

Q&A

General scheme of the Online Safety and Media Regulation Bill

1. Will the Bill establish an Online Safety Commissioner?

Yes. The proposed Bill will establish an Online Safety Commissioner as part of a wider Media Commission.

This proposed Bill also seeks to dissolve the Broadcasting Authority of Ireland and give all the present functions of the Authority to the new Media Commission. This means that the regulation of radio and television services will move to the new Commission.

The proposed Bill also intends to implement the revision of the European Union law known as the Audiovisual Media Services Directive. Part of this revised law includes the introduction of new standards for the regulation of video sharing platform services. The revised law also mandates Ireland to regulate video sharing platform services established in Ireland along the lines of these new standards for the whole of the European Union.

The Online Safety Commissioner will regulate video sharing platform services as part of the framework for the regulation of online safety proposed by the Bill.

Further information about this can be found in Parts 2 and 3 of the general scheme of the Online Safety and Media Regulation Bill.

2. What will the Online Safety Commissioner do?

The Online Safety Commissioner will oversee the regulatory framework for online safety proposed by the Bill. Under this framework, the Online Safety Commissioner would:

- Designate online services and categories of online services for regulation,
- Make online safety codes and decide which codes apply to which online services,
- Assess the compliance of online services with online safety codes,
- Audit any complaint or issues handling processes that online services operate,
- Operate a “super complaints” scheme for nominated bodies such as expert charities to bring issues with online services to the Commissioner’s attention,
- Direct online services to make changes to their systems, processes, policies and design, and,

- Seek to apply sanctions, including financial sanctions, against online services which aren't complying.

Further information about this can be found in Part 4 of the general scheme of the Online Safety and Media Regulation Bill.

3. How will the Online Safety Commissioner be appointed?

All members of the Media Commission, including the Online Safety Commissioner, will be appointed following an open competition run by the Public Appointments Service.

4. What services will the Online Safety Commissioner regulate?

The proposed Bill will create a system where the Online Safety Commissioner can designate any online service or categories of online services that allow users to share, spread or access content that other users have made available.

This means that a wide range of different services may be designated by the Online Safety Commissioner, including:

- Social media services,
- Public boards and forums,
- Online gaming services
- Ecommerce services,
- Private communication services,
- Private online storage services,
- Online search engines, and,
- Internet service providers.

However, the Online Safety Commissioner is not required to designate all online services that are within scope. . Instead, the Commissioner will focus on large or risky services where the likelihood of people being exposed to harmful online content is greatest.

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

Further information about this can be found in Head 56 of the general scheme of the Online Safety and Media Regulation Bill.

5. What will be in the online safety codes?

The proposed Bill allows the Online Safety Commissioner to make online safety codes on a range of topics, including:

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

Given the large range of different kinds of services that the Online Safety Commissioner may be regulating, the Online Safety Commissioner will not apply all online safety codes or all aspects of every code to every online service it regulates. Instead, the Online Safety Commissioner will decide which codes apply to which services it regulates. This will allow the Online Safety Commissioner to tailor its regulation for online services of all sizes and business models.

Further information about this can be found in Head 50A of the general scheme of the Online Safety and Media Regulation Bill.

6. What is harmful online content?

The proposed Bill creates a number of categories of harmful online content. These categories cover:

- Material which it's a criminal offence to disseminate,
- Cyberbullying material,
- Material encouraging or promoting eating disorders, and,
- Material encouraging or promoting self-harm or suicide.

The proposed Bill provides for more categories of harmful online content to be created through a process designed to be robust and respect the fundamental rights of users and operators of online services.

Further information about this can be found in Heads 49A and 49B of the general scheme of the Online Safety and Media Regulation Bill.

7. How will the Online Safety Commissioner assess compliance?

The proposed Bill provides the Online Safety Commissioner with a number of powers that can be used to assess the compliance of online services. These powers include:

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

By using these powers the Online Safety Commissioner will be able to see if the actions taken by an online service to comply with the online safety codes are robust and if they actually work in practice.

Further information about this can be found in Heads 50B and 52A of the general scheme of the Online Safety and Media Regulation Bill.

8. How would the super complaints scheme work?

The proposed Bill provides that the Online Safety Commissioner will create a scheme for nominated bodies such as expert charities to bring issues with online services to the Commissioner's attention. This will be an important and innovative means of ensuring that there is a mechanism for the regulator to tap into the insights of those who work closely with children and adults impacted by harmful online content.

