

Submission to Coimisiún na Meán on the Draft Online Safety Code for Video-Sharing Platform Services

31 January 2024



Founded in 1995, the Children's Rights Alliance unites 150 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies, and services.

Accompaniment Support Service for Children (A.S.S.C.)
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
Anew
Anne Sullivan Foundation
Aoibhneas
Archways
AsIAm
Association of Occupational Therapists of Ireland (AOTI)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Bodywhys
Catholic Guides of Ireland
Child Law Project
Childhood Development Initiative
Children in Hospital Ireland
Children's Books Ireland
Children's Grief Centre
Citywise Education
Clarecare
COPE Galway
Cork Life Centre
Cork Migrant Centre
Crann Centre
Crosscare
CyberSafeKids
Cycle Against Suicide
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Early Learning Initiative (National College of Ireland)
Educate Together
EPIC
Equality for Children
Extern Ireland
FamiliBase
Féach
Focus Ireland
Foróige
Gaeleideachas
Galway Traveller Movement
GIY Ireland CLG
Good Shepherd Cork
Helium Arts
Immigrant Council of Ireland
Inclusion Ireland
Institute of Guidance Counsellors
Irish Aftercare Network
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals' Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)

Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation
iScoil
Jigsaw
Katharine Howard Foundation
Kerry Diocesan Youth Service (KDYS)
Kids' Own Publishing Partnership
Kinship Care
Laois Domestic Abuse Services
Leap Ireland
Let's Grow Together! Infant and Childhood Partnerships CLG.
LGBT Ireland
Meath Women's Refuge & Support Services
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
Museum of Childhood Ireland
Music Generation
My Mind
My Project Minding You
National Childhood Network
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
New Directions
Novas
One Family
One in Four
Parents Plus
Pavee Point
Peter McVerry Trust
Prevention and Early Intervention Network
Psychological Society of Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond Housing
SAFE Ireland
Saoirse Domestic Violence Services
SAOL Beag Children's Centre
School of Education UCD
Scouting Ireland
Sexual Violence Centre Cork
Simon Communities of Ireland
SIPTU
Social Care Ireland
Society of St. Vincent de Paul
SPHE Network
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
TASC
Teachers' Union of Ireland
Terenure College Rugby Football Club
The Ark, A Cultural Centre for Children
The Irish Red Cross
The Jack and Jill Children's Foundation
The UNESCO Child and Family Research Centre, NUI Galway
The Wheel
Transgender Equality Network Ireland
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Variety – the Children's Charity of Ireland
Vision Ireland
Women's Aid
Young Ballymun
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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1. Introduction

The Children’s Rights Alliance unites over 150 organisations working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services. We identify problems for children. We develop solutions. We educate and provide information and legal advice on children’s rights.

The Children’s Rights Alliance is also a member and National Partner of Eurochild, the largest network of organisations and individuals working with and for children in Europe. Eurochild works closely with the European Union, as protecting children’s rights is among the EU’s aims and values.

The Children’s Rights Alliance welcomes the swift publication of the first draft Online Safety Code and the opportunity to make a written submission to Coimisiún na Meán on the draft Online Safety Code for video-sharing platform services. In September 2023, the Alliance made a submission¹ to Coimisiún na Meán to inform the development of this draft Online Safety Code. This response is informed by our previous submission and further consultation with the membership of the Alliance.

The UN Committee on the Rights of the Child have acknowledged the increasing importance of the digital environment in that it ‘affords new opportunities for the realization of children’s rights, but also poses the risks of their violation or abuse.’²

Results from a National Survey of Children, their Parents and Adults regarding Online Safety conducted between December 2019 and October 2020, found that 62 per cent of children and young people in Ireland aged nine to 17 years use social media.³ This rises to 90 per cent of 15 to 17 year olds.⁴ While the online world brings unparalleled opportunity for children to learn, create, connect, and socialise, it also brings risk including the loss of personal data, exposure to harmful content, cyberbullying, negative impacts on health and well-being, online grooming, and extortion. In 2023, CyberSafeKids reported that a quarter of all children have seen or experienced something online in the last year that bothered them, with almost one third of those children having kept it to themselves rather than report it to their parents or someone else.⁵ While undoubtedly the internet has significant positive impacts both for children and wider society, for too long legislation and policy have not kept pace with the evolution of the online world. This has left children and young people at risk and unprepared to appropriately navigate online platforms. The introduction of the Online Safety and Media Regulation Act 2022 and the Digital Services Act will pave the way for a new era of online regulation. Central to this is the introduction of the Online Safety Codes.

We recognise that this Code and associated statutory guidance when implemented will be part of the framework which aims to ensure ‘that we all have a safer internet world’.⁶ However, we are significantly concerned by the level at which the Video-Sharing Platform Service providers (VSPS

1 Submission to Coimisiún na Meán on Developing Ireland’s First Binding Online Safety Code for Video-Sharing Platform Services - Children’s Rights Alliance (childrensrights.ie) [September 2023](#).

2 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 3.

3 National Advisory Council for Online Safety, *Report of a National Survey of Children, their Parents and Adults regarding Online Safety 2021* (2021) 8.

4 *ibid.*

5 CyberSafeKids, *Keeping Kids Safer Online – Trends and Usage Report Academic Year 2022-2023* (2023) 6.

6 Coimisiún na Meán Consultation document Foreword p.5

providers) will be permitted to set their own goals and standards, and at the lack of baselines and targets being set by the Commission.⁷

We note that the section on ‘Supplementary Provisions and Guidance’ is for further consideration by the Commission but is not included in this draft first Code. The matters raised in ‘Supplementary Provision’; safety by design, safety supports, and a recommender system, are all essential elements of the structures needed to protect children and young people online. We welcome the Commission’s intention to regulate these topics. However, it is disappointing that these elements, in particular safety by design, will not be included in the Code. Many of the digital services children and young people use are not designed to protect their rights or meet their needs.⁸ Research from the 5Rights Foundation found that ‘pathways designed into digital services and products are putting children at risk’ with designers tasked with ‘optimising products and services for three primary purposes, all geared towards revenue generation.’⁹ The Online Safety Code presents a missed opportunity to embed the principle of safety by design into the Irish regulatory framework.

We welcome the opportunity to take part in the consultation process and look forward to continued engagement to make the online world safer for children and young people.

⁷ See sections 4,5 and 6.

⁸ 5Rights Foundation, ‘Design of Service’ <<https://5rightsfoundation.com/our-work/design-of-service/>> accessed 4 September 2023.

⁹ 5Rights Foundation, September 2021 Pathways: A Summary Key findings and recommendations from Pathways: How digital design puts Children at Risk (2021) 7.

