

THE DIGITAL SERVICES BILL 2023

HEADS OF BILL

20 February 2023

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PART 1 – PRELIMINARY AND GENERAL

HEAD 1 – Short title, collective citation, construction, and commencement

To provide that –

“(1) This act may be cited as the Digital Services Act 2023.

(2) The Principal Act and this Act, in so far as this Act amends the Principal Act, may be cited as the Broadcasting, Other Media Regulation and Digital Services Acts 2009 – 2023.

(3) This Act shall come into operation on such day or days as the Minister, following consultation with the Minister for Enterprise, Trade and Employment, may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.”.

Explanatory Note

This Head provides for the short title, collective citation, construction, and commencement arrangements.

The Principal Act here, defined later in Head 2, is the Broadcasting Act 2009 (No. 18) as amended by the Online Safety and Media Regulation Act 2022 (No. 41)

Subhead (1) provides for the name of this Act to be the “Digital Services Act”. This title is proposed to make a clear connection to EU Regulation 2022/2065, which is being implemented by these Heads and known as “the Digital Services Act”.

Subhead (2) provides for the collective citation and is inspired by the collective citation in section 1 of the Online Safety and Media Regulation Act.

Subhead (3) provides for the commencement arrangements. These Heads propose to insert new provisions into the Broadcasting Act 2009, as amended, and the Minister for the purposes of that Act is the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. These Heads amend the functions and powers of An Coimisiún na Meán (the Media Commission), which is also within the policy responsibility of the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. Accordingly, subhead (3) provides that the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media will appoint the commencement date or dates.

As the EU Regulation 2022/2065 is a policy responsibility of the Minister for Enterprise, Trade and Employment, subhead (3) provides that the Minister for

Tourism, Culture, Arts, Gaeltacht, Sport and Media will consult with the Minister for Enterprise, Trade and Employment before a commencement date or dates are appointed.

HEAD 2 Definitions

To provide that –

(1) “In this Act,

‘Commission’ means Coimisiún na Meán established under section 6 of the Principal Act as inserted by section 8 of the Online Safety and Media Regulation Act 2022.

‘Minister’ means the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media

‘Principal Act’ means the Broadcasting Act 2009, as amended by the Online Safety and Media Regulation Act 2022.”.

(2) “Amendment of section 2 of the Principal Act

Section 2(2) of the Principal Act is amended by the insertion of the following definitions –

“‘Digital Services Regulation’ means Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)

‘intermediary service provider’ means a provider of an ‘intermediary service’ within the meaning of Article 3(g) of the Digital Services Regulation and includes ‘online platform’ and ‘online search engine’ within the meaning of Articles 3(i) and 3(j) of the Digital Services Regulation

‘Digital Services Coordinator in another Member State’ is the authority that is designated as the Digital Services Coordinator by another Member State pursuant to Article 49(2) of the Digital Services Regulation

‘Digital Services competent authority in another Member State’ is an authority designated as a competent authority by another Member State pursuant to Article 49(1) of the Digital Services Regulation

‘Board for Digital Services’ is the European Board for Digital Services as provided for in Article 61 of the Digital Services Regulation”

Explanatory Note

Subhead (1) provides for the definitions used in this General Scheme of the Digital Services Act 2023.

The Commission is Coimisiún na Meán, which is provided for by section 6 of the Broadcasting Act 2009, inserted by section 8 of the Online Safety and Media Regulation Act 2022. The Government decided on 1 March 2022 that An Coimisiún na Meán will be the Digital Services Coordinator for the purposes of Regulation (EU) 2022/2065. It is necessary to assign it new functions in order to give effect to that EU Regulation.

An Coimisiún na Meán currently comprises one Executive Chairperson and 3 other Commissioners, each heading up particular functions. They are –

- Commissioner for Broadcasting
- Commissioner for Media Development, and
- Commissioner for Online Safety

A fifth Commissioner will be appointed to head up the new Digital Services functions, which are provided for in these Heads and in Regulation (EU) 2022/2065.

The Minister is defined for the purposes of the commencement provisions in Head 1 and is the same Minister as in the Broadcasting Act 2009, as amended, namely the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. Under the 2009 Act, as amended, the Minister has functions including the appointment of Commissioners to An Coimisiún na Meán, following a recommendation of the Public Appointments Service. The Minister, with the consent of the Minister for Public Expenditure, NDP Delivery and Reform, also sets the terms, conditions and remuneration of Commissioners.

The Principal Act is defined as the Broadcasting Act 2009, as amended by the Online Safety and Media Regulation Act 2022. These Heads provide for new provisions to be inserted, and amendments to existing provisions, in that Act.

Subhead (2) inserts new definitions into section 2 (definitions) of the Broadcasting Act 2009, as amended by section 2 of the Online Safety and Media Regulation Act 2022.

The first is a definition of the EU Regulation, known as the Digital Services Act, which these Heads are implementing. The term “Digital Services Regulation” is proposed for clarity, to distinguish from other regulations. Regulation (EU) 2022/2065 was published in the Official Journal on 27 October 2022.

The definition is proposed for the entire Broadcasting Act 2009, as these Heads amend the existing provisions on investigations and sanctions and the Media Commission will be designated as the Digital Services Coordinator under the EU Regulation, so all of its functions and powers are relevant to its designation.

The second definition is of 'intermediary service provider'. Article 2 of the Regulation provides that the scope of the Regulation applies to intermediary services that are provided to recipients established or located in the EU, irrespective of where the service provider is established. The phrase 'intermediary service provider' matches the language already used in the Broadcasting Act 2009, as amended (see section 139ZF).

This definition is intended to provide clarity, to make a distinction with other service providers in the scope of the Broadcasting Act 2009, as amended. The Media Commission will be the competent authority for the Audiovisual and Media Services Directive (2010/13/EU as amended by Directive 2018/1808/EU as well as the Digital Services Coordinator for the Digital Services Act. In the former capacity, it will have competence for a different cohort of undertakings, albeit there is overlap, than it will have as the Digital Services Coordinator. Throughout the Broadcasting Act 2009, as amended, there are different terms for the providers of service, depending on the type of service at issue and the legal code that applies to that type of service. These include 'providers of audiovisual on-demand services', 'media service providers' and 'sound broadcasters'.

This definition is so that the provisions of the Regulation (the Digital Services Act) that are given effect in this General Scheme are tied to the scope of the Regulation and do not extend beyond.

The terms "Digital Services Coordinator in another Member State" and "competent authority in another Member State" are proposed for use in those Heads that follow that provide for the obligations on the Irish Digital Services Coordinator to cooperate as part of the pan-EU supervisory and enforcement network that the Regulation creates. For example, the provisions in these Heads on mutual assistance, cross-border cooperation and joint investigations. In those situations, the Regulation provides for different types of engagement between the Digital Services Coordinators in each of the Member States. The Regulation also contemplates engagement between a Digital Services Coordinator in one Member State and an authority in another Member State that is designated as a competent authority for the Regulation, but not as the Digital Services Coordinator. Hence the distinction between "Digital Services Coordinator" and "Digital Services competent authority".

The term "Board for Digital Services" is proposed for those provisions in these Heads where the Media Commission is required to engage and cooperate with this new Board that the Regulation will establish. Article 61 of the Regulation provides that it will be made up of each of the 27 Digital Services Coordinators and the European Commission.

PART 2 – DIGITAL SERVICES

HEAD 3 – Digital Services (Insert new Part 8AA)

To provide for –

The Principal Act is amended by the insertion of new Part 8AA (Digital Services) after Part 8A (Online Safety), to comprise Heads 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this General Scheme.

Explanatory Note

This Head proposes to insert a stand-alone new Part, entitled “Digital Services”, into the Broadcasting Act 2009, as amended. It is inserted after other Parts on the various functions of the Media Commission and before the Part on investigations.

It is proposed as stand-alone to clarify the distinction between these functions of the Media Commission, which are performed in its capacity as the Digital Services Coordinator and are connected to the implementation of the Regulation, and the other functions that the Media Commission has.

