

Regulation of children's access to online pornography – Recent legal developments

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This L&RS Note provides an overview of some recent legal developments in Ireland in relation to the regulation of children's access to pornography online.

The purpose of this *Note* is to provide an overview of recent developments in relation to the regulation of children's access to pornography online. Regulation in this area in Ireland has primarily emanated from developments in European Union law but may also be a response to growing concerns about online safety more broadly.

This *Note* will include commentary on the following:

- National Survey of Children, their Parents and Adults regarding Online Safety
- Definitions of harmful online content and age-inappropriate online content
- Role of Coimisiún na Meán
- EU Regulations – Digital Services Act and Digital Markets Act
- Developments in relation to online age verification

Previous L&RS Publications

This *Note* builds upon the following research previously published by the L&RS:

- [Insights into the OSMR Bill Part 1: Introduction and Background](#), 15 February 2022
- [Insights into the OSMR Bill Part 2: Societal context resource guide – empirical data on online usage](#), 21 February 2022
- [Insights into the OSMR Bill - Part 3: Introduction to the Current Legal and Regulatory Framework](#), 21 February 2022
- [Bill Digest: Online Safety and Media Regulation Bill 2022](#), 21 February 2022
- [Bill Briefing: Digital Services Bill](#) [internal access only]



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National Survey of Children, their Parents and Adults regarding Online Safety – Some Relevant Findings

In this section some of the relevant findings from a National Survey of Children, their Parents and Adults regarding Online Safety¹ will be set out before outlining recent legal developments in the following sections of this *Note*. Before setting out the survey findings it is important to note that, according to the researchers:

“The availability of robust evidence regarding children's exposure to sexual context is uneven. This is a topic that is methodologically and ethically challenging to research; yet it is vital to have information from children themselves to understand better how to target support to those who are most at risk of harm from such exposure.”²

Findings from the survey revealed that exposure to pornography was the most reported concern by parents for their child's online safety with 59 per cent of parents stating that they worry about this.³ The survey also found that “where 18% of children report seeing obviously sexual images online but only 10% of parents are aware of this”.⁴

In terms of children's experience, the results demonstrated that most children responding to the survey had not seen sexual images in the preceding year, with just one in five responding yes. The following is a breakdown of the responses:

- “18% of children aged 9 to 17 years in Ireland say that they have seen sexual messages on the internet in the past 12 months.
- Reports of seeing sexual images increases with age: 5% of children aged 9-10 say they seen images of this kind. This increases to 11% for 11–12-year-olds, 19% of 13–14-year-olds and one third (33%) of 15–17-year-olds report having received such images.
- Gender differences are notable with more boys than girls (21% vs. 16%) reporting exposure to sexual content.
- For the purposes of comparison, the [EU Kids Online 2020 study](#) of 19 European countries reported an average of 33% of 9–16-year-olds seeing images in the past year. This ranges from the lowest finding of 21% (France) to 43% (Czech Republic).⁴²
- The finding of 18% of Irish children in this age range is similar to the finding of 17% in the first [EU Kids Online survey](#) in Ireland in 2010. The follow up Net Children Go Mobile study in 2014 reported the slightly higher figure of 21%.”⁵

Of the children who stated they had seen sexual images; they were then asked about how often and on which platform they had seen such images. While the survey revealed that children are exposed to sexual images across all media, including from magazines and books, it also noted that “the most prevalent form of exposure is via a mobile phone, computer, tablet or any other online device”.⁶ Table 1 below presents findings by gender and age for sexual content via a mobile phone, computer, tablet or any other online device for children who had reported exposure to such images.