2. Question 1: Sections 1 - 9 of the draft Code

Section 4: Regulatory Principles

Section 4.2

It is welcome that the Commission recognises that it must act in accordance with various legal and legislative frameworks set out in section 4.2, including recognising the rights conferred by the European Convention on Human Rights (ECHR). The Commission is required to carry out its functions in a manner compatible with the European Convention on Human Rights Act 2003. The ECHR is just one of a number of human rights treaties which Ireland has ratified and which confers rights. Consideration should be given to referring to the core human rights treaties and protocols of the United Nations and of the Council of Europe. Amongst the core United Nations Treaties, the Convention on the Rights of the Child,¹⁰ and in particular *General Comment No.25* of the Committee on the Rights of the Child¹¹ are relevant and helpful in the context of online safety and human rights. The relevant Council of Europe treaties include the ECHR and the Convention on Preventing and Combating Violence against Women and Domestic Violence, commonly called the Istanbul Convention¹² which has recently been ratified by the European Union.

In relation to Irish law, the Commission, as a public body, has a public sector duty¹³ to have regard for the need to eliminate discrimination, promote equality of opportunity, and protect the human rights of public sector staff and users. Those who engage with the Commission in relation to children's rights, such as the Alliance and children themselves, constitute users. Consideration should be given to specifically including the public sector duty in this section of the Code.

Section 4.8

Point one of this section could be strengthened by including comments in videos, as well as content 'in' AV programmes etc. for the avoidance of doubt.

Section 4.14

The UN Committee on the Rights of the Child are clear that 'the rights of every child must be respected, protected and fulfilled in the digital environment.'¹⁴ It is welcome that this is included in the draft Code.

However, it is unclear why the Code prioritises naming some rights over others.¹⁵ Absent from the list are; the right to life, to be free from torture and humiliating and degrading treatment, the right to private life, the consideration of the best interests of the child, and the right to an effective remedy. These should be considered for inclusion in section 4.14. Of particular importance is the best interests of the child. The UN Committee on the Rights of the Child has recommended that 'in

10 UN Convention on the Rights of the Child A/RES/44/25 (20 November 1989)

11 UN Committee on the Rights of the Child, General Comment no.25 (23021) on children's rights in relation to the digital environment. CRC/C/GC/25

12 Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210)

13 Section 42 Irish Human Rights & Equality Commission Act 2014

14 *ibid* para 4.

15 Section 4.14 states: The rights that will be of greatest relevance for the Commission's functions are: the right to freedom of expression; the right to privacy; the rights to freedom of thought, conscience and religion; non-discrimination; the right to freedom of assembly and association; the right to earn a livelihood; the freedom to conduct a business; the free movement of services; and the rights of the child and of those with protected characteristics

all actions regarding the provision, regulation, design, management, and use of the digital environment, the best interests of every child is a primary consideration.¹⁶ The Council of Europe (COE) *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* provide that 'in all actions concerning children in the digital environment, the best interests of the child shall be a primary consideration'.¹⁷

Recommendations

- Expand section 4.13 to include all relevant international human rights treaties, in particular UN and Council of Europe treaties relating to the rights of the child
- Expand section 4.13 to include the Public Sector duty
- Expand the description of priority rights in section 4.14 to include others most relevant to protection from harm, including; the right to life, to be free from torture and humiliating and degrading treatment, the right to private life, the consideration of the best interests of the child, and the right to an effective remedy

¹⁶ UN Committee on the Rights of the Child, General Comment no 25 (2021) on children's rights in relation to the digital environment, CRC/C/GC/25 para 12.

¹⁷ *ibid*, 12.

3. Questions 2- 5: Definitions – Section 10 of the Code

User-generated content that is indissociable from user-generated videos

We welcome the inclusion in the Code of user-generated content that is indissociable from user-generated videos in the definition of content. Very often an otherwise neutral video is made harmful by the captions, comments, symbols, or other content surrounding it, and the context in which it is later used.

We have heard from our members that the content connected to a video can often cause significant harm and distress to children and young people, particularly in the context of bullying. At times, the video itself may not be what is causing harm but when it is considered alongside the content, such as comments connected to the video, it can cause significant distress and harm.¹⁸ Our members have told us that Travellers and Roma are often targeted in the comments that go with particular videos, for example the poor treatment of animals, which can result in racist content being shared in the comments under the video.¹⁹

Illegal content harmful to children

The forms of regulated content harmful to children contained in the draft Code remain very limited.

In relation to content which may impair the physical, mental, and moral development of children, the term ‘pornography’ does not appear to be defined in the Code or described in the guidelines. References to ‘child pornography’ are clear because they are, by reference, relevant to Irish or EU legislation. However, given that much sexually explicit material of adults will be self-generated rather than generated by commercial interests, there would be value in including a general definition of pornography. Pornography is also carried across many digital platforms, not just those which seek to particularly focus on adult content.

Irish teenagers are the fourth highest users in the EU for sexting.²⁰ A recent Report from the Children’s Commissioner for England found that pornography consumption is widespread among children, with 13 years old being the average age of first exposure.²¹ A significant minority of children are first exposed to pornography at a very young age; 10 per cent of over 1,000 young people surveyed had seen it by age nine, 27 per cent had seen it by age 11, and 50 per cent had seen it by age 13.²² The Children’s Commissioner Report also found that children ‘often stumble accidentally across pornography online’²³ and X (formerly Twitter) is the platform where the greatest number of children had seen pornography.²⁴ The majority, 79 per cent of 18-21 year olds surveyed, had seen content involving sexual violence before turning 18.²⁵ This content not only impacts the physical, mental, and moral development of children, but can also impede their social development.

It is welcome that ‘content consisting of dangerous challenges that give rise to a risk to life or risk of significant harm’ are included in the draft Code. However, this could be expanded upon to include not just physical health but also mental health.

18 Children’s Rights Alliance member consultation, August 2023.

19 Communication received by the Children’s Rights Alliance from Pavee Point, 25 August 2023.

20 Dublin City University, ‘Irish Teens the Fourth Highest in the EU for Sexting’ <<https://bit.ly/3qTC2HK>> accessed 6 January 2022. See also: Raymond Arthur, ‘Policing Youth Sexting in Ireland’ (2019) 22(3) Irish Journal of Family Law 66.

21 Children’s Commissioner for England, ‘A lot of it is actually just abuse’ Young people and pornography’ January 2023, 6-8.

