on the appropriateness of the flexibility should be left up to the regulator. Therefore option 2, to amend section 43(1) (b) of the Act to allow the regulator to determine the minutage and flexibility within scope of the revised AVMSD, is recommended.

Section 6 – Prominence of Public Service Content

The draft head in respect of the amendments proposed below is attached at Head 63 in Appendix 1.

Background

The prominence of Public Service Broadcasters (PSBs) is currently provided for by section 74 of the Broadcasting Act. It stipulates that services provided by RTÉ, TG4 and Virgin Media Television (which operates under a section 70 contract) shall have a priority position within Electronic Programme Guides ("EPGs"). However, no EPG contracts under Section 74 of the Broadcasting Act have been entered into by the BAI since its enactment in 2009. Essentially, the main reason for this is that the definition of an EPG in the 2009 Act is no longer fit for purpose. The definition (as set out in Section 74 of the Act) concerns text-based EPGs which would have operated in the early 2000s but which no longer exist now.

Presently, an EPG generally features picture-in-picture video streams of the channels on the service as the viewer browses the EPG, essentially providing a compilation of scheduled programming. In these circumstances, the Broadcasting Authority of Ireland took the view that EPG services would be licensed under Section 71 of the Act (a content provision contract), thereby remaining consistent with the definition of an audiovisual media service under the 2010 AVMSD. The BAI have advised that they have one such content provision contract in place with Eircom Limited for Eir Vision IPTV. Accordingly, the positioning of PSBs on other platforms operating in the State is the result of commercial decisions and arrangements.

Given the considerable change in technology and viewing habits since the Broadcasting Act 2009 was enacted, the regulatory framework for prominence does not address the prominence of PSBs' on-demand or online services, nor does it take account of services and platforms that enable viewers to navigate and select TV programmes beyond the EPG, such as the user interfaces on smart TVs, set-top boxes and streaming sticks.

Importance of the prominence of PSB content

Irish public service content is delivered in line with the objectives and obligations placed on broadcasters under the Broadcasting Act 2009. The provision of balanced, well-resourced and independent public broadcasting services is considered fundamental to democratic society in most EU countries.

Quality public service broadcasting in Ireland reflects the voice and interests of Irish citizens, serves their needs and connects them to the wider world; it provides a trusted and impartial source of news and current affairs; it supports linguistic diversity; and it makes an invaluable contribution to social, political and cultural life.

PSBs face significant challenges in responding to the rapidly evolving media environment which is marked by the fragmentation of audiences and the growth of digital and non-linear services and content. The audiovisual media market is evolving at pace, with the growth in on-demand services, new platforms and technological developments. These developments include viewers being offered direct access to individual programmes without having to navigate via an EPG or an on-demand player. Some TV platforms' homepages include personalised or specific programme recommendations and offer increasingly sophisticated text and voice search functionality, in addition to a range of on-demand players.

As technology continues to evolve there is a real risk that, without protection, PSB channels will become harder to find. Accordingly, it is proposed that any provision included in the OSMR Bill in relation to the discoverability of PSB content, requires platform operators (e.g. Sky Q, Virgin, Eir TV) to ensure the prominence of PSB content on their platform homepage.

The point was raised in response to the 2019 public consultation that Irish audiences have reasonable expectations that public service content and channels will be easily findable and discoverable. It is envisaged that such measures have the potential to encourage greater viewing and help to continue to ensure that as many people as possible can easily access PSB content. Furthermore, in light of the financial challenges that PSBs in Ireland currently face, increased prominence has the potential to play a role in buttressing the commercial revenues of PSBs as advertisers are likely to place additional value on services that have the widest possible audience reach.

International approach

<u>UK</u>

In the UK, Ofcom recently published a review of prominence for public service broadcasting. The review includes recommendations to the Government for a new framework to keep PSB TV prominent in an online world. The main recommendations include:

- New legislation is needed to keep PSB prominent and support the sustainability of the public service broadcasters (PSBs). A new framework of legislation and regulation would ensure that viewers can continue to find and access the PSBs' linear and on-demand services, across a range of connected devices (smart TVs, set-top boxes and streaming sticks).

- These new rules should specify what PSB content is given prominence, and on what platforms. The framework should be flexible, so the new rules can quickly be adapted to changes in technology and viewer behaviour.

- The initial focus should be on connected TVs – which means smart TVs, and those connected by a set-top box or streaming stick. These are currently the main ways that viewers select and watch TV online and on-demand. Other TV platforms and

services may be subject to the prominence rules in the future, as technology and viewing habits change.

- Viewers should be able to find PSB content easily on the homepage of connected TVs. This would include both the PSBs' traditional channels and their on-demand services (e.g. 'players'). One practical approach could be to have a single PSB portal or 'tile' through which all of the PSBs' players are made available.

- On-demand services should only be given prominence if the service is clearly delivering PSB content. This should be based on the service meeting new requirements for a suitable range and amount of high-quality content made for UK viewers, as well as content in particular genres such as children's, current affairs and factual.

- PSB content should also be given protected prominence within TV platforms' recommendations and search results. Viewers are increasingly able to use TV platforms' recommendations and search functions to find content, so new rules would ensure that they can still find a range of high-quality, UK content when selecting individual programmes directly.

- The new framework should protect the prominence of PSB content that is made available without charge. As PSBs develop new and different routes to make content available to viewers (e.g. BritBox), it may be appropriate going forward for the framework to apply to a broader range of the PSBs' services.

- There may need to be new obligations to ensure the continued availability of PSB on-demand content to viewers – equivalent to the existing "must offer" and "must carry" rules for PSBs' traditional channels.

It is understood that the recommendations in the Ofcom report will not be progressed by the UK at this juncture. Therefore enhanced prominence requirements are not expected to be introduced as part of the UK's transposition of the revised AVMSD.

The Department is broadly aligned with Ofcom's recommendations on this matter. At the point that prominence requirements are introduced, the most prudent approach would be to focus on connected TVs (as defined above) as this is still the primary way in which PSB content is consumed.

<u>Germany</u>

The high level German proposals are set out in the Interstate Treaty on the modernisation of media legislation in Germany. The proposals in relation to prominence are wide ranging, broadly requiring that media of a public service nature is easy to find on user interfaces. The German proposal also sets out that it is a regulatory offence to not comply with the prominence requirements.

Other Member States

The Department is awaiting the emergence of concrete proposals from a number of other Member States.

ERGA

It is noted that the European Regulators Group for Audiovisual Media Services (ERGA) is preparing a report on potential appropriate measures which would guarantee that audiovisual media services of general interest are given appropriate prominence, for example within Electronic Program Guides, connected TVs environments and on other similar distribution platforms. The report will also address what type of regulatory approaches Member States can take regarding the prominence requirements and which criteria to take into account. This report is not expected to be finalised until the end of 2020, at the earliest.

EU basis for implementation

Article 7a of the AVMS is a legal basis for the introduction of prominence requirements.

Article 7a - "Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest."

It should be noted that the Directive does not require the introduction of measures to support the prominence of public service content, but rather allows for it.

Options for Implementation of prominence requirements

Option 1 – Confer the regulator with broad powers in relation to prominence

Under this option, the regulator would be given the power to make codes and rules around the prominence of public service services and content on platforms. The regulator would have the power to monitor compliance with the rules in this respect and impose administrative fines or sanctions where noncompliance is detected.

Given the pace of technological change and the diversity of ways in which platforms can present content, it is considered appropriate to leave the precise rules on prominence and discoverability to the regulator to formulate. This flexible approach is in line with the Department's overall approach in relation to the OSMR Bill, which is to futureproof the legislation by providing mechanisms to allow the regulator a degree of flexibility to adapt to changing circumstances, subject to appropriate safeguards, including providing for sufficient principles and policy in the legislation.

Some examples of the possible approaches that the regulator could take are set out below:

- The regulator may require that platform providers reserve a portion of their homepage to highlight certain categories of PSB content as the regulator may set out in the rules. The regulator may, for example, specify that news and current affairs content is promoted for a certain amount of time during any given day.
- The regulator may require that each platform includes a prominent link to the Electronic Programme Guide on the home screen.
- The regulator may require that platforms provide appropriate search functionality in order for users to easily find public service content.

The above approaches outlined are not exhaustive and are not necessarily mutually exclusive. The regulator may opt to impose a number of requirements as it deems appropriate.

Definition of service of general interest

While the AVMSD is silent on the precise definition of the term "services of general interest", it could be reasonably interpreted that "services of general interest" could cover services and content provided by PSBs.

It is noted from recital 25 of the AVMSD that general interest objectives should be "clearly defined by Member States in accordance with Union law". Accordingly, in line with section 74 of the Broadcasting Act 2009, it is proposed that services provided by RTÉ, TG4 and services holding section 70 contracts (currently Virgin Media Television) should be classified as services of general interest for the purposes of the OSMR Bill. This is on the basis that the Act imposes public service obligations on the aforementioned services.

A proposed definition of services of general interest is set out as follows:

(1) In this section, a service of general interest means

(a) any service or item of content provided by

i. A public service broadcasting corporation

ii. A television programme service contractor [section 70]

Devices in scope

Under this option, it is intended that operators providing audiovisual media services through certain devices such as set top boxes, smart TVs and streaming sticks would fall within the scope of the prominence and discoverability requirements. Section 140 of the Broadcasting Act provides a useful definitional basis in this respect, as it defines the meaning of a television set for the purposes of TV licence collection:

"television set" means any electronic apparatus capable of receiving and exhibiting television broadcasting services broadcast for general reception (whether or not its use for that purpose is dependent on the use of anything else in conjunction with it) and any software or assembly comprising such apparatus and other apparatus.

In order to capture the myriad of devices capable of receiving audiovisual content, it is proposed that a broad definition of an "audiovisual device", based on section 140 of the Broadcasting Act 2009, is included in the draft head:

(x) In this section, "audiovisual device" means any electronic apparatus capable of receiving and exhibiting audiovisual media services transmitted for general reception (whether or not its use for that purpose is dependent on the use of anything else in conjunction with it) and any software or assembly comprising such apparatus and other apparatus

Legal advice is required on the robustness of this definition.