It also follows the structure of the Broadcasting Act 2009, as amended.

This new Part comprises those Heads that are specific to the implementation of the Regulation in Irish law, giving effect to requirements in the Regulation that are confined to that Regulation. It does not include Heads on those provisions that –

- Amend the existing provisions in the Broadcasting Act 2009, as amended with respect to the powers of the Media Commission to conduct investigations and determine financial sanctions, or
- Amend other existing provisions in the Broadcasting Act 2009, as amended, that have general application to the Media Commission.

HEAD 4 – Definitions

To provide that –

“In this Part–

1)

- “online platform” is a platform within the meaning of Article 3(i) of the Regulation
- “online search engine” is a search engine as defined in Article 3(j) of the Regulation
- “Very large online platform” or “very large online search engine” is a platform or search engine that has been designated as a very large online platform or very large online search engine by the European Commission in accordance with Article 33 of the Digital Services Regulation

2) A word or expression that is used in this Part and which is also used in the Digital Services Regulation has, unless the context otherwise requires, the same meaning in this act as it has in the Regulation.”

Explanatory Note

This Head sets out the necessary definitions for the new Part 8AA (Digital Services).

Subhead (1) defines “online platform” and “online search engine”

Subhead (1) defines “very large online platform” and “very large online search engine” as the provisions in this General Scheme on vetted researchers (Head 9) refer to them. A “very large online platform” or “very large online search engine” is a platform or search engine that has 45 million or more users in the EU and is designated as a “very large online platform” or “very large online search engine” by the European Commission pursuant to Article 33(4) of the Regulation.

Subhead (2) is standard. It follows the wording of provisions such as Regulation 2(2) of the Platform to Business Regulations 2020 (SI 256 of 2020). Terms such as “online platform” and “online search engine” are defined in Article 3(i) and (j) respectively and are used throughout the Regulation. Some obligations in the Regulation apply to all providers of intermediary services, while others apply to just a subset. In this Part, Heads 5, 7, 8 and 12 relate to Articles in the Regulation that apply to all providers of intermediary services. Heads 10 and 11 are relevant to providers of online platforms (a subset of intermediary service providers), while Head 9 relates to Article 40, which is concerned with access to the data held by providers of “very large online platforms” or “very large online search engines” only.

Subject to the advice of OPC, this subhead may be better placed in section 2 (definitions) of the Principal Act. If so, it may be necessary to consider how best to confine its scope to those terms in the Regulation that will appear in the Principal Act but may have another meaning in the Act or have a different scope, outside of intermediary service providers.

HEAD 5 – Liability of providers of intermediary services

In new Part 8AA (Digital Services) (inserted by Head 3) –

To provide that –

“(1) Regulation 15 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003) is hereby repealed.

(2) Regulations 16 to 18 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003) are hereby repealed

In Part 8 A (online safety) –

To provide that -

(3) Substitute the following for subsection (1) of section 139ZF of the Principal Act –

“(1) The Commission shall prepare, and may revise, an e-Commerce compliance strategy setting out its approach to ensuring that –

(a) No requirements are inconsistent with the limitations placed on the liability of intermediary service providers by Articles 4 to 6 of the Regulation, and

(b) No general obligation on providers, when providing the services covered by Articles 4 to 6 of the Regulation, to monitor the information they transmit or store, and no general obligation are imposed, by virtue of online safety codes or online safety guidance materials or advisory notices.

In Part 8 B (investigations and sanctions) –

To provide that –

(4) Substitute the following for subsection (5) of 139ZZD of the Principal Act –

“(5) A notice under subsection (1) shall not impose an obligation on a provider contrary to Article 8 of the Digital Services Regulation.”.

Explanatory Note

Article 89 (Amendments to Directive 2000/31/EC) of the Regulation deletes Articles 12, 13, 14, and 15 of Directive 2000/31/EC, the “e-Commerce Directive” and provides that references to those Articles should be construed as references to Articles 4, 5, 6 and 8 of the Regulation (the Digital Services Act). These are Articles that provide for the exemption from liability for intermediary online services.

The “e-Commerce Directive” was transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003).

This Head proposes the repeal of those measures that transpose the now deleted Articles of the e-Commerce Directive. Note that Article 15 of the e-Commerce Directive is a requirement addressed to Member States not to impose a general monitoring obligation on providers, so this is not transposed into Irish law. Article 15 of the e-Commerce Directive is replaced by Article 8 of the Regulation.

Subhead (1) proposes the repeal of Regulation 15 of S.I. No. 68 of 2003 for clarity. Regulation 15 is connected to Regulations 16, 17 and 18 of S.I. No. 68 of 2003 in that it provides information on how to construe those Regulations. As Regulations 16, 17 and 18 are also proposed for repeal in this Head, Regulation 15 is no longer required.

Subhead (2) proposes the repeal of Regulations 16, 17 and 18 of S.I. No. 68 of 2003, which transposed Articles 12, 13, and 14 of the e-Commerce Directive into Irish law.

Article 4 of the Regulation applies to “mere conduit” services and repeats exactly the provisions of Article 12 of the Directive. Article 12 of the Directive was transposed by Regulation 16 of S.I. 68 of 2003. As the Regulation takes direct effect, the existing national transposing measure is considered redundant. Accordingly, subhead (2) provides for its repeal for clarity.

Article 5 of the Regulation repeats exactly Article 13 of the e-Commerce Directive, applying to “caching services”. Article 13 of the Directive was transposed by Regulation 17 of S.I. 68 of 2003. As the Regulation takes direct effect, the existing national transposing measure is considered redundant. Accordingly, subhead (2) provides for its repeal for clarity.

Article 6 of the Regulation replaces Article 14 of the e-Commerce Directive, and applies to “hosting services”. Article 14 of the e-Commerce Directive was transposed by Regulation 18 of S.I. 68 of 2003. The main change in Article 6 of the Regulation, as compared with the Directive, is that it excludes from the exemption of liability a situation where online marketplaces present goods for sale as though they were the seller or at least that the recipient of the service who is the seller is acting under its authority or control. Accordingly, Regulation 18 of S.I. 68 of 2003 as it is out of date and is repealed for clarity. The provisions of Article 6 of the Regulation will have direct effect.

Subhead (3) provides for the removal and replacement of section 139ZF of the Broadcasting Act 2009, inserted by section 45 of the Online Safety and Media Regulation Act 2022. Section 139ZF obliges Coimisiún na Meán to prepare and revise an e-Commerce compliance strategy setting out its approach to ensuring that its online safety codes and online safety guidance are not inconsistent with the liability

regime in the e-Commerce Directive, citing regulations 16 to 18 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003). As those regulations are being repealed here, it is considered prudent to update the references in section 139ZF to the newer liability regime.

Subhead (4) updates the references in section 139ZZD of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022, from a reference to the e-Commerce Directive to a reference to the Regulation. This is proposed for legislative clarity.

Article 7 of the Regulation adds to the existing liability regime. It provides an entirely new protection allowing an intermediary service provider to carry out voluntary own-initiative investigations or similar measures against illegal content while retaining the benefit of these exemptions.

HEAD 6 – Designation of the Commission as the Digital Services Coordinator for the Regulation

To Provide that-

“(1) The Commission shall be the Digital Services Coordinator within the meaning of, and for the purposes of, the Digital Services Regulation.

(2) In performing its functions under the Digital Services Regulation, the Commission shall only have regard to the provisions of sections 7(2), 7(3) and 7(4) of the Principal Act as are relevant to the conduct of the functions and powers of the Digital Services Coordinator.”

Explanatory Note

Subhead (1) gives effect to the obligation in Article 49 of the Regulation to designate a Digital Services Coordinator and to the Government Decision of 1 March 2022 that it will designate Coimisiún na Meán as the Digital Services Coordinator for Ireland.

The text of subhead (1) uses section 11 of the Data Protection Act 2018 as its template. That section designates the Data Protection Commission as the ‘supervisory authority’ for the General Data Protection Regulation (Regulation EU 2016/679).

