

Upcoming legislation tackling harmful and illegal content online: a children's perspective

Introduction

For the last quarter of a century the online world has been a source of access to unfettered information, available to everyone in the world, where freedom of expression reigns supreme. We live in an information age, which we have come to realise can have devastating consequences when harmful and illegal content is left unregulated: misogyny, hate speech, xenophobia to name but a few categories of harmful content online. This is especially so when children, who account for one in three internet users, are concerned and are exposed to harmful or illegal content online.¹

The protection of persons, especially children, from harm is clearly a laudable goal and children are entitled to specific protection under international and European human rights law.² However, any measures to regulate harmful and illegal content online will inevitably impact on other fundamental rights such as freedom of expression (which has been held to include the right to 'offend, shock and disturb')³ privacy and data protection rights, freedom of assembly, freedom to conduct a business and accordingly any such measures must satisfy the requirements of legality, necessity and proportionality.⁴ The United Nations Committee on the Rights of the Child ('UNCRC') has said that '*a balance must be struck between children's right to information and freedom of expression and the requirement to regulate the media to protect children from harmful information especially pornographic materials and materials that portray or reinforce violence, discrimination and sexualized images of children*'.⁵

In this context, new legislation is emerging from the European legislature aimed at, among other things, providing a regulatory framework to counter harmful and illegal content online. This article will provide an overview of: a) the relevant provisions of the Online Safety and Media Regulation Bill ('OSMR Bill') which, *inter alia*, transposes

¹ Sonia Livingstone, John Carr and Jasmina Byrne, 'One in Three: Internet Governance and Children's Rights', Innocenti Discussion Paper No 2016-01 (2016) UNICEF Office of Research, Florence

² See e.g Article 19 of the United Nations Convention on the Rights of the Child [1990] which provides that: '*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*' See also Article 24 of the EU Charter of Fundamental Rights [2012] OJ C 326/02: '*children shall have the right to such protection and care as is necessary for their well-being.*'

³ *Handyside v the United Kingdom* App No 5493/72 (ECtHR, 7 December 1976), para 49.

⁴ Irish Human Rights and Equality Commission, Submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht on the General Scheme of the Online Safety and Media Regulation Bill (March, 2021) pg. 6.

⁵ UNCRC General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights

the provisions relating to harmful online content contained in the Revised Audiovisual Media Services Directive into Irish law ('Revised AMSD') and b) the Digital Services Act ('DSA') which is currently at draft legislation stage at the EU level. The manner in which these pieces of legislation can serve to protect children online will be explored below.

The Online Safety and Media Regulation ('OSMR Bill')

The OSMR Bill transposes the Revised AMSD into Irish law and overhauls the broadcasting regulatory landscape in Ireland. One of the biggest changes brought in by the Bill will be the dissolution of the Broadcasting Authority of Ireland ('BAI') and its replacement by a multi-person Media Commission, tasked with regulating the audio-visual sector. The Media Commission will include an Online Safety Commissioner, with specific responsibility for regulating content on social media platforms. The Media Commission will have the power, under Head 56, to designate '*relevant online services*' which will allow the Media Commission to identify individual services or categories of services to be regulated under the new regime. If a service is so designated it will have to comply with any codes issued by the Media Commission and will be subject to the Media Commission's regulatory and enforcement powers, which are set out below.

Part 4 of the General Scheme of the OSMR Bill deals with online safety and Head 49A provides a definition of '*harmful online content*' as:

'(a) material which it is an criminal 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 pertains and which a reasonable person would conclude was the intention of its dissemination,

(c) material which is likely to encourage or promote eating disorders and which a reasonable person would conclude was the intention of its dissemination, and,

(d) material which is likely to encourage or promote [self-harm or suicide] or provides instructions on how to do so and which a reasonable person would conclude was: (i) the intention of its dissemination and (ii) that the intention of its dissemination was not to form part of philosophical, medical and political discourse'

Both the Irish Council for Civil Liberties ('ICCL')⁶ and the Irish Human Rights and Equality Commission ('IHREC')⁷ have criticised the vagueness of the above definition of '*harmful online content*' saying that it may create uncertainty in terms of

⁶ ICCL Submission on the Online Safety and Media Regulation Bill (8 March, 2021)

⁷ IHREC Submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht (March, 2021)

application as well as the possibility that it may not meet the requirements of legality, necessity and proportionality. Both bodies have also predicted negative consequences of such vague definitions on the right to freedom of expression. It is recommended that the definition of *'harmful online content'* be re-considered to ensure that it is foreseeable, workable and will not have unintended consequences in the realm of self-censorship, or disproportionate constraints on freedom of expression.

