

Consultation Document

Consultation on the proposed designation of video-sharing platform services as a category of relevant online services under the Broadcasting Act 2009 as amended.

Publication date: 28 June 2023

Coimisiún na Meán

Contents

1. Overview	3
2. Background and legislative context	3
3. Why are we consulting on VSPS Category Designation?	4
4. Issues for consideration and response	5
5. How can I respond?	5
6. Timeframe for responses	5
7. Use of information	5
8. Freedom of Information	6
9. Registration	6
Appendix 1	7
Statutory powers and duties relating to the designation of video sharing platform services	7
Appendix 2	11
Draft Notice of VSPS Category Designation	11

Coimisiún na Meán

1. Overview

Coimisiún na Meán (the “**Commission**”) has both the power and obligation under the Broadcasting Act 2009 as amended by the Online Safety and Media Regulation Act 2022 (the “**2009 Act as amended**”) to designate **video-sharing platform services**, the provider of which is under the jurisdiction of the Irish State, as a **category of relevant online services** to which online safety codes may be applied.¹

In accordance with its statutory powers and having had regard to its statutory duties, the Commission is now proposing to designate such video-sharing platform services as a category of relevant online services and we are consulting on this proposal.

This consultation document explains the background and legislative context to the category designation of video-sharing platform services, the consultation process and how you can submit your views and comments to the Commission.

Appendix 1 details the relevant statutory provisions in the 2009 Act as amended that empower and require the Commission to undertake this designation.

Appendix 2 includes a draft *Notice of Video-Sharing Platform Services Category Designation*, and we are seeking views on this Notice as well as the overall proposal.

It is recommended that you review the Appendices prior to providing a response.

2. Background and legislative context

The Commission was established on 15 March 2023 in accordance with the provisions of the 2009 Act as amended. The Act establishes a new regulatory framework for online safety and transposes into Irish law the revised Audio-Visual Media Services Directive (the “**AVMS Directive**”).² The Act is applicable to broadcasting services, on-demand audiovisual media services, video-sharing platform services and other relevant online services established in the State on a European Union (EU)-wide basis.

The AVMS Directive requires Member States to ensure that video-sharing platform service providers under their jurisdiction take appropriate measures to protect young people from potentially harmful content (which may impair their physical, mental or moral development) and to protect the general public from incitement to violence or hatred and illegal content (such as public provocation to commit terrorist offences, child sexual exploitation and abuse, and racism or xenophobia). It also requires Member States to ensure that video-sharing platform service providers comply with requirements and standards around advertising on the services.³

¹Section 139E(1) of the 2009 Act as amended confers on the Commission the power to designate an online service as a service to which online safety codes may be applied. Section 139E(2) provides that this designation may be made in relation to a named service or in relation to all services falling within a category. Section 139G requires the Commission to designate video-sharing platform services, under Irish jurisdiction, as both a named service and a category of services under section 139E.

² Directive 2010/13 as amended by Directive 2018/1808:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:02010L0013-20181218&qid=1686866051928>.

³ Article 28b(1).

Coimisiún na Meán

Video-sharing platform services (“**VSPS**”) are a type of online service where users can upload, share and engage in video and other social media content. Under the 2009 Act as amended, VSPS are identified as a form of relevant online service that the Commission *must* designate, both as a category of services⁴ and as a named service where the provider of the service is under the jurisdiction of the State.⁵

The 2009 Act as amended provides that online safety codes may be applied to designated online services and *shall* be applied to designated VSPS in order to ensure that service providers take appropriate measures to provide the protections referred to in Article 28 and comply with the requirements set out in Article 9(1) of the AVMS Directive.⁶ Designation is, therefore, a necessary procedural first step in ensuring that video-sharing platform services comply with online safety codes that will be developed and enforced by the Commission and with other requirements of the 2009 Act as amended.

For information, the text of the relevant statutory provisions is set out in *Appendix 1*.

3. Why are we consulting on VSPS Category Designation?

Before designating a category of services, the Commission is required to consult with a number of persons, including an organisation representative of providers of services falling within the relevant category, the providers of those services (so far as the Commission is able to consult them), any advisory committee the Commission has established for assistance and advice on designation,⁷ and any other person the Commission considers appropriate.⁸

In accordance with the statutory consultation procedure the Commission invites comments and observations from interested members of the public, from Technology Ireland (the organisation representative of providers of VSPS falling within this category of services), from the individual VSPS established in the State who are known to the Commission and also any other interested parties. The Commission has not, at this time, established any advisory committee.

A draft *Notice of Video-sharing Platform Services Category Designation* can be found at *Appendix 2*.

The Commission will take account of submissions made in response to this consultation and make a decision regarding the category designation of VSPS.

Note: This consultation relates solely to the Commission’s statutory obligation to designate VSPS as a **category** of relevant online services pursuant to section 139G(1) of the 2009 Act as amended. The Commission is not consulting on the designation of **individual** named VSPS services at this time.

⁴ Section 139G(1) of the 2009 Act as amended.

⁵ Section 139G(2) of the 2009 Act as amended.

⁶ Section 139K of the 2009 Act as amended.