Devices not in scope

The initial focus should be on non-portable devices where PSB content is more traditionally consumed, such as Smart TVs and set top boxes. Services such as Saorview would already be automatically compliant with any new legislation as their platform already gives prominence to public service content.

As such, it is proposed that if this option is chosen, the draft Head would provide for the Minister to be able to make an Order to exclude certain devices from the scope of the any prominence requirements imposed by the regulator.

This is in line with the approach taken under section 142 of the Broadcasting Act 2009, where the Minister has opted to exclude, by Order, portable televisions from licencing requirements. It is intended that a similar Order could be made on the commencement of the OSMR Bill to exclude devices such as mobile phones and tablets from prominence requirements.

Summary of option 1

TV and on-demand viewing are evolving rapidly. The continued shift away from linear programming towards on-demand content is likely to lead to further innovations in technology and opportunities for new entrants to the market. The dynamic between TV platforms, content providers and technology providers is also likely to evolve, including who and how routes to content are controlled. Given the rapid pace of change in the market, this option entails the immediate introduction of a prominence provision in the OSMR Bill. While this is not the preferred option for the reasons outlined under Option 2, a draft provision has been prepared should the Minister wish to proceed with this course of action.

Option 2 – Media Commission to review legislation

As indicated under option 1, while the introduction of prominence requirements appears to be worthwhile, as this is a complex issue with potentially wide ranging impacts on stakeholders, it appears prudent that further research, analysis and consultation into the potential impact on the Irish market should be carried out prior to introducing such a provision.

Accordingly, this option entails the Media Commission undertaking a review of the relevant legislative provisions in relation to prominence (i.e. the current EPG provisions) in line with Head 33 of the OSMR Bill and bringing forward recommendations to the Minister regarding legislative change.

This option would allow time for a period of consultation to be carried out, given that is a complex issue with potentially wide ranging impacts on stakeholders. It would also allow for emerging best practice at European level to be fed into considerations.

This is the recommended approach to this issue.

Decision sought

The Minister is asked to consider which option is most preferable at this juncture. There are merits to both approaches to this issue. On the one hand, the immediate introduction of prominence rules would help underline the continued importance of PSBs and reinforce their central role in the provision of content that educates, entertains and informs the general public. If the Minister decides to proceed with the immediate introduction of prominence requirements, a draft provision (Head 63) has been prepared.

On the other hand, there is currently little precedent at EU level or from the UK around how the introduction of prominence rules would work in practice. As this is a potentially complex issue, it is seen as one that would likely benefit from further research and stakeholder input. It is considered that the Media Commission would have the appropriate resources and expertise to carry out this additional research and consultation. It is noted that research is also being undertaken by the European Regulators Group for Audiovisual Services with a report expected by the end of 2020, at the earliest.

Accordingly, Option 2 is the recommended approach to this issue.

Section 7 – European Works

The draft heads in respect of the amendments proposed below are attached at Heads 64, 65 and 66 in Appendix 1.

Under the revised AVMSD, broadcasters will continue to be obliged to ensure their catalogues comprise of at least 50% of European works (including national content), however, ODAVMS providers will be obliged to ensure at least 30% share of European content in their catalogues (subject to certain exceptions such as companies with low turnover / audiences).

Definition of European Works

Draft head 64 provides for a definition of European Works. This definition is based on the definition of European Works in the Revised Audiovisual Media Services Directive.

Notably the definition includes works originating in European third states party to the European Convention on Transfrontier Television of the Council of Europe, this will include the UK post Brexit.

Legislative approach for ODAVMS

Quotas

In line with the minimum requirements of the directive, it is proposed that ODAVMS providers will be obliged ensure at least a 30% share of European works in their catalogues. It is not considered necessary to impose quota requirements in excess of the minimum requirements of the AVMSD, particularly as the majority of services targeting the State are predominately focused on English language content.

Prominence of European Works

The revised AVMSD stipulates that media service providers shall ensure the prominence of European works in their on-demand catalogues. This requirement is distinct from the prominence of PSB content, which is addressed in section 4 of this paper. While there is no definition of prominence or operational direction given by the revised Directive it is clear that prominence primarily refers to visibility. It does not refer to the amount of European Works consumed by users but simply the visibility of these works within the catalogue of On-Demand Audiovisual Media Services. As such, this is a presentational obligation.

There is a wide range of tools to ensure visibility of European works, for example:

- indicating the country where a film or series comes from;

- providing a dedicated section for European works that is accessible from the service homepage,
- providing possibilities for searching for European works by means of a search tool made available as part of the service;
- placing information and materials promoting European works, including in the home/front page; using trailers or visuals;
- using European works in promotional campaigns for the service; or
- promoting a minimum percentage of European works in the service's catalogue e.g. by means of banners or similar tools

Given the likely diversity of on-demand services (both in terms of content and size), it is considered appropriate to assign the detailed rule making for this requirement to the regulator.

Exemptions

The revised AVMSD gives scope to Member States to ensure that obligations relating to the promotion of European works do not undermine market development and in order to allow for the entry of new players in the market, providers with no significant presence on the market should not be subject to such requirements. This is particularly the case for providers with a low turnover or low audience. It might also be inappropriate to impose such requirements in cases where, given the nature or theme of the audiovisual media services, they would be impracticable or unjustified. The European Commission is currently in the process of finalising guidance regarding the methodology for determining such exemptions.

In the interests of flexibility and future proofing, it is therefore proposed to allow the regulator to make rules in relation to the thresholds for low turnover and low audiences. It is further proposed that the regulator shall have regard to the aforementioned guidance being prepared by the European Commission on this matter.

Recommendation

For the transposition of European Works elements of the AVMSD, the following is recommended:

- Minimum of 30% of European works in catalogues
- Regulator to make rules around prominence requirements
- Regulator to determine appropriate thresholds for exemptions from European Works requirements, having regard to guidance from the European Commission.

Section 8 – Content production levies

Summary of issues

The following is a summary of the issues raised in this section:

- The revised Directive provides the option to levy media service providers located in other Member States which provide services that target audiences in the State.
- This is viewed by certain stakeholders in the Irish media industry as a potentially lucrative source of funding for Irish content.
- However, there are a number of pertinent factors that require consideration prior to the introduction of any such levy.
- Firstly, this is a new, optional, measure introduced by the Directive. As such, there is minimal precedent for how such a system would work in practice, particularly around the methodology for calculating the quantum of levy imposed on services.
- Second, it should be noted that any levy will only apply to income earned within the State. For example, if a provider such as Netflix earns 2% of their overall EU revenues in the State, the levy can only apply to that 2% of their overall income.
- Furthermore, there is a lack of reliable data around how much such a levy would raise in practice. No detailed research has been carried out on this matter to date.
- It is important to note that any levy system will have to abide by the principles of proportionality and non-discrimination. This means that Irish media service providers such as RTÉ and Virgin Media Television will also be subject to this levy. Furthermore, media service providers from across the EU will be eligible to compete for funding raised by this levy.
- The aforementioned factors could significantly constrain the overall positive impact on the potential level of additional funding for Irish content.
- Taking into account the above considerations, the recommended approach to this issue is that further research into this matter is undertaken by the Media Commission once established.
- Furthermore, this section will present the option to include a provision for a levy in the OSMR Bill. Any such provision would only be commenced after the relevant research is carried out. The alternative to this is to bring forward a legislative proposal at a later date once the relevant research is carried out.
- If the Minister decides to proceed with the implementation of a content production levy, it is recommended that a separate provision is included to establish schemes to disburse funds raised by content production levies. This keeps any money raised through any content production levy separate from the current structure.

The key issues requiring the Minister's decision are as follows:

1. Should a content production levy be introduced?
2. If so, should it be put into effect immediately or only after further research is carried out by the Media Commission? The recommended approach to this issue is that further research should be carried out before a levy is implemented.
3. If the Minister decides that the levy should only be put into effect after further research is carried out, should a provision be included in the legislation to be activated at a later date, or should a legislative amendment be brought forward at a future date? The assumption with this option is that research shows that the introduction of a levy is viable.
4. If the Minister decides that a levy should be included in the legislation to be activated at a later date, the Minister is asked to consider an appropriate approach for implementation if research shows that content levies are a viable option. The options are:
    a. Commence provision at a later date;
    b. Commence provision immediately but any levy made is subject to Ministerial approval.

Options for implementation

Article 13(2) of the revised AVMSD give Member States the option to levy media service providers under their jurisdiction or which are not under their jurisdiction, but that are targeting audiences in their territories, for the production of domestic content. These levies must be appropriate and proportionate. Therefore, under the revised AVMSD the Irish regulator may levy media service providers, both linear and on-demand, for domestic content production, which target Irish audiences whether under Irish jurisdiction or not. It is important to note that any levy applied to media service providers located in other jurisdictions will be based solely on their income earned in the Ireland. The revised AVMSD does not permit a levy on overall EU or global turnover. Given the size of the Irish market, this provision consequently limits the amount that could potentially be raised through transnational content levies.

There are a number of benefits to increasing funding for Irish content production. It benefits the production sector, training on content/film making and the economy. Irish content production can provide representation of Irish culture and Irish stories. The making of Irish content provides many benefits before the content is viewed by any audience, and there are benefits to making Irish content available to as wide and diverse an audience as practicable. The feeling amongst stakeholders is that there is potential to generate significant additional

funding for Irish content primarily from large media service providers targeting audiences in the State.

It would be prudent to examine the options available considering the provision under the revised AVMSD to apply content levies on the revenue generated in the Irish market by media service providers and the potential impact this could have on Irish content production. There are a number of options as to how such levies would be operated and a myriad of factors to be considered for each option.

Option 1: Maintain the Status Quo

Maintain the status quo of the Broadcasting Fund operating as usual and do not apply content levies to media service providers as is permitted under the revised AVMSD.

Recommendation

This option requires minimal change however it disregards the potential for additional funding for Irish content. Accordingly, this option is not recommended.

Option 2: Implement content levies immediately

This option requires amendment to Part 10 of the Broadcasting Act.

Firstly, new provisions for the establishment of a content production levy would be required and related schemes would be required. Draft provisions are included at Heads 77 and 78 in this respect.

Second, the Media Commission, once established, would need to consider the following in making any levy order:

- Range of services targeting the State;
- Income earned in the State by services targeting the State;
- Determine thresholds and exemptions from levy requirements (e.g. low audience, low turnover).