Subhead (2) allows the Media Commission to take account of the criteria in section 7 (powers and functions of Commission) of the Broadcasting Act 2009, as inserted by section 8 of the Online Safety and Media Regulation Act 2022 only insofar as they are relevant to its functions as the Digital Services Coordinator.

Article 50(1) of the Regulation requires that the Digital Services Coordinator can perform its tasks under the Regulation in an impartial manner. Article 50(2) requires the Digital Services Coordinator to act with complete independence. The Department considers that the obligation in section 7 on the Media Commission to consider these criteria in performing its functions could be considered a restriction on that impartiality and independence.

Additional Information on Article 49 and the requirement to designate a Digital Services Coordinator

Article 49 (1) of the Regulation requires that Member States designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and enforcement of the Regulation.

Article 49(2) further provides that one of those competent authorities must be designated as the Digital Services Coordinator. The Digital Services Coordinator is responsible for ensuring coordination at national level for supervision and enforcement as required within the Regulation and for liaison and cooperation with the European Commission and the Digital Services Coordinators of other Member States to contribute to the effective and consistent supervision and enforcement of this Regulation throughout the Union.

Article 49(3) obliges Member States to have designated their Digital Services Coordinator by 17 February 2024. So, it is open to Member States to designate at any time before that date. However, Article 93 provides that the articles on the functions and powers of the Digital Services Coordinators do not apply until 17 February 2024. Accordingly, a designated Digital Services Coordinator cannot perform the functions or exercise its powers until that date.

Functions and powers of the Media Commission in its role as the Digital Services Coordinator

The functions of the Commission and the powers necessary for it to execute those functions are set out throughout the Regulation.

The following Articles are the key provisions with respect to the functions and tasks of the Digital Services Coordinator –

- Article 9 (Orders to act against illegal content)
- Article 10 (Orders to provide information)
- Article 21 (Out of court dispute settlement)
- Article 22 (Trusted flaggers)
- Article 24 (Transparency reporting obligations for providers of online platforms)
- Article 33 (Very large online platforms and very large online search engines)
- Article 40 (Data access and scrutiny)
- Article 41 (Compliance function)
- Article 52 (Penalties)
- Article 53 (Right to lodge a complaint)
- Article 55 (Activity reports)
- Articles 61 and 63 on the European Board for Digital Services
- Article 64 (Development of expertise and capabilities)

These **functions and** tasks can be categorised as –

1. Administrative
2. Supervisory / Enforcement
3. Coordination

The key Article with respect to powers is Article 51, which sets out the investigatory and enforcement powers that the Digital Services Coordinator shall have. These are for the investigation and enforcement of an infringement of a provision of the Regulation by an online intermediary service provider in scope of the Regulation, and may be used in cooperation with a Digital Services Coordinator in another Member State (Articles 57, 58 and 60) or with the European Commission (Articles 65 – 82 inclusive)

In addition to the powers in the Regulation, section 7 of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022, provides that the Commission shall have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently. Designation of the Media Commission as the Digital Services Coordinator adds that function to the Media Commission.

HEAD 7 – Notification of orders issued to take down content and of the ISPs response

To provide that:

“(1) Where an authority issues an order to an intermediary service provider to act against illegal content on its service, that authority shall ensure that the order contains –

a) all the information listed in Article 9 (2)(a)(i)-(vi) inclusive of the Digital Services Regulation, and

b) where the territorial scope extends beyond the State, confirmation that the territorial scope of the order is limited to what is strictly necessary to achieve the order’s objective, taking into account national and EU law, the Charter of Fundamental Rights of the Union and general principles of international law,

and the order shall be delivered to the electronic point of contact that the intermediary service provider has designated pursuant to Article 11(1) of the Digital Services Regulation.

(2) Where an authority issues an order to an intermediary service provider to act against illegal content under subsection (1), that authority shall provide to the Commission without undue delay:

a) a copy of that order, and

b) details of the effect given to the order by the intermediary service provider, which have been prepared by the intermediary service provider pursuant to Article 9(1) of the Digital Services Regulation and the authority has received.

(3) Any person applying to a court for an order, addressed to an intermediary service provider, to act against illegal content on that intermediary service provider’s service, must provide the court, in addition to any other information required by the court in an application for an order to act against illegal content, with the following information –

a) the electronic point of contact that the intermediary service provider has designated pursuant to Article 11(1) of the Digital Services Regulation,

b) all the information listed in Article 9(2)(a)(i)-(v) inclusive of the Digital Services Regulation, and

c) where the person is seeking a territorial scope beyond the State, a description of the territorial scope sought, and any additional information

required by the court to enable it to satisfy itself that the scope is limited to what is strictly necessary.

(4) Following an application to a court under subsection (3), any order issued by that court shall include –

- a) all the information listed in Article 9(2)(a) of the Digital Services Regulation,
- b) a description of the territorial scope of the order and, if it extends beyond the State, the reasons for that, and
- c) a requirement on the intermediary service provider to submit to the Commission without delay details of the effect given to the order by the intermediary service provider, which have been prepared by the intermediary service provider pursuant to Article 9(1) of the Digital Services Regulation,

and that order shall be delivered to –

- i) the electronic point of contact designated by the intermediary service provider pursuant to Article 11(1) of the Digital Services Regulation, and
- ii) the Commission.

(5) The Commission shall prepare and promulgate guidance on –

- a) applying to the courts for orders to act against illegal content online,
- b) the form and content for the details to be prepared by an intermediary service provider on the effect it has given to an order to act against illegal content online, and
- c) the form and content of the information to be provided by the intermediary service provider to recipient of the service in accordance with Article 9(5) of the Digital Services Regulation.”

Explanatory Note

Requirements of Article 9 (Orders to act against illegal content)

Article 9 of the Regulation is concerned with orders issued to an online intermediary service provider (ISP) that require that ISP to act against illegal content. Its main objectives are to ensure consistency in orders across the EU, to give clarity to ISPs about such orders, to ensure that there is transparency of the actions taken to give

effect to these orders, and to ensure regulators across the EU are informed of these orders wherever they are issued. Recitals 31 and 32 are associated here.

Specifically, Article 9 provides –

- An obligation on Member States to ensure that these orders contain some specific information, listed in the Article (Article 9(2)(a));
- An obligation on Member States to ensure that the territorial scope of the orders is limited to what is strictly necessary to achieve the objective (Article 9(2)(b));
- An obligation on the ISP to respond to the order, giving information of any effect it has given to the order (Article 9(1));
- An obligation on the ISP to inform the recipient concerned (the user who posted the material) of the effect given to the order and the possibilities for redress (Article 9(5)); and
- Mandatory procedures for handling of the order and the ISP's response to that order. It specifies the DSC must be notified of the order and the ISP's response, and the DSC must then circulate that information across the DSA's enforcement network in the EU (Articles 9(3) and (4)).

Article 9 does not otherwise interfere in the existing procedures or requirements for seeking or issuing an order to take down illegal content. It also does not change what constitutes illegal content – that remains defined elsewhere, in sectoral law.

Orders to take down illegal content are issued by the Courts or by a market surveillance body, pursuant to Regulation 9 of the European Union (Market Surveillance) (Compliance with Certain Products) Regulations 2022 (S.I. No. 108 of 2022) and the relevant sectoral laws.

This Head makes a distinction between an order issued by an authority, and one issued by the courts. This is mainly because the authority will be seized of the necessary information, while the courts will require the applicant to provide the information.

Subhead (1) is concerned with the situation where a market surveillance authority issues a take down order. It provides for the mandatory content, listed in Article 9(2)(a), and for the requirement in Article 9(2)(b) with respect to the territorial scope to be part of the order. This implements the obligation on Member States to ensure that these orders contain these elements and that territorial scope is so limited. It also obliges the authority to issue the order to the electronic contact point that the ISP has designated under Article 11(1) of the Regulation. This gives effect to a requirement in Article 9(2)(c). This is information that will be available to the

authority, either directly or through the Media Commission. It is also an obligation on the ISP, under Article 11, to have this information publicly available.