22 *ibid.*

23 *ibid.*

24 *ibid.*

25 *ibid.*

Regulated Harmful Content to Children

Violence

It is welcome that the definition of regulated content harmful to children includes content ‘consisting of realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty’. This needs to be retained in the final Code as consultations with children and young people have shown that they are most disturbed by violent content online.²⁶

Audiovisual commercial communications harmful to children

The current definition of audiovisual commercial communications harmful to children is narrow and limited. While it does include ‘audiovisual commercial communications for alcohol aimed specifically at children’, it omits unhealthy foods and breast milk substitutes.

Research from the American Academy of Paediatrics²⁷ showed that young children’s understanding of advertising material is extremely limited. The Council of Europe recommends²⁸ that States should take measures to ensure that children are protected from commercial exploitation in the digital environment, including exposure to age-inappropriate forms of advertising and marketing. The UN Committee on the Rights of the Child has reiterated this in their recent General Comment and has recommended that:

‘States parties should make the best interests of the child a primary consideration when regulating advertising and marketing addressed to and accessible to children. Sponsorship, product placement and all other forms of commercially driven content should be clearly distinguished from all other content and should not perpetuate gender or racial stereotypes.’²⁹

Aligned to this, the Committee have recommended that there is a need to ensure that the profiling or targeting of children for commercial purposes is prohibited, including practices that ‘rely on neuromarketing, emotional analytics, immersive advertising and advertising in virtual and augmented reality environments to promote products, applications and services’.³⁰ The 2020 WHO-UNICEF-Lancet Commission on the future for the world’s children noted that ‘commercial marketing of products that are harmful to children represents one of the most underappreciated risks to their health and wellbeing’.³¹

Digital media advertising has changed dramatically over time and is predicted to account for 60 per cent of global advertising expenditure by 2025.³² A 2023 report from UNICEF and the WHO highlights

26 EU Kids Online ‘EU Kids Online 2020: Survey results from 19 countries’ <<https://www.lse.ac.uk/media-and-communications/research/research-projects/eu-kids-online/eu-kids-online-2020>> accessed 4 September 2023, 142,149,151.

27 The American Academy Of Pediatrics| Policy Statement, July 01 2020, Digital Advertising to Children, <<https://publications.aap.org/pediatrics/article/146/1/e20201681/37013/Digital-Advertising-to-Children?autologincheck=redirected>> accessed 29 August 2023.

28 Council of Europe, Guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018) Recommendation CM/Rec(2018)7 of the Committee of Ministers, 20.

29 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 41

30 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 42.

31 Clark, H., Coll-Seck, A.M., Banerjee, A., Peterson, S., Dalglish, S.L., Ameratunga, S. *et al.* (2020). A future for the world’s children? A WHO–UNICEF–Lancet Commission. *Lancet* 2020; 395: 605–58. <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32540-1/fulltext#articleInformation](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32540-1/fulltext#articleInformation)> accessed 4 September 2023.

32 WHO, Understanding the digital media ecosystem. How the evolution of the digital marketing ecosystem impacts tobacco, alcohol and unhealthy food marketing (WHO 2022) <<https://apps.who.int/iris/handle/10665/355277>> accessed 4 September 2023.

that as marketing communication techniques have moved away from one-size-fits-all spot advertisements towards strategies for fostering engagement, children are now not just passive viewers of commercial messages, but rather ‘active practitioners’ in commercial communications and marketing.³³

As the marketing of unhealthy foods and breast milk substitutes could reasonably be seen as promoting or encouraging behaviour that characterises a feeding or eating disorder, and because the Broadcasting Act 2009³⁴ permits inclusion of such products in regulation, the Commission may consider using its discretion to include them in the Code.

Regulated Content Harmful to the General Public

In relation to regulated content harmful to the general public, Travellers and Roma should be specifically identified as groups against whom incitement to violence or hatred should not be permitted. We appreciate that the current wording follows Article 21 of the Charter but note that such wording may not describe Travellers and Roma sufficiently. Roma are not a clearly identified national minority in Ireland. Travellers, though recognised officially as an ethnic minority³⁵ in Ireland since 2017, are often not recognised as such by the general public. Specific mention would help identify their protected status and may help to reduce harm.

Recommendations

- Retain inclusion in the Code of user-generated content that is indissociable from user-generated videos in the definition of content.
- Retain the inclusion of content ‘consisting of realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty’ in the Code.
- Define pornography to ensure that sexually explicit content which a child may encounter on a site not devoted to adult content is covered.
- Include mental health as well as physical health in relation to regulated content – dangerous challenges.
- Specifically name Travellers and Roma as protected groups in relation to content harmful to the general public
- Within audiovisual commercial communications consider including the harms to children by alcohol, unhealthy foods, and breast milk substitutes in regulated content harmful to children in audiovisual commercial communications. Consider also expanding the designation from advertising of alcohol products aimed specifically at children to alcohol products which are likely to be attractive to children.

33 UNICEF and WHO, Taking action to protect children from the harmful impact of food marketing: a child rights-based approach. Geneva: World Health Organization and the United Nations Children’s Fund (UNICEF 2023) 7.

34 Section 139K(5) Broadcasting Act 2009

35 Recognised officially as a distinct ethnic group by Taoiseach Enda Kenny 1 March 2017 https://merrionstreet.ie/en/news-room/news/travellers_recognised_as_an_ethnic_group_within_the_irish_nation.html

4. Questions 6-13: Content – Section 11 of the Code

Terms and Conditions

In relation to terms and conditions, but also other proposed obligations of VSPS providers, the current draft Code relies on the regulated platforms to set standards, terms and conditions, reporting mechanisms, and baselines. As the government's strategy, *Harnessing Digital: The Digital Ireland Framework*, states in relation to implementation: 'Regulation needs to be measured, understandable, enforceable and effective'.³⁶ This is also consistent with the Commission's regulatory principles as outlined in the draft Code.³⁷

The proposed system of regulation lacks standard measures. It will require each platform to produce their own materials and proposals, and therefore is not understandable to the consumer. The absence of baselines and standards means that it will be difficult to understand what is enforceable. Further, it will not be possible to adequately evaluate the effectiveness of the regulator where each platform is setting its own standards and targets, or which of the platforms is indeed improving.

The UN Committee on the Rights of the Child sets out that States should require all businesses that affect children's rights in relation to the digital environment to implement regulatory Codes and frameworks to adhere to the highest levels of privacy and safety standards.³⁸ They also recommend that States encourage these businesses to take accountability and measures to innovate in the best interests of the child.³⁹ Children's digital media choices and data control possibilities are shaped by the design and functionalities of communication spaces, control of which rests neither with them, their parents, or indeed national regulators.⁴⁰

If the Code was a more detailed and prescriptive Code encompassing both protective and preventive measures, it would be more understandable for users. This would in turn lead to a more effective capacity to complain and enforce it. Such a Code could clearly set out a prohibition on all forms of violence, exploitation, and abuse; include child-friendly mechanisms for consultation and participation; provide support measures for parents and carers; and ensure effective remedies⁴¹.