The Bill says that the scheme will:

- Outline how the Online Safety Commissioner will receive notices,
- The timeline in which the Online Safety Commissioner will respond to notices,
- The criteria for nomination,

- The process through which a body can apply for nomination, and,
- The process through which a body's nominated status can be taken away by the Media Commission and the criteria for this.

The Online Safety Commissioner can review the compliance of online services or consider designating them if they are not already designated on the basis of any information it receives through this scheme.

It will also be open to individuals to bring issues to the attention of the Online Safety Commissioner at any time. While this mechanism does not provide for an examination of individual matters, such issues will feed into the compliance and risk assessments the Commissioner does.

Further information about this can be found in Head 52B of the general scheme of the Online Safety and Media Regulation Bill.

9. What happens if an online service is not complying?

The proposed Bill allows the Online Safety Commissioner to issue a compliance notice to an online service where they consider the online service to not be in compliance with an online safety code.

These compliance notices will set out what an online service must do to bring itself into compliance, which may include changing a system or policy, or the removal or restoration of content, and the timeframe in which to take these actions. If an online service doesn't take these actions and doesn't provide a good explanation to the Commissioner as to why it didn't, then the Commissioner may issue a warning notice.

These warning notices will set out what an online service must do to bring itself into compliance, the timeframe in which to take these actions and what the Commissioner will do if the online service doesn't comply with the warning notice.

Not complying with a warning notice will be an offence. In addition, the Commissioner may seek to apply a civil sanction to the non-compliant online service.

It is left up to the Online Safety Commissioner to decide what timelines are appropriate when they issue compliance or warning notices. This is considered best as the appropriate timeframe will depend on the issues being dealt with and could range from several hours to a longer period. The Commissioner can also publish compliance and warning notices.

Further information about this can be found in Head 53 of the general scheme of the Online Safety and Media Regulation Bill.

10. What sanctions are available to the Online Safety Commissioner?

The proposed Bill provides that any sanctions to be imposed on an online service are sought by the whole Media Commission. This is to provide a further sense check in the process. The Commission will notify an online service that it is seeking to impose a sanction on that service and may publish any notices.

The sanctions available to the Media Commission are:

- Financial penalties,
- Compelling the online service to take certain actions, and,
- Blocking an offending online service in Ireland.

Under Irish law the application of sanctions of this nature requires court approval and this is provided for in the proposed Bill.

The upper amount of the financial penalties that the Media Commission may seek to impose on an online service will be decided in the coming months.

Further information about this can be found in Head 54 of the general scheme of the Online Safety and Media Regulation Bill.

11. How would the Online Safety Commissioner be funded?

The Minister will bring additional proposals to Government in the New Year regarding some remaining issues, including the proposed funding model for the Commission through a levy on regulated services.

In relation to the funding of the work of the Online Safety Commissioner the amount levied will depend on which services are designated to be covered by the new rules and the relevant income of the service. The European Commission will issue guidelines in the coming months to help determine which services are covered by the provisions in the Directive in respect of video sharing platforms.

12. How would the Online Safety Commissioner interface with the online safety roles of other organisations, e.g. An Garda Síochána?

It is intended that there will be memoranda of understanding between the Media Commission and other relevant bodies, such as An Garda Síochána and the Data Protection Commission, to allow these organisations to set out appropriate boundaries in their activities and to ensure an appropriate amount of cooperation in instances where their activities may overlap.

For example, if the regulator, in the course of its activities, becomes aware of potentially criminal activity it will have a dedicated channel to allow for rapid escalation of any relevant information to the appropriate persons within An Garda Síochána. The role of the Online Safety Commissioner will be to regulate online services and not the activities of users.

The role of the new Online Safety Commissioner will not replace but complement the roles of existing regulators such as the Data Protection Commission in respect of privacy and data protection law, the proposed Electoral Commission in respect of online political advertising and the proposed Gambling Regulator in relation to online gambling.

13. Are there any additional issues to be examined?

The revised Audiovisual Media Services Directive also changes some of the standards for the regulation of television services and on-demand services like the RTÉ Player.

The Minister will seek Government approval to add provisions to the Bill on these matters and on how the industry levies for funding the Media Commission in the New Year.

14. What happens next?

The Government has referred the general scheme of the proposed Bill to the Office of the Attorney General who will review the scheme and write the Bill in the appropriate legal language.

