Broadcasting Authority of Ireland

Submission to the Department of Communications, Climate Action & Environment Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Service Directive

Index

Foreword

The Broadcasting Authority of Ireland welcomes the opportunity to contribute to the Public Consultation on the Regulation of Harmful Content and the Implementation of the Revised Audiovisual Media Services Directive (AVMSD). The media landscape has evolved rapidly over the last decade with the convergence of television and internet and the emergence of new types of services and user experiences. The regulatory framework has not kept pace. The coincidence of the need to transpose the new AVMSD with the international consensus on the urgent necessity to address the issue of harmful content makes this consultative process timely and doubly welcome.

By virtue of the media platforms based here, Ireland is in a unique position to lead the debate and chart a way forward in relation to online safety and regulation. Online media regulation requires leadership which the Authority is endeavouring to show through this submission. We set out below a vision for the regulation of online media, an approach to its implementation and a rationale to support it. In facing the challenges of this brave new world, the BAI believes we should be bold and practical. Given the complexity of the issues involved, we should also be prudent so as to avoid unintended consequences. Some issues will require careful consideration and teasing out.

In advocating a single comprehensive regulatory scheme, the interests and rights of Irish, European and global citizens have been at the forefront of the Authority's consideration. We have sought to balance the vision and principles on the entirety of the media landscape with the practicality of making it work. These underlying principles include diversity, plurality and ensuring culturally-relevant content, protection from harmful content, vindicating freedom of expression, facilitating linguistic and cultural diversity and sustaining and enhancing democratic discourse.

Professor Pauric Travers

Chairperson
Broadcasting Authority of Ireland

Executive Summary

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Ireland, like other countries at a European and global level, has witnessed considerable growth in the consumption of online content across a range of networks, online services and connected devices. The increased capacity for the internet to be used as a tool to shape and influence opinion and the increased use of the internet by people of all ages to communicate means that regulation to ensure protections for audiences and children is necessary, proportionate and reasonable.

EU Member States have agreed significant new rules for online videos to strike a stronger balance between broadcasting regulation and the regulation of videos on the internet. For the first time, popular online platforms that allow users to upload videos will be required to introduce effective age verification and parental control mechanisms for users and will be obliged to take a more active role in moderating content on their platforms.

In parallel, the Minister is proposing to introduce additional rules to improve online safety for Irish residents on certain online platforms – not just those that provide videos – and to encourage platforms to take a stronger role in tackling issues such as cyberbullying.

Governments, advocacy groups and social media companies alike have expressed a desire to establish a regulatory framework for additional regulation on the internet. The Minister for Communications, Climate Action and Environment's consultation on the regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive is therefore both timely and welcome.

BAI Vision for Media Regulation in Ireland

The Broadcasting Authority of Ireland ("BAI") is the independent regulator for radio and television broadcasters in Ireland. Its functions include the regulation of public, commercial and community radio and television services, the making of broadcasting codes and rules, and the provision of funding for programmes and archiving relating to Irish culture, heritage and experience.

The implementation of the new Directive and the proposals for a national framework for online safety outlined in the Minister's consultation provides an opportunity to develop a vision for the future regulation of online media. In its submission, the BAI sets out its vision and outlines the manner in which it may be practically realised. Having given significant consideration to the matter, and drawing on its own regulatory experience, the BAI is of the view that the introduction of new regulation for online videos and new online safety regulation for Irish residents can be most effectively accomplished through the introduction of a single, comprehensive regulatory scheme and regulator.

In the view of the BAI, introducing new rules through a single comprehensive regulatory scheme and regulator offers an opportunity to develop a vision for the future regulation of media content across all platforms and services which, at its heart, seeks to serve and protect audiences and users in the new media environment. The regulator should have regard to the wider objectives of content and services that serve citizens - ensuring Diversity and Plurality, the promotion of Freedom of Expression, sustaining and enhancing democratic discourse, and facilitating linguistic and cultural diversity.

This approach offers the best opportunities and solutions for protecting and supporting audiences and users, and will ensure:

- Consistency in the implementation of the provisions of the Directive and national legislation;
- Clarity for audiences and users;
- Efficiency for the Irish Government, the European Institutions and other European regulators in liaising with a single regulator;
- Operational efficiencies;
- An increased capability to respond to the evolving nature of the services to be regulated, changes in consumption patterns on those services and in the regulation of new services, and
- Facilitation of sector-wide initiatives to promote responsibility and awareness of online safety and other regulatory issues among the general population and industry.

Given its extensive regulatory experience in the area of audiovisual regulation and in the application of content principles across the sector, the BAI would support the consultation proposal which envisages the BAI forming the nucleus of the new regulatory authority. This is further discussed in the submission document.

Governance Structure

While the BAI is supportive of the regulatory framework as outlined above, it is of the view that the proposed multi-person Commission approach requires further consideration. The BAI considers and evaluates the different types of governance structures which may be appropriate for the new regulatory body in its consultation response. It believes that this matter requires further, more detailed, discussion and would welcome the opportunity to do so with the Minister during the transposition phase.

The Regulatory Approach

In this submission, the BAI sets out a proposed regulatory approach in respect of each of the four key strands outlined in the consultation document. One of the key factors which informed the BAI's deliberations was the issue of scale, both in terms of the number of services which may fall to be regulated and in terms of the number of service users. These considerations are reflected in each of the proposals as set out below:

Strand 1: New online safety laws to apply to Irish residents

The BAI welcomes the Minister's intention to introduce regulation which will contribute to the protection of Irish residents from harmful online content.

As outlined in the BAI's consultation response, the BAI submits that combining the regulation of audiovisual content under the Directive with the regulation of online safety has significant advantages from the perspective of audiences and platform users, who may not necessarily distinguish between forms of content in an online context. The regulatory approach adopted should ensure that online safety regulation and audiovisual content regulation are implemented in a separate but complementary manner with aligned strategic objectives, emphasising synergies where possible but recognising differences where appropriate.

The BAI believes that the regulator should have the power to rectify online harms by issuing harmful online content removal notices on behalf of Irish residents that have been directly affected by harmful

online content. In the longer term, the BAI envisions the development and enforcement of an online safety code applicable to key Irish online service providers in order to minimise online harms more generally. The BAI also proposes a role for the regulator in promoting awareness of online safety issues among the public and industry to prevent online harms in the long term.

Strand 2: Regulation of Video-sharing Platforms (e.g. YouTube)

The revised Audiovisual Media Services Directive reflects the growing reach and influence of new types of services that make audiovisual content available online. For the first time, EU Member States are required to regulate video-sharing platform services on the internet like YouTube. The areas of focus include the protection of minors, combatting certain criminal offences, the introduction of advertising rules and preventing incitement to violence and hatred. The revised Directive is intended to rectify "collective" harms to groups of persons rather than direct harms to individuals like online safety.

The BAI believes that video-sharing platforms should be directly regulated by a statutory regulator. The Directive's rules should be implemented through legislation and statutory codes. Fundamental protections for freedom of speech on video-sharing platform services should be enshrined in these codes while addressing significant protection issues that arise on such services in respect of videos.

Ireland is responsible for regulating the video-sharing platform services based in Ireland for the entirety of Europe. Most of Europe's largest providers of video-sharing platform services – such as Facebook, Google and Twitter – are based in Ireland. Ireland's responsibility under the Directive in respect of video-sharing platform services is therefore greater than any other EU Member State.

The level of user engagement with video-sharing platform services is significant – Facebook has over 278 million daily users in Europe while over a billion hours of video is watched on YouTube every day – and matters of scale need to be reflected in any proposed regulatory approach. To manage this issue, the BAI sees the role of the media regulator as being responsible for the development of high-level rules and regulation and then assessing the measures put in place by video-sharing platforms to implement those rules. The BAI also envisages a robust and transparent complaints system and independent appeals mechanism as part of that regulatory framework.

Strand 3: Regulation of On-demand Services (e.g. RTÉ Player, Virgin Media player, iTunes)

The revised Directive envisions a more level playing field in regulation between television broadcasting services and on-demand services like the RTÉ player or YouTube Channels. EU Member States will be required to take a more active role in the regulation of on-demand services through the creation of higher standards of protection and responsibility in areas such as advertising, the protection of minors, accessibility, hate speech and incitement to violence.

The BAI welcomes the greater degree of regulatory consistency between on-demand and linear broadcasting services which is reflective of changing consumption patterns amongst audiences. The use of on-demand services in Ireland continues to increase, with over 50% of Irish adults now regularly accessing audiovisual material through these platforms.

The BAI is of the view that the most appropriate means of introducing the revised Directive's new rules for on-demand services is through statutory regulation and codes, and to assign the role of overseeing on-demand services to the statutory regulator. This approach would need to consider the most effective

mechanism for the regulation of the significant number of additional on-demand services covered by the Directive, estimated to run into many thousands in Ireland.

The BAI proposes that the regulatory framework for on-demand services should allow the regulator to adopt a 'risk-based' approach to regulation to manage scale issues and to allow it to strategically allocate regulatory resources to ensuring the greatest protection of audience interests.

Strand 4: Minor Changes to Regulation of Linear Television Broadcasting

Viewers and listeners in Ireland are served by a wide range of linear broadcasters, all of whom play a valuable role in providing choice and diversity for Irish audiences. The BAI has sought to foster the delivery of creative, innovative and culturally-relevant content for Irish audiences across all broadcasting platforms.

The BAI notes the essential role played by broadcasters in the delivery of news and current affairs, their strong ties to the Irish state and its culture and the key role they play in the creation of Irish content. The continued importance of broadcasting to the Irish state and its culture justifies the approach to regulation currently in place in respect of linear broadcasters in Ireland, which encompasses many matters that are outside the scope of the Directive, such as media plurality requirements and ensuring impartiality in news and current affairs coverage.

The revised Directive requires Member States to ensure a more level playing field in the audiovisual marketplace by increasing standards of protection rather than weakening them. As such, linear broadcasting should continue to be regulated as heretofore, except to the extent that changes may be made pursuant to the revised Directive. These include rules governing advertising and product placement.

Introduction

Introduction

The Broadcasting Authority of Ireland (BAI) was established on 1st October 2009 as an independent regulator for radio and television broadcasting in Ireland. The BAI has a range of objectives and functions including:

- stimulating the provision of high quality, diverse, and innovative programming;
- facilitating public service broadcasters in the fulfilment of their public service objects;
- promoting plurality of control in the commercial and community sectors;
- providing a regulatory environment that:
    - sustains independent and impartial journalism;
    - sustains compliance with employment law;
    - protects the interests of children;
    - facilitates a broadcasting sector which is responsive to audience needs and accessible to people with disabilities;
    - promotes and stimulates the development of Irish language programming and broadcasting services.

The BAI is funded through a levy on all broadcasters licensed in the State.

The BAI, and its predecessors, has been responsible for the regulation of the broadcasting sector in Ireland for 30 years. In that time, its regulatory focus and activities has evolved to respond to the changing media environment brought about by technological developments, increased competition, advertising challenges and, most notably, the changing patterns of media consumption.

Ireland, like other countries at a European and global level, has witnessed considerable growth in the consumption of online videos across a range of networks and connected devices, and this trend is only expected to increase. The substitutability of these services for linear broadcasters means the potential for these services to shape and inform views and opinions has increased.

To reflect the evolving audiovisual landscape, EU Member States have agreed to a revised Audiovisual Media Services Directive ("the revised Directive") which seeks to balance the responsibilities of linear television broadcasters with key providers of online videos, namely on-demand audiovisual media services and video-sharing platform services.

As outlined in the consultation document, implementing the revised Directive requires significant changes to the way in which Ireland regulates audiovisual content.

The BAI welcomes the opportunity to participate in this public consultation on *Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive*. Since the revised Directive was published in December 2018, the BAI has been considering its potential impact on the media environment and the most appropriate regulatory framework to give effect to its various provisions.

In parallel, the BAI has been considering matters arising in respect of the element of the consultation concerning the Regulation of Harmful Content on Online Platforms. As outlined in this submission, the BAI notes the potential for a complementary but separate approach to the regulation of both harmful online content and audiovisual media services under the Directive that is in the public interest.

Introduction

The BAI submission responds to all matters outlined in the consultation document, noting the most appropriate regulatory approach under each of the four Strands. It also sets out how these services should fall to be regulated, addressing matters such as scale, the promotion of freedom of expression and ensuring diversity and plurality.

The BAI would like to thank the Minister for Communications, Climate Action and Environment for the opportunity to respond to the consultation. If required, the BAI would be happy to provide further clarification or elaboration on any of the responses outlined in the document.

Section 1: Regulatory Structures (Strands 1 to 4)

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Q12	**Potential options for regulatory structures to progress the regulation of the four streams are identified in the explanatory note accompanying these questions. These options include:** • **Restructuring the Broadcasting Authority of Ireland as a Media Commission responsible for the four strands.** • **Two regulatory bodies. Assigning the responsibility for editorial services, e.g. on-demand audiovisual media services, to a restructured BAI and creating another regulatory body with responsibility for non-editorial online services, e.g. Video-sharing Platform Services.** **Is one of these options most appropriate, or is there another option which should be considered?**
Q. 13	**How should the chosen regulatory structure or structures be funded given the various categories of services which are to be regulated? [Section 5 of the explanatory note]**

1.1 Introduction

To respond to questions 12 and 13 posed by the Department, this section of the BAI's consultation response begins by discussing the essential characteristics and qualities that will be required of a regulator operating in a regulatory framework intended to give meaningful effect to the objectives and provisions of the revised Audiovisual Media Services Directive and to address urgent Online Safety issues, especially those affecting minors. In explaining the reasons for its preferred regulatory model, the Authority firstly considers the concept of combining online safety and audiovisual regulation. It goes on to propose the leadership role that it considers the BAI should play in the regulatory structure and debates the different approaches that might be taken to the governance structure of the new regulator. The rationale and key features of the regulatory scheme which the BAI considers are essential to meet the objectives set out in the Minister's proposals are summarised. The BAI separately addresses the proposal to extend the provisions of the AVMS Directive to all online platforms. Finally, the BAI sets out its proposal for the funding of the regulatory regime.

1.2 Characteristics and Qualities of the Regulator

The structure of the regulator and the powers it has at its disposal will need to support the aims of both the Directive and the National Legislative Proposal on online safety.

As such, it will be essential for the regulator to be able to keep pace with the rapid and evolving nature of the online environment, as well as changes in the behaviours of users and the way in which they engage with that content. In addition, the regulator will need to be aware of the demands of the marketplace and the need to support innovation in both content and services for audiences and users.

The essential characteristics and qualities of the new regulator that are needed to effectively tackle the challenges of the regulatory environment in which it will operate, can broadly be described under five key headings:

- **Strategic**: an ability to set the strategic direction and shape a vision for the new organisation at an early stage and to develop comprehensive policies to give effect to the objectives of the Directive and the National Legislative Proposal.

- **Knowledge and Expertise**: an in-depth knowledge and developed understanding of the European audiovisual legal, policy and regulatory environment and the wider context within which it operates (i.e. the European Digital Single Market), as well as an in-depth knowledge and developed understanding of online safety and the potential for harm that can arise, will be essential. Knowledge and expertise will also underpin the regulator's ability to develop comprehensive policies at an early stage in the establishment of the new organisation and to anticipate and respond to developments in the audiovisual and online safety regulatory environment.

- **Decision-making**: robust decision-making structures and processes will be central to facilitate authoritative decision-making that engenders public trust and is capable of withstanding legal and regulatory scrutiny.

- **Communications**: communication, co-operation and negotiation with National and European institutions and regulatory agencies, as well as key sectoral players, and an ability to respond with an appropriate degree of authority and urgency to controversial public interest issues as they arise – not only at a national level but also at the pan-European level – are required.

- **Resources**: the regulator should have access to the necessary range of resources to deliver on the objectives of the legislation, including the policy, human, financial, legal and technical resources, to authoritatively set policy, regulate and, where necessary, take appropriate compliance and enforcement actions. Technical resources will be particularly significant in implementing digital solutions to resolve matters arising under the Directive and the National Legislative Proposal, including, for example, the implementation of registration systems and electronic information-gathering systems. The appropriate resources to implement a self-financing model to support its regulatory activities and potentially to develop a content levy system to support the production of European content will also be required at an early stage in the organisation's development.

1.3 The Optimal Regulatory Structure

The National Legislative Proposal presented by the Minister proposes to introduce for the first time in Ireland a regulatory scheme for the regulation of harmful online content. The transposition of the AVMSD extends the provisions of the 2010 Directive in respect of on-demand services and introduces some very new elements to the field of audiovisual regulation with VSP services being brought within the scope of regulation for the first time. Noting the Minister's proposal to combine audiovisual and harmful online content regulation in a single media regulatory agency which has few international precedents, the BAI explored firstly the concept of combining these two areas in one regulatory structure before responding to the question of the most appropriate structure and the potential role for the BAI in such an organisation.

1.4 Concept of a Single Media Regulator

Historically, the rationale for regulating broadcasting content stemmed from the fact that it was considered a powerful and influential medium of public communication. This, in turn, justified audiences being able to avail of, and having entitlements in respect of, a range of protections such as statutory complaints systems. In addition to ensuring protections for audiences, a primary focus of broadcasting regulation is also to ensure culturally-rich and linguistically-diverse content for national and European audiences and supporting democratic discourse by ensuring plurality in the ownership and control of media services and in the provision of impartial news, information and current affairs content for the users of services.

Changes in audience behaviours in the ten years since the previous iteration of the AVMSD have been central to the rationale to extend and strengthen the protections for audiences to on-demand audiovisual media services ("on-demand services") like Netflix and YouTube Channels.

The Directive ensures a degree of alignment throughout the EU in rules applicable to television broadcasting services and on-demand services, and, in so doing, ensures a more level playing field and fairer marketplace for audiovisual content, reflecting changes in behaviour and consumption patterns of audiences.

Similarly, the inclusion of video-sharing platform services within the scope of the new Directive for the first time is a further, very significant, legislative acknowledgement of changes in the audiovisual content ecosystem in recent years and is driven by a desire to strengthen the protections for audiences and to further reflect evolving content consumption habits.

In parallel with developments in the audiovisual content environment, the evolution of social media services - many of which *are,* or provide *access to,* video-sharing platform services - have now become ubiquitous features of daily life for people of all ages. Arising from such developments, there is a growing imperative for many governments around the world to respond to online safety concerns. The urgency for a robust public policy response is understandable and the BAI acknowledges the opportunity presented, as well as the synergy that might be achieved, in combining the transposition of the revised Directive with the regulation of online safety – and placing it on a secure statutory footing – despite the perceived differences in focus of each area of regulation.

While audiovisual regulation fulfils some different purposes to online safety regulation, it is important to recognise that a user is unlikely to distinguish between the different forms that content make take on a platform i.e. whether it is in audiovisual, still image or text form. In this context, the rationale for a single regulatory entity to cover harms arising from audiovisual content and other forms of harmful content is persuasive, and the Minister's proposals reflect the reality that online content of a harmful nature will frequently be delivered through the same devices and platforms as audiovisual content that falls within the scope of the revised Directive.

Transposing the new Directive and introducing a regulatory regime for harmful online content will require fundamental changes to Ireland's current media regulatory landscape. The rationale for a single media regulator that emphasises the synergies between, but respects the differences in, both audiovisual

regulation and online safety regulation in a coherent manner is compelling. There are further reasons to support such an approach:

- It ensures consistency in the application of regulatory principles, policies and rules across all areas of regulation, where appropriate;
- It offers efficiency for the Irish Government, the European Institutions and other European regulators in liaising with a single regulator;
- It offers efficiency for regulated entities in dealing with a single regulator;
- It builds on the institutional knowledge and experience of the BAI in audiovisual regulation over many years (including its work in audience protection), its specific work in implementing previous Directives and more recent work in contributing to the planning and development of the new Directive – at both national and European levels – and
- There are operational efficiencies in having a single organisation – a key policy objective of Government in the past.

It is in this context that the Authority sets out its proposals for a single regulator.

1.5 BAI's Preferred Regulatory Model

The Department has proposed two options for a regulatory model in its consultation documents.

