



**Technology Ireland submission to Joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht on the General Scheme of the Online Safety and Media Regulation Bill.**

**About Technology Ireland:**

Technology Ireland is an Association within Ibec, which represents the ICT, Digital and Software Technology Sector. The Association is a pro-active membership organisation with over 200-member companies located throughout Ireland. We advocate on behalf of Ireland's indigenous and foreign direct investment (FDI) technology companies to Government and policy makers.

**Summary of Technology Ireland Position:**

Technology Ireland is very grateful to the Joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht for the opportunity to comment on the General Scheme of the Online Safety and Media Regulation Bill. When the National Advisory Council for Online Safety (NACOS) was set up in 2018, we were delighted to take part and help with the valuable work carried out to date as documented in the recently published NACOS progress report.

Online safety covers a complex range of internet content types and online activities which affect the daily lives of citizens across the world. Internet services contribute to citizen engagement and bring disparate groups closer. At the same time, our members are committed to addressing categories of harmful online content including those in scope of this draft legislation. Technology Ireland has consistently expressed support for the overall goals of the proposed online safety bill, which should provide for a systemic approach in regulating online platforms and digital services, through the adoption of online safety codes of conduct.

We are keenly aware of the work that has gone into preparing the draft legislation within a very challenging timeframe. We also recognise the major challenges involved in bringing forward proposals that advance the goals of online safety whilst protecting fundamental rights to freedom of expression and promote a thriving digital economy.

First and foremost, the Bill seeks to transpose the EU Audiovisual Media Services Directive (AVMSD) into Irish law. This is an important piece of legislation as it governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. It further enshrines the Country of Origin (COO) principle which is of particular import to Ireland given the number of video sharing platforms established in the State. Given that the deadline for the transposition of AVMS into national law has already passed, Technology Ireland members encourage the swift adoption of this Bill to ensure legal certainty in the regulation of video sharing platforms across the EU.

The proposed measures must strike the right balance, in our view, between the legitimate demands for greater accountability, and proportionality and effectiveness. It is important also that the legislation should be bounded by what is technically achievable and, while allowing for flexibility, should not unintentionally enable limitless scope as this would create regulatory uncertainty. In this regard, we welcome how the Bill sets out a clear process for the designation of services for statutory regulation based on an objective assessment of risk undertaken by the regulator.

Since the Bill was first proposed, the EU has published proposals to introduce a Digital Services Act (DSA) which overlaps with aspects of the Bill. This creates some obvious challenges for providers of online services as to the timing and sequencing of new regulation in this space. However, we reiterate our view that the Bill represents a far more coherent and targeted proposal in that it sets out a clear purpose for regulatory intervention and focuses intervention where there is the greatest risk to consumers. Our members support these principles, and we encourage the Committee to endorse them and urge government to advocate for them at EU level. It is important that a patchwork of regulation doesn't arise across Europe.

Technology Ireland members are however, concerned at the broad overly vague framework of sanctions for noncompliance. It is important that any proposed sanctions should be proportionate and in line with the proposed intention of the framework. Excessive sanctions are potentially damaging to Ireland's reputation. Turnover fines have become the sanction of choice for multiple regulatory frameworks and there is a risk that further sanctions of this kind have a chilling effect on investment in digital business. Furthermore, we are concerned about the possibility to block access to an online service and believe that any such measure should be imposed as a last resort remedy only in cases of repeated and egregious breaches, when lesser sanctions have failed to be effective. We also urge caution about the inclusion of criminal liability sanctions for company directors. Such provisions are often copied by foreign governments but without equivalent due process. The approach to sanctions taken in this Bill must be very carefully crafted with high thresholds and appropriate safeguards so as to be worthy of emulation overseas.

We recognise the need for appropriate governance and regulation of content providers, but we would caution that such regulation should be evidence-based and should not impinge on or contradict existing regulations, already in place for online carriers.

Using the framework of the Heads of Bill please find more detailed comments below as well as the observations you requested on (i) the application of the content levy, and (ii) the protection of children across online services and platforms.

## **Part 1 - PRELIMINARY & GENERAL MATTERS**

### **Head 2 - Interpretation**

Technology Ireland welcomes the clear definitions outlined in the bill, which are derived from the AVMS directive.

## **Part 2 - MEDIA COMMISSION**

### **Head 9 – Objectives & Head 10 - Functions**

Technology Ireland supports the general objectives of the bill to:

- ensure that appropriate regulatory arrangements and systems are in place to address, where appropriate, illegal and harmful online, sound and audio-visual content;
- protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation;
- 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;

In pursuing its objectives, the Media Commission must be careful not to overlap or conflict with other existing regulations. Digital platforms are already subject to a complex range of laws and statutory regulation. Further regulation has been proposed at European level in the recent proposals for a Digital Services Act and Digital Market Act. The Media Commission should focus its attention on the providers of content not on the carriers or intermediaries of that content, whether traditional or online.

### **Head 16A – Administrative Financial Sanctions**

Subsection (1) - Clarity is required as to how in the event of a breach, regard will be taken to “the turnover of the relevant undertaking in the financial year ending in the year previous to the breach and the ability of the relevant undertaking to pay the amount”.