¹ Fieldwork for the research was carried by Ipsos MRBI between December 2019 and October 2020. Further details on the methodology are set out at pages 13-16 of the report. National Advisory Council for Online Safety (NACOS) (2021) [Report of a National Survey of Children, their Parents and Adults regarding Online Safety](#) (hereafter referred to as NACOS Survey)

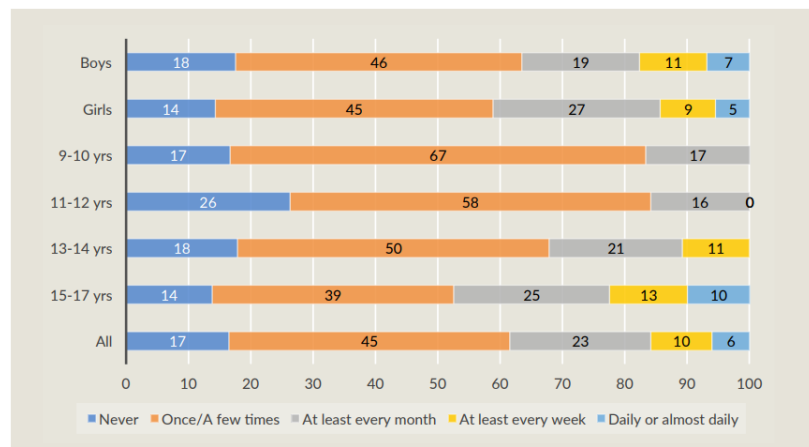
² [NACOS Survey](#), p 55.

³ [NACOS Survey](#), p. 118. For a broader discussion of this research, see L&RS (2022) Insights into the OSMR Bill Part 2: Societal context resource guide – empirical data on online usage.

⁴ [NACOS Survey](#), p 55.

⁵ [NACOS Survey](#), p 56.

⁶ [NACOS Survey](#), p 57.

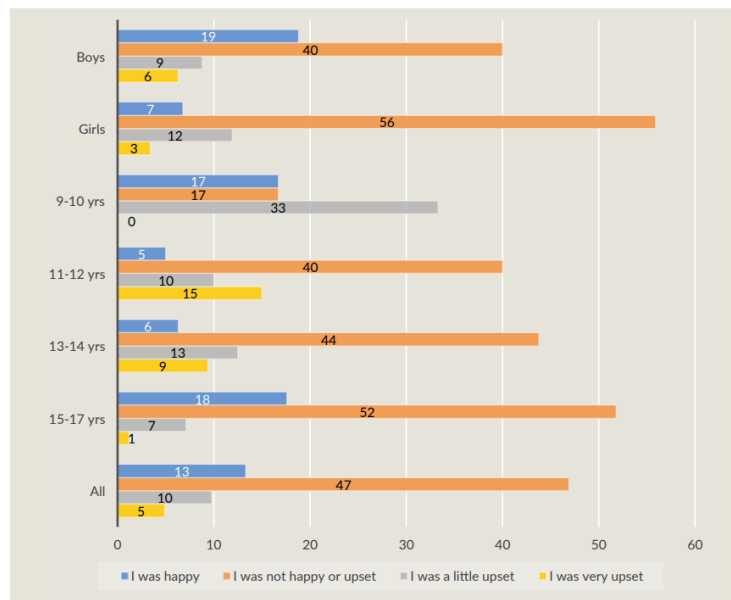
Table 1: Findings from National Survey of Children, their Parents and Adults regarding Online Safety – seeing sexual images online**Figure 25: Seeing sexual images (online only), by age and gender**

QG16 In the PAST YEAR, how often have you seen images of this kind in any of the following ways*Via a mobile phone computer tablet or any other online device

Base: All who have seen sexual images (QG15)

Source: [Report of a National Survey of Children, their Parents and Adults regarding Online Safety, p 56.](#)

In addition, the survey results also indicated that most children stated they were “not happy or upset” by the experience of seeing sexual images. The responses are outlined in more detail in Table 2 below.

Table 2: Findings from National Survey of Children, their Parents and Adults regarding Online Safety – seeing sexual images**Figure 26: Impact of seeing sexual images, by age and gender**

QG17 Thinking of the LAST TIME you have seen images of this kind how did you feel about it?

Base: All who have seen sexual images (QG15)

Source: [Report of a National Survey of Children, their Parents and Adults regarding Online Safety, p. 59](#)

Harmful online content and age-inappropriate online content: new definitions in the *Broadcasting Act 2009*

As mentioned earlier in this *Note*, regulation in this area has primarily emanated from the law of the European Union. For example, the [Online Safety and Media Regulation Act 2022 \(OSMR\)](#) was enacted on 10 December 2022.⁷ The Act transposes the revised Audiovisual Media Services Directive into Irish law,⁸ which sets out provisions to be applied to broadcast and on-demand audiovisual media, and for video-sharing platform services.