Option 1 would see a restructuring of the Broadcasting Authority of Ireland as a media commission with responsibility for regulating all services and content falling within the scope of the Department's Consultation i.e. linear broadcasters (audiovisual and sound), on-demand services, video-sharing platform services and services/content subject to online safety obligations.

Option 2 envisages two regulators; the first, a restructured BAI, would be assigned responsibility for editorial services and the second, a newly created regulator, with responsibility for non-editorial online services.

In considering the questions raised in the Department's consultation, the BAI also considered a **third option**, which would maintain a separation between audiovisual content (across linear, on-demand and video-sharing platform services) and harmful content on all online platforms, i.e. an audiovisual regulator (for current regulatory purposes and for the additional purposes set out in the revised Directive) and a second regulator for online safety.

The preferred option of the BAI is Option 1 – that of a single regulator with statutory responsibility for regulating audiovisual content and harmful online content. In the view of the BAI, a single media regulator offers a unique opportunity to develop a meaningful and holistic vision for the future regulation of the media content landscape, irrespective of how content is delivered, that serves and protects audiences and users and is capable of doing so having regard to the wider objectives of content and services that serve citizens – ensuring Diversity and Plurality, promoting Freedom of Expression and sustaining and enhancing democratic discourse.

The BAI emphasises the value and importance of not only ensuring the **consistent** i**mplementation** of the provisions of the Directive and the National Legislative Proposal, but also in having a **coherent and harmonious approach** to the interests of audiences and users and the protections to be afforded to

them. The desirability for **fair and balanced treatment** of the various players in the audiovisual and online sectors is also an important consideration.

For these reasons, the BAI considers that the effectiveness of Option 2 has significant limitations and does not fully utilise the potential for regulatory synergies available. Also, the BAI considers that there is a significant possibility that having different regulators (one for on-demand content and one for non-editorial online content) could lead to significant inconsistencies in the implementation of the provisions of the Directive and result in different approaches and outcomes on the same points of law.

1.6 Role of the BAI

The BAI believes that it has a central role to play in the new regulatory regime as envisaged by the Minister, and the Authority, which has had responsibilities in this area since 1988, is best placed to form the nucleus of the organisation that will be the new regulator.

The BAI has appropriate and extensive experience and knowledge in regulatory practice in all aspects of linear broadcasting gained over many years. Moreover, specific knowledge and regulatory experience gained in applying **content principles** more specifically are readily transferable to related areas of content regulation.

As the regulator for television broadcasting services pursuant to three previous iterations of the Directive, the BAI has played a significant role in supporting work at the European and national levels in preparing for the significant amendments to the last Directive and more particularly in the debates and negotiations on the new provisions. The Authority has been an active participant in the establishment and development of ERGA – the EC's Audiovisual Regulators' Advisory Group – and in the work undertaken by this group since 2016, consistent with the provisions of the Directive that envisages a central role for existing audiovisual regulators in the new regulatory framework.

The BAI has considered the role it should play in the revised regulatory framework following transposition. In so doing, it has had regard to the characteristics and qualities of the regulator which it considers are most desirable for effective implementation of the Directive and the National Legislative Proposal and considers that it is uniquely placed to deliver on the objectives of the proposed legislation. While acknowledging that further work is required to develop a more in-depth knowledge and expertise on online safety and the potential for harm that can arise, the Authority considers that the BAI has a strong track record in the regulation of harmful content which can be applied to newer aspects of such work. We view the regulation of online safety as a natural extension of our regulatory work and practice in protecting audiences to date. A single media regulator offers the opportunity to address, in a meaningful way, current public concerns regarding harmful online content, to continue to afford audiences the protections they have enjoyed heretofore, and, at the same time, provide assurance to citizens that the enduring objectives of audiovisual regulation – Freedom of Expression, Plurality and Diversity – continue to be a high priority.

The BAI's work in recent years in implementing its media literacy functions and its pivotal role in the establishment of a national media literacy network (*Media Literacy Ireland*) also provides a strong basis for delivering on the wider objectives of online safety regulation. The Authority played a leadership role in this area in developing and publishing its Media Literacy policy aimed at empowering Irish citizens to make informed choices about the media they consume, create and disseminate across all platforms.

As well as engaging with a wide range of stakeholder interests, the BAI understands the importance of true cross-sector collaboration and participates in delivering media literacy initiatives with a nationwide reach, for example, the recent "Be Media Smart" campaign. Its role and experience thus far form a solid foundation to expand further its regulatory expertise into the online space.

1.7 Governance Structure of the Regulator

The BAI has considered the Minister's proposal for a multi-person commission structure for the new regulator having regard to its own existing structures, and, more broadly, the types of structures under which Irish regulatory bodies operate. The Authority recognises that the governance and key decision-making structures of the BAI is highly complex – an Authority, Compliance Committee and Contract Awards Committee were established for a body which is first and foremost a linear audiovisual regulator.

In an Irish regulatory context, broadly, one of two approaches are typically adopted:

- Authorities/agencies with a part-time board – often comprised of seven or more persons – and supported by a full-time, permanent executive. The composition of such boards can vary – sometimes including the CEO (or not) and sometimes having members who are representative of certain sectoral interests. Occasionally, such boards are led by a full-time Executive Chairperson.
- The second most common structure is that of a full-time Commissioner or Commission, comprised of 1-5 commissioners and led by an executive chairperson – ComReg and the CCPC being current examples of this approach.

The BAI is not aware of any formal public policy guidance in Ireland regarding the circumstances in which the different options are exercised. Drawing from the experience of the Authority currently, the BAI makes the following observations:

- Boards with part-time members appear to reflect a traditional corporate approach in which the role of the board is primarily one of governance/oversight and policy formulation.

- Single commissioner and multi-person commissions may derive from the approach envisaged under European legislation, or where there is a perceived need for "experts".

Each approach has its strengths. Single commissioner and multi-person commissions can use specialist knowledge and experience to ensure speed and agility in decision-making and to be more responsive to sectoral developments, particularly in fast-evolving environments where innovation is the norm. A further advantage of a commissioner-led structure may be one of greater public visibility and public perception of a "champion" in the matters under regulation.

Part-time boards bring a breadth of experience and a wider range of perspectives that are often vital in making determinations on issues that are frequently complex, and in situations where the rights and protections to be afforded to citizens need to be finely balanced with public policy objectives (e.g. on issues concerning freedom of expression). To leverage such value in a Commissioner-led governance model, there may be benefit, at a minimum, in availing of structured support through the inclusion of a statutory advisory board in the design of the legislative scheme.

However, regardless of the governance structure that is ultimately adopted, the BAI views it as essential that there is **coherence** in the overall functioning of the regulator; the governance structure should lend itself to the sharing of knowledge and experience and to delivering consistency across its functional areas – particularly in developing and implementing its organisational strategies, in setting its policies and in making key decisions. The BAI believes that this matter would benefit from further consideration and discussion and the Authority would welcome further engagement with the Minister in this regard.

1.8 Brief Description of Proposed Regulatory Regime

In this section, the BAI proposes its approach to the regulatory regime for the achievement of the legislative objectives, briefly discussing the rationale, principles, objectives, challenges and other factors underpinning its approach, before going on to describe the key features of the regulatory framework envisaged.

1.8.1 Rationale

Central to the BAI's approach to the new regulatory regime is a statutory regulator and a framework that combines a range of regulatory approaches, appropriate to the type of service to be regulated, the nature of the regulatory objectives to be achieved, and the scale of the task on hand. It is envisaged that common regulatory and content principles are established by a statutory regulator and given meaningful and tailored effect through appropriate codes and guidance. Furthermore, the BAI's proposed framework clearly establishes the responsibilities of the regulator as well as those of the various regulated entities within the framework. More specifically:

- The BAI considers that statutory regulation is a "well-trodden path" from a constitutional and legal perspective in Ireland. An approach based on statutory regulation provides a strong degree of legal certainty for all stakeholders – the State, the regulated entities and for audiences and users.

- A statutory regulator is more likely to engender public trust and to have the legal authority that follows from being a single, strong and well-resourced regulator.

- It is the regulatory option that will place audiences and users and the public interest at the centre of its work.

1.8.2 Principles, Objectives, Challenges and other Factors underpinning the BAI's approach to the Regulatory Regime

The BAI's proposed approach to the establishment of a new regulatory framework is underpinned by several principles, objectives, challenges and other factors. These include:

- Ensuring a high standard of protection for audiences and providing effective and meaningful redress options for all services within scope of the National Legislative Proposal and the Directive.
- Ensuring that the Directive and the National Legislative Proposal are implemented lawfully and in spirit and that all its obligations are satisfied.
- Facilitating concrete solutions to dealing with the scale of audiovisual content that will fall to be regulated and the number of on-demand services in scope.

- Ensuring that efficiencies are maximised and that no undue regulatory burdens are placed on industry players.
- Promoting a culture of regulatory responsibility and compliance in the online space through the adoption of a service-provider first approach to incident resolution.

1.8.3 Key Features of the Regulatory Framework proposed by the BAI

The framework is designed to ensure that the focus of the regulator's work is on:

- Setting the strategic direction for delivery of the statutory objectives
- Determining key policy decisions to deliver on those objectives and
- Taking high-level "macro" decisions in the public interest in a consistent manner across the services in scope.

The framework also envisages that the regulator plays a central role in the necessary interactions with external interests, particularly with audiovisual and online regulators in other Member States of the European Union, for example in matters of jurisdiction.

While aiming to guarantee a high standard of protection for audiences and users, the statutory framework is complemented by creating a dispute resolution system that facilitates large-scale resolution of micro disputes.

Regarding the regulation of the four streams of content posed in the consultation documents, the BAI highlights the following:

- In respect of the fields co-ordinated by the Directive, linear broadcasting should continue to be regulated as heretofore, except to the extent that changes may be made pursuant to the revised Directive.
- The rationale for bringing on-demand content closer in regulatory terms to that of linear content is also appropriate for the reasons set out by the European Union having regard to audience trends and behaviours in the intervening years since the 2010 Directive came into force.
- It is appropriate that audiovisual content on video-sharing platform services (VSPS) is also brought within the scope of regulation, in the light of changes in audience consumption patterns and users' behaviours together with the significant and growing body of evidence of concerns regarding content on VSPS and principally to ensure that the same protections afforded to users of linear and on-demand content are extended as far as possible to users of content on VSPS.
- Combining the regulation of online safety with audiovisual content has significant advantages for audiences and platforms users, who do not always distinguish different forms of content, the platform on which they have viewed such content, or the source of harmful content in an online context.
- The concept of a single regulatory structure facilitates the transfer of significant knowledge and experience in respect of content-related harm to online platforms and delivers the best opportunity and solutions for protecting and supporting audiences and users.

More specifically, the framework proposed by the BAI envisages:

- A direct regulatory relationship between the statutory regulator and (a) linear broadcasters; (b) on-demand audiovisual media service providers falling within the Irish jurisdiction; (c) video-sharing platform services that also fall to be regulated here in Ireland in respect of audiovisual and harmful content.
- For the time being at least, regulation introduced pursuant to the Directive in respect of on-demand services that fall to be regulated in the Irish jurisdiction should be limited in scope to the fields coordinated by the Directive.

(a) Linear Broadcasters (Audiovisual and Sound Broadcasters):
Except to the extent that changes may be made pursuant to the Directive, the BAI envisages broadly a continuation of the current arrangements in respect of linear broadcasters.

Linear broadcasters, both audiovisual and sound, would be subject to a broadly similar regulatory regime. While maintaining substantive regulatory obligations on linear broadcasters, regard should be had in the proposed approach to transposition to reducing administrative burdens on these services.

In this regard, the BAI would be happy to submit to the Minister further proposals in respect of amendments to the existing legislative provisions in respect of linear broadcasters as set out in the Broadcasting Act 2009 that would increase administrative efficiencies and further reduce regulatory burdens on broadcasters.

(b) On-demand Services:
Arising from the provisions of the Directive, three categories of on-demand services fall to be considered:

- Irish on-demand services
- Other EU on-demand services carried on Irish VSPS
- Non-EU on-demand services carried on Irish VSPS

The BAI's approach envisages a direct regulatory relationship between the regulator and Irish on-demand services (including Irish on-demand services that are carried on Irish VSPS). Other EU on-demand services, carried on Irish VSPS, will fall to be regulated in the relevant EU Member States. Non-EU on-demand services on Irish VSPS will fall to be indirectly regulated in the Irish state via the measures to be adopted by VSPS in accordance with the provisions of Article 28b of the Directive. It may be noted that other EU on-demand services on Irish VSPS will also be subject indirectly to a level of regulation arising from the measures to be adopted by Irish VSPS pursuant to the provisions of Article 28b. The relationship between the regulator and the Irish VSPS will facilitate an ability to extend the protections to be afforded by the Directive to non-EU on-demand content on VSPS via the terms of service of VSPS. These terms of service will also help to strengthen the application of the minimum provisions of the Directive in respect of on-demand services insofar as they hold the VSPS to account via the measures to be adopted. The relationship between the regulator and the VSPS will also be helpful in dealing with content, the origin of which may be difficult to determine – even in an EU context.

(c) Audiovisual Content on VSPS:
VSP providers are obliged to follow a principles-based common code (the "VSP Code"). This code establishes rules for audiovisual content on the VSP provider's ecosystem, which in turn affects on-demand content on the VSP, User-Generated Videos and Audiovisual Commercial Communications falling within the scope of the Directive. A detailed accountability regime is proposed by the BAI: we set out proposals for the Article 28b assessment and reporting process for evaluating the VSP provider's compliance with the VSP Code.

(d) Online Safety:
The BAI discusses how an Online Safety regulatory regime might work in practice in an Irish context within a wider media regulatory framework. In this regard, online safety focuses specifically on harms to be specified in the legislation that can be caused by one individual to another in the online environment and is not limited to video-sharing platform services, as is the case with the AVMSD. In the view of the BAI, online safety fulfils a different purpose to audiovisual regulation, although there is significant alignment in the strategic objectives of both.

(e) Other Features of the BAI's proposed Regulatory Framework:

Compliance framework: the BAI proposes a broad compliance and enforcement framework for implementation of the audiovisual and online safety regulatory regime that is underpinned by best regulatory practice and the BAI's specific experience to date in regulating audiovisual content. The BAI believes it is capable of being adapted to different types of content and circumstances appropriate to the National Legislative Proposal and the regulation of audiovisual content as envisaged by the Directive.

Reflecting the requirements of the European legislation, the BAI elaborates specific proposals in respect of a number of new features of the Directive, including:

- **Out-of-court dispute resolution mechanism**: a multi-stage approach to dispute resolution, involving roles for the VSPs, the regulator and an independent adjudicator;
- Framework for **adjudicating complaints** in respect of audiovisual content on VSPS;
- **Article 28b5** assessment process;
- **Sanctions regime**, which has regard, *inter alia*, to the specific constitutional arrangements in respect of the imposition of fines in the Irish state and which also has regard to current regulatory schemes in Ireland for such financial penalties.

General powers required in line with good regulatory practice are suggested e.g. a requirement for all regulated entities to supply data and information in a form to be specified by the regulator is envisaged as necessary. A research role for the regulator to support an evidenced-based approach to regulation is deemed desirable; liaison powers and possibly formal co-operation arrangements (such as MOUs) with other statutory bodies may be desirable and appropriate.

1.9 Applying the AVMSD Provisions to all forms of online content

The BAI notes the proposal in the *Explanatory Note* to the Department's Consultation to extend the Directive's rules for video-sharing platforms services to all kinds of user-generated content (UGC) for Irish residents on online platforms[1].

In the view of the BAI, this proposal merits further detailed consideration. Some of the questions to be discussed include:

- **What online platforms** are in scope – video-sharing platforms or all online platforms? Only platforms within the Irish jurisdiction or in other jurisdictions but available to Irish residents? On what basis would jurisdiction be established?
- **What content** is in scope?
- **What specific provisions of the AVMS Directive** would be applied to other content? (Not all provisions may be capable of being applied to UGC).
- What will be the nature of the **regulatory relationship** between the regulator and the Online Platform in this context?
- What is the **wider impact and policy implications** of such a proposal?
- What **redress mechanisms** would be appropriate and how would these function in practice?
- Is it envisaged that the same **compliance and enforcement regime** as applies to audiovisual content would underpin the regulatory regime for UGC?
- How would **issues of scale** be addressed, given that the scale of content in scope would likely far exceed the scale of content within the scope of the AVMSD provisions?
- The **resource implications** of all the above merit consideration.

In the view of the BAI, there are issues of very significant complexity and scale in applying the provisions as proposed. Bearing in mind that the AVMSD provisions were developed for audiovisual content and may not necessarily or readily be applied to other forms of content, such as still images, text etc, a detailed consideration on a provision-by-provision basis would be desirable to ascertain whether and how the Directive provisions could or should be applied.

The BAI suggests that further detailed consideration be given to the above issues, to evaluate the practicalities of extending the provisions *at this time*. Such an approach would have the added advantage of allowing time for the new regulator to become successfully established, before its competences were enlarged. Experience gained in dealing with video-sharing platforms could then, if necessary, be applied effectively to other areas of content regulation on online platforms.

1.10 Funding of the Regulatory Scheme

In line with common practice in Ireland, it is the view of the BAI that the regulatory scheme should be funded by the sector(s) to be regulated and the BAI is positioned to apply its extensive prior experience in developing a fair and transparent scheme. The broad principles underpinning such a scheme would include:

- **Transparency** as to the purposes to which levy raised will be used and in contributions made by individual entities.

[1] Page 5 of the DCCAE Explanatory Note

- **Fairness and Proportionality**: the amounts of the levy should, in principle, be set at a rate that is commensurate with the burdens incurred by the regulator in the administration of the regulatory scheme. It should be sufficient to raise the funds necessary to facilitate the efficient running of the regulator's operations, including its operational, capital expenditure and cashflow requirements, without recourse to borrowings.
- **Certainty**: in amounts to be paid by the regulated entities on an annual basis to facilitate adequate financial planning.
- **Accountability**: the regulator should be fully accountable on the use to which monies raised are put.
- **Flexibility**: while adhering to a general principle of proportionality, having regard to the disparity in scale between the various regulated entities to be regulated under the proposed legislation and a certain unknown quantity in the level of regulatory activity involved, it may also be desirable to build in a degree of flexibility in the design of the scheme. Such flexibility might also take account of a regulated entity's ability to pay.

1.11 What is required in the legislative design of such a scheme?

The legislative provisions should set down the broad principles and parameters for the design and operation of such a scheme and a requirement for the regulator (or the BAI prior to the enactment of the legislation) to prepare such a scheme for submission to the Minister for approval. As with the BAI's current industry levy scheme, the BAI suggests that proposals for a scheme would be subject to consultation with the industry to ensure that the overarching principles and objectives for the scheme are met.

Section 2: Video-sharing Platform Services (Strand 2)

2.1 Proposed Approach to Transposition for Video-sharing Platform Services

The revised Audiovisual Media Services Directive requires EU Member States to introduce new rules for video-sharing platform services into Irish law by September 2020. The BAI's view is that these rules should be introduced in a separate but complementary manner to the rules the Minister is proposing to introduce in respect of Online Safety.

Video-sharing platform services are services that allow users to access large amounts of videos uploaded by other users. They can be provided on their own (e.g. YouTube) or as parts of social media services (e.g. the Facebook News Feed).

The principal focus of the Directive's rules for video-sharing platform services is to require them to moderate content on their services more effectively. The areas covered include the protection of minors, preventing incitement to violence and hatred, doing more to combat certain criminal offences and the introduction of advertising rules. To achieve these goals, video-sharing platform providers must provide genuinely effective age verification mechanisms, genuinely effective parental control mechanisms, introduce transparent and robust complaints procedures and ensure their terms and conditions prohibit certain kinds of videos (among other things). A regulator must monitor and oversee the implementation of these measures introduced by video-sharing platform services.

In this consultation response, the BAI proposes that video-sharing platform services should be directly regulated by a statutory regulator. The primary means by which the Directive's new rules for video-sharing platform services should be implemented in Ireland is through legislation and statutory codes.