⁷ Section 19 of the 2009 Act as amended enables the Commission to establish committees to assist and advise it on matters relating to its functions or on such other matters as the Commission may determine. Section 139H requires the Commission to consult with any advisory committees established under section 19 for that purpose (i.e. to assist and advise the Commission on designation).

⁸ Section 139H(1) of the 2009 Act as amended prescribes the consultation procedure.

Coimisiún na Meán

4. Issues for consideration and response

Having regard to above background and legislative context, we invite you to submit your comments on the following matters:

- 1) The Commission's proposal to discharge its statutory obligation pursuant to Section 139G to designate, as a category of relevant online services under section 139E of the 2009 Act as amended, video-sharing platform services, the providers of which are under the jurisdiction of the State.
- 2) The draft Notice of Video-Sharing Platform Services Category Designation at *Appendix 2*.

5. How can I respond?

Your response should be submitted in writing by email or by post/hand to one of the following addresses:

Email: VSPSdesignation@cnam.ie **Contact Person:** Caroline Keville

Post: VSPS Category Designation, Coimisiún na Meán, 2-5 Warrington Place, Dublin 2.

Please note the following in preparing your response:

- Submissions should be set out clearly and relate to the issues for consideration and response at section 4 above. Responses outside the material scope of these issues will not be considered.
- Responses submitted in electronic format should have read/write access.
- Please note that third party disks or USB drives cannot be accepted.
- Submissions are subject to a 20-page limit.
- Information provided via hyperlinks will not be considered.
- Please see section 7 below in relation to confidentiality.

6. Timeframe for responses

All responses to this consultation must be submitted to the Commission by 12 noon on **Wednesday 26 July 2023**.

If you require any assistance with making a response, please contact the Commission by email at VSPSdesignation@cnam.ie or by phone on 01 644 1200.

7. Use of information

Personal data

The Commission shall comply with its obligations under the General Data Protection Regulation (“**GDPR**”), the Data Protection Act 2018 and any other applicable data privacy laws and regulations.

Coimisiún na Meán

The Commission is obligated and committed to protecting all personal data submitted. The Commission has an appointed Data Protection Officer who is registered with the Data Protection Commission.

You can find out more on how the Commission processes personal information in the Commission's published policy at: <https://www.bai.ie/en/about-us/data-protection-policy/>

For this process, the Commission will collect the name, email address and any other personal information that is included in your response. The name of the respondent to the consultation and the response provided will be made publicly available. However, the Commission will not make publicly available your contact details, such as your address, phone number or email.

The information collected will be used only for the purposes of this review and for no other purpose.

Confidential information

It is the Commission's intention to publish submissions received in response to this consultation.

Please provide your response as a non-confidential document, with confidential information contained in a separate annex, or submit a redacted non-confidential version together with your response.

The Commission will treat confidential information in line with its [Consultation Guidelines](#) published on 28 June 2023.

8. Freedom of Information

Information held by the Commission is subject to its obligations under law, including under the Freedom of Information Act 2014. The Commission will consult you about information you mark as confidential before making a decision on any Freedom of Information request received.

9. Registration

If you are an online service provider under the jurisdiction of the Irish State, you are invited to contact the Commission and register at the link below to receive our news, updates and publications.

[Sign Up For News Updates](#)

Appendix 1

Statutory powers and duties relating to the designation of video-sharing platform services

This appendix details the legislative basis for the requirement for the Commission to designate video-sharing platform services, the providers of which are under the jurisdiction of the State as a category of relevant online services.

The relevant statutory provisions relate to: 1) the powers and duties of the Commission in relation to designation of relevant online services; 2) the definition and characteristics of VSPS; and 3) jurisdiction.

1. The Commission's Powers and Functions

The powers, functions and duties of the Commission are set out in Section 7 of the 2009 Act as amended.

2. Designation Powers and Duties

Section 139E of the 2009 Act as amended confers on the Commission specific powers and duties in relation to the designation of relevant online services in accordance with the procedures laid down in Chapter 2 of the Act as follows:

139E. (1) The Commission may designate a relevant online service as a service to which online safety codes may be applied under Chapter 3.

(2) A designation under this section may be made in relation to a named service, or in relation to all services falling within a category of services described in the designation (and a service may be designated both as a named service and as falling within a category).

Section 139G requires the Commission to designate VSPS as relevant online services. Section 139G states:

139G. (1) The Commission shall designate as a category of services under section 139E the video-sharing platform services the provider of which is under the jurisdiction of the State.

(2) The Commission shall designate as a named service under section 139E any relevant online service that appears to the Commission to be a video-sharing platform service the provider of which is under the jurisdiction of the State.

(3) Where the Commission has reason to believe that a relevant online service may be a video-sharing platform service the provider of which is under the jurisdiction of the State, the Commission shall issue a notice under section 139F requiring the provision of any information that appears to the Commission to be relevant for the purpose of complying with subsection (2).

(4) For the purposes of subsections (2) and (3) the Commission shall have regard to any guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion in the definition of a video-sharing platform service in Article 1(1)(aa) of the Directive.⁹

⁹ The AVMS Directive.