Subhead (2) follows from (1) and obliges the market surveillance authority issuing the order to transmit a copy of that order, together with the information it receives from the ISP about the effect that the ISP has given to the order, to the Media Commission. The Media Commission is then obliged to forward all that information to the other 26 Digital Services Coordinators. These obligations are in Articles 9(3) and (4).

Subhead (3) is concerned with the situation where there is an application to the courts to issue a take down order. It provides that the person making the application submits to the courts, as part of the application, the information that must feature in any resulting order, if that order is to meet the requirements of Article 9(2). This includes the address for service of order, which is the electronic point of contact that the IPS designated under Article 11(1). This information is publicly available. The applicant is only required to provide the information listed in Article 9(2)(i)-(v) inclusive, as it is not necessary to specify the authority that is to receive the information about the effect given to the order. That will form part of the order under the provisions of subhead (4).

Subhead (4) provides for the content and serving of an order issued by the courts. It sets out that the order must contain the elements set out in Article 9(2) (a) and (b) and must be served on the electronic point of contact designated by the ISP in accordance with Article 11(1) of the Regulation. It also provides that a copy of the order shall be sent to the Media Commission, in line with the obligation in Article 9(3) of the Regulation. In order to make the process more efficient, it also provides that the order shall oblige the ISP to remit the information it prepares on the effect it has given to the order directly to the Media Commission, rather than through the courts. This is permitted by Articles 9(1) and 9(3), which state that the ISP should forward that information to the authority issuing the order or to “the authority specified [in the order]”.

Subhead (5) is considered a useful provision. It is in line with the Media Commission’s role as a coordinator for these orders. It also advances the objective of harmonisation of orders that is behind Articles 9 and 10 of the Regulation. Given the mandatory elements of the orders and the requirements for follow up in this Article, it is also an important provision to support compliance and raise awareness of the new rules.

Article 9 orders and language

Article 9(2)(c) sets the requirement about the language an order to act against illegal content must use. This requirement is that the order must be in a language that –

- Is one of the languages declared by the ISP pursuant to Article 11(3) of the Regulation, or
- Is a language agreed between the authority issuing the order and the ISP

Under Article 11(3) the ISP must include at least one of the official languages of the Member State where the ISP is established. Therefore, for any orders issued against an ISP established in the State, the language will be either Irish or English.

For those ISPs not established here, the Department is exploring whether any further legislative provision is required. Recital 35 indicates that provision of a translation, alongside the original order, may suffice. This then is an administrative matter for implementation.

Article 9 orders and territorial scope

Article 9(2)(b) requires orders to be confined to a territorial scope that is limited to what is strictly necessary. Recital 36 expands that the scope should be limited to the Member State where the order is issued unless –

- The illegality of the content derives directly from Union law, or
- The issuing authority considers that the rights at stake require a wider territorial scope, in accordance with Union and international law, while taking into account the interests of international comity

Article 9 orders and the obligation on the Media Commission to publish information

As well as the obligation in Article 9 on the Digital Services Coordinator to forward information on orders, and the ISP's follow up action, to the other 26 Digital Services Coordinators, there is an obligation to report publicly.

Article 55 (activity reports) obliges the Digital Services Coordinator to prepare an annual report that includes the number and subject matter of orders to act against illegal content that were issued in accordance with Article 9. The activity report must also include information on the effect given to those orders by the intermediary service provider. Activity reports must be made publicly available.

HEAD 8 - Notification of orders to provide information and the ISPs response

To provide that –

“(1) Where an authority issues an order to an intermediary service provider to provide specific information about one or more recipients of that intermediary service provider’s service, that authority shall ensure that the order contains –

- a) all the information listed in Article 10 (2)(a)(i)-(vi) inclusive of the Digital Services Regulation, and
- b) confirmation that the order only requires the provision of information that the intermediary service provider has already collected for the purpose of providing its service and is within the provider’s control,

and the order shall be delivered to the electronic point of contact that the intermediary service provider has designated pursuant to Article 11(1) of the Digital Services Regulation.

(2) Where an authority issues an order to an intermediary service provider to provide specific information under subsection (1), that authority shall provide to the Commission without undue delay:

- a) a copy of that order, and
- b) details of the effect given to the order by the intermediary service provider, which have been prepared by the intermediary service provider pursuant to Article 10(1) of the Digital Services Regulation and the authority has received.

(3) Any person applying to a court for an order, addressed to an intermediary service provider, to provide specific information about one or more recipients of that intermediary service provider’s service, must provide the court, in addition to any other information required by the court in an application for an order to provide specific information, with the following information –

- a) the electronic point of contact that the intermediary service provider has designated pursuant to Article 11(1) of the Digital Services Regulation,
- b) all the information listed in Article 10(2)(a)(i)-(v) inclusive of the Digital Services Regulation, and

c) an assessment that the information required is information that the intermediary service provider has already collected for the purpose of providing its service and is within the provider's control.

(4) Following an application to a court under subsection (3), any order issued by that court shall include –

a) all the information listed in Article 10(2)(a)(i)-(v) of the Digital Services Regulation, and

b) a requirement on the intermediary service provider to submit to the Commission without delay details of the effect given to the order by the intermediary service provider, which have been prepared by the intermediary service provider pursuant to Article 10(1) of the Digital Services Regulation,

and that order shall be delivered to –

i) the electronic point of contact designated by the intermediary service provider pursuant to Article 11(1) of the Digital Services Regulation, and

ii) the Commission.

(5) The Commission shall prepare and promulgate guidance on –

a) applying to the courts for orders to provide specific information,

b) the form and content for the details to be prepared by an intermediary service provider on the effect it has given to an order to provide specific information, and

c) the form and content of the information to be provided by the intermediary service provider to recipient of the service in accordance with Article 10(5) of the Digital Services Regulation.”

Explanatory note

Article 10 of the Regulation is concerned with the content of and procedures for orders that require intermediary service providers to provide “specific information about one or more specific individual recipients of the service”. These are not orders for general information. Recital 37 states that these are orders to produce –

“specific information about individual recipients of the intermediary service who are identified in those orders for the purposes of determining compliance by the recipients of the service with applicable Union or national rules.”

Recital 37 continues that the orders should request information with the aim of enabling the identification of the recipients of the service and do not include orders regarding information on groups of recipients.

As with Article 9, Article 10's main objectives are to ensure consistency in orders across the EU, to give clarity to ISPs in receipt of these orders, to ensure transparency of actions given by ISPs to these orders, to ensure regulators across the EU are informed of these orders wherever they are issued.

Specifically, Article 10 provides –

- An obligation on Member States to ensure that these orders contain some specific information, listed in the Article (Article 10(2)(a));
- An obligation on Member States to ensure that the orders only look for information that the provider has already collected and which lies within the provider's control (Article 10(2)(b));
- An obligation on the ISP to respond to the order, giving information of any effect it has given to the order (Article 10(1));
- An obligation on the ISP to inform the recipient concerned of the effect given to the order and the possibilities for redress (Article 10(5)); and
- Mandatory procedures for handling of the order and the ISP's response to that order. It specifies the DSC must be notified of the order and the ISP's response, and the DSC must then circulate that information across the DSA's enforcement network in the EU (Articles 10(3) and (4)).

Article 10 does not otherwise interfere in the existing procedures or requirements for seeking or issuing this type of order.

Orders to take down illegal content are issued by the Courts or by a market surveillance body, pursuant to Regulation 9 of the European Union (Market Surveillance) (Compliance with Certain Products) Regulations 2022 (S.I. No. 108 of 2022) and the relevant sectoral laws.

This Head makes a distinction between an order issued by an authority, and one issued by the courts. This is mainly because the authority will be seized of the necessary information, while the courts will require the applicant to provide the information.