Part 11 of the [Online Safety and Media Regulation Act 2022](#) relates to online safety. [Section 45](#) inserts new provisions into the [Broadcasting Act 2009](#) which defines both “harmful online content” and “age-inappropriate online content”.

Harmful online content

“Harmful online content”, as defined in section 139A of the [Broadcasting Act 2009](#), may either:

- be offence-specific (involves an action which is an offence under certain enactments listed in Schedule 3);
- fall into other categories of harmful online content (including online content related to bullying; self-harm or suicide, or eating disorders); or
- meet a risk test, whereby online content gives rise to any risk to a person's life or a risk of significant (reasonably foreseeable) harm to a person's physical or mental health.

Section 139B of the *Broadcasting Act 2009* also enables the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media to specify a further category of harmful online content if such a proposal is recommended by [Coimisiún na Meán](#).

Therefore, online pornography does not appear to fall within the definition of harmful online content. However, offences related to the publication or distribution of intimate images without consent under the [Harassment, Harmful Communications and Related Offences Act 2020](#) are included in the definition of offence-specific harmful online content.

Age-inappropriate online content

Section 139D of the [Broadcasting Act 2009](#) defines ‘age-inappropriate online content’ as:

“online content that is likely to be unsuitable for children (either generally or below a particular age), having regard to their capabilities, their development, and their rights and interests, including in particular content consisting of —

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

⁷ Many of the provisions were commenced on 15 March 2023 by the Online Safety and Media Regulation Act 2022 (Commencement) Order 2023 (S.I. No. 71 of 2023).

⁸ [Directive \(EU\) 2018/1808](#) of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of Audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

While pornography is referred to in this section, it is not defined further. The Special Rapporteur on Child Protection recommended that such a definition be provided for.⁹ In its pre-legislative scrutiny report, the Joint Committee recommended that “where content such as pornography and gross or gratuitous violence are defined, these definitions are highly specific so as to avoid subjective interpretation or potential loopholes”.¹⁰

It may be of interest to note that a search of the term “pornography” on the online Irish Statute Book returned 79 references to the term in Acts and 15 references to the term in statutory instruments. The search result indicates that although pornography itself is not defined in statutory law, there are references to pornography in different contexts. Most of the references relate to the [Child Trafficking and Pornography Act 1998](#).

Role of Coimisiún na Meán

The [Online Safety and Media Regulation Act 2022](#) also provided for the establishment of a new media regulator, [Coimisiún na Meán](#), which was established on 15 March 2023.¹¹

Part 11 of the Act gives powers to [Coimisiún na Meán](#) to develop guidance and codes in relation to online safety. Such codes may apply to “relevant online services”, where An Coimisiún has issued a designation notice to a service in accordance with sections 139E, 139G and 139H of the [Broadcasting Act 2009](#). On 4 August 2023, [Coimisiún na Meán](#) published a [Notice of Designation of Video-Sharing Platform Services as a Category of Relevant Online Services \(VSPSs\)](#), which came into effect on 11 September 2023. Coimisiún na Meán is currently progressing the designation of Video Sharing Platform Services and will consult in the coming weeks with named services on their proposed designation as VSPSs.¹²

In developing such materials, section 139ZA of the [Broadcasting Act 2009](#) requires An Coimisiún to have regard to the following:

- “€ levels of availability of any online content, and of age-inappropriate online content, on relevant online services,
- (f) levels of risk of exposure to harmful online content, or of exposure of children to age-inappropriate online content, when using relevant online services,
- (g) levels of risk of harm, and in particular harm to children, from the availability of such content or exposure to it,”

On 11 July 2023, Coimisiún na Meán published a Call for Inputs, entitled Online Safety – Developing Ireland’s First Binding Online Safety Code for Video-Sharing Platform Services. The deadline for responses to the consultation was extended to 4 September 2023, following requests from industry and civil society organisations. In the [consultation paper](#), An Coimisiún sought views on a range of matters, including, but not limited to:

- What online harms should the Code Address? (Includes reference to children’s access to pornography) (pp. 7-9)

⁹ [Annual Report of the Special Rapporteur on Child Protection 2022](#), p. 16.