Ireland is responsible for regulating the video-sharing platform services that are based in Ireland, and these services will only have to comply with Irish rules for all their European activities in the areas covered by the Directive. Most of Europe's largest providers of video-sharing platform services –such as Facebook, Google and Twitter – are based in Ireland. Ireland's responsibility under the Directive in respect of video-sharing platform services, therefore, is greater than any other EU Member State and Ireland must ensure that effective protections are put in place for hundreds of millions of European users of such services. The scale of audiovisual content that Ireland is responsible for regulating and the number of users of such services presents significant challenges for traditional regulatory methods.

To resolve matters of scale and numbers of users on Irish video-sharing platform services, the BAI proposes that the regulator should principally work at a "macro" level. This means that the role of the regulator would be to make very important regulatory decisions that affect large numbers of users simultaneously e.g. by drafting codes, and then by assessing on a regular and ongoing basis the measures put in place by video-sharing platform services to the code provisions. Electronic information-gathering mechanisms between the regulator and video-sharing platform services should be established to ensure that video-sharing platform services are complying with their obligations. The regulator should have extensive powers to compel video-sharing platform services to conduct independent audits, to supply data and other information as considered appropriate by the regulator

(including information in respect of processes and procedures) and to provide truthful accounts of features or aspects of the services they are providing.

Providers of video-sharing platform services should be obliged to comply with codes drafted and enforced by the regulator. These codes should be drafted in consultation with relevant stakeholders, should clearly establish the responsibilities of the video-sharing platform providers to their users and should create common standards of protection that all video-sharing platform services are obliged to follow. In developing such codes, consideration should be given to the scale of audiovisual content that must be regulated and the resources available to providers of video-sharing platform services. Fundamental protections for freedom of speech on video-sharing platform services should be enshrined in these codes while balancing that right with the need for significant protections on such services in respect of video content.

Video-sharing platform services should have robust and transparent complaints systems and users of video-sharing platform services should have the option of having their complaints resolved impartially if they are unsatisfied with the initial determination of their complaint. The BAI is proposing that video-sharing platform providers should be obliged to retain independent decision-makers, whose independence would be enshrined in statute and who can make protected disclosures to the regulator.

The regulator for video-sharing platform services should have significant compliance and enforcement powers including powers of audit, investigation and sanction. Further detail in this regard is outlined in our response to Questions 14 & 15 in Section 5.2 of this consultation response.

In the view of the BAI, online safety regulation fulfils a different purpose to the audiovisual regulation intended to fulfil the obligations contained in the Directive. Nevertheless, the strategic objectives of online safety and audiovisual regulation can be viewed as aligned in many respects. Further discussion on this issue is outlined in our response to Questions 12 & 13 in Section 1.4 of this consultation response.

Q.5	**The revised Directive introduces a definition of Video-sharing Platform Services. Where should the limits of this definition be i.e. what services should and shouldn't be considered Video-sharing Platform Services? Please include your rationale and give examples. [Section 3 of the explanatory note]**

2.2 The Definition of a Video-sharing Platform Service

The definition of a video-sharing platform service in the revised Directive is novel and contains multiple legal elements that must be considered and assessed:

> *"video-sharing platform service" means 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".*

This definition is complex but not unclear. **Annex 1** to this submission highlights and discusses the key points of complexity in the definition in further detail, with a view to establishing a framework in which the various criteria in the definition can be applied. This can be used to identify video-sharing platform services and to explore the limits of the legal definition.

Developing a clear understanding of what constitutes a video-sharing platform service and an established methodology to reach such a determination is important because this will clarify the extent to which services that meet these descriptions are subject to the Directive's new rules. Future guidance from the European Commission on the essential functionality criterion, as envisioned by the Directive, will be vitally important to ensuring a harmonised and consistent interpretation of the definition across the EU (particularly regarding "edge cases"), as will work carried out through the now formalised European Regulators Group for Audiovisual Media Services (ERGA).

While the limits of what constitutes a video-sharing platform service will have to be determined on a case-by-case basis through detailed examination of the functionality of a particular service, for the reasons explored in Annex 1, the BAI is confident to offer its preliminary view that the services or aspects of the services in the following table are video-sharing platform services:

"Principal Purpose VSP Services"	"Essential Functionality VSP Services"
YouTube	Facebook
TikTok	Twitter
Daily Motion	Instagram
Vimeo	Snapchat
Twitch	LinkedIn
	Reddit

The BAI's views on these services are offered without prejudice to the future detailed guidance of the European Commission on the essential functionality criterion. These views are also subject to the requirement to conduct research on jurisdiction which will be necessary to ascertain where these services will fall to be regulated (although the BAI would say definitively that services provided by Facebook, Google and Twitter will fall to be regulated in Ireland).

Q6	**The revised Directive takes a principles-based approach to harmful online content and requires Video-sharing Platform Services to take appropriate measures to protect minors from potentially harmful video content, the general public from video containing incitement to violence or hatred and certain criminal video content. It also requires that Ireland designates a regulator to oversee the ongoing implementation of these measures.** **Given this, what kind of regulatory relationship should there be between a Video-sharing Platform Service established in Ireland and the Regulator?**
Q7	**On what basis should the Irish regulator monitor and review the measures that a Video-sharing Platform Service has in place, and on what basis should the regulator seek improvements or an increase in the measures the services have in place?**
Q16	**Given that the revised Directive envisages that a Video-sharing Platform Service will be regulated in the country where it is established for the entirety of the EU, it does not envisage that the relevant regulator would assess individual complaints. However, the revised Directive requires Ireland to put in place a system of mediation between users and Video-sharing Platform Services. Given that such a system would be in place on an EU-wide basis, should thresholds apply before an issue could be brought before this system? If so, then what thresholds would be most appropriate?**

2.3 How the Obligations Relating to VSP Providers in the Directive Function

The BAI considers that the most appropriate means of providing its response to these questions is to answer them together, as the questions posed raise many interrelated issues.

The BAI's response to these questions is therefore structured in six parts:

2.3.1 The BAI's understanding of how the obligations on VSP Services in the Directive function
2.3.2 Jurisdictional rules and assumptions underpinning the BAI's approach
2.3.3 Viewing the obligations in the Directive from "macro" and "micro" perspectives
2.3.4 The proposal for a VSP Code
2.3.5 Complaints and the Impartial Dispute Resolution Mechanism
2.3.6 Assessments of VSP Providers' Compliance with the Directive's rules

2.3.1 Article 28b Obligations

The revised Directive requires Ireland to ensure that video-sharing platform providers like Google, Facebook and Twitter, that are based in Ireland, comply with certain obligations and moderate videos on their services more effectively. Protections must be put in place by Ireland for all European users of these services. The areas covered by the Directive's rules include the protection of minors, preventing incitement to violence and hatred, doing more to combat certain criminal offences and prohibiting certain kinds of advertising.

The business models of VSP Providers rely on users of the service uploading content without the direct intervention or oversight of the VSP Provider. This has fundamental implications for how VSP Services can be regulated. EU rules specify that online platforms can only be made responsible for illegal content uploaded by users where they have been made aware of its existence (e.g. by being informed by a regulatory authority or by another user of the service) and where they do not act expeditiously to remove or disable access to it after being notified.[2] Additionally, EU Member States are prohibited from introducing laws that create comprehensive general monitoring obligations on VSP Services.

The obligations placed on VSP Providers in the Directive are carefully worded to differentiate between circumstances where a VSP Provider itself is responsible for an activity being regulated and where the Directive requires the VSP Provider to take a more active role or to devote additional resources to moderating users' activity on the service. Where a Directive obligation requires VSP Providers to take measures to better moderate users' activities on the service, the wording of the relevant obligation in the Directive will require the VSP Provider to adopt "appropriate measures" in respect of that activity.

The ten key obligations relating to VSP Providers in the Directive are paraphrased in the table below. The obligations are phrased in a "general" way to allow EU Member States to regulate video-sharing platform services in a manner that is consistent with their own national legal framework and traditions. Member States are obliged to:[3]

Article	Obligations	Appropriate Measures?
Art. 28b.1(a)	Ensure video-sharing platform providers take appropriate measures to protect minors from audiovisual content[4] which may impair their physical, mental or moral development;	Yes
Art. 28b.1(b)	Ensure video-sharing platform providers take appropriate measures to protect the public from audiovisual content containing incitement to violence or hatred.	Yes
Art. 28b.1(c)	Ensure video-sharing platform providers take appropriate measures to protect the public from audiovisual content the dissemination of which constitutes an activity which is a criminal offence under Union law (e.g. terrorist offences, child sexual exploitation).	Yes
Art. 28b.2 Sub-Para 1	Ensure video-sharing platform providers comply with the Directive's advertising rules in Article 9(1) with respect to audiovisual commercial communications that are under their control.	No
Art. 28b.2 Sub-Para 2	Ensure video-sharing platform providers take appropriate measures to comply with the Directive's advertising rules in Article 9(1) with respect	Yes

[2] There are some caveats to this general rule.
[3] This list is not intended to be exhaustive but highlights the main responsibilities that Member States and VSP Providers will have in respect of VSP Services.
[4] Audiovisual content in this instance means programmes, user-generated videos and audiovisual commercial communications.

Article	Obligations	Appropriate Measures?
	to audiovisual commercial communications that are not under their control (i.e. those which are not marketed, sold or arranged by them)	
Art. 28b.2 Sub-Para 3	Ensure video-sharing platform providers clearly inform users where videos contain audiovisual commercial communications, where they have been declared as such by users, or the provider has knowledge of the fact.	No
Art. 28b.2 Sub-Para 4	Encourage co-regulation and self-regulation to effectively reduce the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, particularly fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended.	No
Art. 28b.7	Ensure there is an out-of-court redress mechanism available for the settlement of disputes between users and video-sharing platform providers in relation to measures taken pursuant to the Directive in respect of such services.	No
Art. 28b.8	Ensure users can assert their rights in respect of the protection of minors, incitement to violence or hatred and EU criminal offences before a court.	No
Art. 28a.6	Establish and maintain an up-to-date list of video-sharing platform providers.	No

As discussed above, obligations which require VSP Providers to adopt "appropriate measures" require video-sharing platform providers to moderate videos on their service more effectively. To achieve this, video-sharing platform providers must[5]:

- Establish and operate genuinely effective age verification mechanisms on the service to prevent minors from viewing videos which may impair their physical, mental or moral development.
- Establish and operate genuinely effective parental control systems on the service.
- Align the platform's terms and conditions and actively enforce the platform's terms and conditions to deal more effectively with issues concerning the protection of minors, incitement to violence or hatred and EU criminal offences.
- Align the platform's terms and conditions and actively enforce the platform's terms and conditions in a manner consistent with the Directive's rules for video advertisements (prohibiting certain kinds of advertising on the service e.g. tobacco);

[5] The contents of this list are paraphrased from the contents of the list of measures contained in Article 28b.3 of the Directive.

- Establish and operate transparent, easy-to-use and genuinely effective procedures for handling and resolving users' complaints about videos.

- Introduce technical measures to ensure that where users on the service upload videos any advertisements in those videos are declared.

- Introduce transparent and user-friendly mechanisms that allow users of the service to report or flag videos where they may be harmful to minors, constitute an incitement to violence or hatred and constitute an EU criminal offence. The provider must explain to users of the platform what effect has been given to reports and flagging by users.

- Introduce mechanisms to allow users to "rate" content i.e. to indicate what age it might be appropriate for.

- Promote media literacy on the service and introduce tools to raise users' awareness of media literacy.

The Directive creates a rebuttable presumption that the measures listed above must be adopted. The manner and form in which an appropriate measure is adopted, as well as whether it is appropriate for the measure to be adopted at all, is determined through reference to the assessment framework established in the first two sub-paragraphs of Article 28b.3.

Article 28b.3 requires an assessment of: the nature of the content; the harm it may cause; the characteristics of the category of persons to be protected; rights and legitimate interests at stake, including those of the video-sharing platform providers and users that have created or uploaded the content; the practicality of the measures (taking into account the size of the video-sharing platform service and the nature of the service that is provided); the proportionality of the measures (taking into account the size of the video-sharing platform service and the nature of the service that is provided) and the general public interest.

2.3.2 Article 28b Obligations

The obligations contained in the Directive for VSP Services relate to activity which is solely under the control of VSP Providers and activity which relates to how VSP Providers moderate videos uploaded by users of their service.

For example, Article 28b.2 (1) requires Member States to ensure that VSP Providers do not market, sell or arrange audiovisual advertisements for tobacco products in a manner contrary to Article 9.1(d). Where a VSP Provider markets, sells or arranges for an audiovisual advertisement for a tobacco product on the service, in most cases determining whether this has occurred can be determined solely through reference to actions undertaken by the VSP Provider (much in the same way responsibility would fall solely to a broadcaster if they broke a similar rule). The activities of the users of the service are not relevant in this case.

By way of contrast, Article 28b.2 (2) requires Member States to ensure that VSP Providers take *appropriate measures* in respect of audiovisual advertisements for tobacco products that appear on the

service, but which are not under the control of the VSP Provider i.e. they are uploaded by users of the service. Determining whether a VSP Provider is satisfying this obligation will require an assessment of the VSP Provider's conduct having regard to the scale and nature of user activity on the service, the resources available to the VSP Provider and any other relevant factors as appropriate (e.g. are automated decision-making procedures present, and, if so, to what extent?).

Some obligations relating to VSP Providers in the Directive have significantly more complex implications than others. For example, Article 28b.1(a) requires VSP Providers to take appropriate measures to protect minors from audiovisual content that may impair their physical, mental or moral development. While many issues on the protection of minors will be relatively straightforward, many others will contain more complex elements that require a decision to be made based on context, the age of the minor in question and any vulnerabilities a minor might have. Arriving at a determination in these cases will typically be a more complex exercise than determining if an advertisement is featuring a tobacco product, for example.

Implementing the obligations in the Directive will require, therefore, a variety of different regulatory approaches and techniques. Clear, detailed guidance will be appropriate in some cases while requiring VSP Providers to adopt a principles-based approach to protection will likely ensure better protection for users in other circumstances. Whether a breach of the Directive's obligations has occurred can sometimes be determined in a straightforward manner, while on other more complex issues a determination of the appropriateness of measures adopted by VSP Providers will have to have regard to a range of factors. The approach to transposition adopted should reflect this complexity and provide the regulator with an appropriate range of regulatory powers to assess the measures put in place by VSP Providers.

2.4 Key Legal and Jurisdictional Assumptions Underpinning the BAI's Approach

Each EU Member State is responsible for regulating the VSP Services provided by VSP Providers from its jurisdiction on a pan-European basis (insofar as a matter falls within the scope of the fields coordinated by the Directive). As a corollary to this, the new rules in the Directive mean that other Member States may have had their ability to impose regulatory rules and sanctions on VSP Providers established outside of their Member State weakened. This has given rise to legitimate concerns among other Member States about the extent to which they can now impose regulatory measures on prominent video-sharing platform services being provided from Ireland to protect residents in their Member States.

Understanding the scope and limits of the Directive's obligations is important, as this will clarify the scope of the authority of the regulator appointed in respect of VSP Providers and the Directive's compatibility with other EU Member States' laws. The issue of the Directive's compatibility with other areas of law will be a paramount consideration in a wider European context.

In that regard, the BAI notes the following points concerning jurisdiction and compatibility:

1. While not underestimating the significance of the revised Directive's provisions, the BAI does not consider that the Directive turns Ireland into a "super regulator" for all the activities of video-sharing platform providers. The proposed approach to the transposition of the Directive must be compatible with a range of European and national rules and regulations in other Member States such as data protection and privacy, online safety, consumer protection, criminal

enforcement and political advertising that are not coordinated by the Directive. Insofar as it is possible, the Directive must be interpreted and applied in a manner that is compatible with these other rules and compatible with the work of many regulatory authorities across the EU spanning a range of substantive areas that occur *on* VSP Services, but which do not relate to the regulation of VSP Services in the manner envisioned by the Directive *as such*. This will include the work of many online safety regulators that are likely to be established in other EU Member States over the next decade, for example. Where a conflict does exist, however, the rules of the Directive will prevail.

2. The Directive's rules on VSP Services are intended to vindicate audiences' rights in respect of audiovisual content only. In order to vindicate the rights of users in respect of audiovisual content, it is likely that content other than audiovisual content present on a service may be incidentally affected by measures intended to implement the Directive, for example where the purpose of a function on a VSP Service has a dual- or multi-purpose and affects access to, or the use of, other kinds of content on the service e.g. a login screen or a parental control mechanism. The fact that content other than audiovisual content might be affected by measures intended to implement the Directive does not act as an impediment to the application of its rules, as otherwise – given the complexity inherent in modern social media services – it would be impossible to apply the Directive. The responsibility for achieving the standards set by the Directive and for reflecting these in changes in a proportionate manner is the responsibility of VSP Providers.

3. The provisions in the Directive relating to VSP Services only create obligations on VSP Providers and only in respect of the VSP Services they provide. They do not create obligations on the users of those services unless they are audiovisual media services. To the extent that a law in another Member State creates obligations on *users* of VSP Services (other than audiovisual media services) and is enforced from that perspective, it will likely be fully compatible with the regulatory regime created by the Directive.

2.5 The Directive's VSP Provisions in Terms of Macro and Micro Elements

In developing its position on the transposition of the Directive's provisions relating to video-sharing platform services, the BAI carried out a detailed analysis of many of its provisions from the perspective of elucidating the large scale ("macro") and small scale ("micro") implications of its obligations, having particular regard to the scale of audiovisual content that will fall to be regulated on Irish video-sharing platform services.

For example, Article 28b.1(a) of the Directive requires Member States to ensure that video-sharing platform providers take appropriate measures to protect minors from audiovisual content that may impair their mental, moral or physical development. The "macro" implication of this obligation is that high level rules and principles must be drawn up determining the kinds of content that is harmful to minors and ensuring that the VSP providers' policies and procedures are aligned with these macro rules. The "micro" implications of this obligation are the millions of decisions that must be made by video-sharing platform services in relation to the rules intended to protect minors.

Viewing the Directive's provisions in respect of VSP providers in terms of their macro and micro obligations, the BAI concluded that the most effective means of transposing the Directive is to have the state and a statutory regulator make the "macro" decisions in the legislative and regulatory framework for VSP providers and to have the VSP providers resolve "micro" disputes stemming from those "macro" rules on the platform. The role of the regulator in this context is to ensure, at the macro level, that the VSP provider acts in a manner that is aligned with these "macro" rules and to assess and monitor their compliance from this perspective. This is the overall approach to transposition favoured by the BAI in respect of VSP services for the following key reasons:

- The key strengths of statutory regulation – the public trust and the public interest – can be applied to the issues that have the largest implications for the largest amount of people.
- The cost and other resources required in having a statutory regulator in the administration of individual complaints and "micro" issues on video-sharing platform services on a pan-European basis would be inordinate and impractical.
- By having access to technical solutions to resolve issues and a direct, administrative technical link to the video-sharing platform service itself, the video-sharing platform provider is the body best equipped to resolve "micro" issues on the service at an early stage. A robust, impartial secondary stage of decision-making within a VSP provider is envisioned by the BAI in its proposed approach to enhance VSP Providers' decision-making processes.
- "Micro" harms, which are harms that have a direct impact on an individual, need to be resolved as quickly as possible to prevent harms occurring to those individuals. Given the scale of audiovisual content to be regulated, the regulator is best placed to resolve "macro"/collective harms which affect a large number of individuals or groups of persons together.
- The video-sharing platform service's compliance on micro issues can be taken, reviewed and given transparency through targeted audits of the service and selective reviews of certain key cases and issues.

2.6 A VSP Code or Codes

In the view of the BAI, the most appropriate means of transposing the Directive's obligations for VSP Services into Ireland's national legal framework is through statute and statutory codes. Statute should be utilised to create the regulatory "framework" that VSP providers are obliged to comply with and statutory codes – prepared by the regulator – should be the primary means by which regulatory standards and objectives are communicated by the regulator.