Head 49A explicitly excludes from the definition of *'harmful online content'* material that comprises a defamatory statement; violates data protection or privacy law; material that violates consumer protection law and material that violates copyright law. It is suggested that these exclusions be reconsidered by the legislature given that such exclusions may result in a redress lacuna for those who experience harmful online content that may also constitute breaches of e.g data protection or consumer law. In such an instance, the Data Protection Commission nor the Competition and Consumer Protection Commission would have any statutory remit in relation to content moderation (e.g take down mechanisms) so victims may be left with no avenue of redress, which could, in turn, impact upon their right to an effective remedy under Article 13 of the European Convention on Human Rights.

Head 49B(1) keeps open the possibility of allowing the Media Commission to propose to include or exclude further categories of material from the definition of harmful online content. This statutory opportunity to respond to technological and societal developments by defining new categories of harmful content is to be welcomed in a realm where the law is constantly struggling to keep pace with technological advances and consequent online behaviour of individuals including children. However, as above, regard should be had to the criticisms made by the ICCL and the IHREC and any future categories of harmful online content would have to be specific, foreseeable, workable and, in a worst case scenario, it would have to be ensured that they do not fall to be determined as unconstitutional for vagueness.⁸

Head 49C provides a definition of *'age inappropriate online content'* as follows:

'material which may be unsuitable for exposure to minors and that they should not normally see or hear and which may impair their development, taking into account the best interests of minors, their evolving capacities and their full array of rights, and includes:

- (a) material containing or comprising gross or gratuitous violence,*
- b) material containing or comprising cruelty, including mutilation and torture, towards humans or animals, and*

⁸ See e.g comments of Hardiman J. in *The People (Director of Public Prosecutions) v Cagney* [2008] 2 IR 111, 121-122: *'From a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful.'*

(c) *material containing or comprising pornography*'

Head 49C refers to the best interests of the child and the fact that their capacity can be evolving, which is welcomed. The Council of Europe Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment state that: *'States and other relevant stakeholders should recognise the evolving capacities of children, including those of children with disabilities or in vulnerable situations, and ensure that policies and practices are adopted to respond to their respective needs in relation to the digital environment.'*⁹

Under Head 50A the Media Commission is mandated to prepare and revise online safety codes that shall be observed by designated online services. A non-exhaustive list of matters to be covered by such codes is set out at Head 50A(2)(a)-(e) and a list of matters that the Media Commission shall have regard to in drafting such codes is set out at Head 50A(3), one of which is *'the protection of minors and the general public from harmful online content'*.¹⁰ If a designated online service is in breach of online safety codes of the Commission or a direction of the Commission the Commission will be able to issue a compliance notice and then a warning notice,¹¹ failure to adhere to which can result in a sanction being imposed against the designated online service. Under Head 54A the Media Commission may seek any of the following sanctions: a) an administrative or financial sanction; b) leave of the High Court to compel a designated online service subject to a warning notice to take such steps that the Commission deems warranted to bring said service into a state of compliance, or c) leave of the High Court to compel internet service providers to block access to a designated online service in the State. There is also provision under Head 54 for senior management liability where an offence under Head 53 has been committed by a designated online service and the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect/wilful neglect on the part of a person in a senior management role.

Under Head 52B the Media commission is mandated to establish a scheme to receive notice of systemic issues with relevant and designated online services from nominated bodies. There is currently no individual complaints mechanism in the current draft of the Bill. The lack of an individual complaints mechanism has been raised by children's rights organisations. The Children's Rights alliance in their 2021 report card gave the Irish Government a score of 'D-' for efforts in the field of

⁹ Council of Europe, 'Guidelines to respect, protect and fulfill the rights of the child in the digital environment' (2018) 7, Recommendation of the Committee of Ministers, 74-75.