At the same time, the Government has referred the general scheme of the proposed Bill to the Joint Oireachtas Committee on Communications, Climate Action and Environment. This Committee will examine the proposed Bill to see if there are any improvements that could be made.

These two processes will feed into the creation of a final Bill which will then be brought to Government to seek approval to begin its passage through the Oireachtas. If the Bill is voted through the Oireachtas it will become law and the Media Commission including an Online Safety Commissioner will be established.

Online Safety and Media Regulation Bill

Explanatory Note - Establishment of Media Commission

In order to implement the measures required under the revised AVMSD and the online safety proposals new regulatory arrangements are required. The Broadcasting Authority of Ireland (BAI) and its Statutory Committees will be dissolved and replaced by a multi-person Media Commission.

The new Commission will be headed by an executive chairperson who will have overall responsibility for the management of the organisation. In addition to the executive chairperson, a number of Commissioners will be appointed. One of the appointees to the Commission will serve as the Online Safety Commissioner.

It is desirable to have a structure in place that incorporates maximum flexibility to take account of the increasing pace of change in the regulatory landscape going forward and one in which decisions can be made in a timely and effective manner.

The staff currently working in the BAI will transfer to the new Commission. The new Commission will assume BAI's current functions.

The Commission will be assigned a range of functions including:

- To promote and protect the interests of the public in relation to online, audio-visual and audio content;
- To prepare and make codes and rules to be observed by entities operating designated online services, audiovisual media services and sound media services and to take enforcement action where breaches are identified.
- To 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;
- To engage in public awareness campaigns and educational initiatives in relation to online safety and media literacy;
- 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.

Online Safety and Media Regulation Bill

High level overview of online safety elements

The online safety elements of the Online Safety and Media Regulation Bill create a new framework for the regulation of online services. This framework will provide the Online Safety Commissioner, as part of a wider Media Commission, with the ability to focus on high-risk issues and services and to set rules and norms through online safety codes.

The robust compliance, enforcement and sanction powers provided to the Online Safety Commissioner will create a culture of active compliance among online services. This will in turn start a regulatory backed cycle of risk and harm reduction among online services, which will continuously improve the safety of people online.

Designation of services

- The Online Safety Commissioner takes into account the nature and scale of online services, the legal limits of liability and issues of fundamental rights, among other things, when considering designating online services.
- The Online Safety Commissioner can categorise online services it designates as it sees fit and can designate whole categories of online services.
- The Online Safety Commissioner decides which codes apply to which online services, including to whole categories.

Online safety codes

- The Online Safety Commissioner will make online safety codes governing standards and practices of online services.
- These codes can relate to a wide range of matters, including harmful online content, commercial communications, risk and impact assessments, and complaints handling.
- Online services are obliged to abide by the codes that apply to them.

Assessing compliance

- The Online Safety Commissioner can create rules about periodic reporting of compliance with online safety codes by online services.
- The Online Safety Commissioner can request information from online services about their compliance with the online safety codes that apply to them.

- The Online Safety Commissioner can audit the complaints and/or issues handling mechanisms operated by online services.
- The Online Safety Commissioner can appoint authorised officers to assess compliance and carry out audits.
- The Online Safety Commissioner will establish a scheme to receive “super complaints” about systemic issues with online services from nominated bodies, including expert NGOs, and may request information, investigate or audit an online service on the basis of information received through this scheme.