In regulating VSP Providers, the BAI does not see any need to "reinvent the wheel". While the regulatory framework should contain several mechanisms that are designed to resolve issues of scale (particularly complaints) and to allow the regulator to make informed decisions about VSP providers' activities, ultimately, statutory codes are tried and tested mechanisms that produce effective regulatory results.

Statutory codes strike an effective balance between ensuring compliance by regulated entities and allowing enough flexibility to develop and improve regulatory rules. By having a basis in statute, a breach of a statutory code is equivalent to a breach of the law, thus allowing a regulator to take enforcement actions in the event of non-compliance against an entity that has committed a breach of the code. Unlike statute, a code can be amended directly by a regulator to adapt quickly to changing

circumstances, to respond to matters of public importance or to reflect changes in attitudes or expectations about standards of protection.

Statutory codes set common standards among all regulated services, ensuring a level playing field between the regulated entities and communicating the standards required of entities in a concise, clear manner. VSP providers should be responsible for aligning their policies, terms of service and procedures with the codes set by the regulator and ensuring that the objectives set by the codes are achieved.

The BAI cautions against a regulatory regime based solely in statute as such a rigid approach to transposition may become quickly dated and statutory rules cannot be adapted to respond quickly to urgent issues.

The standards set by the regulator should be able to take account of the resources available to different providers of video-sharing platform services and the extent to which protections might be more desirable/necessary on one service than another.

2.7 Complaints and the Impartial Out-Of-Court Redress Mechanism

Audience complaints serve a vital function in any regulatory system for media. Having an effective outlet in which complaints can be heard, considered and adjudicated upon fairly promotes compliance among regulated entities and empowers audiences to hold regulated entities to account. From the perspective of the regulator, audience complaints serve as important indicators about the control environment of a service and on the potential non-compliance of regulated entities with statutory codes and rules. They can also highlight trends and draw attention to key issues that audiences consider to be important.

However, in the context of the transposition of the revised Directive, it is necessary to have regard to the scale of audiovisual content being regulated on video-sharing platform services and the challenges that this poses for traditional regulatory methods. In effect, the Directive's rules mean that effective protection systems will have to be put in place for hundreds of millions of Europeans.

The BAI is of the view that even with a statutory test and a threshold that must be met before complaints would be accepted by the regulator, a "traditional" regulatory approach to complaints resolution whereupon a regulator or external body has a statutory obligation to directly resolve complaints on video-sharing platform services is unlikely to ever be achievable in practice. Where a regulator can provide the most value within the regulatory regime is by focusing on "macro" issues (discussed in Section 2.5) which affect large numbers of users simultaneously.

The BAI concurs with the Minister's view that the Directive does not require such a traditional complaints system to be established in respect of video-sharing platform services. However, insofar as it is possible, the BAI believes strongly that the approach adopted to complaints resolution in the proposed approach to transposition for VSP providers should empower individuals to be able to effect meaningful change in how video-sharing platform services conduct themselves and to encourage VSP Providers to act in a more accountable manner.

While significant work will be required on many of the more detailed aspects of the approach, the BAI is advocating that the approach adopted to complaints resolution on video-sharing platform services should comprise the following four key features:

(1) Video-sharing platform services should be obliged to have robust, transparent internal complaints mechanisms and procedures in respect of audiovisual content. The implementation of these systems and procedures should be overseen and assessed by the regulator.
(2) VSP providers should be obliged to retain independent decision-makers that function as a second stage of decision-making in situations where a complainant or an individual subject to a complaint is dissatisfied with how a complaint has been determined. The independence of these decision-makers should be guaranteed in statute and monitored by the regulator.
(3) At the macro level, the regulator should have regard to complaints received by the VSP provider in "aggregate" when it makes its assessments of a VSP provider's compliance.
(4) Certain bodies across the EU should be designated as "priority complainants". VSP Providers should be obliged to designate additional resources to the resolution of complaints from these bodies and provide comprehensive reasons why decisions have been made in complaints received by them. The manner in which such complaints are resolved should be closely monitored by the regulator.

2.7.1 VSP Providers' Internal Complaints Procedure for Audiovisual Content

The regulatory framework should require VSP providers to have a robust, transparent internal complaints procedure for audiovisual content.

Where audiovisual content is present on a video-sharing platform service, the option to complain directly about that content to the VSP provider should be available to the users of the service. VSP providers should be obliged to provide easily-usable "tools" to report content such as buttons or flagging mechanisms.

VSP providers' internal policies and procedures for complaints resolution and their terms of service should be aligned with the requirements of the VSP Code. Users should be able to complain about other users of the video-sharing platform service or the VSP provider's conduct, processes and/or procedures.

VSP providers should be afforded a suitable degree of flexibility in how they resolve complaints in order to facilitate technological solutions in resolving issues and to ensure that decisions can be made having regard to contextual factors. For example, rather than taking down a single piece of content, a more effective means of responding to a complaint might be to use technological measures to prohibit multiple instances of that piece of content appearing across the service.

Where a complainant is not satisfied with a decision (or decisions) made by a VSP provider, or a user's audiovisual content has been affected by a complaint lodged by another user, the option to avail of an impartial resolution mechanism should be available.

2.7.2 Impartial Decision-Makers

Article 28b.7 of the Directive requires EU Member States to ensure than an impartial out-of-court redress mechanism is available for the settlement of disputes between users of video-sharing platform services and video-sharing platform providers about audiovisual content.

In the view of the BAI, the scale of audiovisual content to be regulated and the number of users of Irish video-sharing platform services (e.g. those provided by Facebook, Twitter and Google) should be a key consideration in the transposition of this provision.

As stated previously, due to the scale of activity on Irish video-sharing platforms services and because of particular features of Irish law, a traditional approach to complaints resolution is likely to be extremely difficult to implement in practice for the following key reasons:

- It would require the employment of thousands of staff solely dedicated to the resolution of complaints by the State.
- The organisation would be required to resolve complaints in most languages utilised within the European Union.
- Sophisticated, technological solutions to facilitate "remote" decision-making on video-sharing platform services would have to be established involving the transfer and processing of the personal data of millions of Europeans. This would include personal data of the complainant, personal data of individuals whose content has been complained about and any other personal data relevant for the making of a determination.
- Decisions made by the organisation would be subject to natural justice obligations, constitutional constraints on public sector bodies and judicial review of decisions made. This has fundamental resource and cost implications which would prohibitively impact the effectiveness of the organisation in resolving large amounts of "micro" decisions and the ability to do so quickly.
- The establishment of such a system would likely come at a significant cost to the State.

The BAI's favoured approach to the implementation of the impartial out-of-court redress mechanism would be to create a statutory regime that requires video-sharing platform providers to retain decision-makers that have a statutory duty to act impartially. This approach would focus on "re-purposing" aspects of the complaints resolution infrastructure already in place within video-sharing platform services and utilising VSP providers' resources directly to serve the public interest. This approach has a broad precedent in, and is analogous to, the requirement to appoint independent Data Protection Officers pursuant to the General Data Protection Regulation (GDPR).

In this approach, impartial decision-makers ("IDMs") could be retained by VSP Providers and incorporated as a "second stage" in complaints resolution processes. Legislation and provisions in the VSP Code could guarantee that IDMs make decisions independently and impartially, introducing rules on matters such as:

- How IDMs can be hired. For example, it might be the case that two-thirds of an interview panel appointing an IDM are comprised of representatives of independent external organisations.
- Who IDMs are required to report to and who they can receive instructions from within an organisation, and on what issues.
- How IDMs can be dismissed, providing, specifically, that they cannot be dismissed or penalised for decisions they reach while carrying out IDM functions (unless they have acted egregiously or negligently).
- Ensuring that IDMs do not have conflicts of interests.
- Establishing whistle-blower protections for IDMs and an ongoing and direct, confidential line of communication between an IDM and the regulator.
- Ensuring that effective training, support and communication networks are in place for IDMs and that they are treated on a non-discriminatory basis within the organisation (while preserving their impartiality).

The regulator would expectedly require significant powers, including investigatory powers, to ensure that IDMs act in an impartial manner. The integration of IDMs into the decision-making processes of the VSP providers would require evaluation and audit by the regulator on a regular basis. The responsibilities of VSP providers in respect of their IDMs would have to be made clear in statute and in a code or codes applicable to VSP providers, and interference with, or contraventions of, these responsibilities would have to warrant the imposition of significant sanctions against VSP providers to preserve the integrity of decision-making processes if the "impartiality" required by the Directive is to be achieved.

An IDM-based model carries significant advantages compared to the "traditional" approach to complaints resolution:

- The burden of financing and administering the system rests with video-sharing platform providers and their extensive human resource capabilities and finances can be utilised.
- There is no need for the State to develop or replicate complex technological solutions to resolve decision-making or to transfer large amounts of personal data to facilitate the resolution of disputes.
- IDMs would be able to make decisions with appropriate rapidity, reflective of the fast-paced online environment.
- Language problems associated with a traditional approach to complaints resolution can be avoided.
- The approach can be implemented with significantly less cost to the State.

The role of the IDM would be to make decisions on the application of the platform's terms of service in an impartial manner, which, in the approach proposed by the BAI, would have to be aligned with the requirements of the VSP Code. While IDMs would not be able to "disapply" the terms of service of the platform, the system could allow IDMs to make "declarations of incompatibility" where they felt that a platform's terms of service prohibited them from making an appropriate decision or where their experience in practice demonstrated an incompatibility between the VSP's terms of service and the VSP Code. Declarations of incompatibility would be notified and considered by the regulator where it assesses the compliance of VSP providers at the "macro" level.

If this approach to the implementation of an impartial dispute resolution mechanism was adopted, significant consideration would have to be given to the statutory mechanisms to be introduced within the regulatory scheme to ensure that it is both genuinely impartial and *perceived to be* impartial by the public and other stakeholders. A fundamental, key issue would likely be the extent to which an IDM receives remuneration directly from the VSP provider. While the effectiveness of an IDM-based approach is contingent upon IDMs being retained by the VSP provider, it could be appropriate, for example, for IDMs to be remunerated directly from the levy that would be applicable to all VSP providers.

An IDM-based approach to the impartial dispute resolution mechanism also carries the significant benefit of encouraging a genuine culture of regulatory compliance within a VSP provider. Establishing an external state body for the resolution of complaints could be used as a mechanism by VSP providers to "outsource" their regulatory responsibilities to that body, rather than encouraging them to reflect upon, improve and invest in their existing decision-making infrastructures.

2.7.3 Macro Review of Decisions Made

Article 28b.5 of the Directive requires Member States to have a national regulatory authority assess the regulatory measures put in place by VSP providers. While it is difficult to envision an approach to transposition where the regulator adjudicates upon individual complaints on video-sharing platform services, information generated from complaints processing by VSP providers viewed "in aggregate" would provide significant value to the regulator in determining how well VSP providers' complaints systems are functioning and whether effective redress is being provided.

For example, it would be a matter of interest to the regulator if a large number of complaints are received about an aspect of the VSP Code in order to determine if action is required at the macro level. It would also be an important feedback mechanism for the regulator if it were necessary to issue a formal regulatory recommendation – see Section 2.8, below.

Helpful indicators in this regard would include:

- The number of complaints received on a particular issue(s).
- The extent to which complainants are satisfied that their complaints have been resolved and the speed with which they have been resolved.
- The number of impartial appeals sought and on what issues.
- The level of "declarations of incompatibility" from impartial decision-makers.
- Year-on-year trends.

If a complaint is of sufficient public interest to warrant the direct intervention and involvement of the regulator, the regulator should have the capacity to issue a binding recommendation(s) to the VSP provider to address the matter. It might also be appropriate for the regulator to issue cross-sectoral "thematic reports" on certain issues to communicate regulatory expectations in a broader sense. Further information on how the BAI considers the conduct of VSP providers should be assessed is outlined below in Section 2.8.

2.7.4 Designated Priority Complainants

While other EU Member States can no longer impose sanctions or introduce rules for Irish video-sharing platform services in respect of matters that fall within the fields coordinated by the Directive, the BAI is of the view that other EU Member States' concerns about loss of jurisdiction in matters coordinated by the Directive could possibly be addressed – in part – by a "priority complainant" scheme within the regulatory framework for video-sharing platform services.

While respecting the country of origin principle, a priority complainant scheme could require VSP providers to dedicate additional resources to, and to resolve complaints more quickly from, certain bodies being designated as "priority complainants". In such an arrangement, a priority complainant would lodge a complaint on behalf of affected parties in their Member State and a VSP provider would have a duty to contact and engage constructively with the body making the complaint with a view to resolving the matter. A VSP provider would not be obliged to comply with the request from the priority complainant (respecting the country of origin principle), but the extent to which it has engaged constructively with the complainant in resolving the issue could be a relevant consideration in terms of assessing the VSP provider's compliance.

In order to implement any such system, significant consideration would have to be given to its purpose and the safeguards necessary to prevent abuse of the system, both in terms of the number of priority complaints that might be lodged and the rationale for complaints made. Various tests would have to be developed to ensure that a matter is, for example, of significant public interest or impact to warrant a priority complaint. A careful balance would need to be achieved to ensure the country of origin principle under the Directive is respected and that the complaints system remains practicable and workable relative to the resources available to a VSP provider.

A possible approach to a priority complainant scheme could be to designate an independent statutory body, such as an audiovisual regulator in each Member State, as a priority complainant.

2.8 Regulatory Assessment Framework for VSP Providers

Article 28b.5 of the revised Directive requires EU Member States to ensure that a national regulatory authority assesses the appropriateness of regulatory measures put in place by VSP providers to moderate content on their services. In the BAI's view, this will require the establishment of a comprehensive regulatory assessment framework for VSP providers with oversight by a statutory regulator.

The BAI considers that the statutory scheme for the regulation of VSP providers will require the regulator to be given significant compliance and enforcement powers, including powers of audit, inspection, investigation and sanction to ensure compliance (discussed in the BAI's response to questions 14 and 15 in Section 5.2). However, the overarching goal of the regulatory scheme should be to reach a point where compliance by VSP providers is such that the use of such powers is an infrequent occurrence or is not necessary. An approach to regulation that is based solely on sanctions and enforcement is unlikely to be conducive towards encouraging compliance, whereas open dialogue between the

regulator and regulated entities also offers an opportunity to allow compliance matters to be explored and resolutions and future compliance to be achieved.

While significant detailed work will be required to develop the details of a regulatory assessment regime for VSP providers, the BAI is of the view that it should comprise the following five main elements:

1. The requirement for a VSP provider to set out annually (or biennially) a **statement** outlining their key compliance objectives and commitments, together with key performance indicators,
2. The requirement for VSP providers to provide a comprehensive **report** relating to the compliance period, assessing their performance against their objectives. ("VSP Reports"). In turn, the regulator would review this assessment and make its own assessment of the VSP's performance.
3. The requirement for a VSP provider to provide a full and fair account of its service(s) in the manner specified by the regulator, and to establish mechanisms for the sharing of information about the service(s) to the regulator.
4. The requirement for the regulator to issue a report of its findings and to make formal recommendations and/or give directions to the VSP provider, which it is obliged to follow.
5. The ability of the regulator to produce "thematic" reports applicable to all VSP Providers.

The assessment process envisioned by the BAI would not be a certification process as such. Rather, the BAI views it as a means of providing transparency on compliance by a VSP provider with its fundamental obligations to comply with the VSP Code and its other statutory obligations, in the period under review. It would also function as a means of directing the attention of a VSP provider to matters where the regulator perceives changes or improvements (including process improvements) should be made to better ensure compliance with the VSP provider's statutory obligations and duties. While it could function as an early warning system if the VSP provider is to avoid sanctions in the future, it would not preclude the regulator from implementing its statutory enforcement powers where a situation merited such actions.

2.8.1 VSP Statement of Compliance Commitments

Each VSP provider should be required to prepare annually (or biennially) a statement of its compliance commitments, setting out their key performance objectives and commitments, together with key performance indicators in order to ensure that they comply with the VSP Code prepared by the regulator. The format for such a statement should be determined by the regulator in consultation with the VSP provider but, **at a minimum**, it should include the appropriate measures to be implemented by a VSP provider pursuant to Article 28b.

The VSP provider is responsible for devising and introducing technical and other measures to ensure the achievement of its objectives.

2.8.2 VSP Report

Each VSP provider should be obliged to conduct an assessment of its performance against its compliance commitments (as set out in its statement) and to compile and submit a detailed report to the regulator on an annual or biennial basis. This report should contain a comprehensive account of

the extent to which the VSP provider has achieved its compliance objectives and commitments in the period under review and should be in a format specified by the regulator. The regulator should be required to interrogate the report, offer its views on the contents of the report, and draw its own conclusions on the overall performance of the VSP provider. The regulator should have the necessary powers to conduct, or request the VSP provider to arrange to conduct, an independent audit of the matters under review if necessary.

Unless specific information contained in the report is of a highly commercially sensitive nature to the VSP provider, it is expected that VSP Reports would be made published by the regulator in full to ensure the transparency and accountability of the process.

The frequency at which the regulator might require a VSP provider to prepare a statement of compliance commitments and to issue a report could vary depending on the VSP provider in question, having regard to the number of users to be protected on a service and the risk and severity of harm occurring or that may occur. A "tiering" system that allows the regulator to prioritise and allocate resources to assessing the compliance activities of certain VSP providers would likely be appropriate.

The regulator's assessment of the performance of a VSP provider would be supported by information from a variety of sources, for example:

- The VSP provider's statement of compliance commitments and the report arising.
- Specific information requests by the regulator to the VSP provider during the assessment process.
- Information gathered from complaints resolution processes acting as a feedback mechanism (discussed in Section 2.7, above).
- Information gathered from other sources, including:
    - Communications with other Member States, including audiovisual regulators.
    - Information provided by the VSP provider to the regulator on request, (including through electronic information-gathering mechanisms) and in a format to be specified by the regulator.
    - Information available in the public sphere.
    - Reports / confidential communications received from IDMs or whistle-blowers.
- Information gathered from independent and impartial audits conducted by a VSP provider at the request of the regulator.

On concluding its review of a VSP provider's achievement of its compliance performance, the regulator would then prepare its own report and recommendations arising from the Article 28b assessment process.

2.8.3 Statutory Recommendations

The regulator for VSP providers should have the ability to issue a statutory recommendation or recommendations to a VSP provider arising from the Article 28b5 assessment process. The acknowledgement of recommendations and a duty to engage constructively with the regulator on implementing any recommendation arising should be in the nature of statutory obligations on VSP providers and in the VSP Code.

A recommendation could be a means adopted by the regulator to direct a VSP provider in a targeted manner to resolve or address specific matters of public interest falling within the scope of the VSP Code, and could come in two forms:

- A **Category 1** recommendation could be issued where the regulator forms the opinion that action is required by a VSP provider to take steps to address a regulatory matter or to further investigate and clarify a matter. By way of example, a Category 1 recommendation might require a VSP provider:
    - To consult with representatives of [Affected Class of Persons] with a view to addressing their concerns about [Incident] and reflect on how any policies or procedures might be amended to reflect [Affected Class of Persons]' concerns.
    - To take note of [Incident] and ensure that the policies and procedures are amended as appropriate to ensure that like-incidents are less likely to happen again, or that they are resolved more effectively on subsequent occasions.
    - To provide a public explanation about how the decision in [Incident] was made.
    - To ensure that a platform's advertising policy is cognisant of [Issue], and suitably reflect best-practice in this area.

- A **Category 2** recommendation could be issued where the regulator has a reasonable apprehension that the standard of protection required by a provision of the VSP Code is not being met by the VSP provider and that steps must be taken to address a matter. By way of example, a Category 2 recommendation might require a VSP provider:
    - To adopt genuinely effective measures on the platform within a specified period to ensure that minors are significantly less likely to be exposed to [category of content x]. An independently-audited and comprehensive report should be adduced demonstrating a reduced exposure of minors to such content in a specified time period.
    - To amend the platform's policies within a specified period to ensure that audiovisual commercial communications containing [type of advertising] are prohibited by the VSP Service's policies.

2.8.4 Provision of Information to the Regulator and Information-gathering Mechanisms

A VSP provider should be obliged to provide to the regulator an honest and accurate account of how its services function, and to provide such accounts in a manner specified by the regulator. This should include information about the technical capabilities of the service in question and information relating to incidents that have arisen on the service.