¹⁰ The explanatory note to Head 50A states that the online safety codes *'may provide for a wide range of matters, including measures to be taken by designated online services in relation to harmful online content and user complaints and issues handling'*.

¹¹ Head 53 of the OSMR Bill

children's online safety, explaining that a key consideration in giving that grade was the absence of an individual complaints mechanism in the OSMR Bill.¹²

It is suggested these provisions be amended to include an individual complaints mechanism as this is something that would strengthen the rights of children in enabling them to have their voice heard and to have the ability to speak out on matters affecting them.¹³

Digital Services Act

The European Commission in December, 2020, released its proposal for regulation of a Single Market for Digital Services; the Digital Services Act ("DSA") which would among other things amend parts of Directive 2000/31/EC ('the E-Commerce Directive'). The DSA seeks to keep pace with the rapid technological development, and associated risks, that have evolved over the last quarter of a century globally and as stated in section 2 of the Explanatory Memorandum of the DSA *'the proposal seeks to foster responsible and diligent behaviour by providers of intermediary services to ensure a safe online environment, which allows Union citizens and other parties to freely exercise their fundamental rights, in particular the freedom of expression and information'*. The DSA is essentially a form of draft or proposed legislation, by way of Regulation, which will have to go through the EU legislative process to become effective. Some of the main provisions with regard to the proposed regulation of illegal content online will be examined below from a children's perspective.

As was the case under the E-Commerce Directive, under Articles 3-5 of the DSA various providers called *'intermediary services'* (mere conduits,¹⁴ caching services,¹⁵ hosting services¹⁶) are exempted from liability for infringing content. Article 6 explicitly applies the exemption from liability to providers of intermediary services in situations where they carry out voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal content. This explicit statement is to be welcomed as an incitement for intermediary service providers to investigate and tackle illegal content online.

¹² Children's Rights Alliance, 'Report Card 2021'
<https://www.childrensrightrights.ie/sites/default/files/Report-Card-23-Feb-2021.pdf> accessed on 21 March 2021

¹³ Article 12.1 of the United Nations Convention on the Rights of the Child [1990] states that: *'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'*

¹⁴ Article 2(f) of the DSA defines a *'mere conduit'* a *'service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network'*.

¹⁵ Article 2(f) defines a *'caching service'* as a service that *'consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request.'*

¹⁶ Article 2(f) of the DSA defines a *'hosting service'* as service that *'consists of the storage of information provided by, and at the request of, a recipient of the service'*

However Article 7 clarifies that there is no general obligation to monitor imposed on such providers *'nor actively to seek facts or circumstances indicating illegal activity.'*

The requirements under Article 14 that *'providers of hosting services shall put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content'* are to be welcomed. According to Article 15, where a provider of hosting services removes content provided by a user, the provider must deliver a statement of reasons to such a user for its decision to remove such content. An internal complaint handling system against decisions to remove content is prescribed under Article 17.

The concept of *'trusted flagger'* is introduced in Article 19. Article 19.2 states that:

'the status of trusted flaggers under this Regulation shall be awarded, upon application by any entities, by the Digital Services Coordinator of the Member State in which the applicant is established, where the applicant has demonstrated to meet all of the following conditions:

- a) it has particular expertise and competence for the purposes of detecting, identifying and notifying illegal content;*
- b) it represents collective interests and is independent from any online platform;*
- c) it carries out its activities for the purposes of submitting notices in a timely, diligent and objective manner'.¹⁷*

Under Article 19, trusted flaggers' notifications to online platforms must be treated with priority.

While it remains to be seen exactly what type of organisations emerge as trusted flaggers it is suggested that this concept is to be welcomed as an opportunity for a wide variety of organisations, representing collective interests, and meeting the other criteria set out above, to play a crucial role as independent agencies with the objective of tackling the dissemination of illegal content online. It is further suggested that a liberal approach be taken to the type of organisations that could be so designated to include for example children's rights organisations; child protection or parental control organisations/companies (whether public or private) which organisations could play a very important role in detecting illegal content online and preventing harm to children.

