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## Response to Consultation

**Response to Consultation on the Coimisiún na Meán e-Commerce Compliance Strategy relating to Online Safety Codes, Online Safety Guidance Materials & Advisory Notices**

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# Coimisiún na Meán

## 1. Background and legislative context

Coimisiún na Meán (the "**Commission**") was established on 15 March 2023 in accordance with the provisions of the Broadcasting Act 2009 as amended by the Online Safety and Media Regulation Act 2022 (the "**Act**"). 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**").<sup>1</sup> The Act is applicable to broadcasting services, on-demand audiovisual media services and video-sharing platform services established in the State on a European Union (EU)-wide basis.

The AVMS Directive requires Member States to ensure that VSPS providers under their jurisdiction take appropriate measures to protect minors 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 VSPS providers comply with requirements and standards around advertising on the services.<sup>2</sup>

The Act provides that online safety codes adopted under Section 139K of the 2009 Act may be applied to designated online services and *shall* be applied to VSPS (both as a category of service and on individual providers) to reduce harmful content online and to ensure that service providers take appropriate measures to provide the protections referred to in Article 28 of the AVMS Directive.

Section 139ZF of the Act requires the Commission to prepare an e-Commerce Compliance Strategy setting out its approach to ensuring that:

*"(a) no requirements that are inconsistent with the limitations placed on the liability of intermediary service providers by regulations 16 to 18 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003), and*

*(b) no general obligation on providers, when providing the services covered by regulations 16 to 18 of those Regulations, to monitor the information which they transmit or store, and no general obligation actively to seek facts or circumstances indicating illegal activity, contrary to Article 15 of the E-Commerce Directive,*

*are imposed, by virtue of online safety codes or online safety guidance materials or advisory notices."*

The E-Commerce Directive<sup>3</sup> was transposed into Irish law by S.I. No. 68 of 2003 - European Communities (Directive 2000/31/EC) Regulations 2003 (the "**2003 Regulations**"). Regulations 16 to 18 of the 2003 Regulations exempt intermediary service providers from liability for unlawful content transmitted or uploaded by a user. There are some conditions attached to this, such as that the provider must not have actual knowledge of the unlawful nature of the content and must remove it expeditiously if it becomes aware of the unlawful activity.

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<sup>1</sup> Directive 2010/13 as amended by Directive 2018/1808:  
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:02010L0013-20181218&qid=1686866051928>.

<sup>2</sup> Article 28b(1).

<sup>3</sup> Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

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Article 15 of the E-Commerce Directive provides that Member States must not impose a general obligation on intermediary service providers to monitor the information which they transmit or store, nor may Member States impose a general obligation actively to seek facts or circumstances indicating illegal activity.

## 2. Consultation on e-Commerce Compliance Strategy

Before preparing an e-Commerce Compliance Strategy relating to Online Safety Codes, Online Safety Guidance Materials & Advisory Notices ("**Strategy**"), the Commission is required to consult any advisory committee the Commission has established for that purpose, and any other person the Commission considers appropriate.<sup>4</sup>

In accordance with the statutory consultation procedure, on 11 July 2023, the Commission published a Consultation Document on its proposed Strategy.<sup>5</sup> The Commission invited comments and observations from interested members of the public. The Commission has not, at this time, established any advisory committee. The consultation process was also promoted via the Commission's website, news alerts and social media.

Interested parties were invited to provide comments on, suggested additions or amendments to the draft Strategy at Appendix 2 of the consultation document. The closing date for submissions was 16 August 2023.

One (1) response was received. The respondent was Technology Ireland ("**TI**"). A copy of TI's submission is available on the Commission's website: [www.cnam.ie/publications](http://www.cnam.ie/publications).

This Response to Consultation provides a summary of the submission received and explains the outcome of the consultation process.

## 3. Overview of the Response arising from the Consultation

The Commission has considered and taken account of all aspects of TI's submission. The submission and the Commission's response to the most salient points are summarised below.