Subhead (1) is concerned with the situation where a market surveillance authority issues an information order. It provides for the mandatory content, listed in Article

9(2)(a), and for the requirement in Article 10(2)(b) with respect to confirming that the information has been collected by the provider and is within the provider's control. This implements the obligation on Member States to ensure that these orders contain these elements and that the information sought is available to the ISP. It also obliges the authority to issue the order to the electronic contact point that the ISP has designated under Article 11(1) of the Regulation. This gives effect to a requirement in Article 10(2)(c). This is information that will be available to the authority, either directly or through the Media Commission. It is also an obligation on the ISP, under Article 11, to have this information publicly available.

Subhead (2) follows from (1) and obliges the market surveillance authority issuing the order to transmit a copy of that order, together with the information it receives from the ISP about the effect that the ISP has given to the order, to the Media Commission. The Media Commission is then obliged to forward all that information to the other 26 Digital Services Coordinators. These obligations are in Articles 10(3) and (4).

Subhead (3) is concerned with the situation where there is an application to the courts for an information order. It provides that the person making the application submits to the courts, as part of the application, the information that must feature in any resulting order, if that order is to meet the requirements of Article 10(2). This includes the address for service of order, which is the electronic point of contact that the IPS designated under Article 11(1). This information is publicly available. The applicant is only required to provide the information listed in Article 10(2)(i)-(v) inclusive, as it is not necessary to specify the authority that is to receive the information about the effect given to the order. That will form part of the order under the provisions of subhead (4).

Subhead (4) provides for the content and serving of an order issued by the courts. It sets out that the order must contain the elements set out in Article 10(2) (a) and (b) and must be served on the electronic point of contact designated by the ISP in accordance with Article 11(1) of the Regulation. It also provides that a copy of the order shall be sent to the Media Commission, in line with the obligation in Article 10(3) of the Regulation. In order to make the process more efficient, it also provides that the order shall oblige the ISP to remit the information it prepares on the effect it has given to the order directly to the Media Commission, rather than through the courts. This is permitted by Articles 10(1) and 9(3), which state that the ISP should forward that information to the authority issuing the order or to "the authority specified [in the order]".

Subhead (5) is considered a useful provision. It is in line with the Media Commission's role as a coordinator for these orders. It also advances the objective of harmonisation

of orders that is behind Articles 9 and 10 of the Regulation. Given the mandatory elements of the orders and the requirements for follow up in this Article, it is also an important provision to support compliance and raise awareness of the new rules.

Other matters connected to Article 10

See also notes above on Article 9 on language and the obligation to report publicly, as they cross apply to Article 10.

HEAD 9 – Procedures to vet researchers and request data on behalf of vetted researchers

To provide that:

- (1) The Commission shall adopt procedures for:
 - a) Assessing the status of a researcher and determining whether they meet the criteria for “vetted researcher”, either before issuing a request for access to data pursuant to Article 40(4) of the Digital Services Regulation or in connection with an application from a researcher for access to data pursuant to Article 40(8) of the Digital Services Regulation,
 - b) Assessing the content of requests from researchers for access to data pursuant to Article 40(8) of the Digital Services Regulation, establishing criteria for determining whether the Commission forms a reasoned opinion in support of those requests,
 - c) Terminating a vetted researcher’s access to the data that was the subject of the initial request, whether a request made under Article 40(4) or Article 40(8) of the Digital Services Regulation, and the associated notification requirements
 - d) Notifying the European Commission and the Board of Digital Services that an application under Article 40(8) has been made, and notifying the Board of Digital Services that the status of vetted researcher has been granted or terminated for a specific researcher
 - e) Engaging with very large online platforms and very large online search engines on the requests made pursuant to Article 40(4) or 40(8) and assessing their responses, pursuant to Article 40(5) and 40(6) of the Regulation, to the DSC’s reasoned request
 - f) In the case of an application by a researcher affiliated to an organisation in the State for access to data by a VLOP that is established in another Member State, making an “initial assessment” of that researcher’s credentials and forwarding the application and its initial assessment to the DSC in the Member State where the VLOP is established.
 - g) In the case of an application by a researcher in another Member State that has been forwarded by the DSC in that Member State, assessing the initial assessment of that other DSC

- (2) The procedures in subhead (1) shall take account of the –
 - (a) In the case of assessing whether a researcher may be considered “vetted”, the criteria in Article 40(8) (a) to (g) of the Regulation

- (b) In the case of assessing the content of the request, whether the request is connected to societal concerns or commitments and procedures agreed in codes of conduct or crisis protocols,
- (c) In the case of engaging with a very large online platform or a very large online search engine, any Delegated Acts adopted pursuant to Article 40(13) of the Regulation
- (d) The timelines in Article 40(5) and 40(6) of the Regulation

(3) Before adopting the procedures in subsection (1), the Commission shall consult with any person it thinks appropriate.

(4) The Commission shall publish the procedures on its website.

(5) Any person who knowingly provides false information to the Commission in connection with access to data shall be guilty of a category 2 offence.

Explanatory Note

Article 40 (4) and Articles 40 (8 – 11) **of the Regulation** set out the procedures and conditions for researchers to gain access to data that is held by a very large online platform (VLOP) or a very large online search engine (VLOSE). The Media Commission will have a central role in –

- vetting the researchers seeking access to the data
- assessing the requests for the data, and
- acting as an interlocutory between the researcher and the VLOP or VLOSE

Subhead (1) obliges the Media Commission to institute procedures for the conduct of all of its functions and tasks under Articles 40(4), (5), (6), (8), (9), (10) and (11) of the Regulation. These will include procedures to assess whether a researcher qualifies for the status of “vetted researcher”, to assess applications from researchers for specific access to data and determining whether the Media Commission supports the scope of the research, to meet the notification requirements and to engage with very large online platforms and very large online search engines on the requests.

Subhead (2) obliges the Media Commission to take account of the criteria in Article 40(8) when vetting researchers, the criteria in Recital 98 when forming an opinion on the scope of the research proposed by the applying researcher, the delegated acts that may be adopted by the European Commission on technical conditions for sharing data, and the deadlines that are set out in Articles 40(5) and 40(6).

Subhead (3) obliges the Media Commission to consult with stakeholders in the framing of these procedures. It is modelled on section 139N (online safety codes:

procedures) of the Broadcasting Act 2009, as inserted by section 45 of the Online Safety and Media Regulation Act 2022.

Subhead (4) is proposed to support transparency and provide clarity for researchers and providers alike.

Subhead (5) provides for an offence where a person, whether a researcher or a person acting on behalf of a provider, provides false information in the course of applying for access, having access or providing information to the Media Commission. The penalty, a category 2 offence, is aligned with similar provisions in the Broadcasting Act 2009, as amended. For example, section 46F (failure to notify or to provide further information) of the Broadcasting Act 2009, as inserted by section 9 of the Online Safety and Media Regulation Act 2022. Accordingly, this is considered proportionate.

Additional information on Article 40 – Access to data for Digital Services Coordinators and the European Commission

Articles 40(1) – (3) inclusive are concerned with the rights of Digital Services Coordinators and the European Commission to seek access to data held by very large online platforms and very large online search engines.

These Articles oblige the VLOPs and VLOSEs to comply with reasonable requests from the DSCs and EC, set out the circumstances in which a DSC or the EC may make the request and provide for the conditions under which that data may be used by a DSC or the EC. There is also an obligation on a VLOP or VLOSE to give explanations of algorithmic systems, on request.

Additional information on Article 40 – Access to data for vetted researchers

Articles 40(4) and 40(8) both provide that vetted researchers may have access to data held by VLOPs and VLOSEs.

The key differences between the 2 Articles are –

- 40(4) is at the initiative of the Digital Services Coordinator, and the research is for the sole purpose of –
 - Contributing to the detection, identification and understanding of systemic risks in the EU, as set out in Article 34(1), and
 - Assessing the adequacy, efficiency and impacts of risk mitigation measures as set out in Article 35
- 40(8) is at the initiative of the researcher, and is tied to the specific piece of research scoped out in the researcher’s application for access

Another key difference between the 2 is that in 40(4) the VLOP or VLOSE must provide access to the data, and a process for negotiating the scope of the request between the VLOP / VLOSE and the DSC is provided for in Articles 40(5) and 40(6). In the case of Article 40(8), the Regulation is silent as to how the VLOP / VLOSE may respond to the request.