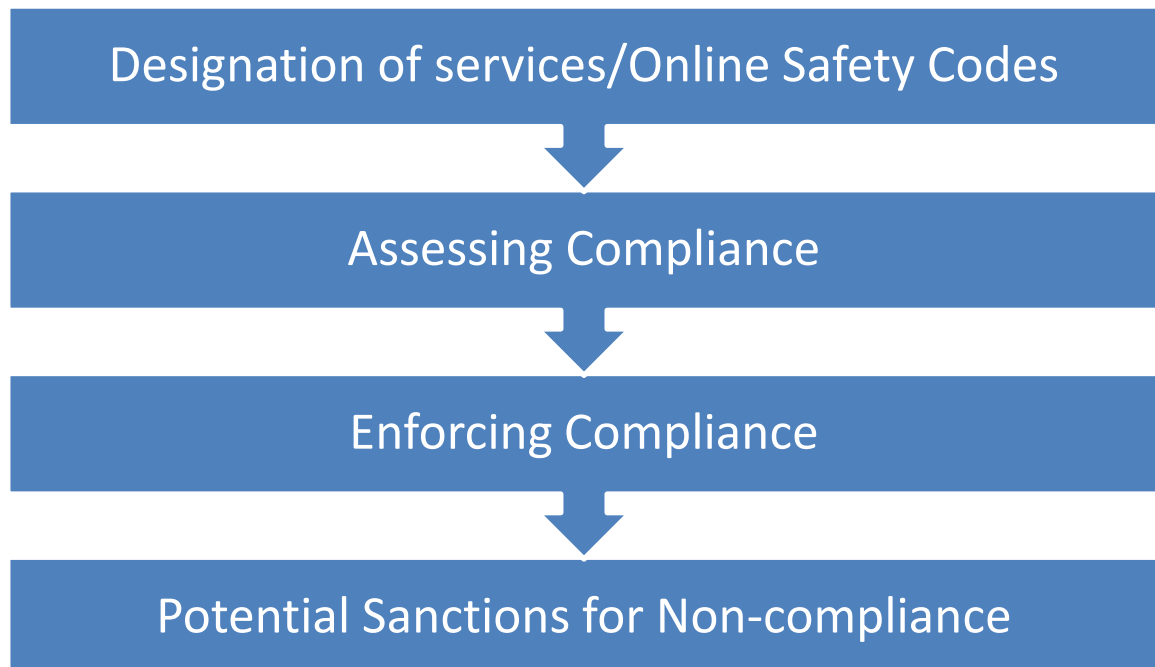
Enforcing compliance

- The Online Safety Commissioner can issue compliance notices setting out what an online services must do to bring itself into compliance, including the removal or restoration of content.
- If the Online Safety Commissioner is not satisfied with the response and action taken by the online service, the Online Safety Commissioner can issue a warning notice.
- Warning notices will set out what the online service must do to bring itself into compliance and what steps the Online Safety Commissioner will take if it fails to do so.
- If the Online Safety Commissioner is not satisfied with the response and action taken by the online service on foot of a warning notice then the Online Safety Commissioner can seek to impose a sanction on that service.
- The Online Safety Commissioner can publish compliance and warning notices.

Sanctions for non-compliance

- The Media Commission can only seek to impose a sanction on an online service if the service has failed to comply with a warning notice.
- The sanctions that the Media Commission can impose include:
 - Financial penalties,
 - Compelling the online service to take certain actions, and,
 - Blocking an offending online service.
- The application of each of these sanctions requires court approval.

Appendix 1 – Regulatory Process



Appendix 2 – Regulatory Cycle



Online Safety and Media Regulation Bill

Explanatory Note - Administrative financial sanctions

The Online Safety and Media Regulation Bill creates a hierarchy of sanctions be applied to non-compliance services. The aim of an efficient regulatory system is to create a culture of compliance which minimises serious non-compliance. It is essential that where non-compliance occurs, that it is responded to appropriately.

The Law Reform Commission in the *Report on Regulatory Powers and Corporate Offences* describes the power to impose administrative financial sanctions as “one of the most effective” in the regulatory toolkit and that “the power to impose administrative financial sanctions is both valuable and necessary in ensuring that financial and economic regulators have the requisite powers to achieve their regulatory objectives.”

Traditionally, regulatory bodies have only been able to avail of such powers in limited legal contexts, such as to give effect to European Union legislation. This is the case, for example, with the Data Protection Commission.

However, recent case law (*Purcell v. Central Bank* [2016] IEHC 514) and the recommendations of the above mentioned Law Reform Commission Report have highlighted that such sanctions are permissible where they do not constitute the administration of justice by a non-court entity. Certain safeguards must be built into such a system, for example where a regulator seeks to impose an administrative financial sanction against, such sanction will be subject to confirmation by a court.

The procedure for administrative financial sanctions is out in Heads 16A-16D of the general scheme of the proposed Bill. Administrative financial sanctions may be imposed where a regulated entity has failed to comply with a compliance or warning notice issued by the Commission, or where the Commission decides to do so following an investigation. The Commission does not have the power to make a final determination in this regard (save where a regulated entity elects for the Commission to do so) and decisions to impose such sanctions will require court confirmation. A regulated entity may appeal the decision to impose such a sanction of the amount of the sanction.

The upper amount of the administrative financial sanctions that the Media Commission may seek to impose on an online service will be decided in the coming months.