Applying a content levy on media service providers targeting Irish audiences, could potentially increase the quantity of funding available for Irish productions, however there is currently insufficient data on the Irish revenue of media service providers which target Irish audiences but which are not under Irish jurisdiction, to determine if the implementation of a content levy is worthwhile. Given that the Irish market is limited in size in comparison to other Member States, this may limit the overall potential of such a levy. Consideration

would have to be given whether the administrative costs incurred in collecting the levy are proportionate to the amount collected. Furthermore, an immediate introduction of a levy would also have implications for media service providers operating in Ireland. For example, RTÉ would be required to pay a levy on the same basis as a service targeting the State (e.g. Netflix, Amazon Prime Video). Therefore such a content levy would require careful consideration in the context of the financial challenges faced by broadcasters, particularly RTÉ.

As there is currently insufficient data available to support the immediate introduction of a content production levy, this option is not recommended. Instead, it would be prudent to carry out further research before implementing a content levy system. This proposal is addressed in the following option.

Option 3: Bring forward legislative proposal for content levies at a later date once research is carried out

Under this option, a content levy would be introduced at a later stage once the Commission has carried out the relevant research.

To determine the appropriateness and efficacy of implementing such a levy requires extensive research and consultation. Subsequently if such a levy is found to be beneficial then determining how a funding scheme should be operated would also require research and consultation. This research could be undertaken by the Media Commission, once established.

Considering the lack of data in regard regarding the viability of a levy it would be imprudent to establish a content levy system at this juncture. However in order to assess any opportunity to provide more funding for Irish content, the Media Commission, once established, could conduct the aforementioned research and based on the outcome of that research, bring proposals to the Minister to introduce such a content levy and, if appropriate, establish or amend funding schemes. It is proposed that the Commission would undertake research in line with the provisions of Head 33 in the OSMR Bill as approved by the Government.

Head 33 provides for the following:

(1) The Minister may consult the Commission regarding proposals for legislation relating to online safety or media services.

(2) The Commission shall—

> *(a) keep under review the relevant statutory provisions,*
>
> *(b) submit, from time to time, to the Minister or such other Minister of the Government having responsibility for any other statutory provisions relating to, or*

which impact on, online safety or media services, any proposals that it considers appropriate relating to any of the relevant statutory provisions or any other statutory provisions or for making or revoking any instruments under those provisions,

(c) undertake such reviews of the relevant statutory provisions as the Minister may direct, and

(d) assist in the preparation of such draft legislation as the Minister may direct.

(3) Before submitting proposals to the Minister or any other Minister of the Government, as the case may be, the Commission may consult any other person who, it appears to the Commission, is appropriate in the circumstances to be consulted or whom the Minister or the other Minister of Government, as the case may be, directs is to be consulted.

Conclusion

Under this option, a provision in relation to content levies would not immediately be included in the OSMR Bill. Instead, the Commission would be directed to carry out the relevant research and the Minister would subsequently bring forward proposals to amend primary legislation only if the research showed that the introduction of such a levy was viable. This approach is recommended.

Option 4: Include content levy provisions in legislation but only activate after relevant research is carried out.

The key difference between this option and option 3 is that a provision would be included in the OSMR Bill but only activated at a later date once research shows that the introduction of a content production levy is a viable source of funding for Irish content. The potential advantage of this is that the provisions would be ready to be activated if research showed a levy is viable. This would be quicker to implement than bringing forward legislation at a later date.

However, the potential drawback of this is that inclusion of such a provision in legislation, even if it is not put into action due to lack of viability, may create a heightened expectation amongst the creative industry of additional funding. As such, it could be reasonably expected that the Media Commission and the Minister would be consistently lobbied to activate such a provision and introduce a levy and related schemes.

Potential approaches to implementation of Option 4

The base assumption for the suboptions below is that further research is required before the introduction of any content production levy. Accordingly, it must be considered how to best provide for a content levy in the legislation, if this is the approach the Minister wishes to take, bearing in mind that the intent is to initiate the collection of a levy only after further research and consultation has been carried out.

It is important to note that the policy intent is not to infringe on the Commission's independence in the performance of its functions. As this element of the AVMSD is not directly related to the regulation of audiovisual media services, it is considered that any proposed option in relation to Ministerial oversight of a content production levy would not adversely impact on the Commission's independence. A number of approaches to implementation of Option 4 are set out below:

Suboption 1: Commence provision at a later date

Under this option a provision would be included in legislation providing that the Commission shall implement a content production levy.

However, the provision would not be commenced in line with the rest of the Act. Instead, the Minister would refrain from commencing this section until the Media Commission had carried out the relevant research and shown that the introduction of a content production levy is justifiable.

If it was shown that a content production levy was not viable, then the provision would not be commenced.

Suboption 2: Commence provision immediately but any levy made by Media Commission is subject to Ministerial approval

Under this option, the Minister would have the power to approve or refuse the proposed levy order, thus maintaining control over the process in line with the policy intention. It is the intent that the Minister would only approve a levy order if it was shown that a content production levy was a viable option.

Conclusion

On the basis of the suboptions evaluated above, it is proposed that suboption 1 is the most appropriate course of action, should the Minister wish to proceed with the inclusion of provisions in the OSMR Bill. Heads 77 and 78 would only be commenced by the Minister when research shows that the introduction of a levy is appropriate. There is no impediment from a legal perspective to this approach.

Draft provision to allow Commission to make levy orders

Subsection (1) of the draft provision captures the different options for implementation. It is intended to keep any provision in relation to content levies separate from provisions in relation to a general levy for the funding of the Commission's regulatory activities.

(1) [The Commission shall] / [The Minister may direct the Commission to] / [The Commission shall, subject to the approval of the Minister,] make regulations prescribing a levy to be paid by audiovisual media service providers which are

i. *Established in the State, and*

ii. *Established in other Member States and wholly or mainly targeting audiences in the State*

for the purposes of providing financial contributions to the production of European works.

(2) The amount of the levy referred to in subsection (1) shall be calculated in such manner that

i. *the levy imposed solely relates to revenues earned within the State;*

ii. *the levy imposed on media service providers established in other Member States targeting audiences in the State is proportionate and has regard to any levies imposed by the home Member State*

(3) In particular, regulations under subsection (1) may provide for any of the following matters:

(a) the activities, services or other matters for which specified kinds of levies are payable;

(b) the media service providers or classes of media service providers who are required to pay specified kinds of levies;

(c) the amounts of specified kinds of levies;

(d) the means by which specified kinds of levies are calculated;

(e) the periods for which, or the dates by which, specified levies are to be paid to the Commission;

(f) the information required to be provided to the Commission which it requires to calculate the liability of media service providers, or classes of media service providers;

(g) procedures to be taken where an media service providers has over paid in respect of their levy obligation(s);

(h) penalties payable by an media service providers who does not pay a levy on time;

(i) the keeping of records, and the making of returns to the Commission, by persons who are liable to pay a specified levy;

(j) matters relating to exemptions from, or deferrals of payment of, the levy or payment of a reduced levy, and the application process for exemptions, deferrals, refunds or reduced levy;

(k) matters relating to the refund of the whole or a part of a levy paid or payable under regulations in force under this section;

(l) the collection and recovery of levies.

(5) A levy shall be payable to the Commission in the [manner/form] prescribed having regard to the terms of the levy order.

(6)) The Commission may, by proceedings in a court of competent jurisdiction, recover as a simple contract debt an amount of levy payable under regulations in force under this section.

(7) Every regulation made by the Commission under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Collection of levy from media service providers in other Member States

Another issue that arises is the enforceability of the application of cross border levies. The question here is whether the provisions of Article 13 of the Directive give the Commission sufficient grounds to legally compel a media service provider established in another Member State to comply with Irish law and pay the levy. Legal advice was sought on this issue and it has been confirmed that it is permissible to enforce such a levy against services established in other Member States.

It is intended that the collection of the levy will be enforced by way of a liquidated sum debt. The levy sum owed shall be statutorily a liquidated sum debt. The Media Commission will be able to collect the debt through well-established EU enforcement of foreign judgement procedures and European order for payment processes.

Options for schemes funded by content production levy

If the Minister chooses to proceed with the implementation of a content production levy, the following options are available in terms of the provisions for funding schemes. There are two approaches to this: (i) Create a consolidated provision which would cover both linear and on-demand services to replace the current broadcasting fund or (ii) retain the existing broadcasting fund structure and create a new content production provision.

i. Consolidated provision

Licence fee money is currently only collected from households containing a device capable of receiving a television signal, and households which fall under this category don't necessarily have access to internet streaming services or to "opt-out " linear channels which might also be subject to a content levy . The Act provides that any programming funded by the Broadcasting Fund must be aired on a free-to-air television channel meaning that anyone contributing to the Broadcasting Fund via their TV licence fee is able to consume the content funded by the Broadcasting Fund.

This scenario, where all content funds go into a single pot, raises the issue of what services would be able to host the content. If funding provided for in this fund came from levying on-demand media service providers and subsequently an on-demand media service provider was granted funding for the production of Irish content, then should they be able to host the content in question. It may be prohibitive to require such providers to air the content on a free-to-air television channel as is the case with the current Sound and Vision Scheme.

However, this is in opposition to ensuring TV licence payers can consume content funded through the Broadcasting Fund. Content funded through the current Broadcasting Fund is appropriately required to be distributed via a free-to-air television channel, as it is funded through licence fee money collected from members of the public who could then view the content on a free-to-air channel. However, the audiences of on-demand media service providers don't necessarily own a television. If funds are being collected from the revenue made from people watching an on-demand service it follows that those people should be able to view that content. Furthermore, an on-demand service may not consider that is it worth applying for funding unless they were retaining the exclusive rights to show the content.

ii. Retain the existing broadcasting fund structure and create new provision for schemes funded by content production levy

In order to mitigate the problem of licence fee money potentially being used to produce content for an internet based service and to prevent on-demand services needing to partner

with a free-to-air service to apply for funding, a system could be constructed where the Broadcasting Fund remains as is and a provision is created to establish schemes funded by content production levies.