A VSP provider should also be obliged to put in place, as appropriate, information-gathering arrangements and mechanisms to facilitate the regulator's work. This should include summary information generated from the provider's complaints operations and information relating to certain categories of content on the service, for example regarding advertising or on-demand services present on the VSP service. The approach taken should be cognisant of minimising the extent to which personal data is transferred to the regulator and should also avoid any undue administrative burden.

Section 3: Online Safety (Strand 1)

Q1	**What system should be put in place to require the removal of harmful content from online platforms? For example, the direct involvement of the regulator in a notice and take down system, where it would have a role in deciding whether individual pieces of content should or should not be removed on receipt of an appeal from a user who is dissatisfied with the response they have received to a complaint submitted to the service provider. [Sections 2, 4, & 8 of the explanatory note]**
Q2	**If the regulator is to be involved in deciding whether individual pieces of content should or should not be removed, should a statutory test be put in place before an appeal can be escalated to the regulator? Please describe any statutory test which you consider would be appropriate. [Sections 2, 4 & 8 of the explanatory note]**
Q3	**Which online platforms, either individual services or categories of services should be included within the scope of a regulatory or legislative scheme? [Sections 2, 5 & 6 of the explanatory note]**
Q4	**How should harmful online content be defined in national legislation? Should the following categories be considered as harmful content? Online platforms are already required to remove content which it is a criminal offence under Irish and EU law to disseminate, such as material containing incitement to violence or hatred, content containing public provocation to commit a terrorist offence, offences concerning child sexual abuse material or concerning racism and xenophobia. Are there other clearly defined categories which should be considered? For example,** **- Serious Cyberbullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)** **- Material which promotes self-harm or suicide** **- Material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health**

3.1 Summary

The potential for real-world harm to occur to individuals through their use of the internet has increased significantly as more aspects of their "real lives" have moved to social media platforms. The BAI concurs with the Minister that additional regulation in the area of online safety is important to protect Irish residents.

The BAI believes that the responsibilities given to the Online Safety Regulator should reflect the need to tackle online safety holistically, in the short-, medium- and long-term. To accomplish this, the BAI considers that the Online Safety Commissioner should have three primary responsibilities:

1. **Rectifying** online harms by issuing harmful online content ("HOC") removal notices to services on behalf of Irish residents that have been directly affected by harmful online content.

2. **Minimising** online harms by developing and enforcing an online safety code applicable to key, Irish resident online service providers.

3. **Preventing** online harms by promoting awareness of online safety issues among the public and industry.

The experience of the Australian, New Zealand and German jurisdictions in establishing similar regulatory bodies may assist Ireland in designing a regulatory scheme for harmful online content.

Online Safety – covering all kinds of content – should form a core, separate, but complementary function to the audiovisual and sound regulatory functions of a new media regulator.

3.2 Strand 1 – National Legislative Proposal

Like the BAI's response to issues relating to video-sharing platform services under strand 2 of this consultation response, the BAI feels that the most appropriate means of providing its response to these questions is to answer them together. The questions posed raise many interrelated issues that can be viewed from a holistic and complementary perspective in the approach adopted.

The BAI's response to these questions is structured in three parts:

1. Purpose and Objectives of the Online Safety Commissioner
2. Challenges and Practical Considerations regarding Online Safety Regulation
3. Potential Functions of an Online Safety Commissioner
    a. Take-down Mechanism
    b. Harmful Online Content Codes
    c. Promoting Awareness

3.3 Purpose and Objectives of the Online Safety Commissioner

In establishing an Online Safety Regulator, the BAI is of the view that regard should be had in the first instance to ascertaining its fundamental purpose and focus.

The concept of "online safety" as it is commonly understood comprises a broad range of areas relating to the harms that can be caused to and by individuals via online technology, including cyberbullying and self-harm among other issues. While having no clear or agreed definition, the area of online safety has a strong focus on the rectification of "wrongdoing" caused to an individual by another individual or individuals, which in some cases may be of a criminal nature.

In the BAI's view, this significant element of *personal* "wrongdoing" is what fundamentally distinguishes online safety regulation from the regulation contained in the revised Directive. The revised Directive requires the introduction of sector-wide rules applicable to audiovisual media services and video-sharing platforms services which are intended to prevent or rectify "harms" of a collective nature to large groups of individuals (e.g. a race of persons) rather than to individuals as such. This is in addition to the Directive's stated aim to promote plurality, cultural and linguistic diversity, consumer protection and fair competition (among other things).

Despite the differences in focus of online safety and media regulation more generally, the BAI considers that the purpose and strategic objectives of online safety regulation can be viewed as being aligned with media regulation – by viewing online safety in an expansive and holistic manner rather than with a strict focus on the rectification of harms to individuals and by drawing upon some of the key principles and goals of media regulation. Such an approach to online safety strongly emphasises the synergy and benefits of including an online safety regulator under the wider umbrella of a media regulator and facilitates an approach to online safety that tackles issues in a comprehensive manner in the short-, medium- and long-term.

The BAI considers that the following four strategic objectives and responsibilities are relevant for an online safety regulator operating within the new media regulatory structure:

- Rectifying serious harms occurring to Irish residents through their use of online services.
- Ensuring that individuals and members of groups that are frequently subject to harmful online content can fully benefit from digital technology and social media.
- Reducing online harms by introducing online safety rules for online platforms.
- Promoting responsibility and awareness of online safety issues among the general population and industry.

To fulfil these objectives and responsibilities, the BAI considers that the Online Safety Regulator could have the following three functions:

1. Operating a statutory mechanism to remove harmful online content that directly affects Irish residents **(Rectification of Harm)**
2. Developing and enforcing an online safety code for Irish-resident online platforms **(Minimisation of the potential for Harm)**
3. Promoting awareness of online safety issues among the public and industry **(Preventing Harm).** Ensuring that online services play a more effective role in tackling online safety issues can provide wide, "collective" benefits to large numbers of individuals simultaneously.

In any scenario involving harmful online content, the BAI notes that there are generally three key categories of persons involved:

(1) The individual affected by harmful online content.
(2) The individual that has created the harmful online content.
(3) The platform that the harmful online content is hosted on.

In the view of the BAI, the **principal** focus of the Online Safety Regulator should be on the individual affected by harmful online content **(1)** and on ensuring that online platforms moderate harmful online content more effectively **(3)**.

3.4 Challenges and Practical Considerations regarding Online Safety Regulation

Before discussing the functions that an Online Safety Regulator might have, the BAI would like to take the opportunity to highlight some of the key challenges and practical considerations that it considers should influence the overall approach to putting an online safety regulator on a statutory footing.

Firstly, having regard to considerations on freedom of expression, it is essential that the harmful content within scope of the legislation is clearly defined. In addition, adequate checks and balances should be introduced to ensure that any limitation on freedom of expression is duly justified.

Resolving many of the issues relating to online safety will require long-term, societal change. While platforms can and should take a more active role in regulating harmful online content, the overall approach adopted to online safety must recognise that harmful online content originates in how individuals use online platforms. Promotion and raising awareness of online safety with a view to preventing harms occurring in the first place should be a fundamental function of the online safety regulator.

The scale of potentially harmful activity that an online safety regulator might be expected to regulate is immense. Significant consideration should be given to ensuring that the resources of the Online Safety Regulator can be directed towards resolving the most serious issues and which ensure the greatest possible good to the greatest number of persons. The functions and resources available to the regulator should reflect such an approach.

The regulatory approach taken should function consistently with the approach taken to the implementation of the revised Directive in respect of video-sharing platform services. In the BAI's view, the most effective means of accomplishing this is through implementing the revised Directive and online safety rules in a separate but complementary manner with broadly aligned strategic objectives, recognising synergies where appropriate but also respecting differences in the goals to be achieved by both kinds of regulation.

The Online Safety Regulator should operate in a manner that is separate and complementary to other Irish regulators and enforcement bodies that have other responsibilities in respect of online platforms.

3.5 Potential Functions of an Online Safety Regulator ("OSR")

In considering the foregoing, the BAI is of the view that the role of an Irish Online Safety Regulator could comprise three key functions reflecting short-, medium- and long-term approaches to online safety intended to rectify, minimise and prevent online harms to Irish Residents.

3.5.1 Function 1: Harmful Online Content ("HOC") Removal Notices

The BAI supports the proposal that the OSR should be empowered by statute to issue notices to providers of online services to remove harmful online content on those services.

The BAI considers that those notices (hereinafter referred to as "Harmful online content notices", or "HOC notices") should be issued by "investigators", who are employees of the OSR.

The OSR should be able to issue HOC Notices to both "open" online services (e.g. social media platforms) and "encrypted" online services (e.g. private messaging services). The approach taken to determining what services are in scope should focus on where the protections of an OSR can provide the most benefit, and the legal definition of services covered by the HOC notice mechanism should be drafted accordingly.

While including encrypted private communications networks within the scope of harmful online content notices is desirable to "future proof" them and to effectively tackle certain online harms, significant detailed consideration will have to be given to how this will work in practice and how such inclusion intersects on issues such as data protection, for example.

In the interests of clarity, harmful online content for the purposes of the National Legislative Proposal should be defined in legislation independently of the provisions and requirements of the Directive in respect of harmful content.

The OSR should issue takedown notices on receipt of requests from Irish residents or someone legitimately acting on an Irish resident's behalf e.g. a parent, guardian or a representative from a protection group that is in contact with the Irish resident.

The key legal test that should be triggered for an investigator to take up a request is that the request gives rise to a reasonable apprehension in the mind of the investigator that the Irish resident initiating the request is or is likely to be directly affected by content that satisfies the statutory definition of "harmful online content". Content should only be considered "harmful online content" where it is actually and presently hosted on a service at the time a request is made to the OSR.

For an Irish resident to be "directly" affected by harmful online content, the harmful online content should:

- Relate specifically to the requester (i.e. the information contained in the harmful online content relates specifically to the individual making the request), **or**
- Be directly targeted at the requester in a harmful manner (i.e. the information contained in the harmful online content may be of a general nature but is targeted directly at the requester in a manner intended to, or likely to, cause harm).

Takedown notices for harmful online content should comprise two substantive elements:

- Requiring the online service to remove content relating to the specific instance of harm, and
- Requiring the online service to adopt reasonable steps to prevent the same specific harm re-occurring (e.g. by banning or suspending the individual(s) that have uploaded the harmful online content).

The BAI agrees with the Minister's proposal that requests should first go to service providers before the OSR takes them up. Foreseeably, exceptions to this rule will be appropriate in certain circumstances, and the approach to online safety that is taken should ensure that effective mechanisms for managing complaints concerning harmful online content exist on certain key platforms most used by Irish residents.

To ensure the OSR can act in an "agile" manner and can provide redress quickly, HOC notices should be issued without prejudice to any assessment as to the lawfulness of the harmful online content itself or the activity that has led to the creation of the harmful online content. In issuing HOC notices, OSR investigators should not enter into investigations or fact-finding exercises regarding the liability of

individuals or organisations that have uploaded harmful online content. The key focus of HOC notices should be on preventing further harm occurring to the individual directly affected by the harmful online content by having it removed in a timely manner and requiring the platform provider to take reasonable steps to ensure the same or similar instances of harm does not reoccur.

To minimise conflict with other areas of law (national and European), the legislation establishing the takedown mechanism should not create any "ongoing" liabilities for internet services or the users of those services in respect of harmful online content. The only liability arising in the HOC scheme should be where a platform has failed to take measures to comply with a HOC notice issued by the OSR.

As envisioned by the Minister's Explanatory Note, the statutory definition of harmful online content should be broader than just audiovisual content and should include all *kinds* of online content (e.g. words, images, sound). It should include specific identifiable harms which can always clearly be regarded as "harmful".

The BAI agrees that the harms set out in the Explanatory Note to the consultation i.e. serious cyber-bullying of a child, material which promotes self-harm or suicide and material designed to encourage prolonged nutritional deprivation (that would have the effect of exposing a person to risk of death or endangering health) are clearly among the most serious harms that could be envisaged to an individual and for this reason, merit their inclusion in the categories of harmful content to be included in the legislation. Other additional specific identifiable harms within the definition of "harmful online content" might also be included. Any such additional harms to be specified in the legislation should be evidence-based, whether that evidence has been established in Ireland or is based on evidence gathered in other jurisdictions.

The BAI envisages that the statutory scheme for HOC notices would need to ensure that the OSR takes requests from complainants and issues notices at its sole discretion i.e. it cannot be compelled through legal action to issue HOC notices. Legislative steps to ensure that HOC notices are "privileged" would be necessary to minimise actions taken against the OSR. However, effective appeal mechanisms to the online safety regulator should exist for users of internet services whose content is subject to a takedown notice. Where appropriate, the reasons for making a decision to issue a takedown notice should be clear to facilitate such an appeal.

A decision-making framework for investigators should be established by the regulator, providing principles-based guidance and balancing matters such as freedom of expression with the need for the rectification of harm/protection from further harm.

Service providers should be obliged to comply with HOC notices within a specified time period.

3.5.2 Function 2: Harmful Online Content Code

To approach online safety from a more proactive perspective, the BAI considers that there is scope for certain Irish online services with large numbers of Irish resident users to comply with a Harmful Online Content Code (the "HOC" Code).

The aim of the HOC code would be to reduce the potential for, or actual, harm occurring to Irish residents on certain key Irish online services by ensuring:

- That appropriate complaints mechanisms exist on such services in respect of harmful online content;
- That the terms of service and policies of the online platform are aligned to ensure that harms as defined in statute are prohibited;
- That the policies of online platforms in respect of moderation of harmful online content are transparent;
- That platforms take a consistent approach to implementing appropriate measures to combat harmful online content;
- The promotion, in a transparent manner, of the policies and practices of online platforms.

The HOC Code would be drafted by the OSR in consultation with relevant stakeholders. An appropriate mechanism should be established by the regulator for compliance and reporting purposes. The expectation of the full co-operation of the platforms should be laid down in the legislation, together with the requirement to supply any, or all, necessary data and information to support this function.

Appropriate and dissuasive sanctions should exist in statute where a regulator determines that an online platform has repeatedly or seriously breached the HOC Code. Suitable investigatory powers should be granted to the regulator to support this function. Further discussion on the powers and sanctions available to the regulator in this regard are discussed in the BAI's response to Questions 14 and 15 in Section 5.2 of this submission.

3.5.3 Function 3: Promoting Awareness

The OSR should have a statutory responsibility to engage publicly, and in a targeted way, in a variety of awareness-raising activities relating to online safety. There will likely be significant synergies that could be achieved with the regulator's wider media literacy activities in the audiovisual sector. Examples of such activities might include:

- Running nationwide online safety awareness campaigns.
- Undertaking research in respect of online safety.
- Supporting other statutory bodies and institutions with an online safety agenda.
- Providing statutory reports to the Minister to be laid before the Houses of the Oireachtas

Section 4: Audiovisual Media Services (Strands 3 &4)

Q8	**The revised Directive closely aligns the rules and requirements for television broadcasting services and on-demand audiovisual media services. Given this, what kind of regulatory relationship should there be between an on-demand audiovisual media service established in Ireland and the relevant Irish regulator? In addition, should the same content rules apply to both television broadcasting services and on-demand audiovisual media services? [Section 4 of the explanatory note]**

4.1 Summary of Proposed Approach to Transposition

The revised Audiovisual Media Services Directive requires EU Member States to take a more active role in the regulation of on-demand services provided from their jurisdiction. On-demand services come in a variety of different forms and range from large services such as the RTÉ Player, iTunes and Netflix to pages or "channels" of an editorial nature on video-sharing platform services such as YouTube and Facebook.

The 2010 Directive required EU Member States to introduce a basic level of protection for audiences in respect of "television-like" on-demand services. The approach taken to regulation in Ireland was to create ODAS, a self-regulatory body and reflected the nascency of Irish on-demand services at that time.

The revised Directive requires a fundamental change in approach to the regulation of on-demand services in an Irish context. The BAI agrees with the Minister that more active regulatory oversight is required in Ireland to ensure that these kinds of services comply with rules on the protection of minors, advertising rules and the many other matters dealt with in the revised Directive.

A key goal of the revised Directive is to ensure a more level playing field between on-demand services and television broadcasting services. To achieve this, the BAI's view is that the most appropriate means of introducing the revised Directive's new rules for on-demand services is through statutory regulation and codes, and to assign the role of regulating on-demand services to a statutory regulator in order to achieve stronger regulatory alignment on issues specifically dealt with in the revised Directive only (e.g. advertising, protection of minors, accessibility).

With regard to television broadcasters, it is the view of the BAI that these services should continue to be regulated as heretofore, except to the extent that changes may be made pursuant to the revised Directive. In this regard, the BAI welcomes the greater flexibility afforded to television broadcasters in the areas of product placement and television advertising spots. The BAI also proposes that potential amendments to the Broadcasting Act 2009 to reduce administrative burden on linear services – both television and radio – should be actively considered.

4.2 Regulation of Audiovisual Media Services

The BAI considers that it is appropriate to respond to this question in four parts:

1: Key changes to the regulation of on-demand services
2: The appropriateness of equivalent obligations for linear broadcasting and on-demand services
3: The regulatory relationship between Irish on-demand services and the Irish regulator
4: The regulatory environment for linear broadcasting services

4.2.1 Key changes to the regulation of on-demand services

The Directive's provisions in respect of on-demand services originally only applied to "television-like" services such as the RTÉ Player or TG4 Player, which are currently regulated in Ireland through the ODAS system. This "television-like" requirement has been removed in the revised Directive, and, as a result, a much broader range of services including many Irish YouTube Channels, Facebook Pages and Twitter pages that provide audiovisual content in an editorial manner must now comply with the Directive's rules.[6] To achieve greater regulatory parity between television broadcasting services and on-demand services envisioned in the revised version of the Directive, the Irish regulator for on-demand services will, among other things, be obliged to take an active role in ensuring that they:

- Make their ownership information publicly available in a register
- Take measures in respect of incitement to violence and hatred and public provocations to commit terrorist offences
- Take measures to better protect minors from content that may impair their development
- Make their services more accessible to persons with disabilities
- Comply with the Directive's rules on audiovisual advertisements
- Comply with sponsorship rules
- Comply with product placement rules
- Comply with a 30% European Works quota and ensure the prominence of those works (where applicable)

4.2.2 The appropriateness of equivalent obligations for linear broadcasting and on-demand services

As a general regulatory principle, the BAI takes the view that it is desirable for "like" services to be obliged to follow "like" rules. Given the significant convergence of the market for audiovisual media over the past decade, the BAI endorses the more level playing field envisioned by the Directive between television broadcasting services and on-demand services. It also welcomes the fact that the general approach taken at EU level was to ensure this through an increased level of protection in respect of on-demand services rather than to lower existing levels of protection applicable to television broadcasting services.

In introducing a new regulatory scheme for on-demand services on foot of the requirements of the revised Directive, as a starting point, the BAI believes it is useful to consider the differences and

[6] The term "programme" – which is a component of the definition of an on-demand services – has been significantly altered in the revised version of the Directive: *'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;"*

similarities in how such services are provided and consumed when compared to television broadcasting services, as it helps in determining the extent to which similar obligations should apply to on-demand services and television broadcasting services.

Firstly, regard must be had to the essential role that broadcasters play in the delivery of news and current affairs content, their strong ties to the Irish state and its culture, the key role they play in the creation of Irish content and their role as providers of employment within Ireland. While many on-demand services have strong "cultural" and "Irish" elements, the emphasis is much greater for linear broadcasters whose output and influence plays an important role for the State and its citizens.

As a result, it is the view of the BAI that the current regulatory arrangements in respect of television broadcasting services is appropriate and justified going forward. To the extent that an area of regulation is harmonised by the Directive, however, the BAI feels that it is entirely appropriate that television broadcasting services and on-demand services should be obliged to follow similar rules ensuring similar standards of protection for audiences. Taking measures to ensure greater equivalency in these areas is both a legal obligation and desirable from an audience perspective.