¹⁰ [Pre-legislative scrutiny report on the General Scheme of the Digital Services Bill 2023](#), p 22.

¹¹ [Broadcasting Act 2009 \(Establishment Day\) Order 2023 \(S.I. No. 72/2023\)](#).

¹² This information was provided by Coimisiún na Meán in response to a query from the Library and Research Service.

- How should the Code take account of the Digital Services Act (DSA)? (p.11)
- Age Verification and Age Assurance Feature (pp.14-15)
- Content Rating Feature (p. 16)
- Parental Controls (p. 16)

The Library and Research Service has been informed that Coimisiún na Meán intends to open a consultation on the draft Online Safety Code at the end of November 2023.¹³

Coimisiún na Meán are also required to develop a scheme whereby certain bodies, nominated by An Coimisiún, may notify the Coimisiún na Meán of:

“concerns relating to the availability of age-inappropriate online content on a designated online service or a relevant online service;¹⁴”

¹³ This information was provided by Coimisiún na Meán in response to a query from the Library and Research Service.

¹⁴ Section 139ZC(2)(c) of the [Broadcasting Act 2009](#).

EU Regulations: Digital Services Act and Digital Markets Act

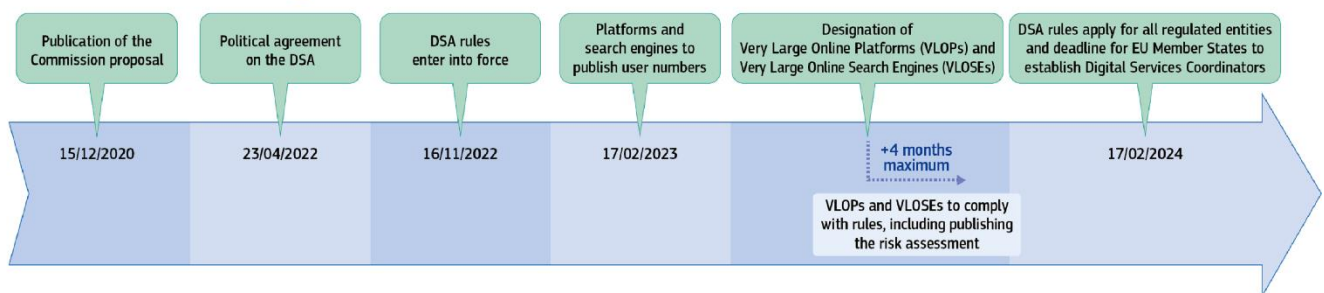
According to the [European Commission](#) website, "[t]he Digital Services Act and Digital Markets Act aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses".

While the Digital Services Act (DSA) is an EU Regulation and will therefore have direct effect in Irish law, it is necessary to give effect to some of the DSA's provisions with national legislative measures. The [General Scheme of the Digital Services Bill 2023](#) was published on 20 March 2023¹⁵ and the Bill is listed as priority for publication on the Autumn/Winter Legislative Programme.

Timeline for implementation of the DSA and DMA

The Digital Services Act¹⁶ was published on 27 October 2022 and came into force on 16 November 2022. A timeline for implementation is illustrated in the graphic below:

Timeline for Digital Services Act



Source: [European Commission](#).