The Broadcasting Fund is funded by the licence fee. The licence fee is only collected from households containing a device capable of receiving a television signal, households which fall under this category don't necessarily have access to internet streaming services. Keeping the funds/schemes separate would allow media service providers to apply for funding to produce Irish content and air the content on their own platform. This benefits the audiences of each of the services.

A new provision for a funding scheme under this structure would allow both media service providers operating either linear or on-demand services to apply for funding raised from the content production levy.

Key considerations

- A key question that arises in the implementation of such an approach is the nature of content that should be funded through such a scheme and what conditions should be included in the provision. For example, under the current Sound and Vision scheme any media service provider in the EU can apply for funding provided that it's broadcast free to air in Ireland. In such cases media service providers come to an arrangement with the likes of RTÉ to broadcast the content to fulfil this requirement. A similar requirement may be appropriate for any new scheme that is created, with appropriate modification to provide that any content must also be made available on a free to view ODAVMS. For the purposes of the Heads of Bill, it is proposed that the principles and polices would broadly mirror those already in place for the Broadcasting Funding schemes established pursuant to section 154 of the 2009 Act. If the Minister decides to proceed with the inclusion of content levy provisions in the OSMR Bill, it may be appropriate to conduct a stakeholder consultation on the type of content that should be funded by such a content production levy.

- The actual implementation of such a scheme is contingent on the Commission carrying out research showing that such a content production levy is worthwhile and can raise sufficient funds to have an impact. The inclusion of such a provision in legislation, even if it is not put into action due to lack of viability, may create a heightened expectation amongst the creative industry of additional funding. As such, it could be reasonably expected that the Commission and the Minister would be consistently lobbied to activate such a provision and introduce a levy and related schemes.

- Even if such a provision was not activated immediately, it could still be seen as a future proofing measure. It is likely that revenues in the on-demand element of the

audiovisual sector will continue to grow at pace, and if even if a levy on media service providers in other Member States is not immediately worthwhile, it could prove to be a significant revenue stream further down the line.

Recommendation

It is recommended that a separate provision is included to establish schemes to disburse funds raised by content production levies. This keeps any money raised through any content production levy separate from the current structure.

A draft head giving effect to the recommendation can be found at Head 78 in Appendix 1 of this paper. The key difference between the below head and section 154 is that the scope has been modified to include on-demand services.

Overall Summary and Recommendation

- The feeling amongst stakeholders is that there is potential to generate significant additional funding for Irish content primarily from large media service providers targeting audiences in the State.
- There are a number of pertinent issues to be considered in the implementation of a content production levy, including its overall viability and the impact on Irish public service broadcasters.
- It is recommended that more research needs to be carried out before a content production levy is implemented.
- The proposals set out in this section entail the Media Commission carrying out research in order to determine the viability of such a levy. Such a levy would only be implemented if research shows that it is a viable option.
- From a legislative perspective, if the Minister decides to include provisions in the OSMR Bill to establish a content production levy and related scheme, it is recommended that those provisions would only be commenced after research have been carried out showing the validity of such an approach.

The Minister is asked to consider the following:

1. Should a content production levy be introduced?
2. If so, should it be put into effect immediately or only after further research is carried out by the Media Commission? The recommended approach to this issue is that further research should be carried out before a levy is implemented.
3. If the Minister decides that the levy should only be put into effect after further research is carried out, should a provision be included in the legislation to be activated at a later date, or should a legislative amendment be brought forward at a

future date? The assumption with this option is that research shows that the introduction of a levy is viable.

4. If the Minister decides that a levy should be included in the legislation to be activated at a later date, the Minister is asked to consider an appropriate approach for implementation if research shows that content levies are a viable option. The options are:
    a. Commence provision at a later date;
    b. Commence provision immediately but any levy made is subject to Ministerial approval.

Section 9 – Obligations on Media Service Providers regarding treatment of news and current affairs content

The Broadcasting Act 2009 imposes obligations on linear broadcasters in relation to the presentation of news and current affairs content. Section 39 provides for the following:

"(1) Every broadcaster shall ensure that—

(a) all news broadcast by the broadcaster is reported and presented in an objective and impartial manner and without any expression of the broadcaster's own views,

(b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views, except that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other"

The obligation stems from the important public service role that linear broadcasters play in the provision of balanced and truthful news to the public. According to the *Reuters Digital News Report (2019),* 67% of people named TV as one of their sources of news. While the consumption of news on TV continues to decline, it is notable that at least 50% of people aged 55 and over consider TV to be their main source of news.

In light of the above, it is not proposed to alter the obligations of linear broadcasters in relation to the provision of broadcast news and current affairs.

Potential issues for ODAVMS

In reviewing the current provision, consideration was given to whether ODAVMS should be subject to the same standards as linear broadcasters in the provision of news and current affairs content. It is evident that it is not appropriate to impose the same degree of obligation on ODAVMS providers in general for a number of reasons.

The lower barriers to entry for creating an ODAVMS mean that it is likely that a wide range of individuals, organisations and interest groups have established or can establish services which meet the definition of an ODAVMS. Some of these services are likely to cover predominately news and current affairs content, for example services operated by political parties, blogs and other opinion websites. As it can be expected that such services may wish to cover issues from a particular perspective, it may be disproportionate to require such services to adhere to the same standards as a mainstream outlet such as RTE or Virgin Media. Furthermore, potential issues around freedom of expression may arise. Applying the same standards to individuals that operate minor ODAVMS channels on the likes of YouTube may be seen as a disproportionate restriction on freedom of expression.

While the above points suggest that there is an argument that ODAVMS should be excluded from any requirements in relation to news and current affairs, this neglects the fact that mainstream services such as RTÉ, TG4 and Virgin, along with other professional media outlets would also be

excluded from scope. Accordingly, it seems appropriate that a middle ground is found that allows the Media Commission a level of oversight over the activities of ODAVMS in relation to news and current affairs for broadcasters and other media outlets.

Therefore it is proposed that media service providers falling under any of the three categories below shall ensure that any news and current affairs content provided on any on-demand audiovisual media service operated by that media service provider adhere to the same standards required of linear broadcasting services.

The three categories are as follows:

a) a broadcasting corporation (i.e. RTÉ and TG4); or

b) hold a broadcasting contract under Part 6 of the current Act (e.g. Virgin Media, local radio stations); or

c) a media business for the purposes of the Part 3A of the Competition Act 2002 (as amended) (e.g. online news outlets such as the Irish Times or thejournal.ie)

The purpose of this requirement is to ensure that on-demand news and current affairs content provided by media service providers with public service characteristics, such as public service broadcasters and other licenced broadcasters comply with the same standards as linear broadcasting. More generally, operators of media business in the State as defined by the Competition Act 2002 (as amended) should also be subject to these requirements as they play an important role in the dissemination of news and current affairs content to the public. Therefore, the policy intent of this section is to only capture news providers which are 'professional' in nature and that adhere to standard journalistic practices.

It is not desirable from a policy perspective to extend the ambit of this provision to cover ODAVMS more generally, as ODAVMS which do not meet the any of the criteria above are not likely to be run as 'professional' news outlets and will include services operated by individual citizens. Therefore, in line with the principle of proportionally and Article 40.6 of the Constitution which guarantees the right of individuals to "freely express their convictions and opinions", it is not considered appropriate to extend the requirements beyond the 3 abovementioned categories.

Recommendation

It is proposed that tiered obligations would be imposed on media service providers depending on the nature of service provided. This would be reflected in a new Head in the OSMR Bill which would replace section 39 of the 2009 Act.

For linear broadcasters the obligations currently set out in legislation would remain unchanged, given the wide reach and continued relevance of linear broadcasting services in the provision of news and current affairs content.

For ODAVMS, it is proposed that any media service provider that operates both broadcast and on-demand services in the State shall ensure that their on-demand service adheres to the same standards as their broadcast services. This would capture news and current affairs content provided

on RTÉ and Virgin Media while excluding relatively small ODAVMS operated by particular interest groups or individuals. More generally, operators of media business in the State as defined by the Competition Act 2002 (as amended) should be also subject to these requirements as they play an important role in the dissemination of news and current affairs content to the public.

Any breaches of the provision will be subject to enforcement action by the Commission.

Draft provision

It is proposed to modify section 39 of the Act to include the following:

(7) In the interests of ensuring that the public has access to fair, objective and impartial news and current affairs content on on-demand audiovisual media services and recognising that certain media service providers have greater obligations in this respect due to their nature and audience reach, a media service provider which

a) is a broadcasting corporation; or
b) holds a broadcasting contract under [Part 6 of the current Act]; or
c) is a media business for the purposes of the Part 3A of the Competition Act 2002 (as amended)

shall ensure that any news and current affairs content provided on any on-demand audiovisual media service operated by that media service provider adheres, as appropriate, to paragraphs (a) and (b) of subsection (1).

Legal advice is required on the robustness of this provision.

The full draft provision replacing section 39 of the 2009 Act can be found at Head 68 in Appendix 1.

Section 10 – Miscellaneous matters [as identified in Structures policy paper]

Section 76 – MMD systems

MMDS (Multichannel Multipoint Distribution System) was a broadcast TV platform operated by Virgin Media. The service was primarily set up to provide TV to customers outside of our cable network, typically in rural areas.

The last licences issued by ComReg in relation to MMD systems expired in April 2016. As this form of TV distribution is now obsolete, it appears that this section no longer needs to be retained.

Recommendation

It is recommended that this section is deleted.

SI 258 of 2010

The abovementioned SI transposed a number of the requirements of the 2010 AVMSD which will still be in force under the revised Directive. Once the OSMR Bill is enacted, it will replace the current Broadcasting Act and as a consequence, SI 258 of 2010 will no longer have effect. The following relevant provisions in the SI will need to be incorporated into the OSMR Bill during detailed drafting.

Item	SI Reference	AVMSD reference
Short news provisions	Regulation 17	Article 15
European works requirements for TV	Regulation 14	Article 16
Independent productions	Regulation 15	Article 17
Exceptions to Article 16 and 17	Regulation 19	Article 18

The objective in respect of these sections is to maintain their current legal status.

