



LAW SOCIETY
OF IRELAND

General Scheme of the Digital Services Bill 2023

Joint Committee on Enterprise, Trade and Employment

May 2023

Response to Request for a Submission on the General Scheme of the Digital Services Bill 2023

1. Introduction

- 1.1 The Law Society of Ireland (the '**Society**') appreciates the opportunity to respond to a request from the Joint Committee on Enterprise, Trade and Employment (the '**Committee**') to make a written submission on the General Scheme of the Digital Services Bill 2023 (the '**General Scheme**') as published on 20 March 2023.
- 1.2 The Society is the educational, representative, and co-regulatory body for the solicitors' profession in Ireland. Our members provide legal advice on matters related to digital services, content and data.
- 1.3 Given the limited time available to consult on the General Scheme, any failure to comment on a particular head/note does not indicate a particular position on that head/note. We hope that publication of the General Scheme will be followed by publication of a draft Bill which will be subject to full legislative scrutiny, in which event we may contribute additional technical points at a later stage.
- 1.4 As a general comment, we note a significant degree of overlap between *Regulation (EU) 2022/2065* ('the **Digital Services Act/DSA**') and the *Online Safety and Media Regulation Act 2022* (the '**OSMR**') in terms of policy objectives, procedures and impact; the consequence of such an overlap being that service providers and citizens would be required to deal with parallel processes/procedures in relation to what is largely the same content (and issues with that content). This would increase the regulatory burden – both on service providers and on Coimisiún na Meán ('the **Coimisiún**').
- 1.5 Further, the proposed parallel structure risks confusing those the legislation intends to protect and regulate. For example, someone wishing to raise a complaint about problematic content will be faced with a complaints scheme under the OSMR (s139R-Y) and the complaints mechanism under the DSA (Art 53). There is also a risk that dual outcomes differ/are delayed and that orders are not consistent. By way of further example, the OSMR (s139K(6)) contains reporting obligations for service providers which are not dissimilar to the transparency reporting obligations under the DSA (Art 15). Both reports go to the Coimisiún and failure to comply with either set of obligations are to be dealt with differently, applying different sanctions.
- 1.6 In the interests of regulatory clarity, and in order to reduce complexity which may cause delay, procedural difficulties and disputes (particularly around the regulator's competence/independence), it would be preferable to clearly delineate how each regulator will operate independently within the Coimisiún and to eliminate, everywhere possible, any duplication of the regulatory effort placed on both regulated entities and the Coimisiún.
- 1.7 Priority should be given to the DSA/other EU laws where conflict arises, while respecting the government's policy objectives in the area. We would urge decision-makers to take time now, rather than later, to resolve these issues.
- 1.8 A similar opportunity arises to address any potential issue *vis-a-vis* the OSMR and the transposition of the Audio-Visual Media Services Directive ('the **AVMSD**') into domestic law. Article 50(1) of the DSA requires that '*Member States ensure that their Digital Services Coordinators perform their tasks under this Regulation in an impartial, transparent and timely manner*' and describes specific obligations in relation to the management of the budget allocated to DSA matters.



Article 50(2) states that:

'When carrying out their tasks and exercising their powers in accordance with this Regulation, the Digital Services Coordinators shall act with complete independence. They shall remain free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.' (emphasis added)

However, it is proposed that the Coimisiún will be comprised of individuals who have other responsibilities, powers and functions, including under the OSMR and AVMSD.

Head 2

We note that useful information has been provided in the explanatory note however, having regard to Articles 49, 50, and 51 of the DSA, it is unclear (under the General Scheme) how the Coimisiún will organise itself to take decisions in relation to the DSA e.g. will it act on the basis of a simple majority (or some other qualification) when operating as a collective decision-making entity in respect of the exercise of its powers and functions? How will decisions be recorded? How will the Coimisiún deal with topics of mixed relevance in a suitably independent and timely manner e.g. dealing with multi-layered complaints which involve a number of functions across a range of legislative instruments (such as OSMR, AVMD, DSA) for which the Coimisiún has responsibilities and enforcement functions?

Heads 2 & 4

Definitions which are intended to have the same meaning as *Regulation (EU) 2022/2065* should simply cross-refer to that regulation. This is not the result if additional/alternative wording is included in domestic legislation (see the proposed definition of 'intermediary service' and 'online platform').

Further, it is not clear why some *Regulation (EU) 2022/2065* definitions require to be reformulated in domestic legislation while, it would seem, others do not. In this regard, the drafting approach in Head 4 (2) is preferred. It would also assist clarity if the name given to *Regulation (EU) 2022/2065* by the rest of the EU i.e. the Digital Services Act/DSA was retained (and the domestic legislation renamed accordingly) to avoid unnecessary confusion, both domestically and in dealings with the European Commission and other Digital Services Coordinators/DSCs.