While ensuring similar standards of protection in respect of television broadcasting services and on-demand services, the overall regulatory approach adopted to on-demand services in the transposition process should, however, have regard to the significant variety of on-demand services that fall within the scope of the Directive, the realities of how on-demand content is provided and the relative influence of such services *vis-à-vis* television broadcasting services. Where television broadcasting services and on-demand services are competing more "directly" for audiences, as a general rule, the BAI believes that similar regulatory methods should be utilised where practicable. Where broadcasters are competing against smaller on-demand services on video-sharing platforms "collectively", the Directive's rules for video-sharing platform services can be viewed as ensuring a more level playing field in those circumstances.

4.2.3 The regulatory relationship between Irish on-demand services and the Irish regulator

The BAI considers that the creation of a direct regulatory relationship between on-demand services and the regulator should be underpinned in the transposition of the provisions of the revised Directive into Irish law. Our views on the "structural" implications of this approach and our rationale for advocating it are explored in the BAI's response to question 12 in Section 1.

All on-demand services, irrespective of their size, and irrespective of the manner in which they are provided, should be obliged to comply with a statutory code or codes aligned with the requirements of the revised Directive for which their compliance is assessed and enforced by the regulator.

Per the requirements of the Directive, on-demand services should be obliged to register with the regulator, to make their ownership information publicly available and to provide contact information so that they can be contacted about regulatory matters by both the regulator and members of the public.

In considering the scale of on-demand content that will fall to be regulated under the rules of the revised Directive and the large number of "smaller" on-demand services now in scope, significant consideration

should be given to ensuring that the regulator has the flexibility to apply its resources to regulate those services that have the greatest influence or where non-compliance has the most significant adverse consequences for audiences. A "risk-based" approach to regulation can ensure that regulatory resources are applied where they provide the most value to the public.

The statutory powers available to the regulator to regulate on-demand services should reflect the variety of on-demand services present in an Irish context. For example, larger and more "television-like" on-demand services will require a regulatory approach more akin to large linear broadcasters, whereas smaller on-demand services present on video-sharing platform services will likely require a more nuanced, risk-based approach to ensuring compliance.

Members of the public should be able to avail of a statutory complaints system for on-demand services. However, consideration should be given to the extent to which such a process may provide value to the public in respect of smaller on-demand services with little influence, and whether regulatory solutions exist that might achieve the same outcome as the vindication of a complaint but in a more flexible manner.

4.2.4 The Regulatory Environment for Television Broadcasting Services

The focus of the regulatory changes in the revised Directive are on on-demand services and video-sharing platform services, and the BAI welcomes the proposal for a greater degree of regulatory consistency and a more level playing field between these services and television broadcasting services, given the significant convergence of the market for audiovisual media over the past decade.

Television broadcasting services are significant sources of high-quality, culturally-relevant and linguistically-diverse Irish content and, in an increasingly globalised and competitive media environment, play an essential role in ensuring that such content continues to be delivered to Irish audiences. They are also considered sources of trusted news and current affairs content which plays a vital role in informing citizens about issues of importance to the democratic process. Despite commentary heralding the decline of linear broadcasting, it could be argued that television broadcasters play a more important role than ever in the overall media landscape.

As discussed above, the continued importance of broadcasting justifies the more comprehensive approach to regulation currently in place in respect of television broadcasting services in Ireland. Such matters include rules relating to media ownership and control and ensuring fairness, objectivity and impartiality in the provision of news and current affairs, which are outside the scope of the Directive.

While maintaining substantive regulatory obligations on television broadcasters, regard should be had to the challenges faced by the sector in the new media environment, where on-demand services and video-sharing platform services operate and compete for similar audiences.

In this regard, and in keeping with the BAI's strategic objective of developing sustainable funding models for the Irish audiovisual sector, the BAI supports the regulatory changes arising from the provisions of the new Directive for television broadcasting services. In particular, the BAI welcomes broadened rules in respect of product placement and television advertising spots which allows greater flexibility for broadcasters.

As part of the legislative process for the transposition of the Directive, the BAI seeks the opportunity to reduce the administrative burdens on linear services – both television and radio. The BAI would be happy to submit to the Minister further proposals in respect of amendments to existing legislation in respect of linear broadcasters as set out in the Broadcasting Act 2009 that would increase administrative efficiencies and further reduce regulatory burden on broadcasters.

4.3 Content Funding

Q9	**Should Ireland update its current content production fund (Sound & Vision fund currently administered by the BAI from licence fee receipts) to allow non-linear services to access this fund? Should Ireland seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund? [Section 4 of the explanatory note]**

4.3.1 Sound and Vision

The BAI is currently responsible for the administration of Sound & Vision 3, a broadcasting funding scheme for television and radio that provides funding in support of high-quality programmes on Irish culture, heritage and experience, and programmes to improve adult and media literacy. The Broadcasting Fund also supports an Archiving Scheme and both Schemes are funded through 7% of the television licence fee. Sound & Vision 3, has been in operation since 2015, providing over €56m to 293 television and 907 radio projects.

The consultation asks whether Ireland should update its current content production fund to allow non-linear services to access this fund. As structured, Sound & Vision 3 may only fund the production of programmes that are to be broadcast by an eligible television or radio broadcaster as defined in the Broadcasting Act 2009. Any change to the eligibility criteria would require legislative amendment.

The BAI is currently undertaking a statutory review of Sound & Vision 3, further to Section 158 of the Broadcasting Act 2009. The review will explore the potential impact of the on-going significant shifts in the media market, including production, delivery and consumption, and consider how the scheme may need to change and evolve in the coming years to ensure that it is appropriate for, and responsive to, the evolving media landscape and the manner in which audiences are consuming audiovisual content. The BAI will also be gathering the views of key stakeholders as to whether a broader remit for the scheme is considered desirable.

The review is scheduled to be completed in July 2019 and the BAI would be pleased to discuss emerging findings with the Minister at that point.

Question 9 also asks whether Ireland should seek to apply levies to services which are regulated in another EU Member State but target Ireland in order to fund or part-fund an updated content production fund. This is considered further below.

4.3.2 On-Demand: Article 13 Content Levies

Article 13, Paragraph 2, of the revised Directive allows Member States to require media service providers under their jurisdiction to contribute financially to the production of European Works, including via direct investment in content and contribution to national funds. They may also require media service providers targeting audiences in their territories, but established in other Member States, to make such financial contributions, which shall be proportionate and non-discriminatory. In such cases, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes such a financial contribution, it shall take into account

any financial contributions imposed by targeted Member States. Any financial contribution shall comply with European Union law, and, particularly with State aid rules.

The levy cannot be applied to television broadcasting services and on-demand services with a low turnover or low audience threshold. The European Commission is expected to provide guidance on these issues during the transposition period.

The BAI supports the introduction of a content levy in principle.

The BAI is of the view that while the legislation should provide a basis for the introduction of such a scheme, considerable work is required before such a scheme can be determined in legislation. It is recommended that the regulator be charged with drawing up such a scheme to be submitted for Ministerial approval before being implemented. This would allow ample time and opportunity for the following:

- Development of a system to determine what services fall within the scope of such a levy.
- Determining the system for charging. For example, the levy might be interpreted as including revenue generated from product placement. It is especially unclear as to how the levy applies to services that are accessible for "free".
- Consideration of the cross-jurisdictional issues that are likely to arise. The participation of the new regulator in ERGA could assist in identifying issues to be resolved and in determining the means for resolving such issues.
- There are no concrete mechanisms in the Directive obliging service providers who will be subject to the levy to provide financial information to regulatory bodies administering the levy. Provision needs to be made in law to facilitate the regulator in acquiring the information necessary to implement such a scheme. A significant level of cross-jurisdictional co-operation will also be required as will the sharing of relevant information with regulators in other Member States.
- While technically the issue of the levy is a matter to be resolved between a Member State and on-demand services, there will have to be a significant degree of co-operation between Member States to avoid duplication in the charging arrangements and to ensure that broadly harmonised approaches are adopted to levy and revenue calculation.
- In Ireland, such a content levy scheme might also be considered in the context of the already-established Broadcasting Funding Scheme.
- Consultation with relevant stakeholders on the operation of such a scheme would be highly desirable.

4.3.3 On-demand Audiovisual Media Services: Article 13: European Works and Prominence

The BAI would like to take this opportunity, in the context of discussing the regulation of audiovisual media services, to comment on the transposition of Article 13 of the Directive concerning European Works and Prominence as well as on the provisions of Article 7a of the Directive concerning prominence and Public Service Media.

Pursuant to Article 13 of the revised Directive, on-demand services are required to secure a 30% quota of European Works ("EW") and to ensure prominence of those works. The obligation does not apply

where an on-demand service has a low turnover or a low audience. In addition, Member States can waive the quota where it is impracticable or unjustified by reason of the nature or theme of the audiovisual media service in question.

Quotas for European Works are a long-established concept in a linear broadcasting context. A 50% European Works quota for television broadcasting services was included in the original Directive and has been maintained in its revised version. In respect of the services currently under its remit, the BAI reports regularly on the compliance of Irish broadcasters with the European Works provisions of the Directive.

However, while it is recognised that the approach to the calculation of European Works is relatively straight-forward in the case of linear services (as a percentage of the total linear schedule), the methods for calculating compliance with the 30% quota will not be as easily implemented in the case of on-demand services.

Pursuant to the last iteration of the AVMS Directive, regulators in other jurisdictions took a range of approaches to promoting the level and prominence of European works on on-demand services. (Ireland, having taken a different approach to other European jurisdictions, did not assign such functions to the BAI.) The types of methods employed included:

- Calculating the total minutes of EW in an on-demand catalogue.
- Adopting regulatory measures to ensure the prominence of EW in user-interfaces for on-demand catalogues.
- Applying the quotas only to on-demand services with wide reach and audience impact.
- Introducing requirements relating to investment in EW.

Although many jurisdictions made progress in this regard, a wide range of challenges arose including:

- Interpreting and applying the definition of “European Works” contained in the original Directive (which is unchanged in its revised iteration) in a practical manner at the national level.
- Establishing the cut-off point for inclusion/exclusion of on-demand services in implementing quotas.
- Determining what levels of prominence are sufficient for satisfying quotas.

Regarding the provisions of the revised Directive, the European Commission is expected to issue guidelines regarding the calculation of the share of European Works and on the definition of low audience and low turnover.

The regulator might consider, for example, the different business models utilised by Irish on-demand services and whether, and how, the quota might apply to such services. Examples of business models utilised by Irish on-demand services include:

- Paying for content on an item-by-item basis (e.g. iTunes)
- “Free” content funded by advertising (e.g. Irish YouTube Channels)

- "Free" Content paid for via the licence fee and commercial revenue (e.g. The RTÉ Player, TG4 Player)
- "Free" Content paid for via commercial revenue only (e.g. Virgin Media player)
- Paying via a recurring subscription fee to access a "catalogue" of content (e.g. Sky "Boxsets")

The regulator may have regard also to the work of ERGA (EC's Audiovisual Regulators' Group) in this area. A report prepared by ERGA showed that with regard to quotas:

- There were various levels of experience in implementing European works quota or quota-like obligations.
- Where quota levels were applied, the levels of European works required within the different Member States varied significantly and some Member States did not have a minimum quota.
- The preferred method for calculating the share of the catalogue was either on the basis of the number of hours of European works or on the basis of the number of titles of European works. Where a title represented a series, the option of a calculation based on the number of episodes was applied in two jurisdictions.
- Other options included impact-oriented calculation methods, such as share of viewing time or combining the quota with prominence-type measures (e.g. European works featuring on the homepage).
- Some genres of content were excluded from the quota (e.g. news and sport, commercial communications).

In anticipating the implementation of the revised provisions of the Directive in respect of European works, a number of further considerations have been discussed:

- Where an AVMS provider operates linear and non-linear services, can the quota be fulfilled having regard to all its services?
- Where an on-demand service operates more than one catalogue, is it reasonable to consider the level of European works as a percentage across all catalogues?

On the issue of prominence, the following was noted:

- A definition of what constituted prominence did not exist.
- A limited number of regulators only have been active in this regard, pursuant to the last Directive. This was linked to the lack of an evidence base on what prominence actions were most effective.

One further point of note is the need to give flexibility to regulators to be responsive to changes in the audiovisual sphere. Technology is changing rapidly and there is evidence that this is impacting prominence in respect of certain forms of content. If the objective of the Directive is to be achieved, it seems reasonable to give the regulator in Ireland some flexibility to respond to such developments.

Having regard to all the above, the BAI believes that the proposed legislation should specify the principles and/or other matters to be considered by the regulator in implementing these provisions but that some flexibility should be afforded to the regulator concerning the categories and size of on-

demand services that the quota should be applied to here in Ireland and how best to determine that the quota is satisfied given the nature of the service in question. Given the lack of regulatory intervention in this jurisdiction heretofore, such an approach would allow for an evidence-based approach to the rules to be developed and applied. This could also take account of the evaluation of experience in other European jurisdictions and, particularly, the specific arrangements that are deemed to be effective.

4.3.4 Prominence and Public Service Media: Article 7a

A second but discrete area of prominence concerns the prominence of public service media content. Article 7a of the revised Directive provides that Member States *may* take measures to ensure the appropriate prominence of audiovisual media services of general interest (e.g. public interest content). This is an optional provision in the Directive that Member States can utilise at their discretion.

To date, measures to ensure the prominence of public interest audiovisual content in Europe have been justified on the basis that producing public interest content tends to be less profitable than commercial content, it is publicly funded, and tends to better promote "public goods" such as essential news and current affairs and democratic debate more so than occurs in purely commercial content.

As a matter of public policy, Ireland has, in the past, secured through legislative provisions, a degree of prominence for public service channels/services of a general interest nature (RTÉ, TG4 and Virgin Media services). Currently, the BAI has a number of functions in this regard, although these functions are by no means common amongst all European regulators. In Ireland and the UK, the functions are aimed at ensuring that audiovisual content of public service origin and services of a general/public interest character are suitably "prominent" on services that facilitate access to audiovisual content (e.g. they appear higher in the channel listings on an EPG, or there is prominence within the catalogues of on-demand services).

In Ireland and in the UK, prominence in EPGs for public service channels is deemed to be particularly important because of their licensing obligations to provide relevant news and current affairs and other culturally-relevant content for national audiences. The regulatory focus has been primarily on the prominence of public service channels in the programme listings of EPGs (electronic programme guides). The BAI's functions are limited when compared with e.g. Ofcom in the UK. Notwithstanding this somewhat limited set of statutory functions, the BAI has been occasionally drawn into issues of prominence over the years, typically at the behest of broadcasters who are often seeking some form of regulatory intervention.

More recently, the issues being raised are going beyond the determination of where a service should be placed on the channel listings of an EPG and are linked to technological developments. A typical issue currently is the home screen on smart TVs on which the channel listings are not always prominent and where other content offerings compete for viewers. An issue recently noted, for example, is the way in which access to television listings can "disappear" from the smart TV home screen, depending on a viewer's previous selections. There is clearly an expectation that there is some opportunity for regulatory guidance and/or intervention in such situations which would need to be facilitated in any legislation arising from the transposition of the Directive. The BAI considers it appropriate for the regulator to have such an increased role. In this regard, the overarching regulatory objectives of

plurality and diversity in the range of services and content available to Irish audiences provide a useful rationale for such an approach.

Section 5: Other Considerations

Q10	**The United Nations Special Rapporteur on the promotion and protection of the right to freedom of expression has previously raised concerns regarding the National Legislative Proposals under Strand 1. How can Ireland balance the fundamental rights of all users e.g. the right to freedom of expression, including those affected by potentially harmful online content and those creating said content, in pursuing the further regulation of harmful online content?**

5.1 European and International Context

In response to the concerns expressed by the Special Rapporteur, the BAI suggests ways in which his concerns can be addressed through the legislative provisions and the statutory scheme for Online Safety, achieving a proportionate response to balancing the right to freedom of expression with the protection of residents from harmful online content.

The BAI has considered the concerns expressed by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression arising from the Digital Safety Commissioner Bill 2017 and notes the commitments of the Irish Government in response to these concerns, including its commitment to discharging its obligations under Article 19 of the International Covenant on Civil and Public Rights (ICCPR).

The BAI also notes more generally the means by which Ireland gives meaningful effect to the right to freedom of opinion and expression e.g. through the rights afforded to Irish citizens pursuant to the Irish Constitution, the European Convention on Human Rights and the EU Charter of Fundamental Rights.

The BAI also notes the manner in which this right is reflected in current broadcasting legislation. In line with its statutory objective of endeavouring "to ensure that the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld", the BAI seeks to promote freedom of expression and achieve this overarching objective through all its policies and practices.

Given the concerns of the Special Rapporteur, the BAI suggests that there is a persuasive case for grounding online safety regulation in a regulatory body, such as the BAI, experienced in promoting freedom of expression as a fundamental principle underpinning all its regulatory activities. This experience has necessarily required the BAI to balance the democratic values enshrined in the Constitution and in other legislation with the right of citizens to be afforded certain protections in the media sphere.

The BAI has had regard to the 2018 Annual Report of the UN Special Rapporteur in which he addressed concerns regarding the regulation of content on online platforms and made several recommendations in this regard. Having regard to those recommendations the BAI would suggest the following in respect of the National Legislative Proposal:

- The legislation should clearly define "Harmful Content", specifying as appropriate the specific categories of harmful content within the scope of the legislation. The 2016 Report of the Law Reform Commission provides helpful guidance in this regard.

- A "Smart Regulation" approach: the guiding principles underpinning the Special Rapporteur's recommendations can be reflected in the regulatory principles to be applied in the legislative scheme. In general, an incremental and evidence-based approach to the introduction of restrictions and rules is recommended.

- The Online Safety regulatory scheme proposed by the BAI (see section 3 above) positions the "take-down" proposals in a wider regulatory context that is not simply about the removal of content but one which promotes the reduction of harm and the promotion of public awareness and education of the harms that can be caused through digital technologies. This approach is in line with the Smart Regulation approach advocated by the Special Rapporteur (and indeed the Law Reform Commission) and could be further supported by a continuation and expansion of the BAI's current approach to implementation of its Media Literacy Policy and Activities.

- The BAI endorses the principle of proportionality in respect of sanctions as recommended by the Special Rapporteur – see BAI proposals in this regard set out in this Section 5 below.

- The Special Rapporteur's recommendation #68 advises that "States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression". He recommends that they should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users.

  The regulatory structures in the legislative scheme proposed might be described as quasi-judicial structures. The BAI assumes that actions and decisions of the regulator, as a statutory body, would be required to be taken in accordance with principles of natural justice and would be subject to the scrutiny of the Irish courts by way of judicial review proceedings.

- The Special Rapporteur's recommendation #69 advises that "States should publish detailed transparency reports on all content-related requests issued to intermediaries and involve genuine public input in all regulatory considerations."

  The BAI proposes the publication of such transparency reports in its Online Safety Scheme (see Section 3 above). Furthermore, the BAI also envisages that any codes or guidance arising from the new statutory provisions are drawn up in meaningful consultation with relevant stakeholders.

Q11	**How can Ireland ensure that its implementation of the revised Directive under Strand 2 and any further regulation of harmful online content under Strand 1 fits into the relevant EU framework for the regulation of online services, including the limited liability regime for online services under the eCommerce Directive? [Section 2, 4, 5, 6, 7 & 8 of the explanatory note]**

5.2 E-Commerce Directive

One of the core goals of the European Union has been to promote the "free movement" of services by introducing common rules among Member States about how services should be regulated in cross-border scenarios. A number of key general rules were agreed by EU Member States at the beginning of the 21st century about how online services should be regulated within the EU:[7]

- Online services can only be made liable for illegal content they host when they have actual knowledge of it and have failed to act expeditiously to remove it. Services that "host" content uploaded by users without the oversight of the service provider can generally only be made liable for that content on a "reactive" basis" i.e. after they have been notified of its existence.
- EU Member States cannot introduce "general" obligations that require online service providers to monitor the content on their services or to actively seek facts or circumstances indicating illegal activity. Online service providers cannot generally be required to take "proactive" measures to moderate their services where content is uploaded by users without their oversight.
- EU Member States are prohibited from restricting access to online services being provided from other EU Member States to their jurisdiction.
- Online services are regulated in the Member State in which they are established and provided from rather than from where they are consumed.