Appendix 1

Draft Heads of Bill for Audiovisual Media Services

Part 5 – On-Demand Audiovisual Media Services

Head 57 – Definition of a relevant on-demand audio visual media service

Provides that:

(1) For the purposes of this Part, a relevant service is an on demand audiovisual media service operated by a media service provider established in the State**.**

Explanatory note:

This head provides that on demand audiovisual media services established in the State are relevant services for the purposes of this Part.

Head 58 – Registration of on-demand audio visual media services

Provides that:

(1) The Commission shall, upon the commencement of this section, cause to be established and maintained, in such form as it considers appropriate (including electronic form) a register of relevant services.

(2) A media service provider established in the State that operates or intends to operate a relevant on-demand audiovisual media service, shall, in accordance with this section, apply to the Commission to register the relevant service in the register.

(3) Media service providers who, before the date of the commencement of this section, were providing a relevant on-demand audiovisual media service, shall, not later than [insert time period] after the commencement of this section, apply to the Commission to register the relevant service in the register.

(4) An application for the purposes of this section shall—

(a) be sent to the Commission in such form and manner as the Commission may require (including electronic form); and

(b) contain all such information as the Commission may require.

(5) The Commission shall, as soon as practicable after it receives a valid application in accordance with this section, grant the application and enter in the register—

[relevant information pertaining to the media service provider and the on-demand audiovisual media service]

and a relevant service shall stand registered for the purposes of this Act upon the performance by the Commission of its functions under this subsection in relation to the relevant service.

(6) The Commission shall refuse an application under this section unless it is satisfied that the applicant is a relevant service.

(7) Where the Commission makes a decision to grant an application under this section, it shall, as soon as may be thereafter, notify the applicant in writing (either by electronic means or otherwise) of the decision.

(8) Where the Commission makes a decision to refuse an application under this section, it shall, as soon as may be thereafter, notify the applicant in writing (either by electronic means or otherwise) of the decision and the reasons for the decision

(9) A media service provider who has registered under subsection (2) or (3) shall, before—

(a) making any significant alterations to the relevant service including changes to jurisdiction; or

(b) ceasing to provide it,

notify the Commission of the alterations or (as the case may be) of an intention to cease to provide the relevant service.

(10) Where it comes to the attention of the Commission that a relevant service has not registered, the Commission may direct an unregistered service to make an application to be registered in the register,

(11) It shall be an offence to fail to comply with a direction made by the Commission under subsection (10),

(12) Pursuant to subsection (4), the Commission shall publish guidelines regarding the registration process for relevant services not later than [insert time period] after the commencement of this section.

(13) The Commission may remove a relevant service from the register in accordance with [Head on sanctions for non-compliance]

(14) Where, in accordance with this section, a relevant service ceases to be registered, the Commission shall enter in the register a statement that the body has ceased to be registered and a statement of the reasons therefor.

(15) The Commission shall, from time to time, review each entry in the register and, if it becomes aware that any particular in the register is incorrect or has ceased to be correct, it shall make such alterations to the register as it considers necessary and notify the party concerned in writing (electronic or otherwise) of any such alteration.

(16) Summary proceedings in relation to an offence under this section may be brought by the Commission.

Explanatory note:

This head provides for a system of registration for relevant demand audiovisual media services. Services which are registered on the register will fall under the regulatory regime for demand audiovisual media services as set out in this Part. A relevant service may be removed from the register in accordance with the Head 60. It shall be an offence to operate an audiovisual media service in the State that is not registered.

This head provides that the Commission has the power to prosecute cases of non-registration, in instances where the Commission has directed a relevant service to register and that service has refused to comply. The intent is that the Commission shall have absolute discretion regarding the cases that it chooses to prosecute. In line with the principle of proportionality, the intent of the creation of an offence under this Head is to deter non-compliance where there is a clear risk of harm to the public interest. This could be in instances where, for example, a service with a large audience in the State knowingly and willingly refuses to register with the regulator. The overall intent of the registration system is to bring services within scope of the regulatory regime that could have an adverse impact on the public interest if left unregulated.

Accordingly, it is not intended to penalise individuals who unwittingly create small scale On-Demand Audiovisual Media Services (ODAVMS) where the risk of harm from such services remains low. Instead the regulator will take a risk based approach to the regulation of small scale services. For example, where an unregistered small scale ODAVMS comes to the attention of the Commission and it is apparent to the Commission that the service in question is providing content that is in contravention of the Commission's codes, then the Commission can take appropriate action to bring the service within the regulatory regime and consequently take appropriate enforcement measures against that service.

It should be noted that under the definition of ODAVMS set out in the Directive, there are potentially thousands of ODAVMS established in Ireland, ranging from large scale services

such as RTÉ Player to small scale YouTube channels edited by private individuals. As it would be practically unworkable for the regulator to dedicate enough resources to ensure that each and every ODAVMS in the State is registered, it is therefore intended that the focus of the regulator will be on ensuring that large services and services which are providing content which may harm the public interest are registered. It is not intended that the regulator will pursue individuals or entities that are operating innocuous, small scale ODAVMS.

Head 59 – Compliance and Enforcement

Provides that:

(1) If the Media Commission is of the view that, following [investigation] under [section x] that a relevant service is not in compliance with a [section or sections of a media code], it may issue a compliance notice.

(2) such a compliance notice may state the view of the Commission, and how they formed that view, that the relevant service was or is not in compliance and may,

(a) invite a response from the relevant service,

(b) outline the steps expected to be taken by the relevant service to remedy its non-compliance, including

(i) the removal of specified programme material

(ii) restriction of access to specified programme material

(iii) provision of additional information to users of the service prior to the selection of specified programme material by the user for viewing

(3) if following an appropriate period determined by the Media Commission the relevant service does not provide to the Media Commission a satisfactory justification in relation to the alleged non-compliance or a satisfactory outline of its actions to bring itself into compliance the Media Commission may issue a warning notice to the relevant service.

(4) such a warning notice will outline the view of the Media Commission regarding the alleged non-compliance and outline the steps that the Commission will take if the alleged non-compliance is not remedied.

(5) a warning notice will outline the steps which the Media Commission deems necessary for the relevant service to take to bring itself into compliance and the timescale in which those steps must be taken.

(6) the relevant service shall comply with the steps outlined in a warning notice issued by the Media Commission

(7) the Media Commission shall forward any warning notice issued under this section to the Minister.

(8) the Media Commission may publish details relating to any compliance notice or warning notice it issues under this section.

(9) following a warning issued by the Media Commission under subsection (3) regarding alleged non-compliance by a relevant service and the expiry of the timescale specified in accordance with subsection (5), the Commission may take the view that the alleged non-compliance has not been remedied.

(10) a relevant service which contravenes subsection (6) shall be guilty of a category [X] offence.

(11) notwithstanding subsection (10), should the Media Commission take the view that the alleged non-compliance has not been remedied, the Commission may determine that the relevant service concerned be subject to a sanction in accordance with Head 60.

Explanatory note:

This head provides for the procedure by which the Media Commission may issue compliance and warning notices to an on demand audiovisual media service.

The Commission may issue compliance notices if it is of the view that an on demand audiovisual media service is not in compliance with a media code. If the compliance notice is not adhered to the Commission may issue a warning notice. An on demand audiovisual media service that doesn't comply with the steps outlined in a warning notice issued to it by the Commission shall be guilty of an offence. Notwithstanding this, the Media Commission may pursue a sanction against the on demand audiovisual media service in question in accordance with Head 60.

Both compliance and warning notices will outline the steps the Media Commission deems necessary for the on demand audiovisual media service to take to bring itself into compliance and the timescale in which those steps must be taken.

Head 60 – Sanctions for non-compliance

Provides that:

(1) If the Commission is of the view that a relevant service be subject to a sanction for failing to comply with a warning notice from the Media Commission under Head 59, the Commission shall notify the relevant service of its intention to apply a sanction.

(2) the Commission shall specify in its notice to the relevant service of its intention to apply a sanction and the nature of the sanction.

(3) the Commission may publish details relating to any notice of intention to apply a sanction it issues under this section.

(4) the Commission shall forward any notice of intention to apply a sanction it issues under this section to the Minister.

(5) the Commission may seek to apply any of the following sanctions:

(a) an administrative financial sanction in accordance with [the procedure set out in Head 16],

(b) to seek leave of the High Court to compel a relevant service subject to a warning notice under this section to take such steps that the Commission deems warranted to bring said service into a state of compliance,

(c) remove the relevant service from the register of relevant services, or

(d) to seek leave of the High Court to compel internet service providers to block access to an on-demand audiovisual media service in the State.

(6) the Commission shall publish the outcome of any sanction sought in accordance with subsection (5) and shall forward this information to the Minister.

Explanatory note:

This head provides for the range of sanctions that the Media Commission may seek to apply to on demand audiovisual media service where it is of the view that service has failed to comply with a warning notice issued by the Commission and the procedure for the application of such sanctions.

These sanctions include:

- an administrative financial sanction,

- compelling compliance, or
- removal of the service from the register of regulated services
- blocking access to an on-demand audiovisual media service

The application of each of these sanctions requires court approval whereupon the designated online service in question will have the opportunity to dispute its application. The procedure for administrative financial sanctions is set out in Head 16.

The Media Commission shall have the discretion to determine the sanction it may seek under this section having regard to the nature of the non-compliance of the on demand audiovisual media service.

Part 6 – Miscellaneous/Common AVMSD Provisions

Head 61 – Complaints in relation to media service providers

Provides that:

(1) The Commission may carry out an investigation where it comes to its attention that

(a) programme material provided by a media service provider may have failed to comply with any provision of a Media Code [made pursuant to the relevant sections of the Head on Media Codes],

(b) a media service provider may have failed to comply with one or more of the requirements of [Head on Duties of Media Service Providers]

(c) a media service provider may have failed to comply with one or more of the requirements of [Head on Media Rules]

(2) The Commission may carry out an investigation under (1) either

i. Of its own volition, or

ii. On foot of a complaint

(3) In carrying out an investigation under (1), the Commission shall have regard, as it deems appropriate, to any relevant provisions of [a Code made under the Head on Media Codes], [Head on Duties of Media Service Providers], [Head on Media Rules]

(4) Complaints shall be received by the Commission not more than 30 days after

(a) in case the complaint relates to one broadcast, the date of the broadcast,

(b) in the case of 2 or more unrelated broadcasts, the date of the earlier or earliest, as the case may be, of those broadcasts, or

(c) in case the complaint relates to 2 or more related broadcasts of which at least 2 are made on different dates, the later or latest of those dates.