### *General comments*

TI welcomed the opportunity to respond to the consultation and recognised that many aspects of the proposed approach under the draft Strategy take a sensible approach to ensuring the Strategy's purpose is achieved. In particular, TI highlighted points (2), (3) and (6) of the draft Strategy as "important measures that go towards reflecting this purpose".

Throughout the submission, TI emphasised the importance of exemptions from liability under the E-Commerce Directive and the EU Digital Services Act ("**DSA**").<sup>6</sup> It expressed concerns that the draft Strategy would allow the Commission to include provisions in online safety codes and associated materials that cut across areas reserved for the DSA. TI proposed a number of drafting amendments which, in its view, would ensure consistency of the Strategy with the DSA. It also suggested that a TRIS

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<sup>4</sup> Section 139ZF(2) of the Act.

<sup>5</sup> <https://www.cnam.ie/coimisiun-na-mean-seeks-views-for-developing-irelands-first-binding-online-safety-code/>

<sup>6</sup> Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

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notification<sup>7</sup> may be required in the event that the Strategy did not ensure appropriate harmonisation with EU law (in particular the DSA).

TI expressed the view that the draft Strategy fails to recognise certain protections available to service providers under the DSA, and suggested amendments to ensure consistency with the exemptions from liability. TI also suggested clarifying the provision of the Strategy in relation to the imposition of monitoring obligations, to ensure consistency with the prohibition, under Article 15 of the E-Commerce Directive/ Article 8 of the DSA, on imposing a general obligation on service providers to monitor content.

The Commission is fully cognisant of the obligations and limitations under the E-Commerce Directive and the DSA. However, it observes that the TI submission gives weight to these measures almost to the exclusion of the Commission's powers and obligations under the Act and the AVMS Directive. In particular, the Act provides that online safety codes adopted under Section 139K of the 2009 Act may be applied to designated online services and shall be applied to VSPS to reduce harmful content online and to ensure that service providers take appropriate measures to provide the protections referred to in Article 28 of the AVMS Directive. The Commission also notes that the DSA applies without prejudice to the AVMS Directive.

The imposition of the measures referred to in Section 139K(2) of the Act is required under EU law by Article 28b of the AVMS Directive, which provides that "*without prejudice to Articles 12 to 15 of [the e-Commerce Directive], Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect...*" minors and the general public from harmful content.

The Commission believes there is no merit to TI's arguments in support of a TRIS notification. The Strategy is intended as a framework, not an exhaustive recitation of the law, and is one of a number of elements to be taken into account by the Commission in preparing Codes, guidance materials and advisory notices. The Commission will in all cases take account of relevant obligations under the Act, the E-Commerce Directive, the AVMS Directive and the DSA, and this is made clear in the Strategy (in particular, section A and paragraphs (2), (3), (6), (11) and (13)).

The TI submission contains comments and suggestions which, in the Commission's view, go beyond the Strategy and relate to the substance of future measures and their compliance (or non-compliance) with specific provisions of the E-Commerce Directive and/or the DSA. TI also seeks guidance on how the Commission intends to apply certain obligations. The Commission considers that observations on the compliance of particular measures will be more properly addressed during consultations relevant to specific proposals for Codes and/or guidance materials and does not consider them further in this response.

## *Specific drafting proposals*

The Commission has considered the comments submitted by TI on specific paragraphs of the draft Strategy. These are addressed following the paragraph order of the draft Strategy.

In TI's view, paragraphs (2) and (3) of the draft Strategy imply that the protections under Article 6 of the DSA are available only to hosting providers, and not to caching or mere conduit providers. The

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<sup>7</sup> A notification to the European Commission under Directive (EU) 2015/1535 in relation to draft technical regulations on, inter alia, information society services. The TRIS procedure is designed to ensure that proposed national measures are compatible with EU law and internal market principles.

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Commission has clarified the wording of paragraph (3).

TI suggested expanding paragraphs (2) and (3) of the draft Strategy to make specific reference to guidance materials and advisory notices. The Commission has clarified the wording of paragraph (2) to include reference to guidance materials and advisory notices. The Commission does not consider that it is required to amend paragraph (3) as this is concerned with online safety codes only. TI also proposed that paragraphs (4) and (5) should at a minimum be expressed as being subject to paragraphs (2) and (3). The Commission agrees to clarify that paragraphs (4) and (5) are subject to the principles established in paragraphs (2) and (3).