Requirement for a VSPS provider to suspend or terminate an account

This section of the Code provides for suspension and termination after accounts have 'repeatedly' infringed terms and conditions of service in relation to illegal and harmful material. Harmful material in relation to children, as set out in the Broadcasting Act 2009⁴² includes seriously harmful and illegal actions including sexual grooming of a child, child sexual abuse, trafficking, sharing or threatening to share intimate images, as well as harmful content which encourages or drives a person to engage in harmful behaviour. It is essential that in these circumstances, the platforms take immediate steps to remove and take down the harmful material. Failure to do so may result in dangerous abuse of a child, and also in artificial amplification of abusive and harmful materials through recommenders. The Council of Europe Recommendation, *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment*, gives guidance on what constitutes an effective remedy which

36 gov.ie - Harnessing Digital - The Digital Ireland Framework (www.gov.ie) p.41 accessed 23/1/2024

37 Part 4 Draft Online Safety Code December 2023. P37-42

38 *ibid* para 39.

39 *ibid*.

40 Macenaite, M. (2017). From universal towards child-specific protection of the right to privacy online: Dilemmas in the EU General Data Protection Regulation. *New Media & Society*, 19(5), 765-779. <<https://doi.org/10.1177/1461444816686327>> accessed 4 September 2023.

41 5Rights Foundation, Making Child Online Safety a Reality: Global Toolkit (2022) 185

42 Broadcasting Act 2009, Section 139A (1) and Schedule 3.

includes immediate removal of unlawful content.⁴³ Consideration should be given to expanding this section of the Code to allow for immediate take down of material on either a permanent or interim basis as soon as it is aware of it.

The current draft provides only for suspension or termination of an account which has 'repeatedly' infringed terms and conditions. Consideration should be given to requiring the VSPS providers to distinguish where there is even a single infringement which causes or risks causing significant harm and requiring suspension or termination of those accounts.

Flagging System

The Code does not identify a consistent flagging system, instead leaving it to the discretion of each platform. There are no timelines or processes included which all the platforms must observe.

It should not be expected or assumed that a child will be able to identify or report content or conduct which is against a service's community guidelines. The 5Rights Foundation recommend having in place a number of moderation and reporting systems, including take down mechanisms and flagging mechanisms.⁴⁴

The best interest of the child should be a key focus when considering the design of the flagging mechanism. The COE's *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* provide that 'in all actions concerning children in the digital environment, the best interests of the child shall be a primary consideration' and further recommend that States should strike a balance between the child's right to protection and their other rights to freedom of expression, participation, and access to information.⁴⁵ The COE also acknowledges the differing levels of maturity and understanding that children at different ages, and recommends that States recognise the evolving capacities of children which can mean that the 'policies adopted to fulfil the rights of adolescents may differ significantly from those adopted for younger children'.⁴⁶

An example of how to design a flagging mechanism that responds to the rights of children and young people can be seen in the UK Children's Code regarding the protection of children's data online. The Code requires that designated services should provide 'prominent and accessible tools to help children exercise their data protection rights and report concerns.'⁴⁷ The Information Commissioner's Office (ICO)'s guidance to services includes that the tools should be prominent and easy for the child to find, age appropriate and easy to use, tailored and specific to the rights they support, and include mechanisms for tracking progress and communicating with the service.⁴⁸ To make tools prominent the ICO suggests services highlight the reporting tools in their set up process and provide a clear icon on the screen display.⁴⁹ To make tools age appropriate and easy to use the ICO states that they should be tailored to the age of the child in question.⁵⁰ The ICO provides examples of how to do so in the Code for each age range from 0-5 up to 16-17.⁵¹ In order to tailor their tools to support children's rights, the ICO suggests services create a 'download all my data' tool, a 'delete all my data tool' or 'select data for deletion' tool, a 'stop using my data' tool, and a

43 Council of Europe, 'Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment' (COE 2018) 5.

44 5Rights Foundation, 'But how do they know it is a child? Age Assurance in the Digital World'.

45 Council of Europe, 'Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment' (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 26 February 2021, 12.

46 *ibid.*

47 Information Commissioner's Office, 'Age Appropriate Design: A Code of Practice for Online Services' 8.

48 *ibid* 83-84.

49 *ibid* 82.

50 *ibid.*

51 *ibid* 82-84.

‘correction’ tool.⁵² In terms of creating mechanisms that allow parents and children to track the progress of their flagged concern, the ICO states that information should be provided by the service about the timescales for responding to requests and these should be dealt with within the timescales set out at Article 12(3) of the GDPR.⁵³ Additionally, in order to conform with the Code, the ICO suggests that services should have mechanisms for children to indicate that they think their complaint or request is urgent, with appropriate prioritisation and the ability to take swift action on ongoing safeguarding issues.⁵⁴ This model could be taken and adapted to specifically relate to video content for the purposes of the Online Safety Code.

Age Verification

The Code does not prescribe adequate measures to protect the privacy of children, nor does it place sufficient emphasis on the responsibility of platforms to use their technological skills and knowledge to devise suitable methods to protect children from harm or to ensure that some existing features which create risk of harm are disabled.

It does not set standards that should underpin and inform the development of age assurance policies. The Commission could consider including the standards developed by the 5Rights Foundation which sets out 11 common standards that should inform the development of any age assurance mechanism.⁵⁵ Those are:

- Age assurance must be privacy preserving
- Age assurance should be proportionate to risk and purpose
- Age assurance should be easy for children to use
- Age assurance must enhance children’s experiences, not merely restrict them
- Age assurance providers must offer a high level of security
- Age assurance providers must offer routes to challenge and redress
- Age assurance must be accessible and inclusive
- Age assurance must be transparent and accountable
- Age assurance should anticipate that children don’t always tell the truth
- Age assurance must adhere to agreed standards

The use of age assurance ‘is not a silver bullet for keeping children safe online. It is simply a tool to identify that a service is dealing with a child.’⁵⁶ However, age assurance has the potential to drive the ‘development of new products and services to create a richer and more diverse digital ecosystem’ for children and young people rather than ‘being the route to keeping children out of the digital world’.⁵⁷ There is good guidance contained in the guidelines including the recognition that there are substantial technological solutions to identifying and verifying age which can be explored.

We are concerned with the recommendation in relation to robust age verification that an identity document and a selfie might suffice. Where robust age verification is sought, it is because the content being provided is recognised as intrinsically harmful to children. This does not follow the principal of data minimisation, which needs to be central to the design of any age assurance mechanism that is developed. The *Council of Europe Guidelines to respect, protect and fulfil the rights of the child in the digital environment* state that age verification and assurance systems should

52 *ibid* 84.