(d) in case the complaint relates to an on-demand service, the date the programme material ceased to be available.

(5) The Commission, may, at its own discretion, refer the complaint in the first instance to the media service provider for consideration in accordance with a code of practice prepared under [Head on Code of Practice – Complaints Handling]

(6) The Commission may decide not to investigate a complaint referred to in subsection (1), or to discontinue an investigation of a complaint, on the grounds that -

(a) the complaint is frivolous or vexatious or was not made in good faith,

(b) the subject-matter of the complaint is trivial,

(7) The Commission may make preliminary inquiries for the purpose of deciding whether a complaint should be investigated and may in writing request the complainant or the media service provider to provide further information within a period specified by the Commission in the request.

(8) The Commission may decide not to continue to investigate a complaint if the complainant fails to comply with a request for further information within the time specified in the request under subsection (5).

(9) As soon as practicable after deciding not to investigate a complaint, or to discontinue an investigation of a complaint, the Commission shall notify the complainant in writing of the decision and the reasons for the decision.

(10) As soon as practicable after it decides on a complaint made under this section, the Commission shall notify the complainant and the media service provider in writing of the decision and the reasons for decision.

(11) The Commission may appoint authorised officers in accordance with Head 15A to carry out the investigations referred to in subsection (1)

(12) The Commission shall publish its decision not more than 60 working days after initiating an investigation of a complaint.

(13) The Commission may deem a complaint made to a media service provider within the time periods specified in [Head 75 – Complaints Handling] as having been made within the time periods specified in subsection (2).

[The issue of the inclusion of an appeals process in line with Article 30.6 of the revised AVMSD is currently under consideration]

Head 62 – Media Codes

Provides that:

x.— (1) The Commission shall prepare, and from time to time as occasion requires, revise, in accordance with this section, a code or codes governing standards and practice ("media code") to be observed by media service providers providing audiovisual media services and sound media services.

(2) Media codes shall provide—

(a) that all news broadcast by a media service provider is reported and presented in an objective and impartial manner and without any expression of the media service provider's own views,

(b) that the broadcast treatment by media service providers of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the content is presented in an objective and impartial manner and without any expression of the media service provider's own views,

(c) that anything being likely to

(i) promote, or incite to, crime, or as tending to undermine the authority of the State,

(ii) constitute 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;

(iii) constitute a public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/54

is not provided by a media service provider,

(d) that in programmes provided by a media service provider, and in the means employed to make such programmes, the privacy of any individual is not unreasonably encroached upon,

(e) that a media service provider does not, in the allocation of time for transmitting party political broadcasts, or in the positioning of party political content in an on-demand catalogue, give an unfair preference to any political party,

(f) that in respect of programme material provided by a media service provider that audiences are protected from harmful or offensive material, in particular, that programme material in respect of the portrayal of gratuitous violence and sexual conduct, shall be presented by a media service provider—

(i) with due sensitivity to the convictions or feelings of the audience,

(ii) in a way as to ensure that children will not normally hear or see them, in order to mitigate the impact of such programming on the physical, mental or moral development of children

(g) that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any audiovisual media or sound media service, in particular advertising and other such activities which relate to matters likely to be of direct or indirect interest to children, protect the interests of children having particular regard to the general public health interests of children,

(h) that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any audiovisual media or sound media service, other than advertising and other activities as aforesaid falling within paragraph (g), protect the interests of the audience,

(i) that the provision of an audiovisual media service or sound media service which has, as one of its principal objectives, the promotion of the interests of any organisation, protects the interests of the audience,

(j) for the matters required to be provided for by Chapters [x to x] of the Council Directive

(3) In preparing or revising a media code, the Commission shall have regard to each of the following matters—

(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description,

(b) the likely size and composition of the potential audience for programmes included in audiovisual media services and sound media services generally, or in audiovisual media services and sound media services of a particular description,

(c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of a programme's content can be brought to the attention of potential members of the audience,

(d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content,

(e) the desirability of securing that the content of an audiovisual media or sound media service identifies when there is a change affecting the nature of the service that is being watched or listened to and, in particular, a change that is relevant to the application of the codes set under this section, and

(f) the desirability of maintaining the independence of editorial control over programme content.

(4) A media code prepared by the Commission under subsection (2)(g) may prohibit the advertising in an audiovisual media or sound media service of a particular class or classes of foods and beverages considered by the Commission to be the subject of public concern in respect of the general public health interests of children, in particular those which contain fat, trans-fatty acids, salts or sugars.

(5) In preparing a media code under subsection (2) (g) the Commission may consult with the relevant public health authorities.

(6) Whenever the Commission prepares or revises a media code relating to the matter in question every media service provider shall comply with such media code and any revision of it.

(7) A copy of any media code shall be presented to the Minister as soon as may be after it is made.

(8) In this section and section 43 "teleshopping material" means material which, when transmitted, will constitute a direct offer to the public for the sale or supply to them of goods or other property (whether real or personal) or services.

(9) The following codes prepared under section 19 of the Act of 2001, namely—

(a) the Code of Programme Standards (10 April 2007),

(b) the Children's Advertising Code (1 January 2005), and

(c) the Advertising Code (10 April 2007),

if in force on the passing of this Act, continue in force as if made under the corresponding provision of this section and have effect accordingly.

Explanatory note:

This head is replaces section 42 of the Broadcasting Act 2009. This head gives the Commission the power to formulate media codes in line with the principles and policies set out in this head. Given that the revised Audiovisual Media Services Directive aligns the majority of the rules and requirements for Television Broadcasting Services and On-Demand Audiovisual Media Services, this provision covers both linear broadcasting and on-demand services. This head incorporates the additional requirements of the revised AVMSD in relation to incitement to hatred, terrorism and the protection of minors.

Head 63 – Prominence of public service content

Provides that:

(1) In this section, a service of general interest means any service or item of content provided by

a. A broadcasting corporation

b. A television programme service contractor [under section 70 of the Broadcasting Act 2009]

(2) In this section, "audiovisual device" means any electronic apparatus capable of receiving and exhibiting audiovisual media services transmitted for general reception (whether or not its use for that purpose is dependent on the use of anything else in conjunction with it) and any software or assembly comprising such apparatus and other apparatus

(3) This section does not apply to an audiovisual device, which is of a class or description for the time being declared by an order of the Minister to be a class or description of audiovisual device to which this section does not apply.

(4) The Commission shall, in the interests of

(a) ensuring the ease of access to audiovisual media services and content of general interest,

(b) ensuring that audiovisual services and content of general interest reach the widest possible audience

prepare rules with respect to the prominence and discoverability of services of general interest provided though audiovisual devices

(5) Persons who provide access to audiovisual media services through audiovisual devices shall comply with rules made under subsection (4)

(6) A person which contravenes subsection (5) shall be guilty of a category [X] offence.

Explanatory note

This head provides that Commission shall make rules around the prominence and discoverability of services and content provided by RTÉ, TG4 and any section 70 television programme service contractor.

The definition of "audiovisual device" has been adapted from the definition of "television set" under section 140 of the 2009 Act. This definition in intended to capture devices through which PSB content is most commonly consumed, namely connected TVs (i.e. Smart TVs and TVs connected to a set top box).

TV platform providers such as Sky, Virgin Media, Eir and Vodafone will be required to abide by rules set by the Media Commission in this respect. Some examples of the possible approaches that the Media Commission could take are set out below:

- The regulator may require that platform providers reserve a portion of their homepage to highlight certain categories of PSB content as the regulator may set out in the rules. The regulator may, for example, specify that news and current affairs content is promoted for a certain amount of time during any given day.
- The regulator may require that each platform includes a prominent link to the Electronic Programme Guide on the home screen.
- The regulator may require that platforms provide appropriate search functionality in order for users to easily find public service content.

The above approaches outlined are not exhaustive and are not necessarily mutually exclusive. The regulator may opt to impose a number of requirements as it deems appropriate.

Head 64 - Definition of European works

Provides that:

(1). For the purposes of this Act "European works" means the following:

(a) works originating in the State or another Member State,

(b) works originating in European third states party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of section 2(2),

(c) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements;

(2). (a) The works referred to in subsection (1) (a) and (b) of the definition of "European works" are works mainly made with authors and workers residing in one or more of the States referred to in this section provided that they comply with one of the following 3 conditions:

(i) they are made by one or more producers established in one or more of those states,

(ii) production of the works is supervised and actually controlled by one or more producers established in one or more of those States, or

(iii) the contribution of co-producers of those states to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

(b) Works that are not European works within the meaning of the definition of "European works" but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.

(c) The application of subsection (1) (b) and (c) of this section shall be conditional on works originating in the State or another Member State not being the subject of discriminatory measures in the third country concerned.

Explanatory note

This head provides for a definition of European Works. This definition is based on the definition of European Works in the Revised Audiovisual Media Services Directive.

Head 65 - European works quota

Provides that:

(1) On-demand audiovisual media services provided by media service providers shall promote, where practicable and by appropriate means, production of and access to European works.

(2) On-demand audiovisual media services provided by media service providers shall ensure that a minimum of 30% of the works in their catalogues qualify as European works [as defined in Head 64]

(3) Subsection (2) shall not apply to media service providers with a low turnover or low audience

(4) The Commission shall prepare rules with respect to the application of subsection (3)

(5) In preparing rules under subsection (4), the Commission shall have regard to any relevant guidance produced by the European Commission

(6) A media service provider shall comply with the rules made under subsection (4)

(7) A media service provider that contravenes subsection (6) shall be guilty of a [category X offence]

Explanatory note

This head transposes the requirements of Article 13 of the Revised Audiovisual Media Services Directive. It provides that on-demand audiovisual media services provided by media service providers shall ensure that a minimum of 30% of the works in their catalogues qualify as European works.

Head 66 - Prominence of European works

Provides that:

(1) On-demand audiovisual media services provided by media service providers to whom [subsection (2) of the European works head] applies shall, in the interests of providing culturally diverse European content to the widest possible audience, ensure the prominence of European works on their service.