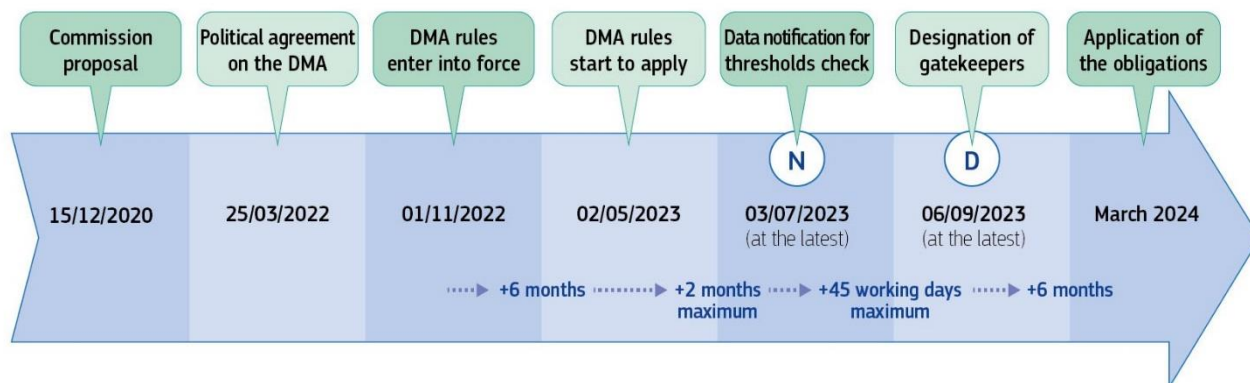
The Digital Markets Act¹⁷ was published on 12 October 2022 and came into force 1 November 2022. A timeline for implementation is illustrated in the graphic below:

¹⁵ The L&RS Bill Briefing page is available [here](#) [internal access only].

¹⁶ [Regulation \(EU\) 2022/2065](#) of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

¹⁷ [Regulation \(EU\) 2022/1925](#) of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

Timeline for Digital Market Act



Source: [European Commission](#)

Key provisions of the DSA regarding online safety of children

Article 28 of the Digital Services Act relates to the online protection of minors and states:

1. Providers of online platforms accessible to minors shall put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors, on their service.
2. Providers of online platform shall not present advertisements on their interface based on profiling as defined in Article 4, point (4), of Regulation (EU) 2016/679 using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor.
3. Compliance with the obligations set out in this Article shall not oblige providers of online platforms to process additional personal data in order to assess whether the recipient of the service is a minor.
4. The Commission, after consulting the Board, may issue guidelines to assist providers of online platforms in the application of paragraph 1."

Article 34 of the Digital Services Act also places an obligation on very large online platforms (VLOPs) and on very large online search engines (VLOSEs)¹⁸ to:

"identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services.

...

¹⁸ On 25 April 2023, the European Commission [designated the first set of Very Large Online Platforms and Search Engines](#) under the Digital Services Act, which includes a range of social media companies. On 6 September 2023 the European Commission also [designated six "gatekeepers"](#) under the Digital Markets Act, including Meta.

This risk assessment shall be specific to their services and proportionate to the systemic risks, taking into consideration their severity and probability, and shall include the following systemic risks:

...

(d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being."

Having carried out such risk assessments, providers of very large online platforms (VLOPs) and of very large online search engines (VLOSEs) are required to "put in place reasonable, proportionate and effective mitigation measures" to address such risks, including, for example:

"taking targeted measures to protect the rights of the child, including age verification and parental control tools, tools aimed at helping minors signal abuse or obtain support, as appropriate;"¹⁹

The recitals to the Digital Services Act also make several references to the protection of minors and the obligation of service providers to design services in a manner that ensure that content will not impair minors' health, physical, mental and moral development.²⁰ For example, Recital 87 to the Digital Services Act states:

"Providers of very large online platforms, in particular those primarily used for the dissemination to the public of pornographic content, should diligently meet all their obligations under this Regulation in respect of illegal content constituting cyber violence, including illegal pornographic content, especially with regard to ensuring that victims can effectively exercise their rights in relation to content representing non-consensual sharing of intimate or manipulated material through the rapid processing of notices and removal of such content without undue delay."

While recitals themselves are not legally binding, they may be construed as an indicator of legislative intent.

Overlap between the DSA and the OSMR

In its [pre-legislative scrutiny report on the General Scheme of the Digital Services Bill 2023](#), the Joint Committee on Enterprise, Trade and Employment recommended that a review be conducted of the potential areas of overlap with the [Online Safety and Media Regulation Act 2022](#).²¹

In its submissions to the Joint Committee the Department of Enterprise and Trade and Employment explained that:

"... one of the main reasons the Government decided Coimisiún na Meán would be the regulator for the Digital Services Act is because it is the regulator for the online safety legislation. There are similarities between the two codes. There is an overlap of the platforms and the search engines that will be in the scope of both. Both take a similar approach in obliging companies to institute procedures that make them more transparent

¹⁹ Article 35 of the Digital Services Act.