In both cases, the researcher must be vetted and awarded the status of vetted researcher by the Digital Services Coordinator. In the case of Article 40(8), the status is linked to the specific piece of research, so a researcher must reapply for it each time they propose a new piece of research. Although not explicit, it would seem that the same applies to the status when it is the Digital Services Coordinator's decision to ask for access to data under Article 40(4).

The Digital Services Coordinator also has some notification obligations – it must inform the European Commission and the European Board for Digital Services when it receives an application from a researcher and notify the Board of specific information on all researchers it awards the vetted status to.

Applications for the status of vetted researcher may come direct to the Digital Services Coordinator, from researchers located in their home Member State, or via a Digital Services Coordinator in another Member State.

Additional information on Article 40 – Termination of the status of vetted researcher

Article 40(10) of the Regulation provides for the termination by the Commission of the status of vetted researcher. The Commission will investigate the standing and conduct of a vetted researcher either on its own initiative or as a result of information received from a third party. It shall terminate a vetted researcher's access to data if the researcher if it finds that it can no longer fulfil the criteria set out above. However, before it does that it must give the researcher the right to respond to notice of the intention to terminate that access.

HEAD 10 – Trusted flaggers

To provide that:

Procedures for awarding trusted flagger status and handling reports

(1) The Commission shall adopt procedures:

- a) Setting the form and content of applications by persons seeking the status of trusted flagger
- b) Awarding the status of trusted flagger, including identifying the areas of designated expertise held by the applying entity in the award, and determining any period for renewal
- c) Notifying the European Commission and the European Board for Digital Services of the awarding, suspending, or revoking of the status of trusted flagger; and
- d) Determining the appropriate format and content of reports provided by trusted flaggers.

(2) Those procedures shall –

- a) In the case of subheads (1)(a) and (1)(b), take account of the criteria in Article 22(2) of the Digital Services Regulation and any guidelines issued by the European Commission pursuant to Article 22(8) of the Digital Services Regulation
- b) In the case of subhead (1)(d), take account of the criteria in Article 22(3) of the Digital Services Regulation

(3) Upon receipt of a report from a trusted flagger, the Commission, or a person duly authorised by the Commission, shall make an assessment as to whether any further action is required. That assessment shall include, at least, a consideration of whether the report –

- a) gives rise to a belief that an intermediary service provider may have breached a provision of the Digital Services Regulation,
- b) indicates any systemic or emerging issues in application of the Digital Services Regulator that should be referred to the European Commission or the Board for Digital Services, and
- c) gives rise to a belief that the trusted flagger no longer meets the criteria for the status of trusted flagger

Compliance with trusted flagger status

(4)(a) Where the Commission has received information from an online platform that a trusted flagger has submitted a significant number of notices that are –

- i. insufficiently precise,
- ii. inaccurate, or
- iii. inadequately substantiated,

the Commission, or a person duly authorised, shall assess the information received and any supporting information, to determine if there are legitimate reasons to open an investigation.

(b) Where the Commission, or a person duly authorised by the Commission, considers that the information supplied by a provider of an online platform, pursuant to subsection (1) of this Head, does give rise to legitimate reasons to open an investigation into the status of a trusted flagger, it, or the person duly authorised, shall suspend that trusted flagger's status and appoint an investigator.

(c) Where the Commission, or a person duly authorised by the Commission, considers that there is reason to believe that an entity that the Commission has awarded trusted flagger status to no longer meets the criteria for that status, it shall appoint an investigator.

(d) An investigator may for the purposes of an investigation under this section require the entity that was awarded trusted flagger status concerned to -

- i. produce to the investigator such information or records in the entity's possession or control relevant to the investigation,
- ii. where appropriate, attend before the investigator for the purposes of the investigation.

(e) Where an investigator appointed under this section, having conducted an investigation, forms a view that a trusted flagger no longer meets the criteria for that status, then he or she shall notify the finding to the trusted flagger and afford that trusted flagger an opportunity to make submissions to the Commission either in writing or at a hearing.

(f) After consideration of the submissions, if any, made by the trusted flagger, the Commission may -

- i. make a finding that the trusted flagger no longer meets the criteria,

ii. make such other finding as it considers appropriate and the Commission shall revoke the trusted flagger's status.

(5) A person that knowingly fails to provide accurate information to the Commission in connection with –

- a) An application for the status of trusted flagger, or
 - b) An investigation into the conduct of a trusted flagger
- shall be guilty of a category 2 offence.

(6) A person who knowingly misrepresents themselves as a trusted flagger shall be guilty of a category 3 offence.

Explanatory Note

This Head implements provisions in Article 22 of the Regulation.

Article 22(1) places an obligation on providers of online platforms (a subset of intermediary service providers) to give priority attention to certain notices that have been submitted through the notice and action mechanism in Article 16. These are notices that have been submitted by an entity that –

- Has the status of "trusted flagger", and
- Is acting within their designated area of expertise

The status of "trusted flagger" is awarded by the Digital Services Coordinator in the Member State where the entity seeking the status is established.

Article 22(2), (6) and (7) of the Regulation set out the criteria and procedures for awarding, suspending, and revoking the status of trusted flagger by the Digital Services Coordinator. Article 22(8) is related and provides that the Commission may issue guidelines to assist both providers of online platforms and Digital Services Coordinators on the application of Articles 22(2), (6) and (7).

Articles 22 (4) and (5) set out the obligations of the Digital Services Coordinator and the European Commission with respect to maintaining up to date information on who is a trusted flagger.

Article 22(3) sets out the obligations on trusted flaggers.

Subhead (1) provides that the Commission will institute procedures for –

- the application process for, including awarding, the status of 'trusted flagger',
- meeting its own notification obligations, and

- the format for the reports made by trusted flaggers

Subhead (1)(a) is self-explanatory. It implements part of Article 22(2) of the Regulation, which obliges the Digital Services Coordinator to consider applications from persons seeking the status of ‘trusted flagger’ and, if the DSC is satisfied that those persons have met the criteria in Article 22(2) (a)-(c), to award that status to them.

Subhead (1)(b) is intended to support the provision in Article 22(1) that ISPs must give priority to trusted flaggers acting within their “designated area of expertise”. It is considered appropriate, therefore, that the award from the Media Commission specify those areas for clarity for the ISP.

The Regulation is silent as to the duration of the award of trusted flagger status, in contrast to the specifics in Article 21, where a body can only be certified as an out of court dispute settlement body for a maximum of 5 years, with the possibility to renew. However, the Department considers it is prudent for the Media Commission to consider a period for renewal to ensure that there is periodic review of whether the trusted flagger continues to meet the conditions in Article 22(2) over time and that its designated area of expertise is up to date.

Subhead (1)(c) is proposed to ensure that the Media Commission meets its obligations under Article 22(4) to notify the European Commission and the European Board for Digital Services.

Once the status of ‘trusted flagger’ has been awarded, Article 22(4) provides that the Media Commission shall notify the European Commission and the Board for Digital Services of the names of entities that it has granted ‘trusted flagger’ status to. The European Commission then makes that information publicly available, and keeps it up to date, so there is no need to oblige the Media Commission to do so too.

Subhead (1)(d) obliges the Media Commission to set out requirements for the format and content of the trusted flaggers’ reports.

Article 22(3) of the Regulation requires a ‘trusted flagger’ to publish a report, at least annually, on the notices it has submitted through the Article 16 procedure during the reporting period. It goes on to set out the essential minimal content of those reports and obliges them to both submit the report to the Media Commission and make it publicly available. As the Regulation contemplates that these reports could include more information than is required by Article 22(3), the Department proposes to give the Media Commission the opportunity to add to or expand on the requirements of Article 22(3). Also, consistency in these reports over time and across different flaggers would be a useful transparency measure.

Subhead (2) is related to subhead (1) and provides that the Media Commission must advert to some specifics when setting the procedures referred to in subhead (1).