Head 3

We note that this head intends to be specific to the implementation of the DSA into Irish law so that this part (Heads 2-12 inclusive) does not impact on existing powers under the *Broadcasting Act 2009* (as amended), particularly in the context of investigations and sanctions. Accordingly, it may be appropriate to delineate explicitly - within these heads - which specific aspects of existing laws are not impacted by their provisions.

Given the wording of sub head (2), we agree (with the suggestion in the explanatory note) that it is better placed in the Section 2 (Definitions) of the Principal Act.

Head 5

With regard to sub-section (4) and references to sub-section (5) of 139ZZD of the Principal Act, it may be appropriate, in the interests of transparency and clarity, to expand this sub-section to specify what would constitute "actively to seek facts or circumstances indicating illegal activity" in respect of Article 8 of the DSA.



Heads 7, 8, 10 and 12

Similar to the approach taken to Online Safety Codes under the OSMR, consideration could be given to adopting a similar approach to the procedures to be introduced in Heads 7, 8, 10 and 12 of the General Scheme.

These measures will have a significant impact on providers in circumstances where failure to comply could attract considerable sanction/s. As such, we believe it would be sensible to consider requiring that these procedures be approved by the Houses of the Oireachtas, in order to avoid any issues arising if they were not.

Head 14

- (a) "*Suspected contraventions*" (at subhead 14(1)), "*contraventions*" (at subhead 14(2)) and "*notices*" (at subhead (3)), shall be notified *inter alia* to "*Each Digital Services Coordinator in another Member State.*"

This is explained in the explanatory notes as a notification to the other 26 DSCs to meet the requirements of Article 57(1). However, Article 57(1) requires that such matters are to be addressed to "*all Digital Services Coordinators of destination*".

"*Digital Services Coordinator of destination*" is defined (in Article 3(o)) as the DSC of a Member State where the intermediary service is provided.

If it is the case that not all DSCs must be notified, the addition of the words "*of destination*" (or equivalent) would, we believe, better reflect the intention and wording of Article 57(1).

- (b) Subhead 14(2) - the named parties shall be notified that the Coimisiún intends to "*take a decision*". This is stated to be required by Article 57 however, we note that Article 57(1) requires such notification only where there is an intention to take a final decision. This is also stated in the explanatory notes.

Perhaps the inclusion of the word "*final*" before "*decision*" in the last line of subhead (2) would address the issue?

Head 17

The explanatory note for this head specifies that section 139ZZB (2) of the *Broadcasting Act 2009* (as inserted by section 47 of the *Online Safety and Media Regulation Act 2022*), provides a power for the Coimisiún to issue a notice to end a contravention.

For the purposes of a contravention of the DSA, the notice (referred to in the new section 139ZZB – A(a), as proposed by Head 17) shall state "*the steps that the Coimisiún requires the provider to take to put an end to the contravention*". The explanatory note for this head then further states that section 139ZZB(2) "*appears to be sufficient to implement the requirements of Article 51(2)*" of the DSA.

However, we note that Article 52(2) of the DSA provides for five specific powers of the DSC. While sections 139ZZB(2) and 139ZZB–A might be broad enough to give effect to Article 52(2), they do not specify the five specific powers, thereby leaving room for debate. It would be prudent to specify here, the powers listed in Article 52(2) in order to clarify that they are, in fact, the Coimisiún's powers.



Head 18

The procedures that the Coimisiún will adopt to identify those with a legitimate interest (for the purposes of paragraph 2 of Article 51(3) of the DSA) should be made clear.

In the absence of such clarity, it is likely that parties may challenge those procedures (perhaps on the basis of whether the Coimisiún has such an interest) and so, a clear statutory authority is recommended (note Article 51(6) of the DSA in this regard).

Head 20

- (a) Subhead (2) - insert the word "do" (which is omitted) between "to" and "one" in the last line of the first paragraph.
- (b) Subhead (8) - defines any "*relevant person*" as any person reasonably likely to be in possession of information that is relevant to an investigation, however account should also be taken of the status of certain professional advisers, such as solicitors, and we would recommend the adoption of a similar approach to that implemented by the *Data Protection Act 2018* in this regard.

Conclusion

Again, we appreciate the opportunity to contribute these comments and observations to the Committee's consideration of the General Scheme of the Digital Services Bill 2023.

We will be glad to engage further with the Committee on any matters raised.

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