Subsection (2) – A financial sanction of “up to €20,000,000 or, in the case of an undertaking, up to 10% of relevant turnover of the preceding financial year, whichever is higher.” Is extremely punitive. It is important that any proposed sanctions should be proportionate. Excessive sanctions are potentially

damaging to Ireland's reputation. Turnover fines have become the sanction of choice for multiple regulatory frameworks and there is a risk that further sanctions of this kind have a chilling effect on investment in digital business. Nor is it clear whether turnover is based solely on relevant activity within Ireland. Turnover based on international activity or activity unrelated to content provision should not be considered.

### **Head 28 – Strategy statement and work programme**

The strategy statement for the Commission should clearly set out the resource requirements for the Commission, particularly with regard to staffing. It is essential that the Commission is adequately staffed with sufficient in-house expertise to negate the need for external consultants, which may result in a process of uneven and inconsistent decision making.

### **Head 40 – Levy**

There is a potential conflict of interest where an industry-funded Media Commission is given sole discretion to designate further in-scope services which will supplement its funding. We would welcome the inclusion of further checks and balances which would mitigate this potential conflict of interest. Clarity is also required as to the basis the levy will be decided on. In particular how will entities that are only partly in scope be treated? Will levies be based on revenue, level of use, etc?

### **Part 3 - TRANSITIONAL PROVISIONS**

These are essential internal governance and operational matters. Technology Ireland does not have any input to make.

### **Part 4 - ONLINE SAFETY**

#### **Head 49A – Categories of harmful online content**

Technology Ireland agrees with the decision not “to define harmful online content as a singular concept as it has not been possible to arrive at a suitable, broad, and principle based description of the meaning of this phrase. Instead, it is proposed to enumerate definitions of categories of material that are considered to be harmful online content.” We support government's proposal to limit scope to a small number of clearly defined harms which are most impactful on consumers.

We would like to clarify that item (a):

“(a) material which it is an (sic) criminal offence to disseminate under Irish [or Union law]”

should state clearly that this refers to Irish and European Union law only and does not apply to national laws of other countries within the European Union. Otherwise, there is a risk that some future government of an EU country could pass very restrictive legislation, which would then impact on both traditional and new Irish media outlets in their coverage of that country's affairs.

It should be noted also that some measures to prevent the dissemination of harmful content will be more effective for certain categories but different measures more effective for others. For instance, child sexual abuse material (CSAM) is categorically different to cyber-bullying. All are against community guidelines but for CSAM technical measures such as hash lists can be used and models can be built to help detect this content. However, cyber-bullying often implies a pattern of conduct, where individual posts on their own may not give an indication that the content is harmful.

#### **Head 49B – Provision for further categories of harmful online content**

Technology Ireland agrees that further categories may need to be added or deleted by the Commission in future. However, the Commission should be obliged to consult with relevant stakeholders before making recommendations to the Minister.

#### **Head 50A - Online safety codes**

Technology Ireland supports the adoption of online safety codes of conduct, which would assist in providing for a systemic approach in regulating online platforms and digital services and would be happy to participate with the Media Commission and other relevant stakeholders in the design of such codes.

#### **Head 52B – Systemic complaints scheme**

Technology Ireland welcomes the provision for a complaints mechanism based on addressing systemic issues, which is to be established by the Media Commission. We believe that such an approach would lead to outcomes that would benefit all users. There is, however, no guidance in the Bill as to the circumstances in which a nominated body may submit a complaint.

We have noted some commentary that the Bill should provide for a mechanism for dealing with individual complaints. We are strongly of the view that this would be ineffective and administratively unworkable for both the Media Commission and individual platforms alike. Neither would it deliver better outcomes for citizens and users of online services, as the number of complaints the Commission could expect to pursue would necessarily be limited, and time and resources would be diverted from pursuing systemic improvements in online safety for all.

#### **Head 54A Sanctions for non-compliance**

Administrative financial sanctions should be limited to the most serious, repeated and systemic cases to ensure that systemic failures are penalised, rather than isolated individual ones, thus reflecting the “seriousness of the breach” as per Head 16A.

#### **Head 54B - Senior management liability**

Technology Ireland believes that the inclusion of senior management liability could have a detrimental effect on prospective investment into Ireland. Such clauses are also unlikely to be practical in terms of proof of liability and as such could undermine the credibility of the act.

Inclusion of senior management liability could also create an international precedent, which could be utilised by more oppressive regimes, seeking to pressure management of media outlets, without the checks and balances present in Irish law.

#### **Head 56 – Designation of relevant online services**

Technology Ireland supports the two step process by which a targeted list of in scope services is set out in primary legislation and the regulator has a duty to designate individual services or categories of service for statutory regulation based on an objective and evidence-based assessment of risk to Irish consumers and in consultation with the service provider. This will ensure that providers have maximum certainty as to which services are in scope and the regulator focuses their resources where the public interest and risk is greatest. Those in-scope services not designated for regulation would be subject to general guidance from the regulator and could be designated at a later date were the risk to Irish consumers materially increases.