Subhead (2)(a) provides that the procedures for applications and awarding the status must be in line with the conditions in Article 22(2) and any guidelines issued by the European Commission pursuant to Article 22(8) of the Regulation.

Subhead (2)(b) provides that the Media Commission must take account of Article 22(3) in determining the form and content of the trusted flaggers' reports. It does not refer to Article 22(8) as that Article does not contemplate further guidance on the application of Article 22(3).

Subhead (3) obliges the Media Commission to assess the reports it receives from trusted flaggers and take a decision as to whether any further action is necessary. Further action could include an investigation into a suspected contravention of the Regulation by an online platform or a breach of the trusted flagger's own obligations. Subhead (3) goes on to set out some particular matters for the Media Commission to consider. These are in support of the provisions in Article 22(7), where the Media Commission may determine on its own initiative, following an investigation, that a flagger no longer meets the criteria, the provisions in Articles 61 and 63 on the tasks of the Board, and the provisions of Article 64(2). This is considered an appropriate consequent obligation on the regulator receiving these reports.

The obligation in Article 22(3) of the Regulation on trusted flaggers to make their reports public is considered an important transparency measure and a useful tool in helping to identify potential infringements of the Regulation. Furthermore, a failure by a trusted flagger to produce this report may be an indication that it can no longer meet the conditions of Article 22(2)(c). It is also framed in the Regulation as a key responsibility of a trusted flagger.

Investigations into compliance by trusted flaggers

Subhead (4) implements Articles 22(6) and (7) of the Regulation, which provide that the Media Commission shall open an investigation where it has–

- i. received information from an online platform that the trusted flagger has submitted a significant number of flawed notices and the Media Commission agrees that there are legitimate reasons to investigate,
- ii. received information from an online platform or any third party that indicates the trusted flagger no longer meets the criteria for the status in Article 22(2),
or
- iii. formed its own view that the trusted flagger may no longer meet the criteria in Article 22(2)

In the case of the (i) above, Article 22(6) obliges the Media Commission to suspend the trusted flagger's status pending the outcome of the investigation. In all cases, the

investigation is to ascertain whether the trusted flagger meets the conditions of Article 22(2).

If the Media Commission finds that the trusted flagger no longer complies with the conditions in Article 22(2), it must revoke the status of flagger. Prior to revocation, the Media Commission must first s investigation and has found that the entity with trusted flagger status no longer meets the conditions of Article 22(2) and should, therefore, have its status revoked. In this situation, before making a final decision, the Media Commission must –

- Afford the flagger the opportunity to respond to the outcome of that investigation, and
- Inform the flagger of its intention to revoke the trusted flagger status.

The Department considers it is appropriate to set out these procedures in statute. Although there is no financial or other penalty associated with failure to meet the conditions for a trusted flagger, the potential for reputational damage to an organisation that has its status revoked warrants this formality. That said, Article 22(8) provides that the European Commission will, where necessary, issue guidelines on the application of Articles 22(6) and (7), so that is factored into these Heads.

Subhead 4(a) obliges the Media Commission to form a view on a complaint from a platform that the trusted flagger has submitted a significant number of flawed notices. This is in line with the requirement of Article 22(7) and is likely to include an assessment of the necessary explanations and any supporting documents that the platform has provided, in line with the platform’s obligations in Article 22(7).

If the Media Commission finds that the complaint does raise legitimate reasons to open an investigation, it must suspend the trusted flagger’s status and open an investigation.

Subhead 4(b), therefore, provides for that suspension and obliges the Media Commission to open the investigation in the circumstances of subhead (4)(a).

Subhead 4(c) is concerned with (ii) and (iii) above, where the Commission conducts an investigation either on its own initiative, for example following receipt of a report from a trusted flagger that gives rise to concerns, or where it has received information from an online platform or other third party.

Subhead (4)(d) is modelled on section 50 of the Broadcasting Act 2009 and provides for the powers of an investigator to assess whether or not a trusted flagger still meets the criteria.

Subhead (4)(e) obliges the investigator, once s/he has formed a view, to notify the trusted flagger of his / her view and give the flagger an opportunity to respond. This is modelled on section 50(5) of the Broadcasting Act 2009, as amended.

Subhead (4)(f) provides for the findings that the Media Commission may make after an investigation and after the trusted flagger has been given an opportunity to reply. It is modelled on section 50(7) of the Broadcasting Act 2009, as amended. It also obliges the Media Commission to revoke the status if it finds that the trusted flagger no longer meets the criteria for that status.

Subhead (5) makes it an offence to give false information to the Media Commission in connection with trusted flaggers. It is set at a category 2 offence as this aligns with similar failures in the Broadcasting Act 2009, as amended. This is proportionate.

Subhead (6) makes it an offence to falsely present as a trusted flagger. This is to deter abuse of the priority treatment afforded to trusted flaggers. It is set at a category 3 offence. This is proportionate.

HEAD 11 – Certification of out of court dispute settlement bodies

To provide that:

(1) An out of court dispute settlement entity established in the State that intends to be certified by the Commission as an “out of court dispute settlement body” for the purposes of resolving disputes pursuant to Article 21 of the Digital Services Regulation shall notify the Commission of the following information -

- a) the name, contact details and website address of the out of court dispute settlement entity,
- b) information on the structure and funding of the out of court dispute settlement entity, including information on the natural persons in charge of dispute settlement, the remuneration of such persons, the term of office of such persons, and the persons by whom those natural persons are employed;
- c) the procedural rules of the out of court dispute settlement entity, including information on accessibility of its service through electronic communications technology;
- d) the fees charged by the out of court dispute settlement entity, if applicable;
- e) the average length of dispute settlement procedures;
- f) the language or languages in which complaints can be submitted and the dispute settlement procedure conducted;
- g) a statement on the expertise of the out of court dispute settlement entity with respect to one or more areas of illegal content or in relation to the application and enforcement of terms and conditions of one or more types of online platform; and
- h) a reasoned statement on whether the entity qualifies as an out of court dispute settlement body in compliance with the requirements set out in Article 21(3) of the Digital Services Regulation

(2) The notification referred to in subsection (1) shall be submitted in a form and manner specified by the Commission.

(3) Where an out of court dispute settlement entity has made a notification under subsection (1), the Commission shall assess whether the entity meets all of the conditions in Article 21(3) of the Digital Services Regulation.

(4) Where the Commission is satisfied that the out of court dispute entity does meet all of the conditions in Article 21(3) of the Digital Services Regulation, it shall certify that entity as an “out of court dispute settlement body for the purposes of the Digital

Services Regulation” for a period not greater than 5 years. That certificate shall be in a form specified by the Commission and shall at least include the following information –

- a) the particular issues to which the out of court dispute settlement body for the purposes of the Digital Services Regulation’s expertise relates, and
- b) the language in which the body is capable of settling disputes.

(5) As soon as reasonably practicable, the Commission shall notify the out of court dispute settlement entity of its assessment under subsection (3) and, if applicable, that it has certified the entity as an “out of court dispute settlement body for the purposes of the Digital Services Regulation”. In that case, it shall also furnish a copy of the certificate.

(6) An “out of court dispute settlement body for the purposes of the Digital Services Regulation” shall notify the Commission without delay of any changes to the information notified under subsection (1).

(7) The Commission shall, without undue delay notify the European Commission that it has certified an entity as an out of court dispute settlement body for the purposes of the Digital Services Regulation and provide a copy of the certificate.