53 *ibid*.

54 Information Commissioner’s Office, ‘Age Appropriate Design: A Code of Practice for Online Services’ 84.

55 https://5rightsfoundation.com/uploads/But_How_Do_They_Know_It_is_a_Child.pdf 8

56 5Rights Foundation, ‘But how do they know it is a child? Age Assurance in the Digital World’ 7.

57 *ibid* 9.

use methods that are in line with the principle of data minimisation.⁵⁸ The UN Committee on the Rights of the Child has noted that;

‘digital practices, such as automated data processing, profiling, behavioural targeting, mandatory identity verification, information filtering and mass surveillance are becoming routine. Such practices may lead to arbitrary or unlawful interference with children’s right to privacy; they may have adverse consequences on children, which can continue to affect them at later stages of their lives.’⁵⁹

Interference with a child’s right to privacy should only be permissible if it is ‘provided for by law, intended to serve a legitimate purpose, uphold the principle of data minimisation, be proportionate and designed to observe the best interests of the child’.⁶⁰

There needs to be a range of age assurance solutions developed that can respond to the different situations that children and young people face.⁶¹ The 5Rights Foundation have set out that ‘many of the changes necessary to make a service age appropriate do not need additional or new age assurance technologies, but rather require services to disable some of their more intrusive or risky design features’.⁶²

Age assurance must be carried out in compliance with children’s rights under National and International law. In order to ensure a rights-based approach to the design and implementation of age assurance measures, a human rights analysis should be carried out and measures that are compliant with children’s rights should be adopted. The level of assurance should be proportionate to the nature and level of risk presented by a product or service in relation to the age of the child. It is important that the ‘cumulative nature of risk must also be taken into account, as multiple design features or different parts of a user’s journey combine to create greater risks.’⁶³

The reporting and evaluation requirements are insufficient in the absence of robust indicators of what is acceptable in terms of standards and baselines. It is essential for adequate understanding and evaluation of the information it receives that the Commission sets down baselines and standards common to all the parties.

Content Rating

The failure to establish a standard system for all platforms is very disappointing.

It is helpful to see that the Code requires the VSPS providers to adopt an objective code. It is noted that in the draft statutory guidance, the Commission may consider a consistent system which will have to be used by providers. This is promising but does not deal with the current situation or the system proposed which is to allow the VSPS providers to each devise their own system.

Quite apart from the lack of direction in that approach, the current proposal means that users will have to try to understand a plethora of different content rating systems devised – even objectively –

58 Council of Europe, Guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018) Recommendation CM/Rec(2018)7 of the Committee of Ministers, 69.

59 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 68.

60 *ibid*.

61 5Rights Foundation, ‘But how do they know it is a child? Age Assurance in the Digital World’ 7.

62 5Rights Foundation, ‘Pathways: How digital design puts children at risk’ 11.

63 *ibid* 19.

by each of the VSPS providers. Even in the broadcast world, the rating system does not depend on which supplier is providing the material.

The Council of Europe has recommended that ‘states should co-operate with a view to promoting standardisation of content classification and advisory labels among countries and across stakeholder groups to define what is appropriate and what is inappropriate for children’.⁶⁴ There are a number of frameworks that could be considered;

CO:RE 4Cs classification

A key tool to identify risk and classification of harm is the 4Cs framework. The CO:RE 4Cs classification recognises that online risks arise when a child:

- Engages with and/or is exposed to potentially harmful content
- Experiences and/or is targeted by potentially harmful contact
- Witnesses, participates in and/or is a victim of potentially harmful conduct
- Is party to and/or exploited by a potentially harmful contract⁶⁵

The 4Cs classification ‘distinguishes between aggressive, sexual and value risks’ along with recognising important cross-cutting risks such as children’s right to privacy and fair treatment.⁶⁶

 CO:RE	Content Child as recipient	Contact Child as participant	Conduct Child as actor	Contract Child as consumer
Aggressive	Violent, gory, graphic, racist, hateful and extremist content	Harassment, stalking, hateful behaviour, unwanted surveillance	Bullying, hateful or hostile peer activity e.g. trolling, exclusion, shaming	Identity theft, fraud, phishing, scams, gambling, blackmail, security risks
Sexual	Pornography (legal and illegal), sexualization of culture, body image norms	Sexual harassment, sexual grooming, generation and sharing of child sexual abuse material	Sexual harassment, non-consensual sexual messages, sexual pressures	Sextortion, trafficking for purposes of sexual exploitation, streaming child sexual abuse
Values	Age-inappropriate user-generated or marketing content, mis/disinformation	Ideological persuasion, radicalization and extremist recruitment	Potentially harmful user communities e.g. self-harm, anti-vaccine, peer pressures	Information filtering, profiling bias, polarisation, persuasive design
Cross-cutting	Privacy and data protection abuses, physical and mental health risks, forms of discrimination			

67

Australian Classification Scheme

64 Council of Europe, Guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018) Recommendation CM/Rec(2018)7 of the Committee of Ministers, 29, para 121.

65 CORE, ‘4 Cs of online risk: Short report & blog on updating the typology of online risks to include content, contact, conduct, contract risk’ <<https://core-evidence.eu/posts/4-cs-of-online-risk>> accessed 28 August 2023.

66 *ibid.*

67 CORE, ‘4 Cs of online risk: Short report & blog on updating the typology of online risks to include content, contact, conduct, contract risk’ <<https://core-evidence.eu/posts/4-cs-of-online-risk>> accessed 28 August 2023.

A classification scheme is in place in Australia where the Australian Online Safety Act (2021) defines content as either ‘class 1 material’ or ‘class 2 material’.⁶⁸ Class 1 material and class 2 material are defined by reference to Australia’s National Classification Scheme, which is also used for classification of films, computer games, and other publications.⁶⁹

Class 1 material includes material that:

- ‘depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified
- describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not), or
- promotes, incites or instructs in matters of crime or violence.’

Class 2 material is material that is, or would likely be, classified as either:

- ‘X18+ (or, in the case of publications, category 2 restricted), or
- R18+ (or, in the case of publications, category 1 restricted) under the National Classification Scheme, because it is considered inappropriate for general public access and/or for children and young people under 18 years old.’⁷⁰

The eSafety Commissioner works with online service providers to ensure access to Class 2 material, which is considered unsuitable for children and young people under 18, is restricted.⁷¹

Parental Controls

While parental controls are one measure for protecting children online, they ‘are not a substitute for good design that prioritises user safety’ and can result in parents having a false sense of security ‘while children continue to be exposed to risks due to poor service design’.⁷²

As safety by design is not being addressed in this iteration of the Code, it is essential that the Commission makes it very clear to providers that parental controls are not a substitute for safety by design features and are only a limited part of the solution.