As a result of these measures (among other things), many popular online services made available on the modern internet are now provided on a continental and global basis.

At the time these rules were drafted the most popular services on the internet today either did not exist or were only nascent. Since that time, a significant growth and consolidation of market players has taken place and most of the "main" services made available on the internet in Europe today are provided by a small number of service providers. These service providers primarily function as "platforms" whose business models depend on providing their users with access to services, goods or non-economic activities provided by smaller entities or by enabling communication between users (e.g. Amazon, Google, Facebook, iTunes, Netflix).

The revised Directive requires providers of video-sharing platform services to take proportionate, proactive measures to moderate the content that they provide access to more effectively and to utilise

[7] See Directive 2000/31/EC. Exceptions and variations to these general rules have naturally evolved over time as appropriate.

the substantial resources and technical capabilities they have accrued in providing their services to further the public interest, in particular to protect minors, to combat incitement to violence and hatred, to combat certain criminal offences and to improve advertising standards. The BAI wholly welcomes this development, as well as the Minister's intention to introduce rules for Online Safety – which speak very much to the same kinds of issues.

At the principles level, while preserving the EU's online liability framework, the BAI would note that the revised Directive is a recognition by the European Institutions that purely "reactive" frameworks of liability for large, popular online platforms and services without corresponding "proactive" obligations to introduce measures and tools to protect users are causing significant, pan-European issues.

In summary, in considering the questions raised by the Department in its consultation, the BAI has been cautious to ensure that its proposals respect the EU's online liability framework and feels that the standard of protection required by the revised Directive and an effective regulatory system for Online Safety for Irish residents can be achieved within this framework.

Q14	**What functions and powers should be assigned to the relevant regulator to allow them to carry out their monitoring and enforcement role (Section 8 of Explanatory Note). In addition, should these functions and powers differ between regulation for VSPS under the revised Directive under Strand 2 and regulation adopted at a national level under Strand 1? Please include your rationale and give examples. (Sections 2,4,5, 7 and 8 of Explanatory Note)**
Q15	**What sanctions should be available to the relevant regulator to apply to a service that does not comply with its obligations? Such sanctions may include:** - **The power to publish the fact that a service is not in compliance,** - **The power to issue administrative fines,** - **To issue interim and final notices to services in relation to failures of compliance and the power to seek Court injunctions to enforce the notices of the regulator, and,** - **The power to apply criminal sanctions in the most serious cases.** **Are there any other sanctions which should be considered, please provide your reasoning as to why the regulator should have recourse to a particular sanction. [Sections 2, 4, 6, 7 & 8 of the explanatory note]**

5.3 Sanctions/Powers

In response to the matters raised in the above questions, in this Section the BAI describes broadly the functions and powers that should be assigned to the relevant regulator to facilitate its compliance and enforcement role. More specifically, the BAI then addresses the powers of sanction that should be available to the regulator. The approach of the BAI has been informed by its own compliance and enforcement activities over many years, which incorporates principles of better regulation and reflects general good practice in compliance aspects of regulation.

5.3.1 Compliance and Enforcement: General Considerations

Any regulation requires that the appropriate regulator be empowered to ensure compliance by regulated entities with the statutory provisions under which the entities operate. To deliver on the objectives of the National Legislative Proposal and the Directive, it is essential that the regulator has at its disposal a robust and wide range of compliance and enforcement powers prescribed in law if its work is to be conducted effectively and credibly. This includes powers up to and including the imposition of fines and sanctions on entities who are deemed to be in breach of the statute.

Member States are obliged to ensure that video-sharing platform services under their jurisdiction comply with a range of measures set out in the Directive. In this context, it is helpful to consider the changed nature of the relationship between the regulated entities and the regulator. Heretofore, the majority of linear broadcasters have had a statute-based contractual relationship with the regulator, and the statutory provisions, together with the contractual provisions with which the broadcasters must comply,

have placed the regulator in a strong position for the most part, as the ability of the regulator to suspend or terminate a contract acts as a significant deterrent in ensuring compliance.

In the case of online platforms, including VSPS, the nature of the regulatory relationship will be quite different. In addition, the challenges may be significant given that many such platforms are coming into the realm of statutory content regulation for the first time. In the absence of a contractual relationship, therefore, the means at the disposal of the regulator to ensure effective compliance and enforcement need to be robust and fit-for-purpose.

In an Irish context, the BAI is mindful of the fact that the imposition of financial sanctions must also have regard to the specific constitutional arrangements in respect of the role of the Irish courts in such matters.

5.3.2 Compliance and Enforcement Principles and Powers

The overall aim of the regulator should be to ensure a consistent and transparent approach to its compliance activities, holding platforms to account in respect of their statutory obligations in a manner that encourages and promotes a culture of compliance.

A number of general principles should underpin the approach to determining the regulator's compliance and enforcement powers to enable the regulator to monitor compliance effectively and to take the necessary enforcement actions in a timely manner:

- **Effective**: The regulator's statutory powers should facilitate an effective regulatory response and act as a deterrent to future breaches of statute
- **Proportionate**: The regulator should be required to act **proportionately**, particularly having regard to the wider objectives of the regulator in promoting freedom of expression
- **Flexibility**: The regulator's powers should facilitate an appropriate **range of responses**, tailored to the specific circumstances of a breach, as well as the nature of the content and platform upon which the content is carried. This includes an ability to escalate concerns as appropriate and an ability to respond at a level appropriate to the seriousness, scale or impact of a specific event. Where rectification does not occur, the means to enforce the decision of the regulator should be available.
- **Risk-based approach**: The statutory provisions should facilitate a risk-based approach to the regulator's compliance and enforcement activities, allowing regulatory actions to be targeted at content likely to have greatest impact or cause most harm.
- **Evidence-based**: The overall approach of the regulator should be guided by the statutory provisions, its strategic objectives and priorities, and underpinned by a credible evidence base.
- **Co-operation**: The statute should set an expectation of co-operation and regular engagement between the regulator and online platforms, in addressing issues in a timely manner and taking actions to ensure that the same types of breaches do not re-occur.

5.3.2.1 Strand 1: Compliance Powers

The powers available to the regulator, necessary for monitoring compliance by online platforms with the statutory provisions in respect of harmful content, must correspond with the breadth of functions as

ultimately determined by the legislation. The key function envisaged in the consultation documentation is the take-down or removal of harmful content and the process for the issuing of such notices is addressed separately by the BAI in Section 3 of this document, *Online Safety*, (see above). In this context, the power to issue directions, including interim and final notices to services in relation to failure to comply and the additional power to seek injunctive relief to enforce notices are all appropriate. Powers of inspection, investigation and audit are also useful general powers in a compliance context. Consideration might also be given to placing voluntary disclosures of non-compliance by platforms on a statutory footing.

5.3.2.2 Strand 2: Compliance Powers

The BAI has set out specific proposals for redress, as well as proposals in respect of the Article 28b assessment process – see Section 2 above. Some further powers are suggested below:

- A wide range of monitoring and compliance powers are envisaged consistent with the functions of the regulator as set out in the legislation.
- Power to request the supply of data and information in a format specified by the regulator
- Ability to issue directions, interim and final notices to services in relation to failures of compliance is appropriate
- Power to direct the VSPS to supply a compliance plan of action for the approval of the regulator
- Power to seek injunctive relief to enforce the notices of the regulator are also appropriate
- Power to issue recommendations and directions to a VSP to adapt its systems, processes and procedures in order to ensure compliance with the legislative provisions
- Powers of inspection, investigation and audit
- Power to receive and consider voluntary disclosures of non-compliance

5.3.3 Enforcement and Sanctions

The same principles as apply to the regulator's compliance functions also apply to the enforcement powers and powers of sanction that should be available to the regulator (see paragraph 5.3.2 above).

The current sanctioning powers of the BAI are set out in Part 5 of the Broadcasting Act 2009 – these include powers of investigation, suspension and termination of contracts and the issuing of fines. The BAI's experience in implementing those powers, has proven to be effective. However, it must be noted that the Authority's experiences in the application of the provisions have been limited to a number of instances only given that the provisions are procedurally- and resource-heavy and the level of resources available to the Authority can have a practical limiting effect on the level of activity that can be undertaken.

In the case of online platforms, including video-sharing platforms, the nature of the relationship with the regulator will be a markedly different one (i.e. non-contractual in nature) and such powers will not exist in the case of any of the online platforms that will fall to be regulated pursuant to the revised Directive or the National Legislative Proposal. This requires, therefore, appropriate provisions in respect of sanctions and fines that are capable of being fully implemented as speedily and effectively as possible.

5.3.3.1 Enforcement: Regulator's general powers common to Strands 1 and 2

The following enforcement powers of a general nature are considered appropriate in respect of the regulator's role:

- Requirement for platforms to adopt technological solutions as may be directed by the regulator to ensure compliance with the legislation
- Power for the regulator to issue notices or directions to ensure compliance with the legislation. Examples of such directions might include the requirement to adapt a platform's systems, processes and procedures, (e.g. complaints procedures), submit a compliance action plan etc.
- Ability of the regulator to issue compliance performance reports supporting transparency in the overall compliance process
- Power to issue notifications, warning notices and final warning notices to services in relation to failures of compliance and the power to seek injunctive relief to enforce the notices of the regulator
- Ability to negotiate settlements should also be considered, having regard to the experience of other Irish regulatory bodies in this regard.

On 8 April last, the UK Government issued a White Paper on Online Harms. Within the scope of consultation is the consideration of compliance and enforcement powers that would enable the regulator to disrupt the business activities of a non-compliant company, as well as to introduce measures to impose liability on individual members of senior management (compatible with the E-Commerce Directive) and measures to block non-compliant websites or apps. Such measures might merit further consideration in an Irish context. In addition, the experience to date in Australia and New Zealand in the regulation of online harms and the effectiveness of the compliance and enforcement powers assigned to regulators in those jurisdictions might also merit consideration. The BAI would be happy to assist the Department and Minister further in this regard.

5.3.4 Sanctions and Fines

The BAI considers the following sanctions as appropriate:

- The power to issue findings and recommendations arising from the regulator's compliance activities and from an inspection, investigation or audit.
- The power to publish such findings, including a finding that a service is not in compliance. This reflects a growing recognition of the significance of ancillary measures in arriving at a proportionate sanction such as the effect of widespread publication of any negative determination, and the content of any public notice of sanction.
- The power to issue administrative fines.
- The power to apply criminal sanctions in the most serious cases, while appropriate, will not fall solely to the regulator. Further consideration is required as to the respective roles of the regulator and the relevant law enforcement agencies of the State in such cases. There are several regulatory bodies in Ireland (for example, the CCPC) whose experience in such matters could be drawn on, in finalising the regulatory arrangements in respect of the criminal aspects of the proposed legislation.

5.3.4.1 Principles applying to sanctions and determining the level of fines:

In determining the level of a fine, the legislation should set out guidance for the regulatory body concerning the range of considerations to be applied in determining a sanction and reducing it to a quantitative amount.

Broadly, the principles that should apply to the issuing of sanctions and fines should reflect the general practice of the Irish courts i.e. have regard to the specifics of a particular offence, where it sits on a range of seriousness and then applying mitigating factors, having the effect of reducing the penalty.
In the view of the BAI, the following considerations should apply to sanctions and fines:

- They should be appropriate and proportionate to the breach/offence
- They should act as an incentive/deterrent to ensure future compliance and reflect public disapproval
- Account should be taken of the gravity of the breach; culpability, offender behaviour/conduct in the commission of a breach and the impact and/or degree of harm caused.
- Regard should be had to the context of pursuing a legitimate public interest agenda, if the offender is exercising important freedom of expression rights, was genuinely adhering to public interest values, or has merely erred. The public interest in avoiding any "chilling effect" on reporting should be considered.
- Amount: the amount of a fine might have regard to: (1) turnover in the previous financial year; (2) ability to pay; (3) quantifiable consumer detriment/level of financial gain/unjust enrichment on the part of the regulated entity.
- Mitigating factors: co-operation with the regulator; explanations for breach or failure to co-operate e.g. accidental breach or oversight? Previous good conduct/isolated incident? Timeliness in responding to/taking action on foot of a notification.
- Compliance history of the offender – e.g. First breach? Repeated breach? Continuing breach?
- Actions taken to remedy the consequences of the breach
- Consideration should also be given to the granting of express provisions for the regulator to negotiate settlement agreements, in line with the practices of other Irish regulatory organisations, with a view to reaching speedy and certain outcomes and to avoid the need for referral to the courts.

5.3.4.2 Administrative Fines

The current powers of the BAI in respect of the issuing of financial sanctions are set out in Chapter 2 of Part 5 of the Broadcasting Act 2009. The BAI's powers are not dissimilar to those currently available to, and used frequently by, the Central Bank of Ireland. In the case of the BAI, the financial sanction provisions of the 2009 Act have been used on one occasion only. The experiences of a number of Irish regulatory bodies in implementing their enforcement functions, highlighting the constraints in issuing administrative fines and making the case for reform, were raised in a joint submission to the Law Reform Commission's Fourth Programme of Law Reform in December 2017. The contents of this submission may be worth considering in the context of the drafting of the new statutory provisions.

5.4 Conclusion

In the view of the BAI, the above compliance and enforcement principles and powers are applicable across the range of content to be regulated by the new media regulator. However, the manner in which these principles are given effect will need to be developed further and need to be capable of being adapted to the particular circumstances of online content and services. Given its regulatory experience in the media area, this is work which the BAI would be happy to undertake in advance of the drafting of the legislative provisions and would be willing to examine and evaluate practices (albeit still relatively limited) in other jurisdictions.

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

Annex 1: Determining if a Video-sharing Platform Service is Being Provided

The purpose of this Annex to the BAI's consultation response is to discuss the complex elements in the definition of a video-sharing platform service in more detail, to create a clear framework in which the legal elements in this definition can be applied and to establish a methodology for identifying video-sharing platform services.

It is structured in six parts:

1. A breakdown of the various elements of the legal definition of a video-sharing platform service.
2. A detailed discussion on the concept of dissociability, and how this creates the framework in which the legal criterion in the definition of a video-sharing platform service should be applied.
3. Core VSP Service Functions and Ancillary VSP Service Functions
4. A detailed discussion on the Principal Purpose Test and the Essential Functionality criterion.
5. Statutory mechanisms to assist a regulator in arriving at determinations.
6. A proposal for a methodology to determine whether a video-sharing platform service is being provided.

A1.1 Legal Definition of a Video-sharing Platform Service

The legal definition of a video-sharing platform service contained in the Directive contains several components. When these components are compartmentalised and described in their plain meaning (insofar as this is possible), they are as follows:

- The service is a service for the purposes of the Treaty on the Functioning of the European Union, meaning it is a service that is ordinarily provided for remuneration. In essence, this means that it is a service that generates revenue for the service provider or for other service providers providing *like* services (and can be a service with no direct monetary cost to a consumer).

- A principal purpose of the service or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the public in order to inform, entertain or educate. The service may be a service in its entirety (e.g. an entire website or application), or, where appropriate, a part of a service that is "dissociable" from the rest of the service.

- The provider of the service does not have editorial responsibility over the programmes and user-generated videos that are uploaded to the service (as the term "editorial responsibility" is defined in the Directive). This means that the act of uploading videos to the service is not generally carried out by the provider of the service, or at their request, or in coordination with others.

- The service is provided through electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. This includes both fixed and mobile internet.

- The organisation of the programmes and user-generated videos on the service is determined by the video-sharing platform provider, including by automatic means or algorithms particularly by displaying, tagging and sequencing. This means the service provider creates and maintains

effective control of the framework in which videos can be uploaded and accessed by users of the service.

- If the service is a non-economic activity (which includes services centered on the provision of audiovisual content on private websites and non-commercial communities of interest), it is excluded from the scope of the Directive.

A1.2 Dissociability: A framework for applying the legal criteria in the VSP Definition

The legal purpose of the definition of a video-sharing platform service in the revised Directive is to function as a "trigger" for the protections contained in Article 28b when a service meeting the qualities contained in that definition is being provided. In the view of the BAI, the starting point in creating a framework and methodology in which the criteria in the definition of a video-sharing platform service can be applied consistently is the concept of "dissociability".

The concept of dissociability arose from Case C-347/14 of the European Court of Justice.[8] It has been formalised and incorporated into the text of the Directive in its revised version. The case in question explored *how* the criterion in the definition of a service covered by the Directive should be applied, and ruled that the correct approach to doing so in a complex scenario is to examine the extent to which any functionality present on a service aligns with the definition, in itself and irrespective of the framework in which it is offered. ([…] *"preference must be given to a substantive approach which, according to the wording of Article 1(1)(a)(i), consists of examining whether the principal purpose of the service at issue, in itself and regardless of the framework in which it is offered, is the provision of programmes to inform, entertain or educate the general public"*.) Services that fall within the scope of the revised version of the Directive in such a way are considered "dissociable".

The key purpose of the concept of dissociability (as explored in Case C-347/14) is to ensure that the protections granted by the Directive in respect of the services it covers cannot be circumvented where the complexity of the framework in which they are offered stretches or strains the limits of a relevant legal definition.

In a practical sense, the essence of Case C-347/14 is that in attempting to determine if a service covered by the Directive is being provided, pre-conceived notions about whether the service under examination falls within scope should be disregarded and specific functionalities that align with the criterion in the legal definition should be searched for i.e. rather than taking a "top-down" approach that starts from the a pre-conceived notion that a VSP service is being provided and attempting to "fit" the definition around that pre-conceived notion, the approach taken should be to analyse a service from the "ground up" through reference to specific functionalities which are present to find the parts of the service that align with the definition.

Dissociable parts of social media services that are video-sharing platform services will include the Facebook News Feed or the Twitter feed accessible to users on their Twitter home page. These are examples of services that are provided *through* a service with a broader range of functionality which align very clearly with definitions of services covered by the Directive.

[8] Case C-347/14

The concept of dissociability also serves to limit the Directive's scope. The Directive states that *"[w]here a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive 2010/13/EU, only that section should be covered by that Directive, and only as regards programmes and user-generated videos"*[9], and that social media services should be covered by the Directive "*to the extent that they meet the definition of a video-sharing platform service"*.[10]

Thus, once it has been established that a video-sharing platform service is *being provided*, it will be important to establish the limits of this definition in order to determine which aspects of a service are in scope of the Directive and which are not. This is a key consideration as a video-sharing platform provider is only obliged to introduce protections in respect of the video-sharing platform services they provide rather than all the services they provide.

A1.3 Core VSP Service Functions and Ancillary VSP Service Functions

The concept of dissociability has two key implications for any regulator's analysis of a service:

1. Any aspect of a service with a broad range of functionality (e.g. a social media website), insofar as it independently satisfies the legal criterion in the definition of a video-sharing platform service, can be regarded as a video-sharing platform service.

2. The Directive only applies to the parts of a service under examination that constitute part of a video-sharing platform service.

In the BAI's view, the logical starting point in determining whether a video-sharing platform service is being provided is, therefore, to examine services from a "blank slate", to identify all of the user-interface elements of the service in question that might independently satisfy the definition of a video-sharing platform service and then to apply the legal criterion in the definition to those elements. This approach is consistent with the two key interpretative implications of the dissociability criterion described above, as it will lead to a fully comprehensive examination of the service in question, provide grounds for why those parts are included within the scope of the Directive and will naturally exclude parts of the service that do not form part of a video-sharing platform service.

A common technical feature that must be present in all video-sharing platform services irrespective of any other matter is that there is a publicly-available interface element included on a service that allows users to view audiovisual content uploaded by other users. In the BAI's view, these kinds of interface elements should be used as "grounding" mechanisms when analysing services to see if a video-sharing platform service is being provided, as they act as easily identifiable focal points to apply the "legal" and "technical" elements of the definition consistently and methodically across different services. By "deconstructing" services in such a way, "like" interface elements common to different services can be more easily identified (e.g. the News Feed, Twitter Feed and Instagram feed) and similar regulatory methods in respect of these "like" functions across different services can be developed.