TI suggested including a reference in paragraph (2) to Article 7 of the DSA, to recognise that intermediary service providers may retain the benefit of exemptions from liability while carrying out voluntary investigations. The Commission is of the view that nothing in the draft Strategy contradicts Article 7 of the DSA; nevertheless it is satisfied to include a new reference to Article 7 in paragraph (2) of the Strategy to recognise the liability exemptions related to voluntary investigations contained therein.

TI was concerned that paragraph (4) (which states that online safety codes may contain provisions that make it a contravention not to remove unlawful content expeditiously once a provider becomes aware of the unlawful nature of the content, and that the Commission may further specify what would be regarded as expeditious) may redefine the liability exemption expressly set out under Article 6 of the DSA. Furthermore, TI expressed concern that paragraph (4) envisages that online safety codes may prescribe what constitutes "expeditious" for the purposes of Article 6. The Commission does not agree that paragraph (4) (or any other element of the draft Strategy) is inconsistent with Article 6 of the DSA. If the Commission does specify what would be regarded as expeditious in a particular case it will do so in compliance with established legal principles.

TI requested the deletion of paragraph (5) of the draft Strategy on the basis that it would allow the Commission to introduce online safety codes containing provisions, on a general basis, requiring providers to take measures to reduce the risk of harmful content on their services. In TI's view, this conflicts with the DSA and the distinction (under the DSA) between the obligations of VLOPs/VLOSEs<sup>8</sup> and other providers of intermediary services. The Commission considers that TI's observations are based on a misreading of paragraph (5) of the draft Strategy, which does not use the words "on a general basis". Nothing in paragraph (5) indicates an intention to contradict paragraph (3) or to circumvent the limitations of liability imposed by the E-Commerce Directive/DSA. Paragraph (5) reflects Section 139K(2) of the Act and Article 28b of the AVMS Directive and will be retained.

TI expressed concerns that Section C of the draft Strategy (paragraphs 7 – 9) has the potential to undermine the prohibition in Article 15 of the E-Commerce Directive/Article 8 of the DSA on a general obligation to monitor information. It suggested including an express requirement to assess any provisions introduced pursuant to paragraphs (7) to (9) against applicable case law of the CJEU and to ensure compliance with Article 8 of the DSA. The Commission does not believe that paragraphs (7) to (9) in any way undermine the provisions of Article 15 of the E-Commerce Directive/Article 8 of the DSA and fully intends to apply the Strategy in accordance with these provisions. The Commission will amend paragraph (7) to clarify that a Relevant Provision can be complied with, at the option of the provider, either by general monitoring or in other ways.

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<sup>8</sup> Very large online platforms (VLOPs) and very large online search engines (VLOSEs).

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TI suggested amending paragraph (11) to state that the Commission, when consulting on relevant measures, will invite respondents' views on whether the proposed measures contain provisions inconsistent with any provision of the DSA. The Commission does not believe that a general debate on any and all provisions of the DSA is required when consulting on relevant measures, but instead considers that a more focused view on Articles 4, 5 and 6 is more appropriate in line with the Strategy.

TI also proposed that the Strategy should stipulate that all codes contain a provision that where a code requirement contradicts or overlaps with a DSA requirement, the provider will not be guilty of a contravention so long as it has complied with the DSA. The Commission does not believe that the proposed amendment is necessary or appropriate. The Strategy is not intended to establish a hierarchy between the various rules.

TI noted that paragraph (12) omitted a reference to advisory notices. The Commission has amended paragraph (12) to address this point.

#### **4. E-Commerce Compliance Strategy**

Following the conclusion of this statutory consultation process and pursuant to its statutory powers and duties, the Commission has today, 6 October, published an *e-Commerce Compliance Strategy* under section 139ZF of the Act and a copy of this Strategy can be found on the Commission's website [www.cnam.ie/publications](http://www.cnam.ie/publications)