Some of those most vulnerable in the physical world are also vulnerable in the digital world. The Code does not refer to the reality that many children are out of home, are unaccompanied minors seeking asylum, are in complex or state supervised situations with parents and guardians, or have other vulnerabilities. The draft Code assumes a model of parenthood and family relationships which is stereotyped and unreal for a lot of children. The Code needs to think about children who do not have any parents to supervise them online at all and make provisions for their safety that takes

68 Online Safety Act 2021 s106 and s107.

69 Online Safety Act 2021 s106 and s107.

70 Online Safety Act 2021 s106 and s107.

71 Online Safety Act 2021 s106 and s107.

72 https://www.ofcom.org.uk/__data/assets/pdf_file/0027/226269/5rights-foundation.pdf.

account of this reality. Parental controls can undermine trust between parent and child, and hinder child empowerment and the privacy of the child.⁷³

The Council of Europe has recommended that children's evolving capacities should be taken into account when businesses establish or update their parental controls.⁷⁴ Additionally, States should ensure that such controls do not reinforce discriminatory attitudes or infringe on children's privacy and information rights.⁷⁵ The Code fails to distinguish between children of various ages to take into account their evolving capacities. There is no recognition of the changing balance of rights as a child grows and develops. Section 11.27 requires an explanation to users how parental control systems operate. This could be clarified to specifically ensure that a child user receives age-appropriate information about any parental control or monitoring.

Complaints

While it is important that a complaints system has been included in the draft Code, the core problem is that there are no common standards, baselines, or even processes for all the platforms. This can hamper the provision of an effective remedy for users. There are no common timelines or systems. Complainants are required to engage with every platform individually and, in the nature of abusive and harmful material, may have to engage with several; each with a different system. This is particularly difficult at a time where a complainant who has suffered harm or abuse may be particularly vulnerable and traumatised and in need of structures and support.

The draft statutory guidance issued by the Commission proposes directing the VSPS providers to the guidance given by the Ombudsman and by the Children's Ombudsman on complaints. This could be strengthened by including the principles underpinning both Ombudsmen's guidance specifically in the Code.

In order to be effective, it is essential that the Codes provide for a maximum time-period for VSPS providers to handle user complaints so to offer quick and effective resolutions for children and young people. The Online Safety Code developed by the Australian eSafety Commissioner states that Tier 1 social media services must resolve complaints within 'a reasonable time' and that what constitutes a reasonable time 'should be based on the scope and urgency of potential harm that is related to a complaint and the source of the complaint.'⁷⁶

It is important that VSPS providers are required to be transparent in their complaint handling. To this end, they should be required to report on their complaint handling systems at a minimum annually.

Recommendations

- Strengthen the Code to place clear obligations on providers to meet common standards and adopt common methodologies to establish baselines to ensure regulation that is measured, understandable, enforceable, and effective
- Strengthen Code by providing for immediate take down of materials or accounts in circumstances where there is a risk of harm to a user pending full investigation
- Provide for the possibility of termination or suspension of an account where there has been a single breach only, if the harm or risk of harm warrants it

73 Commission nationale de l'informatique et des libertés (CNIL) France. <https://5rightsfoundation.com/Approaches-to-Childrens-Data-Protection---.pdf> p31

74 Council of Europe, Guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018) Recommendation CM/Rec(2018)7 of the Committee of Ministers, 54.

75 *ibid.*

76 eSafety Commissioner for Australia, Schedule 1 – Social Media Services Online Safety Code (Class 1A and Class 1B Material), 15.

- Strengthen the Code by prescribing a consistent flagging system with timelines and processes for providers to adhere to, rather than leaving these matters to the discretion of each provider.
- Age verification and assurance mechanisms should respect the principle of data minimisation and avoid unlawful or arbitrary interference with the right of the child to privacy.
- Ensure that any age assurance mechanism introduced is compliant with children's rights under National and International law.
- There should be a range of age assurance solutions developed which respond to the different situations children and young people face.
- Data Protection Impact Assessments and Children's Rights Impact Assessments should be used to monitor the level of interference of age verification mechanisms with the right of the child to privacy and help balance that right with the need for protection online.
- Include common standards, such as those developed by the 5Rights Foundation, into the Code which would then underpin every provider's age verification processes.
- Ensure that all VSPS providers take appropriate measures for robust age verification as pornographic and harmful content is widely accessible to children.
- Review guidance suggesting that photographs and IDs are suitable identification on adult content VSPS providers, and seek appropriate technological solutions from the providers.
- Strengthen the Code by identifying basic standards which should be in place to permit effective reporting and evaluation.
- Provide a common system for content rating. The CO:RE model suggested is an objective test to identify levels of harm and may be a suitable model.
- The Code needs to contain a clear statement to providers that parental controls are only a limited part of an online safety solution, and are no substitute for safety by design.
- The Code take into account children who do not have any parents able to supervise them online and make provisions for their safety that takes account of this reality.
- The Code needs to take into account the changing balance of rights as a child grows and develops. There should be an explicit recognition that the best interests of a child should be the primary consideration and, in that context, ensure balance between the various rights of a child to safety, to privacy, freedom of information, freedom of association, and freedom of identity.
- Where parental controls are used by a VSPS, children and young people who are service users should be given age appropriate and accessible information about this.
- Regulated services should provide parents with information about the child's right to privacy and resources for age-appropriate discussion between parent and child.
- The new Online Safety Code should provide for a maximum time-period for VSPS providers to handle user complaints so to offer quick and effective resolutions for children and young people, and guidance as to what is a reasonable timeframe for responding to complaints. The Code could further be strengthened by including standardised process and systems.

5. Questions 14-17: Audiovisual Commercial Communications – Section 12

While the Code requires VSPS providers to observe providers' terms and conditions not to provide audiovisual commercial communications harmful to the general public or children, there is no requirement to particularly highlight this provision or in any way to draw attention to this term or condition.

It is particularly important that terms and conditions relating to Audiovisual Commercial Communications are prominent, explicit, highlighted, clear, and easily understood, and that those providing such commercial content understand the prohibition and specifically confirm that no such harmful content is being shared.

User-created video content on social media platforms and video-streaming services (e.g. TikTok, YouTube) frequently involves commercial content and marketing messages. For example, unboxing videos, toy play videos, or influencers reviewing products. It can be unclear for children and young people that this content is actually advertising.