(2) The Commission shall prepare rules for media service providers in relation to the prominence of European works for the purposes of subsection (1)

(3) A media service provider shall comply with the rules made under subsection (2)

(4) A media service provider which contravenes subsection (3) shall be guilty of an [category X] offence.

Explanatory note

This head transposes the requirements of Article 13 of the Revised Audiovisual Media Services Directive. It provides that the Commission shall prepare rules for media service providers in relation to the prominence of European works on their services.

Head 67 – Reporting

Provides that:

(1) The Commission shall report to the Minister on an annual basis on the operation of [preceding sections on quotas and prominence]

(2) A report made under subsection (1) shall be in such form and manner as the Minister may specify.

Explanatory note

This head provides that the Commission shall report to the Minister on an annual basis on the operation of the preceding Heads on European Works quotas and prominence.

Head 68 – Duties of Media Service Providers

(1) Every media service provider shall ensure that—

(a) all news broadcast by the media service provider is reported and presented in an objective and impartial manner and without any expression of the broadcaster's own views,

(b) the broadcast treatment of current affairs, including matters which are either of public controversy or the subject of current public debate, is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views, except that should it prove impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other,

(c) in the case of sound broadcasters a minimum of—

(i) not less than 20 per cent of the broadcasting time, and

(ii) if the broadcasting service is provided for more than 12 hours in any one day, two hours of broadcasting time between 07.00 hours and 19.00 hours,

is devoted to the broadcasting of news and current affairs programmes, unless a derogation from this requirement is authorised by the Authority under subsection (3),

(d) anything which may reasonably be regarded as causing harm or offence, or as being likely to promote, or incite to, crime or as tending to undermine the authority of the State, is not broadcast by the broadcaster, and

(e) in programmes broadcast by the media service provider, and in the means employed to make such programmes, the privacy of any individual is not unreasonably encroached upon.

(2) Nothing in subsection (1) (a) or (b) prevents a broadcaster from transmitting party political broadcasts provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party.

(3) Notwithstanding subsection (1)(c), the Commission may authorise a derogation from the requirement in question in whole or in part in the case of a sound broadcasting service but only if it is satisfied that the authorisation of such a derogation would be beneficial to the listeners of the sound broadcasting service.

(4) The sound broadcasting services established and maintained by RTÉ are deemed to be one sound broadcasting service for the purposes of subsection (1)(c).

(5) A media service provider shall ensure that the broadcast treatment of any proposal, being a proposal concerning policy as regards broadcasting, which is of public controversy or the subject of current public debate, which is being considered by the Government or the Minister, shall be reported and presented in an objective and impartial manner.

(6) Paragraphs (a) and (b) of subsection (1), in so far as they require the media service provider not to express his or her own views, do not apply to any broadcast made under subsection (5).

(7) In the interests of ensuring that the public has access to fair, objective and impartial news and current affairs content on on-demand audiovisual media services and recognising that certain media service providers have greater obligations in this respect due to their nature and audience reach, a media service provider which

d) is a broadcasting corporation; or
e) holds a broadcasting contract under [Part 6 of the current Act]; or
f) is a media business for the purposes of the Part 3A of the Competition Act 2002 (as amended)

shall ensure that any news and current affairs content provided on any on-demand audiovisual media service operated by that media service provider adheres, as appropriate, to paragraphs (a) and (b) of subsection (1).

Explanatory Note

Updates section 39 of the 2009 Act to align with the OSMR Bill.

In light of the fact that on-demand audiovisual media services are now to be directly regulated, subsection (7) of this provision requires media service providers which are

a) a broadcasting corporation; or
b) hold a broadcasting contract under [Part 6 of the current Act]; or
c) a media business for the purposes of the Part 3A of the Competition Act 2002 (as amended)

to ensure that any news and current affairs content provided on any on-demand audiovisual media service operated by that media service provider adhere to the same standards required of linear broadcasting services under paragraphs (a) and (b) of subsection (1).

The purpose of this requirement is to ensure that on-demand news and current affairs content provided by media service providers with public service characteristics, such as public service broadcasters or broadcasters that are subject to contractual conditions set out by the regulator comply with the same standards as linear broadcasting. More generally, operators of media business in the State as defined by the Competition Act 2002 (as amended) are also subject to these requirements as they play an important role in the dissemination of news and current affairs content to the public. Therefore, the policy intent of this section is to only capture news providers which are 'professional' in nature and that adhere to standard journalistic practices.

It is not desirable from a policy perspective to extend the ambit of this provision to cover ODAVMS more generally, as ODAVMS which do not meet the any of the criteria above are not likely to be run as 'professional' news outlets and will include services operated by individual citizens. Therefore, in line with the principle of proportionally and Article 40.6 of the Constitution which guarantees the right of individuals to "freely express their convictions and opinions", it is not considered appropriate to extend the requirements beyond the 3 abovementioned categories.

Head 69 - Retention of programme material

40.— (1) A media service provider shall, for the purposes of addressing complaints or investigations made under [Head 61 - Complaints], shall retain copies of all programme material for such period as shall be determined by the Commission after the programme material ceases to be available.

(2) The making or retaining of a recording in compliance with subsection (1) is not a contravention of the Copyright and Related Rights Act 2000.

Explanatory Note

Replaces section 40 of the 2009 Act. The scope of the section has been expanded to cover retention of material by on-demand services.

Head 70 - Advertising

(1) A programme provided by a media service provider may include advertisements inserted in it.

(2) The total daily times for broadcasting advertisements in a sound broadcasting service must not exceed a maximum of 15 per cent of the total daily broadcasting time and the maximum time to be given to advertisements in any hour shall not exceed a maximum of 10 minutes.

(3) A media service provider shall not broadcast or make available an advertisement which is directed towards a political end or which has any relation to an industrial dispute.

(4) A media service provider shall not broadcast or make available an advertisement which addresses the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation.

(5) Nothing in *subsection (3)* is to be read as preventing the broadcasting of a party political broadcast provided that a media service provider does not, in the allocation of time for such broadcasts, give an unfair preference to any political party.

(6) *Subsection (3)* does not apply to advertisements broadcast or made available at the request of the Referendum Commission in relation to a matter referred to in section 3 of the Act of 1998 concerning a referendum.

(7) In this section, references to advertisements shall be read as including references to advertising matter contained in sponsored programmes, that is to say, in programmes supplied for advertising purposes by or on behalf of an advertiser.

Explanatory Note

Updates section 41 of the 2009 Act to align with the OSMR Bill. On-demand services are included under this section.

Head 71 - Media rules

(1) The Commission shall, subject to the requirements of *[Head 70 – Advertising]* and, in accordance with *subsection (4)*, prepare, and from time to time as occasion requires, revise rules ("media rules") with respect to—

(*a*) the total daily times that shall be allowed for the transmission of advertisements and teleshopping material on a broadcasting service, in respect of a contract under *Part 6* ,

(*b*) the maximum period that shall be allowed within the period of 6.00 and 18:00 and the period of 18.00 and 24:00 for the transmission of advertisements and teleshopping material (within the meaning of [*Head on Media Codes])* on such a broadcasting service, and the Commission may make different such rules with respect to different classes of broadcasting service,

(*c*) the specific steps each media service provider is required to take to promote the understanding and enjoyment by—

(i) persons who are deaf or have a hearing impairment,

(ii) persons who are blind or partially sighted, and

(iii) persons who have a hearing impairment and are partially sighted,

of programmes transmitted on any broadcasting service provided by the media service provider.

(2) Without prejudice to the generality of *subsection (1)(c)*, media rules with respect to that paragraph shall require each provider of audio-visual material to take specified steps to provide access to that material by persons who are deaf or have a hearing impairment, persons who are blind or partially sighted, and persons who have a hearing impairment and are partially sighted by means of specified services such as—

(*a*) sign language,

(*b*) subtitling, and audio description, and

(*c*) with respect to broadcasting services, have regard to whether the foregoing material is being provided—

(i) daily or at other regular intervals,

(ii) at popular viewing times as well as at other times, and

(iii) for news and news-related matters as well as for other matters.

(d) with respect to on-demand audiovisual services, have regard to whether the foregoing material being provided is easily identifiable and accessible

(3) Rules under *subsection (1)(c)* may, in respect of any period specified in them beginning on or after the passing of this Act, require a media service provider to ensure that a specified percentage of programmes transmitted on a broadcasting service provided by him or her in that period employs specified means by which the understanding and enjoyment by persons referred to in *subparagraphs (i), (ii)* and *(iii)* of that paragraph of that percentage of programmes may be promoted.

(4) Media rules shall provide for the matters required to be provided for by Chapters [x to x] of the Council Directive.

(5) Whenever the Commission prepares or revises a media rule relating to the matter in question every media service provider shall comply as required with such rule and any revision of it.

(6) The Commission shall, from time to time, or as the Minister may direct,, review a media rule made under *subsection (1)(c)*.

(7) In carrying out a review under *subsection (6)* the Commission shall consider the quality of services provided by media service providers in endeavouring to comply with a media rule made under *subsection (1)(c)*.

(8) The Commission shall prepare a report for the Minister, in a form and manner that the Minister may specify, on the operation of this section not later than three years after the commencement of this section, and every three years thereafter.

(8) The following rules namely—

(*a*) Access Rules (1 January 2005) prepared under section 19 of the Act of 2001, and

(*b*) rules with respect to the maximum daily and hourly limits on advertising and teleshopping continued under section 19 of the Act of 2001,

if in force on the passing of this Act, continue in force as if made under the corresponding provision of this section and have effect accordingly.

Explanatory Note

Based on section 43 of the 2009 Act. The scope is widened to include on-demand services. Section 1 (b) has been updated to provide for the increased advertising minutage flexibility provided for in the revised AVMSD.

Head 72 - Inspection of draft media codes and rules.

(1) Before preparing a media code or making a media rule, the Commission shall make available for inspection on request by any person a draft of the media code it proposes to

prepare or the media rule it proposes to make and shall have regard to any submissions made to it, within such period as it specifies for the purpose, by that person in relation to the draft before it prepares the media code or makes the media rule concerned.

(2) The Commission shall cause to be published on a website maintained by the Commission, and may cause to be published in a newspaper circulating in the State, notice of the fact that, under *subsection (1)*, a draft referred to in that subsection is available for inspection, of the place at which or the means by which the draft can be inspected and of the period specified by it under that subsection within which submissions may be made to it in relation to the draft.