Further work is needed in our view on the inclusion of private communications services and the intersection of the Bill with users' fundamental right to privacy. There is no clear rationale behind the inclusion of private messaging and private cloud storage services. Such inclusion may also conflict with forthcoming EU directives on CSAM and ePrivacy.

The inclusion of private messaging and private cloud storage services risks measures which would require providers to prevent harms in a way that conflicts with users' privacy rights. These risks are greatest for one-to-one private communications like email and this should be excluded from the OSMR Bill noting that email is already specifically excluded from the EU's Digital Services Act proposals and the proposed Online Harms Bill in the UK. We believe there is also scope to remove other private communications services on the same grounds. Their inclusion is also likely to conflict with forthcoming EU directives on CSAM and ePrivacy.

Likewise, there is no clear rationale for the potential inclusion of search services, which are categorically different to content-sharing or social media services, which form the main focus of the proposed legislation. The Committee should give careful consideration to avoid disproportionate impacts on users' ability to navigate the web and rights to information. Other governments have recognised these risks by recommending that search is subject to a separate and more nuanced approach, for example the UK online harms framework proposes separate guidance for search services.

#### **Head 60 – Sanctions for non-compliance**

Technology Ireland is concerned about the possibility to block access to an online service and believe that any such measure should be imposed as a last resort remedy only in cases of systematic and serious breaches, when less intrusive means have failed.

#### **Part 5 - ON-DEMAND AUDIOVISUAL MEDIA SERVICES**

Technology Ireland does not have any input to make.

## **Part 6 - MISCELLANEOUS AVMSD PROVISIONS**

### **Head 76 – Content levy establishment & Head 77 Content levy scheme**

Please see specific observation on the application of the content levy.

## **REQUESTED SPECIFIC OBSERVATIONS**

### **(i) The application of the content levy**

Technology Ireland acknowledges the need for and desirability of supporting the provision of audiovisual programmes including feature films, animation and drama on Irish culture, heritage and experience. The government should support these content providers by ensuring that they are adequately resourced and skilled to take full advantage of the new technologies. In addition, some commercial operators provide assistance, for example by providing training to support independent journalism. They also provide distribution for public interest content which extends reach and engages new audiences in cost-effective ways and allows consumers to easily access and share content. This increased reach can provide new sources of funding for the creation and distribution of further content.

The need for subsidies is likely to remain and they can be provided, where appropriate to support Irish language, culture and sport. The criteria for deciding on the level of support should be no different than with more traditional media outlets, but again support must be given to organisations to allow them to maximise opportunities for exposure. The advent of online media also provides the possibility for more direct support to grass roots organisations and opens up new outlets. Effectively any organisation can now become a “broadcaster” allowing for example an Irish language theatre production to be streamed nationwide (even internationally to a wider diaspora) without necessarily depending on the support of a traditional broadcasting partner. Of course, partnerships with traditional broadcasting companies and the sharing of expertise could all form part of a healthy and thriving public service ecosystem. The new technologies provide new opportunities and capacity and in turn demand new ways of thinking and operating.

New technologies and new audiences also provide new ways of monetising content. Revenue from this can be fed back and added to traditional revenue sources such as licensing to fund the creation of subsequent content. To maximise these opportunities content creators and providers must be innovative and imaginative and embrace new technologies and new outlet opportunities.

Any move to impose a form of digital charge or tax would be counterproductive as it would discourage technology companies from providing outlets for public interest media, many of which enjoy the use of free sites allowing them to access wider audiences. The cost of such a levy would also likely be

borne by advertisers - including small businesses for whom digital advertising is the most affordable method available to them to reach customers and find new markets. Such a move would also be contrary to Ireland's general position regarding digital tax, which is that no unilateral actions should be taken and that any changes should be agreed internationally through the OECD.

## **(ii) The protection of children across online services and platforms**

Technology Ireland has always and continues to support on-line safety in particular with regard to protection of children. There are many regulations already in place to support these important objectives and Technology Ireland is continuing to work with our members at a national and international level to ensure that future regulations provide adequate and meaningful protection, while not imposing unrealistic technological demands.

In managing online content, the Media Commission must be careful not to overlap or contradict existing regulations. Digital platforms are already subject to a complex range of laws and statutory regulation. Further regulation has been proposed at European level in the recent proposals for a Digital Services Act and Digital Market Act. The Media Commission should focus its attention with regard to governance and regulation on the providers of content not on the carriers of that content, whether traditional or online. We welcome Government's commitment to maintaining the legal principles which separate the regulation of content from that of intermediaries engaged in its carriage and distribution.

## **Conclusion**

Technology Ireland is strongly supportive of the overall objectives of the Online Safety and Media Regulation Bill and, given that it also transposes the AVMSD into Irish law, we encourage its adoption without undue delay. We hope that our comments and observations in this submission are useful to this process.

We recognise that this consultation is only part of an ongoing dialogue with stakeholders. Technology Ireland and its members remain committed to supporting and valuing the work of the joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht and look forward to participating in future discussions, both with the Committee and with departmental officials.