The American Academy of Paediatrics has outlined that research on children's understanding of television advertising shows that:

- Children under the age of 8 have 'limited ability to understand the persuasive intent (i.e., that someone else is trying to change their thoughts and behaviour) of the advertiser.'
- Children aged 7 to 11 'can start to recognize television advertising and persuasive intent with their parents' assistance but lack the abstract thinking skills that help individuals recognize advertising as a larger commercial concept.'
- Children and young people over the age of 12 'were able to identify television advertisements (ads) and advertisers' intention to change behaviour'.⁷⁷

The Council of Europe has recommended that 'States should take measures to ensure that children are protected from commercial exploitation in the digital environment, including exposure to age-inappropriate forms of advertising and marketing.'⁷⁸

The UN Committee on the Rights of the Child has reiterated this in their recent General Comment and has recommended that:

'States parties should make the best interests of the child a primary consideration when regulating advertising and marketing addressed to and accessible to children. Sponsorship, product placement and all other forms of commercially driven content should be clearly distinguished from all other content and should not perpetuate gender or racial stereotypes.'⁷⁹

⁷⁷ The American Academy Of Pediatrics | Policy Statement, July 01 2020, Digital Advertising to Children, <<https://publications.aap.org/pediatrics/article/146/1/e20201681/37013/Digital-Advertising-to-Children?autologincheck=redirected>> accessed 29 August 2023.

⁷⁸ Council of Europe, Guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018) Recommendation CM/Rec(2018)7 of the Committee of Ministers, 20.

⁷⁹ UN Committee on the Rights of the Child, General Comment no 25 (2021) on children's rights in relation to the digital environment, CRC/C/GC/25, para 41

Aligned to this, the Committee have recommended that there is a need for the Code to ensure that the profiling or targeting of children for commercial purposes is prohibited including practices that ‘rely on neuromarketing, emotional analytics, immersive advertising and advertising in virtual and augmented reality environments to promote products, applications and services’.⁸⁰ The 2020 WHO-UNICEF-Lancet Commission on the future for the world’s children noted that “commercial marketing of products that are harmful to children represents one of the most underappreciated risks to their health and wellbeing”.⁸¹

Consideration could be given to requiring VSPS providers to ensure that recommenders from audiovisual commercial communications do not lead children or the general public to harmful material.

In relation to declarations that user-generated content contains an audiovisual commercial communication, consideration should be given to introducing a form of declaration for users. This should be clear, concise, transparent, and easy for children and young people to understand.

Recommendations

- Ensure that a consistent feature for VSPS providers is introduced across all platforms that places a stringent requirement on users to declare when videos contain advertising and/or commercial communications. It should include a specific requirement for what form the declaration should take. This should be clear, concise, transparent, and easy for children and young people to understand.
- Ensure that any terms and conditions relating to online safety are prominent, explicit, highlighted, clear, and easily understood.
- By their nature, communications that are surreptitious or use subliminal techniques are difficult to recognise and may give rise to disagreement as to what constitutes such a technique. The Code would be much strengthened by including clear standards relating to such communications.
- It would be helpful if the Commission designed the declaration that users should make as to whether there is a commercial communication in content. This should be clear, concise, transparent, and easy for children and young people to understand.

80 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 42.

81 Clark, H., Coll-Seck, A.M., Banerjee, A., Peterson, S., Dalglish, S.L., Ameratunga, S. *et al.* (2020). A future for the world’s children? A WHO–UNICEF–Lancet Commission. *Lancet* 2020; 395: 605–58. <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32540-1/fulltext#articleInformation](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32540-1/fulltext#articleInformation)> accessed 4 September 2023.

6. Questions 18-21: Other Obligations – Section 13

Media Literacy

While it is welcome that the Draft Code places an obligation on VSPS to provide ‘effective media literacy measures and tools’ and to ‘raise users’ awareness of those measures and tools’, the draft Code does not stipulate any standards or principles for the obligations placed on VSPS providers by this provision. Similarly, while it is welcome that each VSPS will be obliged to publish an action plan ‘specifying the measures it will take to promote media literacy’ and to report to the Commission, there is no guidance as to what should be contained in an action plan. The only requirement that exists is to update the plan annually and report on what the platforms say is the impact.

In order to ensure that this obligation to advance media literacy is effective, it would be useful to contain key principles in the Code itself. By way of example, the European Regulators Group for Audio Visual Media Services (ERGA) has suggested six principles which should underpin Media Literacy and notes the role that national regulators can play in this space.⁸² The principles⁸³ are:

- Transparency
- Multi-stakeholder aspect
- Focus on the user/citizen
- Reach
- Localisation and
- Evaluation

We note that some of material contained in the statutory guidance⁸⁴ reflects some of these principles, but not all of them. Breach of statutory guidance is not necessarily going to result in a breach of the Code. Including principles in the Code itself would permit standards and baselines to be adopted which are common to all providers and which would have to be followed.

Children and those who support children, particularly vulnerable children, need to input into any media literacy programmes. Adopting the above or similar principles into the Code itself would ensure that their voices are heard as stakeholders. Platforms could also be required to report against regulatory principles, including evaluation of impact.

Personal Data of Children

While it is welcome that the guidance accompanying the draft Code signposts the Data Protection Commissioner’s Guide to the Fundamentals for a Child-Oriented approach to Data Processing,⁸⁵ it does not require compliance with it. The Code could include a requirement that VSPS providers certify that they are acting in accordance with those Fundamentals and to provide evidence to this effect.

For the avoidance of doubt, the Code could specify that any processing whatsoever, apart from recording and strictly using the data for the specific purpose that it was supplied and consent was given, shall be deemed to be a breach of the Code until the contrary is proven.

⁸² <https://erga-online.eu/wp-content/uploads/2021/12/ERGA-AG3-2021-Report-on-Media-Literacy.pdf> Accessed 28 January 2024

⁸³ Ibid. Section 2 Key principles for media literacy.

⁸⁴ P.73 of the Commission’s Consultation Document

⁸⁵ Consultation Document p.74

Reporting in relation to complaints

It is noted that this provision is consistent with s.139K(6) of the Broadcasting Act 2009. We note that the Commission will designate the manner of reporting from time to time. It will be important that such reports give sufficient detail to enable the Commission to understand the effectiveness of the VSPS providers' complaints system, and to obtain supporting evidence and audit information as necessary.