²⁰ See for example: Recitals 71, Recital 81 and Recital 89 to the Digital Services Act.

²¹ [Pre-legislative scrutiny report on the General Scheme of the Digital Services Bill 2023, p 22.](#)

and faster in dealing with complaints. They have similar objectives. The way the online safety legislation is framed means Coimisiún na Meán has the flexibility to consider one code when implementing the other if there are similar obligations under both.”²²

According to the Department of Enterprise, Trade and Employment's [website](#): “The Government has decided that it will designate Coimisiún na Meán as the Digital Services Coordinator.”

Therefore, it would appear that further consideration may be given to the legal framework set out in the *Online Safety and Media Regulation Act 2022* during the drafting of the Digital Services Bill.

²² [Pre-legislative scrutiny report on the General Scheme of the Digital Services Bill 2023, p 21.](#)

Developments in relation to online age verification at EU level

During [parliamentary scrutiny of the Online Safety and Media Regulation Bill](#), Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, Catherine Martin TD, referred to developments in relation to age verification as follows:

“Senator Conway raised age verification for children online. There is a real issue with young children accessing online services that simply were not designed with them in mind. It is an issue of which I am particularly aware, both as a parent of young children and as chair of the National Advisory Council for Online Safety, which recently released a comprehensive report on children's online safety. We need to find workable solutions to the negative uses of online spaces. Anonymity raises a number of complex issues, including privacy and data protection matters that would need to be resolved before a solution could be effectively implemented. In this regard, an EU-funded pilot programme called euCONSENT is in development. That pilot aims to deliver a system for online age verification and parental consent that balances the rights of children with the need to protect them from online harm and age-inappropriate content. The outcome of this pilot will inform any approach taken to this issue at EU and national level. I will ask An Coimisiún to look at this issue as a priority and to identify potential options and solutions to dealing with this complex issue. As I said previously, not everything can be dealt with in a single Bill but what matters now is that we have the framework in place.”

Therefore, it seems that like the legislative framework described above, developments in policy and practice in this area are being led by the European Union. Some of these initiatives will be briefly outlined below.

On 11 May 2022 the European Commission published [A Digital Decade for children and youth: the new European strategy for a better internet for kids \(BIK+\)](#), which made reference to pornography in the context of online harms as follows:

“Children report seeing pornography at early ages, affecting their views of what constitutes a healthy relationship.”

Flowing from this Strategy, the European Commission established a [Special group on the EU Code of conduct on age-appropriate design](#), which met for the first time on 13 July 2023, to develop a code to:

“build on the regulatory framework provided in the Digital Services Act (DSA) and assist with its implementation and will be in line with the EU's Audiovisual Media Services Directive (AVMSD) and General Data Protection Regulation (GDPR)”.

Moreover, the European Commission has set out its intention to strengthen age verification methods by means of a robust framework of certification and interoperability. The European Parliament has also called for better age verification methods to protect children online on several occasions.²³

²³ See further: European Parliamentary Research Service (2023) [Online age verification methods for children](#).

Concluding Summary

Therefore, as outlined above, recent legislative amendments and proposals are paving the way for greater regulation of children's access to pornography online. As noted above, age-inappropriate online content as set out in the *Broadcasting Act 2009*, as amended by the *Online Safety and Media Regulation Act 2022*, includes "pornography". In addition, the Digital Services Act, which will have direct effect in Ireland, places an obligation on providers of online platforms to ensure the online safety of children.

In terms of regulatory enforcement, the *Online Safety and Media Regulation Act 2022* has provided the recently established media regulator, Coimisiún na Meán, with powers to promote online safety of children. It is expected that this role will be enhanced when Coimisiún na Meán is designated as Ireland's Digital Services Coordinator under the EU's Digital Services Act. Coimisiún na Meán is currently drafting an Online Safety Code which will apply to Video-Sharing Platform Services and is expected to engage with such services and consult more widely on its draft code in the coming months.

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