Coimisiún na Meán

This means that the Commission must designate both (a) VSPS as a category of services pursuant to S139G(1) and (b) any individual online service that appears to be a VSPS under the jurisdiction of the State, as a named service pursuant to S139G(2).

3. Statutory Consultation

The statutory consultation procedure is set out in section 139H of the 2009 Act as amended and requires the Commission, before designating services falling within a category of services, to consult with:

- (a) an organisation representative of providers of services falling within the category of services if there is such an organisation,*
- (b) the providers of the services so far as the Commission is able to consult with them,*
- (c) any advisory committee the Commission has established for that purpose under section 19, and*
- (d) any other person the Commission considers appropriate.*

4. Notice and Effective Date of Designation

Section 139H of the 2009 Act as amended provides that, in the case of a category of services, the Commission's designation shall take effect at the end of the period of 28 days after the date on which notice of the designation is published by the Commission on its website (www.cnam.ie).

5. Register of Designated Online Services

Section 139J of the 2009 Act as amended requires the Commission to maintain and make available to the public a Register of (a) the services designated as named services, and (b) the categories of services designated by the Commission.

6. Statutory Interpretation and Definitions

Video-sharing platform services

Pursuant to section 2(2) of the 2009 Act as amended, a video-sharing platform service:

means, subject to subsection (3), a service, within the meaning of Articles 56 and 57 of the Treaty on the Functioning of the European Union, where—

- (a) the principal purpose of the service is devoted to,*
- (b) the principal purpose of a dissociable section of the service is devoted to, or*
- (c) an essential functionality of the service is devoted to,*

providing audiovisual programmes or user-generated videos, or both, by electronic communications networks, to the general public, in order to inform, entertain or educate.

Coimisiún na Meán

Subsection 3 states:

(3) A service is a video-sharing platform service within subsection (2) only if the provider of the service—

(a) does not have effective control over the selection of the programmes and videos referred to in that subsection, but

(b) determines their organisation, by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.

Article 1(aa) of the AVMS Directive defines a video-sharing platform service as:

a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

The following definitions from the AVMS Directive are also relevant in the context of the above definition:

“programme” means a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature-length films, video clips, sports events, situation comedies, documentaries, children’s programmes and original drama;

“user-generated video” means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user;

“video-sharing platform provider” means the natural or legal person who provides a video-sharing platform service;

“editorial responsibility” means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

7. Jurisdiction

Section 2B of the 2009 Act as amended sets out the method for determining whether the provider of a video-sharing platform service is under the jurisdiction of the State (or of another EU Member State):

(1) For the purposes of this Act, the question whether the provider of a video-sharing platform service is under the jurisdiction of the State (or another Member State) is to be determined in accordance with this section.

Coimisiún na Meán

(2) The provider of a video-sharing platform service is under the jurisdiction of a Member State if the provider is established in the territory of that state.

(3) If the provider of a video-sharing platform service is not established in a Member State, then the provider is under the jurisdiction of a Member State if—

(a) it has a parent undertaking or a subsidiary undertaking that is established in the territory of that state, or

(b) it is part of a group, and another undertaking of that group is established in the territory of that state.

(4) For the purposes of subsection (3), if in the provider's case there are different undertakings (parent undertaking, subsidiary undertakings, or other undertakings in the same group) that are established in different Member States, the provider shall be deemed to be established—

(a) if it has a parent undertaking that is established in a Member State, in that Member State,

(b) if paragraph (a) does not apply but it has a subsidiary undertaking established in a Member State, in that Member State, and

(c) if paragraphs (a) and (b) do not apply but another undertaking in the group is established in a Member State, in that Member State.

(5) If subsection (4)(b) applies but there are different subsidiary undertakings established in different Member States, the provider shall be deemed to be established in the Member State where one of the subsidiary undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.

(6) If subsection (4)(c) applies but there are different undertakings in the group established in different Member States, the provider shall be deemed to be established in the Member State where one of the undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.

(7) In this section—

(a) 'established' has the same meaning as in Article 3(1) of the E-Commerce Directive;¹⁰

(b) 'parent undertaking' means an undertaking that controls one or more subsidiary undertakings;

(c) 'subsidiary undertaking' means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking;

(d) 'group' means a parent undertaking, all its subsidiary undertakings and all other undertakings having economic and legal organisational links to them.

¹⁰ Directive 2000/31/EC.

Appendix 2

Draft Notice of VSPS Category Designation

Notice of Designation of Video-Sharing Platforms as a Category of Relevant Online Services

Coimisiún na Meán (the “Commission”), in exercise of the powers and duties conferred on it by section 139E and section 139G of the Broadcasting 2009 Act as amended (“Act”), and after consultation with the persons specified in section 139H of the Act, hereby designates as a category of relevant online services to which online safety codes may be applied **video-sharing platform services, the providers of which are under the jurisdiction of the State.**

Effective date

Pursuant to Section 139H(3) of the Act, this designation becomes effective at the end of the period of 28 days after the date of the Commission’s publication of this notice on its website. The effective date of this designation is [xxx].

Date of publication of this Notice is [xxx].