Recommendations

- As currently drafted, the Code gives wide discretion to the VSPS providers as to how they approach advancing media literacy. It would be clearer and easier to understand and comply with if underpinning principles were included in the Code, such as those suggested by ERGA, the European Regulators Group for Audio Visual Media Services
- Children and those who support children, particularly vulnerable children, need to be regarded as stakeholders and consulted in relation to any media literacy programmes.
- The Code itself could specify that providers follow the guidance provided by the Data Protection Commissioner in their Guide to the Fundamentals for a Child-Oriented approach to Data Processing⁸⁶. Currently, this is contained in the Statutory Guidance, but not in the Code.
- For the avoidance of doubt, the Code could specify that any processing whatsoever, apart from recording and strictly using the data for the specific purpose that it was supplied, and consent was given, shall be deemed to be a breach of the Code until the contrary is proven

7. Question 22: Supervision and Enforcement– Section 14

Section 139O (7) of the Act provides that a nominated body may notify the Commission of a matter which may trigger a request for information. It would be helpful if the Code specifically mentioned this power and provided further guidance as to how this could occur and what steps the Commission would take, together with timeframes, in relation to any such nominated body. In particular, it would be useful to understand the rights of such bodies to information as to the progress and outcome of any process undertaken by the Commission on foot of such notification.

In Section 14.6, in line with general fair procedure principles, the Code should specify how the right of any complainant to participate in any investigation would be vindicated, and how such a complainant would be supported. It is noted that the right of the VSPS provider which is the subject of the investigation is specifically included at 14.7 and 14.8.

In 14.15, it would be helpful if the Code specified what follow-up action the Commission might take if a content-limitation notice to a VSPS provider is not obeyed, or if there is delay in implementation.

Recommendations

- It is recommended that the Code be expanded to include information on the power of a nominated body to provide information, and to identify how the nominated body interacts with the Commission on so doing. In line with general fair procedure principles, the Code should specify how the right of any complainant to participate in any investigation would be vindicated, and how such a complainant would be supported.
- It would be helpful if the Code would specify what follow-up action the Commission might take if a content-limitation notice to a VSPS provider is not obeyed, or if there is delay in implementation.

8. Question 25: Consultation on Draft Statutory Guidance— Appendix 2

Our responses in relation to guidelines are contained in our responses to provisions of the Code above.

9. Question 28: Future Supplementary Measures and Related Guidance

Safety by design

It is disappointing that safety by design is not included in the draft Online Safety Code .

In 2018, the Council of Europe published its Recommendation, *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment*, and noted that the online world is reshaping children’s lives in many ways, resulting in ‘opportunities for and risks to their well-being and enjoyment of human rights.’⁸⁷ Recognising that businesses have a responsibility to respect children’s rights,⁸⁸ the Council of Europe recommends that States require businesses to meet their responsibilities by compelling them to implement measures and ‘encourage them to co-operate’ with the State and other stakeholders, including children.⁸⁹ A key proposal of these Guidelines is that States should require relevant stakeholders to implement safety by design, privacy by design, and privacy by default measures, taking into account the best interests of the child.⁹⁰ Including these principles in the Online Safety Code would help ensure that from the planning stages of technology development onward, children are protected. The UN Committee on the Rights of the Child in 2021 recommended that that States should incorporate ‘the integration of privacy-by-design into digital products and services that affect children.’⁹¹

Many of the digital services children and young people use are not designed to protect their rights or meet their needs.⁹² Research from the 5Rights Foundation found that ‘pathways designed into digital services and products are putting children at risk’ with designers tasked with ‘optimising products and services for three primary purposes, all geared towards revenue generation.’⁹³ The Online Safety Code presents a huge opportunity to embed the principle of safety by design into the Irish regulatory framework. It is important that this principle is not incorporated only to services specifically targeted to children and young people, but to all the digital services children and young people are likely to actually access.⁹⁴

The *Council of Europe Guidelines to respect, protect and fulfil the rights of the child in the digital environment* state that States should require businesses to regularly undertake child rights impact assessments in relation to digital technologies and demonstrate that they are taking reasonable steps to mitigate risks.⁹⁵ Child rights risk assessments should be conducted by business “before their digital products or services could reach or affect children”⁹⁶ and businesses should be obliged to “undertake child rights due diligence, which entails that businesses should identify, prevent, and

87 Council of Europe, ‘Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment’ (COE 2018) 10.

88 UN Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights CRC/C/GC/16.

89 Council of Europe, ‘Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment’ (COE 2018) 11.

90 *ibid* 23.

91 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 70.

92 5Rights Foundation, ‘Design of Service’ <<https://5rightsfoundation.com/our-work/design-of-service/>> accessed 4 September 2023

93 5Rights Foundation, September 2021 Pathways: A Summary Key findings and recommendations from Pathways: How digital design puts children at risk

94 5Rights Foundation, ‘Design of Service’ <<https://5rightsfoundation.com/our-work/design-of-service/>> accessed 4 September 2023

95 Council of Europe, Guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018) Recommendation CM/Rec(2018)7 of the Committee of Ministers, 95.

96 The Handbook for policy-makers on the rights of the child in the digital environment by the Council of Europe that accompanies the Recommendation (Livingstone et al., 2020,) 19

mitigate their impact on children’s rights including across their business relationships and within global operations.”⁹⁷

Given the importance of design in online safety, in addition to the guidance now provided to the VSPS providers, the Commission may consider clarifying that, in the light of this Code, guidance and supplementary provisions providers will be expected to commence or increase focus from this point forward to ensure that they progressively prioritise safety by design, privacy by design, and privacy by default to allow them to effectively comply with future regulation.

Online safety supports

It is welcome that the Commission is looking to encourage VSPS to consider what supports they can offer people who engage with harmful content online including by providing users affected by harmful content with contact information about organisations that can support their welfare, or providing support materials to users directly impacted by harmful content among others.

Consideration should be given to reviewing the guidance provided in the supplementary measures with a view to making it suitable to be part of the Code to further support the complaints and remedied provisions of the Code.

Recommender Feeds

It is welcome that the Commission recognises in the consultation document that recommender systems may also amplify harmful content across platforms and has set out measures that the VSPS should take to reduce the risk of harm to children. It is also welcome that the Commission recommends that a safety impact assessment be conducted in relation to recommender algorithms and that safety should be prioritised before optimising user engagement. The consultation documents also set out a requirement for VSPS to report to the Commission on measures that are being taken to address ‘toxic’ feeds and measures to address the amplification of harmful content online.

Recommendations

- The requirement of safety by design should be one of the key measures included in the Online Safety Code and it should require safety by design to be implemented as standard into all products and services of VSPS.
- Child rights risk assessments should be conducted by VSPS before their digital products or services could reach or affect children.
- VSPS should regularly undertake children’s rights impact assessments in relation to digital technologies and demonstrate that they are taking reasonable steps to mitigate risks.
- The provision in the supplementary measures concerning recommender feeds should be incorporated into the Online Safety Code.
- Consideration should be given to implementing the provisions in relation to the recommender feeds into the Online Safety Code.

⁹⁷ *ibid* 72.