Therefore, in examining a complex, multi-functional service like Facebook to determine if a video-sharing platform service is being provided, "Facebook" as the term is commonly used and understood

[9] Recital 6
[10] Recital 4

would not be the focus of regulation *per se* but, more particularly, the user-interface elements of Facebook that most closely align with the definition of a video-sharing platform service in the Directive (one example of which is the News Feed). In complex services these interface elements will form a "network" or "heat map" of interrelated video-sharing platform service "nodes" that can be identified and regulated on a collective or individual basis as appropriate. This approach to regulation is consistent with the proportionality required by the Article 28b.3 test, as the "focus" of regulatory measures will be the elements of the service that align with the definition of a video-sharing platform service. This approach is also consistent with Recitals 4 and 6.[11]

While these terms are not used in the Directive, the BAI considers that the definition of a video-sharing platform service used in the Directive encapsulates platforms' **Core VSP Service Functions** and **Ancillary VSP Service Functions**.

- A **core VSP service function** is the relevant element of a user-interface on a service that independently satisfies all the relevant legal criteria in the definition of a video-sharing platform service. It is the irreducible core element of the VSP service provided that triggers the application of the Directive's rules, and will allow, in some shape or form, users of the service to access audiovisual content uploaded by other users. On social media services, a core VSP service function will often take the form of a content feed (a key example is the Facebook News Feed). In practice, on complex social media services, it is likely that multiple aspects of the service will constitute core VSP functions.

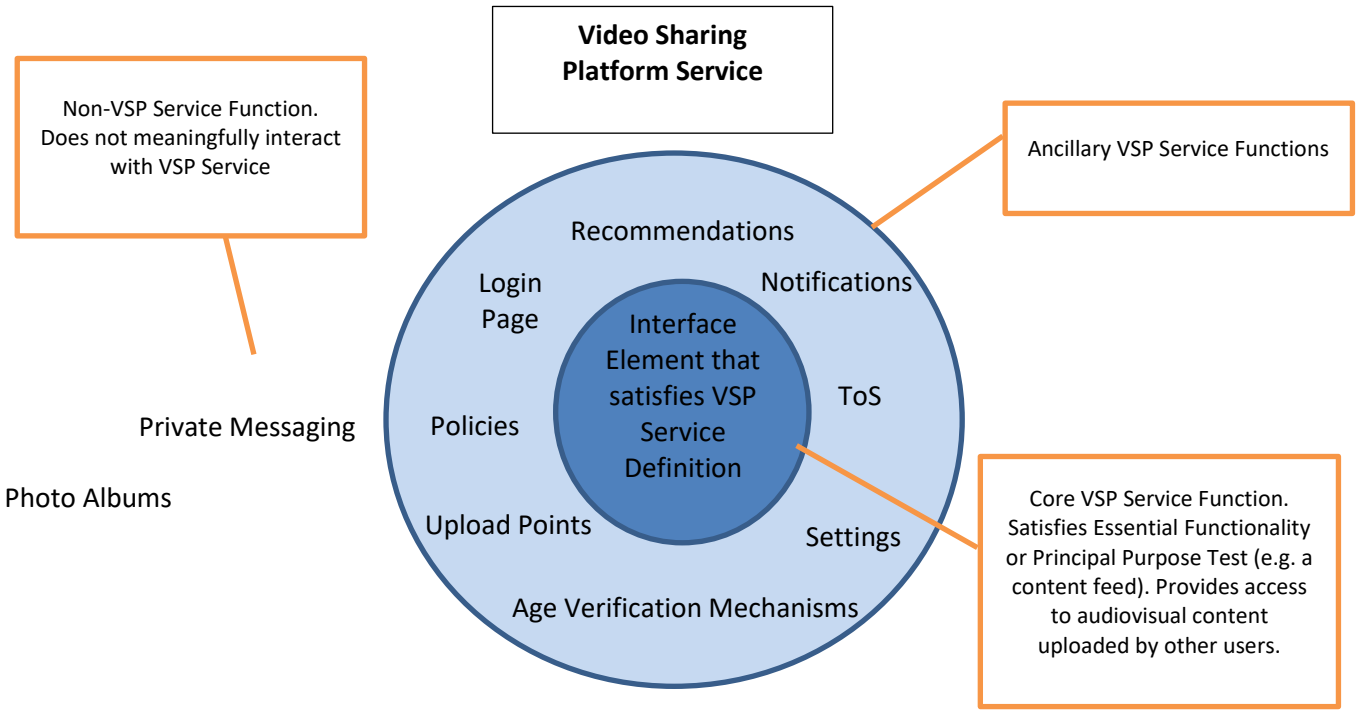
- An **ancillary VSP service function** is an element of a service that interacts with and affects a user's access to, or use of, the core VSP service function being provided, as well as the kind of content that appears on it, but which cannot in and of itself be regarded independently as a video-sharing platform service on a legal analysis. Ancillary VSP service functions do not have to appear on the same website/interface "page" as the core VSP service, and include the terms and conditions of the service, its login page (which provides access to the VSP service), notifications systems or any number of interface elements that directly interact with or affect the VSP service.

The inclusion of ancillary VSP service functions within the scope of the definition of a video-sharing platform service can be justified through reference to the features of a video-sharing platform described

[11] Further discussion regarding the formal application of the concept of dissociability to the essential functionality criterion would be helpful, although the approach advocated by the BAI to identifying and regulating video-sharing platform services would remain largely unchanged by this matter. The BAI's view is that translating the Directive's rules for video-sharing platform services into a practical regulatory regime will require the identification of video-sharing platform services through reference to specific functionalities present on platforms that satisfy the criterion in the legal definition of a video-sharing platform service (irrespective of whether the principal purpose or essential functionality test is used). Many such interface elements may exist on any given platform and the regulatory model used must be able to account for different levels of protection that may be justified under the Article 28b.3 test. The BAI's model for identifying and regulating video-sharing platform services (i) accounts for the complexity inherent in applying the Article 28b.3 test, (ii) ensures regulatory rules can be applied consistently across different services by identifying core "like" elements across those services in combination with easily applicable common constructive indicators to identify VSPs, and (iii) creates an iron-clad basis for the regulatory relationship between the regulator and regulated entities by ensuring that the removal or amendment of any one interface element on the platform does not undermine the basis for regulation in respect of other elements, leading to a stronger overall basis for the application of regulation (i.e. a distributed basis for regulation rather than a single basis).

in Article 28b.3, which include: a platform's terms of service, ACC declaration mechanisms, reporting and flagging mechanisms, age verification systems, content rating systems, parental control systems, complaints handling procedures and media literacy tools. None of these features independently satisfy the definition of a video-sharing platform service when analysed in isolation, but rather are provided as an ancillary function to a video-sharing platform service being provided.

The following diagram illustrates how this view of video-sharing platform services might apply to a complex social media service providing a single, dissociable VSP service.



Once it has been determined that a video-sharing platform service **is being provided** (i.e. there is, at a minimum, a core VSP service function**)**, per recital 4 and 6, a dissociability test must then be applied to determine which parts of the service are ancillary VSP service functions and which parts of the service are not part of the video-sharing platform service provided and hence to which the Directive is not applicable.

Determining dissociability in this context is a question of the extent to which the functionality of the service under examination meaningfully interacts with and affects a user's use of the core VSP service that has been identified, having regard to the protections that were intended to be afforded to audiences by the Directive.

Ancillary VSP Service functions will have to be determined on a case-by-case basis, depending on the service being provided. Examples of ancillary VSP service functions on a complex social media service might include:

Recommendation Systems	**Content Flagging Systems**	**Login Systems**
Notifications Systems	**Terms of Service**	**Upload Mechanisms**
Settings	**Age Verification Mechanisms**	**Content Policies**
Audiovisual Advertisements	**Parental Control Measures**	**Content Algorithms**
Complaints Processes	**Search Mechanisms**	**"Blocking" Mechanisms**

All of these different features are likely to form part of a video-sharing platform service being provided insofar as they affect access to, or use of, a core VSP service function or are features of a service that a regulator might require a VSP provider to change or introduce further to Article 28b of the Directive to bring a VSP service into compliance with rules stemming from the Directive.

Where it has been identified that a VSP service is being provided through a social media service, the complexity inherent in modern social media services will often mean that an aspect of the platform that constitutes part of a VSP service will affect functionality on the platform unrelated to the provision of that VSP service or other VSP services present on the same service. For example, Facebook's login page (an ancillary VSP service function) grants access to both its news feed (a core VSP service function) as well as its photo albums (which possibly does not constitute part of a video-sharing platform service). The Facebook login page is also an ancillary VSP service function relative to Facebook Watch (another core VSP service function). The interrelated nature of the various functionalities present on the platform do not act as an impediment to the application of the Directive's rules. The Directive must be read and applied in a compatible and complementary manner to ensure that the standard of protection required in respect of all VSP services is met.

A1.4 Principal-purpose VSP Services and Essential Functionality VSP Services

The legal definition of a video-sharing platform service in the Directive envisions two main "kinds" of video-sharing platform services.

The first kind of video-sharing platform service is a "**principal-purpose VSP service**". This is a service (including a dissociable section of a wider service) that satisfies the common qualities in the definition of a video-sharing platform service and its principal purpose is devoted to providing programmes, user-generated videos, or both, to the public, in order to inform, entertain or educate.

The second kind of video-sharing platform service is an **"essential functionality VSP service".** This is a service (including a dissociable section of a wider service)[12] that satisfies the common qualities in the definition of a video-sharing platform service and an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the public, in order to inform, entertain or educate.

[12] See footnote 9 above.

A1.4.1 Principal-purpose VSP Services

The scope and limits of the principal purpose test – that a service's principal purpose is devoted to providing audiovisual content to the public in order to inform, entertain or educate – are well understood.

In applying the principal purpose test to services under examination to see whether they are video-sharing platform services, the revised Directive does not appear to envision a significant degree of meaningful change to how the test functions in practice. In essence, the test requires an intuitive assessment as to the extent to which the provision of access to audiovisual content intended to inform, entertain and educate on the service can be regarded as the main/primary purpose for which a service is being provided.

While the exercise of applying the principal-purpose test to services under examination to see whether they are video-sharing sharing platforms will be novel, the BAI does not consider that any significant points of confusion or complexity are likely to arise in doing so. At its most clear, a service such as YouTube in its various forms (e.g. mobile applications) will fall to be regulated as a principal-purpose video-sharing platform service in almost its entirety.

As discussed previously, dissociable sections of social media services may also fall to be regulated as video-sharing platform services through the principal-purpose test. For example, it might be the case that a social media service with a range of different functionalities has a content feed that only supplies videos or that a service has a videos "section" which is distinct from the rest of the functionality it provides.

A1.4.2 Essential-functionality VSP Services

The "essential functionality" criterion is a new concept that appears in the latest iteration of the Directive for the first time. It is a component in the definition of a video-sharing platform service that provides that where an essential functionality of a service under examination the provision of programmes, user-generated videos, or both, to the general public in order to inform, entertain or educate, that the Directive will apply to such a service insofar as all of the other elements in the definition of a video-sharing platform service are met.

How the essential functionality criterion will apply has been the subject of much discussion in the drafting process for the Directive. Helpfully, further to Recital 5 of the revised Directive, the European Commission will provide detailed guidance on how this criterion is intended to be applied.

Without prejudice to any future guidance offered by the European Commission on this issue, the BAI would like to take the opportunity of the Department's Consultation to offer its views on some of the relevant factors that might be considered in its application.

A1.4.3 Purpose of the Essential Functionality criterion

In introducing and approving the inclusion of the essential functionality criterion in the definition of a video-sharing platform service in the Directive, the European Institutions recognised that by itself the principal-purpose test was not sufficient to grant an appropriate level of protection to audiences in respect of audiovisual content provided on the modern internet. Popular social media services such as

Facebook and Twitter, for which the provision of audiovisual content may not constitute their principal purpose, but which nonetheless provide access to vast amounts of audiovisual content every day to hundreds of millions of Europeans, would have fallen outside the scope of the Directive but for the inclusion of the "essential functionality" criterion in the definition of a video-sharing platform service. The inclusion of services such as these within the scope of the Directive was the fundamental purpose for which the essential functionality test was introduced.

A1.4.4 Practical Application of the Essential Functionality Criterion

In considering the foregoing, it is the view of the BAI that the concept of essential functionality should not be interpreted narrowly, but through a broad lens that captures a variety of different circumstances in which the application of the protections contained in the Directive might be justified. A broad interpretation of the essentially functionality criterion allows the purpose for which the concept was introduced to be fully realised.

If it was intended that essential functionality be interpreted in a limited or narrow manner, the concept could have been limited by the European Institutions in the text of the Directive. Instead, the concept of essential functionality was left broadly "open" so that the Directive could be applied to its full effect and flexibly to a range of different services that do not satisfy the principal purpose test but which nevertheless provide access to large amounts of audiovisual content in a manner warranting protection.

In the view of the BAI, essential functionality must therefore be interpreted as encompassing **actual essential functionality** and **constructive essential functionality**.

Actual essential functionality is determined with reference to the manner in which a particular service is being provided in practice and the relative importance of the provision of audiovisual content to the provision of that service. In determining actual essential functionality, one would look at the extent to which the provision of programmes and user-generated videos in order to inform, entertain and educate is essential to the provision of a particular service.

Constructive essential functionality views essential functionality from an abstract perspective that examines whether the Directive should apply to a given *kind* of service. In essence, this approach asks whether there is a functionality present on a service under examination devoted to providing programmes or videos in order to inform, entertain or educate, and to *which it is essential that the Directive's protections apply*. If such a functionality is present, it is an "essential functionality". This approach determines essential functionality with reference to objective, abstract criteria that can be applied across *like* services, having regard to the nature of protections envisioned in the Directive and the purpose for which they were introduced by the European institutions. This would include assessments of factors such as the total number of users on a service being exposed to audiovisual content in a manner envisioned by the Directive, the length of time they are exposed, the influence of a service and the likelihood of harms envisioned by the Directive occurring on a service.

If a service under examination satisfies indicators from one or both types of approaches to essential functionality the Directive should apply to the service.

A1.4.5 Practical Example: Actual and Constructive Essential Functionality

Audiovisual content consumption rates of users on different services present a useful example to illustrate how essential functionality incorporates both actual and constructive elements. For example, compare the following two hypothetical content feeds:

Content Feed A	Content Feed B
- 1 Million European Users - 40% of users' viewing time dedicated to viewing audiovisual content	- 300 Million European Users - 10% of users' viewing time dedicated to viewing audiovisual content

In this scenario, Content Feed A could be regarded as a video-sharing platform service that satisfies the essential functionality test on actual grounds. The provision of audiovisual content constitutes a significant enough share of audiovisual content provided on a daily basis that factually it could be regarded as essential to the provision of the service, despite the relatively low number of users in a Pan-European context. The service could also possibly satisfy the principal purpose test as well, depending on the extent to which the provision of audiovisual content on the service is a merely indissociable complement to the main activity of the service.

Content Feed B satisfies the essential functionality test on a constructive basis due to the total audiovisual content consumed on the service. By way of illustration, if the average user on a service spent 1 hour per day consuming content on both platforms, over a year, Content Feed A would account for approximately 17,000 years of audiovisual content consumed and Content Feed B would account for approximately 1,250,000 years of audiovisual content consumed. In this example, 74 times as much total audiovisual content is consumed on Content Feed B in a year, despite the fact the average user on Content Feed B spends 18 minutes less a day consuming audiovisual content.

Having regard to the purpose for which the essential functionality criterion was introduced, and the protections intended by the Directive, it would be absurd and fundamentally contrary to that purpose if the protections to be afforded to audiences by the Directive did not apply to services such as Content Feed B. This is the case because of the clear and unambiguous intention of the European Institutions to include services such as those within the scope of the Directive in the drafting process, the tremendous influence of such services by virtue of the scale of audiovisual content they provide, and the risk of harms envisioned by the Directive occurring to users of the service. Recital 4 of the Directive is particularly important in this context.[13]

Ultimately, while the manner in which audiovisual content is delivered to users of both services will vary, the functionality provided on both services for which the Directive's intentions were intended to apply to is the same – the act of consuming audiovisual content. If a narrow "actual" approach to essential

[13] Recital 4: "Video-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism, those services should be covered by Directive 2010/13/EU to the extent they meet the definition of a video-sharing platform service".

functionality was the only approach adopted, the fact that less audiovisual content is being consumed in a "relative" sense on the Content Feed B could act as an impediment to the application of the Directive's rules, despite the fact that in an "absolute" sense it provides access to vastly greater amounts of audiovisual content than Content Feed A.

A1.4.6 Technical Criteria and Indicators vs Intuition

An interpretation of essential functionality that includes both actual and constructive components gives voice to reasonable, clear and intuitive determinations about what services should and should not be covered by the Directive as video-sharing platform services.

The example described above has used the indicator of audiovisual content consumption to illustrate why services like Content Feed B should be covered by the Directive. In practice, the approach taken in this example is likely more complex than is necessary, as it is difficult to envision how a service with an excess of 50 million users that provides audiovisual functionality in a manner envisioned by the Directive could not be covered by its protections, unless such consumption is statistically negligible and insignificant or for a purpose that was not to inform, entertain or educate. It is for this reason that the BAI has concluded on an intuitive basis that the services listed in Section 2 of this consultation response are "essential-functionality" video-sharing platform services.

While metrics and the assessment of technical criteria may be useful tools to assist a regulator in determining what services are covered by the Directive, it should be borne in mind that any determination of essential functionality will ultimately be an intuitive exercise assessing the extent to which a service meets a "legal" test rather than a technical one. The avoidance of an overly technical approach to determining essential functionality will be paramount as technical aspects of services can change rapidly, potentially leading to the circumvention of protections, whereas the indicators in an approach focused on the risk of harm occurring to users and the need for the Directive's protections to be applied can remain consistent across different services irrespective of changes to the interface in which they are provided.

To that extent, the key question in determining whether essential functionality applies from a constructive perspective is not to ask *if* the Directive applies, but rather *should* the Directive apply to such services having regard to the need for protections to be put in place for audiences and the European Institutions' intentions.

On that basis, and subject to further detailed work developing thresholds and exceptions, the BAI feels that the following factors could be developed as easily-applicable, key, constructive indicators that determine whether a service satisfies the essential functionality test:

- The number of users on a service being exposed to audiovisual content uploaded by other users of the service.
- The number of minors being exposed to audiovisual content uploaded by other users.
- Total audiovisual content consumed on the service in a given period.
- The extent to which the audiovisual content of users is monetised on the interface element e.g. revenue generated from paid audiovisual commercial communications.

"Edge cases" will always potentially stretch or strain any indicators. In such circumstances, determinations will have to be made on a case-by-case basis.

A1.5 Preliminary Information-gathering Tool

In order to determine if a video-sharing platform service is being provided, as a preliminary step, a regulator will need a statutory tool that obliges providers of services that *may be* video-sharing platform services to provide certain kinds of information to the regulator about their service. This information would then have to be assessed by the regulator to determine if a video-sharing platform service is being provided.

Given that video-sharing platform services can essentially be provided through any electronic communications network, the range of services that this tool will have to apply to should be quite broad, and detailed consideration should be given as to how it will function in practice. The tool should also cover information necessary to ascertain a service's jurisdiction under the Directive rules as well.

A1.6 Determining whether a Video-sharing Platform Service is being provided

In summary, the BAI feels that video-sharing platform services can be identified through the following four-step methodology:

1. Identify a user-interface element of a service that allows users to be exposed to audiovisual content uploaded by other users.
2. Use a preliminary information-gathering tool to collect information from the provider of the service that is relevant to determining whether the service is a video-sharing platform service.
3. Assess whether the user-interface element in question satisfies the legal definition of a video-sharing platform service, determining in the process whether it is a principal-purpose video-sharing platform service or an essential-functionality, video-sharing platform service. This identifies **core VSP service functions**.
4. Apply a dissociability test to determine what aspects of the service constitute **ancillary VSP service functions** and the aspects of the service to which the Directive does not apply.