¹⁷ As to what kind of organisation can become a trusted Flagger, Recital 46 of the DSA states that *'such entities can be public in nature, such as, for terrorist content, internet referral units of national law enforcement authorities or of the European Union Agency for Law Enforcement Cooperation ('Europol') or they can be non-governmental organisations and semi-public bodies, such as the organisations part of the INHOPE network of hotlines for reporting child sexual abuse material and organisations committed to notifying illegal racist and xenophobic expressions online. For intellectual property rights, organisations of industry and of right-holders could be awarded trusted flagger status, where they have demonstrated that they meet the applicable conditions.'*

Under Article 20 of the DSA, online platforms will have the ability, after issuing a warning, to suspend the provision of their services to users that frequently provide manifestly illegal content.

Very large online platforms (defined under Article 25 as platforms with at least 45 million active monthly users in the EU) are subject to extra obligations under the DSA to tackle illegal content. Under Article 26 they will have to analyse and assess at least once a year any '*significant systemic risks*' arising from the performance of their services. This risk assessment shall be specific to their services and shall include: the dissemination of illegal content; any negative effects for the exercise of the fundamental rights to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child, as enshrined in Articles 7, 11, 21 and 24 of the Charter respectively; as well as any intentional manipulation of their service. Under Article 28 very large online platforms will have to submit annual independent audits to confirm compliance with DSA. Again this is to be welcomed as a shifting of accountability onto such large platforms to tackle the proliferation of illegal content online. It is suggested that accountability could be made even more explicit where illegal content involving children (such as child sexual abuse or child pornography) is concerned.

As regards penalties for non-compliance, under the DSA each Member State is permitted to determine applicable penalties with the maximum penalty for failure to comply with provisions of DSA being 6% of the service provider's annual turnover. Provision is also made for the European Commission to impose periodic penalties (not exceeding 5% of the average daily turnover) in order to compel such platforms to: supply accurate information; submit to inspections; comply with interim orders; comply with legally binding commitments offered by such platforms during proceedings and comply with any non-compliance decisions adopted by the Commission.

Summary

In summary, from a children's perspective, the provisions of the OSMR Bill and the DSA are to be welcomed as a step in the right direction in tackling harmful and illegal content online and creating a regulatory framework to counter the dissemination of harmful and illegal content where children are concerned.

In relation to the OSMR Bill, it is suggested, in line with the submissions from the IHREC and the ICCL that further consideration be given to the competing rights at issue to ensure that, in particular, engagement or interference with the rights to freedom of expression and privacy is proportionate. Secondly, it is also suggested that the definition of '*harmful online content*' may need to be re-examined to ensure that it is compliant with the requirements of legality, necessity and proportionality. Thirdly, as suggested above, it is recommended that an individual complaints mechanism for victims of harmful online content be made available, particularly to enable children to vindicate their right to be protected from harm. Fourthly, it is suggested that the exclusions from the definition of '*harmful online content*' be re-

examined to ensure that no unintended lacunae in avenues of redress arise for victims.

As regards the DSA, it is suggested that even more could be done in terms of protecting children online from illegal content. For example it is suggested that explicit obligations (and perhaps increased penalties for failure to comply) could and should be placed on service providers to motivate service providers to make serious inroads in tackling illegal online content concerning children. Regard should be had, for example, to the child-specific provisions of the General Data Protection Regulation ('GDPR') such as Article 12.1¹⁸ and Article 8.¹⁹ Further regard should be had to recommendation of the Council of Europe that *'States should ensure that their legal frameworks encompass the full range of unlawful acts which can be committed in the digital environment, while at the same time providing for suitable preventive and restorative approaches to peer-to-peer online violence and abuse amongst children, with a view to preventing the criminalisation of children.'*²⁰

¹⁸ Article 12.1 of the GDPR refers to the requirement on controllers to provide information to data subjects. It sets out the requirements of how that information should be presented and includes the phrase *'in particular for any information addressed specifically to a child.'*

¹⁹ Article 8 of the GDPR sets out conditions applicable to a child's consent to data processing.

²⁰ Council of Europe, 'Guidelines to respect, protect and fulfill the rights of the child in the digital environment', [\[11\]](#) (2018) 7, Recommendation the Committee of Ministers, 74-75.