Explanatory Note

Updates section 44 of the Broadcasting Act 2009 to align with the OSMR Bill.

Head 73 - Presentation of media codes and rules to Minister.

(1) A copy of any media code or rule shall be presented to the Minister as soon as may be after it is made.

(2) (*a*) The Minister shall, as soon as may be after the receipt by him or her of a copy of any media code or rule made, cause copies of it to be laid before both Houses of the Oireachtas.

(*b*) Either House of the Oireachtas may, by resolution passed within 21 sitting days after the day on which a media code or rule was laid before it in accordance with *paragraph (a)*, annul the code or rule.

(*c*) The annulment of a media code or rule under *paragraph (b)* takes effect immediately on the passing of the resolution concerned but does not affect anything that was done under the code or rule before the passing of the resolution.

(3) Subject to the requirements of *[Head on Media Codes]* the Commission shall, review the effect of a media code or rule from time to time as it sees fit, and shall prepare a report in relation to that review and furnish the report to the Minister.

(4) The Minister may direct the Commission to undertake a review of the effect of a media code or rule.

(5) The Minister shall, as soon as may be after the receipt by him or her of the report, cause copies of it to be laid before both Houses of the Oireachtas.

Explanatory Note

Updates section 45 of the 2009 Act to align with the OSMR Bill.

Head 74 - Co-operation with other parties — standards and self-regulation.

(1) In this section "self-regulatory system" means a system whereby the members of a group of persons with a shared interest voluntarily adhere to rules or code of conduct established by that group.

(2) The Commission may co-operate with or give assistance to one or more persons (whether residing or having their principal place of business in the State or elsewhere) in—

(*a*) the preparation by that person or those persons of standards, or

(*b*) the establishment and administration by that person or those persons of a self-regulatory system,

in respect of audiovisual or audio content or related electronic media.

Explanatory Note

Updates section 46 of the 2009 Act to align with the OSMR Bill.

Head 75 - Code of practice — complaints handling.

(1) A media service provider shall give due and adequate consideration to a complaint on one or more of the grounds specified in [Head 61 – Complaints] writing by a person in respect of an audiovisual media service provided by a media service provider which, in the opinion of the media service provider, has been made in good faith and is not of a frivolous or vexatious nature.

(2) A complaint under *subsection (1)* shall be made to the media service provider not more than 30 days after—

(a) in case the complaint relates to one broadcast, the date of the broadcast,

(b) in the case of 2 or more unrelated broadcasts, the date of the earlier or earliest, as the case may be, of those broadcasts, or

(c) in case the complaint relates to 2 or more related broadcasts of which at least 2 are made on different dates, the later or latest of those dates.

(d) in case the complaint relates to an on-demand service, the date the programme material ceased to be available.

(3) A media service provider shall prepare and implement a code of practice for the handling of complaints made under *subsection (1)*. The code of practice shall make provision for the following matters—

(*a*) an initial point of contact for complainants, including an electronic-mail address,

(*b*) a time period within which the media service provider shall respond to complaints, and

(*c*) the procedures to be followed by the media service provider in the resolution of complaints.

(4) A media service provider shall publish on a website maintained by the media service provider, and generally make available, a copy of the code of practice prepared under *subsection (3)*.

(5) The Commission may prepare and publish guidance for media service providers for the purposes of ensuring compliance with *subsection (3)*.

(6) A media service provider shall supply the information required under *subsection (3)* to the Commission who shall cause such information to be published on a website maintained by the Commission.

(7) A media service provider shall keep a record of complaints made under *subsection (1)* and of any reply made thereto for a period of 2 years from the date of receipt of the complaint.

(8) A media service provider shall, if directed by the Commission, make available for inspection by the Commission all records kept by the media service provider under *subsection (7)*.

Explanatory Note

Updates section 47 of the 2009 Act to align with the OSMR Bill.. This provides that media service providers shall formulate codes of practice for complaints handling.

Head 76 – Right of Reply

Provide that:

(1) Any references to the Authority or Statutory Committee in section 49 of the Broadcasting Act 2009 are replaced by a reference to the Commission.

Explanatory Note

This updates section 49 of the 2009 Act and replaces any reference the Authority or Statutory Committee with a reference to the Commission.

Head 77 – Content Levy Scheme

1) The Commission shall prepare and submit to the Minister for his or her approval a scheme or a number of schemes for the granting of funds to support all or any of the following—

(a) audiovisual programmes including feature films, animation and drama on Irish culture, heritage and experience, including—

(i) history (including history relating to particular areas, groups or aspects of experience, activity or influence),

(ii) historical buildings,

(iii) the natural environment,

(iv) folk, rural and vernacular heritage,

(v) traditional and contemporary arts,

(vi) the Irish language, and

(vii) the Irish experience in European and international contexts,

(b) new audiovisual programmes to improve adult or media literacy,

(c) new audiovisual or sound broadcasting programmes which raise public awareness and understanding of global issues impacting on the State and countries other than the State,

(d) programmes under paragraphs (a), (b) and (c) in the Irish language,

(e) the development of archiving of programme material produced in the State, and

(f) such ancillary measures as are necessary to support schemes prepared under paragraphs (a), (b), (c) or (d).

(2) A scheme—

(a) may only fund audiovisual programmes under subsection (1) which are provided—

(i) on an audiovisual media service established in the State or targeting audiences in the State, as the case may be.

(b) may provide funding for projects relating to matters such as research, needs assessments, analyses, feasibility studies and pilot projects in relation to subsection (1) including such projects undertaken by or on behalf of the Minister, and

(c) may not provide funding for programmes which are produced primarily for news or current affairs.

(3) A scheme may provide—

(a) for the making of applications by persons for funding under a scheme,

(b) general terms and conditions of funding, or

(c) that funding in a particular year will be directed at—

(i) particular classes of audiovisual programmes referred to in subsection (1) including but not limited to programmes of a specified nature or subject matter

(ii) particular classes of projects referred to in subsection (1) (e).

(4) The Commission may attach to any particular funding under a scheme such particular terms or conditions as it considers appropriate in the circumstances.

(5) The Commission in preparing a scheme, may have regard to the developmental needs of community broadcasters.

(6) The Commission, in preparing a scheme, shall have regard to the understanding and enjoyment of audiovisual programmes under the scheme by persons who are deaf or hard of hearing.

(7) The Minister may direct the Commission —

(a) to prepare and submit to him or her a scheme relating to any matter in subsection (1), or

(b) to amend or revoke a scheme.

The Commission shall comply with the direction.

(8) Any amendment or revocation of a scheme shall be submitted by the Commission to the Minister for his or her approval.

(9) A scheme shall, if approved of by the Minister, be—

(a) published (including publication by electronic means capable of being read in legible form), and

(b) carried out in accordance with its terms,

by the Commission.

(10) (a) A scheme shall be laid before each House of the Oireachtas by the Minister as soon as may be after it is made.

(b) Either House of the Oireachtas may, within 21 sitting days after the day on which a scheme was laid before it in accordance with paragraph (a), pass a resolution annulling the scheme.

(c) The annulment under paragraph (b) of a scheme takes effect immediately on the passing of the resolution concerned but does not affect anything that was done under a scheme before the passing of the resolution.

Explanatory Note

The key difference between the draft head and section 154 is that the scope has been modified to include on-demand services. This provision provides for the creation of schemes that will be funded by any levies raised under Head 78.

It is the intent to only commence this section once research has been carried out showing the viability of a content levy.

Head 78 – Content Levy Establishment

(1) [The Commission shall] / [The Commission shall, subject to the approval of the Minister,] make regulations prescribing a levy to be paid by audiovisual media service providers which are

iii. Established in the State, and

iv. Established in other Member States and wholly or mainly targeting audiences in the State

for the purposes of providing financial contributions to the production of European works.

(2) The amount of the levy referred to in subsection (1) shall be calculated in such manner that

i. the levy imposed solely relates to revenues earned within the State;

(3) In particular, regulations under subsection (1) may provide for any of the following matters:

(a) the activities, services or other matters for which specified kinds of levies are payable;

(b) the media service providers or classes of media service providers who are required to pay specified kinds of levies;

(c) the amounts of specified kinds of levies;

(d) the means by which specified kinds of levies are calculated;

(e) the periods for which, or the dates by which, specified levies are to be paid to the Commission;

(f) the information required to be provided to the Commission which it requires to calculate the liability of media service providers, or classes of media service providers;

(g) procedures to be taken where an media service providers has over paid in respect of their levy obligation(s);

(h) penalties payable by an media service providers who does not pay a levy on time;

(i) the keeping of records, and the making of returns to the Commission, by persons who are liable to pay a specified levy;

(j) matters relating to exemptions from, or deferrals of payment of, the levy or payment of a reduced levy, and the application process for exemptions, deferrals, refunds or reduced levy;

(k) matters relating to the refund of the whole or a part of a levy paid or payable under regulations in force under this section;

(l) the collection and recovery of levies.

(5) A levy shall be payable to the Commission in the [manner/form] prescribed having regard to the terms of the levy order.

(6)) The Commission may, by proceedings in a court of competent jurisdiction, recover as a simple contract debt an amount of levy payable under regulations in force under this section.

(7) Every regulation made by the Commission under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Section 157 of the 2009 Act is amended by the insertion of a new subsection as follows:

(3) There shall be paid into the current account all monies paid to the Commission under *[Head 78]* and there shall be paid out of the current account all monies in respect of expenditure by the Commission for the purposes of grants under, and any administration of or reasonable expenses relating to, a scheme duly approved under *[Head 77]*.

Explanatory note

To provide for the Commission to make regulations pertaining to the imposition of a content production levy on media services providers established in the State and target audiences in the State. This applies to providers of both linear and on-demand services. The legal basis for this provision is Article 13 of the revised AVMSD.

It is the intent to only commence this section once research has been carried out showing the viability of a content levy.

It is intended that the collection of the levy will be enforced by way of a liquidated sum debt. The levy sum owed shall be statutorily a liquidated sum debt. The Media Commission will be able to collect the debt through well-established EU enforcement of foreign judgement procedures and European order for payment processes.