(8) The Commission may specify the form and content of the annual reports prepared by an out of court dispute settlement body for the purposes of the Digital Services Regulation, pursuant to the obligation in Article 21(4) of the Digital Services Regulation, including specifying any information that the Commission considers necessary for preparing its own biennial report, prepared pursuant to its obligation in Article 21(4)

(9) An out of court dispute settlement body for the purposes of the Digital Services Regulation shall –

- (a) maintain an up to date website which provides the parties with easy access to information concerning the out of court dispute settlement body’s procedures and fees, and which enables the parties to submit a complaint and the requisite supporting documents online,
- (b) ensure that a natural person who is in charge of out of court dispute settlements for the purposes of the Digital Services Regulation shall possess the necessary expertise and be independent and impartial,
- (c) ensure that procedures it carries out for resolving disputes pursuant to the Digital Services Regulation are effective and fulfil the requirements of Regulation 13(2) of S.I. No. 343 of 2015

(d) ensure that the procedures it carries out for resolving disputes pursuant to the Digital Services Regulation are fair and fulfil the requirements of Regulation 14 of S.I. No. 343 of 2015.

(10) Where an out of court dispute settlement body for the purposes of the Digital Services Regulation fails, fails to comply with its obligations under subsections (6) or an entity applying for certification as an out of court dispute settlement body for the purposes of the Digital Services Regulation fails to provide information or knowingly misleads the Commission it shall be guilty of a category 2 offence

(11) Where the Commission has reason to suspect that an out of court dispute settlement body for the purposes of the Digital Services Regulation is not complying with one of its obligations under this section, it may appoint an investigator under section 50 of the Principal Act to conduct an investigation into the matter.

Explanatory Note

Article 21 of the Regulation provides the circumstances in which recipients of the services provided through online platforms may seek to have their disputes with the platform resolved by an out of court dispute settlement body. The out of court dispute settlement body must –

- Meet the criteria in Article 21(3)
- Be certified by the Digital Services Coordinator in the Member State where the body is established, and
- Meet certain obligations with respect to transparency, fees, and reporting annually to the Digital Services Coordinator on its caseload.

In turn, the Digital Services Coordinator must certify the body if it meets the conditions in Article 21(3). Article 21(3) also provides that the certification must be for no more than 5 years and may be renewed. It also requires that the certificate issued by the Digital Services Coordinator must include specific information on the expertise of and the languages used by the body.

Article 21(8) obliges the Digital Services Coordinator to notify the names and other information of all bodies it certifies to the European Commission, who then publish the list of all bodies for the entire EU on a website.

Article 21(7) provides for the revocation of a certificate.

Article 21(6) is an option for the State to establish its own out of court dispute settlement body. The Department does not propose to avail of this option.

This Head is largely modelled on the relevant provisions of the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 (S.I. No. 343 of 2015).

Subhead (1) sets out the information that an entity must provide to the Media Commission when it applies to be certified as an out of court dispute settlement body for the purposes of Article 21 of the Regulation. This information is intended to capture the conditions listed in Article 21(3) (a)-(f) inclusive. It is modelled on Regulation 7(1) and Schedule 1 of S.I. 343 of 2015.

Subhead (2) empowers the Media Commission to set out the form and content of applications, to ensure consistency, efficiency and comprehensiveness. It is similar to Regulation 7(2) of S.I. 343 of 2015.

Subhead (3) obliges the Media Commission to assess the application. It is adapted from Regulation 7(3) of S.I. 343 of 2015.

Subhead (4) obliges the Media Commission to certify a body where that body meets all the conditions of Article 21(3). This matches the provision that the Digital Services Coordinator "shall certify the body" in Article 21(3). It also provides that the maximum period is 5 years, which is also in line with the requirement in Article 21(3). Finally, it prescribes some information that must be included in the certificate, giving effect to the second paragraph of Article 21(3).

Subhead (5) is an obligation to notify the body that it has been certified. This is modelled on Regulation 7(4) of S.I. 343 of 2015.

Subhead (6) imposes an obligation on the out of court dispute settlement body to keep information up to date. Under the Regulation, an out of court dispute settlement body clearly may only be certified for as long as it meets all of the conditions of Article 21(3). So, if there is a material change that means it can no longer meet all the conditions, its certification must be revoked. This is confirmed by the provisions of Article 21(7) of the Regulation. Accordingly, it is considered prudent to require the body to keep information up to date for the period after certification and before it must reapply, 5 years later. This is modelled on Regulation 7(5) of S.I. 343 of 2015.

Subhead (7) implements the obligation in Article 21(8) to notify the European Commission.

Subhead (8) enables the Media Commission to prescribe the form and content of the annual reports that an out of court dispute settlement body is obliged to prepare under Article 21(4). Article 21(4) does list the content of those reports, but adds that the Digital Services Coordinator may request additional information. Moreover, the

information supplied in the reports of the bodies will form part of the report that the Media Commission itself will have to prepare every second year, also under Article 21(4). Accordingly, it is appropriate that the Media Commission have the ability to require that information is provided to it in a form that is efficient to compare and input to its own report.

Subhead (9) sets out the obligations that the bodies must comply with. These follow some of the conditions in Article 21(3). These include a requirement for impartiality, to be able to lodge complaints online, and that it is efficient. These are intended to ensure that a certified out of court dispute settlement body continues to meet the conditions in that Article over time. It is modelled on Regulations 9 – 14 inclusive of S.I. 343 of 2015.

Subhead (10) provides for offences for a breach of the obligations in subheads (1) and (6). These are set as a category 2 offence as the Department considers this is proportionate. It is aligned with the offences already provided for in the Broadcasting Act 2009, as amended. Breaches of the obligations under subhead (9) are likely to lead the Media Commission to launch an investigation and, if appropriate, revoke the certification.

Subhead (11) provides for investigations where the Media Commission has reason to believe that a certified out of court dispute settlement body no longer meets the conditions of Article 21(3). This implements the requirement in Article 21(7) that a Digital Services Coordinator shall revoke the certification if it determines following an investigation that the body no longer meets the criteria. As the sanction here is removal of certification, the procedures for an investigation under section 50 of the Broadcasting Act 2009, as amended, is considered more appropriate than the procedures for an investigation conducted by an authorised officer under Part 8B of the Broadcasting Act 2009, as amended. Section 50 provides for the situation where there the Media Commission has reason to believe that a contractor is not providing a service in accordance with the contract.

HEAD 12 – Right to lodge a complaint under Article 53 of the Regulation

To provide -

- (1) The Commission shall adopt procedures for the making and resolution of complaints concerning an infringement of the Regulation, made pursuant to Article 53 of the Regulation.
- (2) Those procedures shall be in accordance with the requirements of Article 53 of the Regulation and shall provide for -
 - (a) the form and procedures by which a complaint may be made,
 - (b) the procedures the Commission shall follow in considering and assessing complaints,
 - (c) the procedures for determining whether the complaint should be transmitted to another authority in the State or to a Digital Services Coordinator in another Member State, including procedures for transmission,
 - (d) the procedures the Commission shall follow on receipt of a complaint from a Digital Services Coordinator in another Member State, and
 - (e) the procedures by which the Commission shall inform the complainant and the provider of the progress and the outcome of the complaint, whether –
 - a. the Commission has transmitted the complaint to another authority in the State or to a Digital Services Coordinator in another Member State,
 - b. the complaint has been transmitted to the Commission by a Digital Services Coordinator in another Member State, or
 - c. the Commission has been the sole authority seized of the complaint

Explanatory Note

Article 53 of the Regulation provides that users of an online intermediary service, or a body mandated on their behalf, may lodge a complaint with a Digital Services Coordinator alleging an infringement of the Regulation. Under Article 53, the user makes its complaint to the Digital Services Coordinator in the Member State where the user is located or established, which may, clearly, be a different Member State from the Member State where the provider is established.

Article 53 provides different methods for the handling of these complaints, depending on where the complainant and the provider are located.

Applying these methods to the Media Commission, any of the following may occur –

The complaint may come directly from a user or representative body of users, that is located or established in Ireland. If so, the Media Commission must first determine if the complaint relates to a provider of an online intermediary service that is established in Ireland. If so, the next step is for the Media Commission to determine whether the subject matter of the complaint falls within its own area of responsibility or the responsibility of another competent authority. Where it falls to another authority, the Media Commission must transmit it to that authority. Throughout the proceedings, regardless of which authority is considering the complaint, both the complainant and the provider have the right to be heard and to receive information about the status of the complaint.

If the complaint, made by a user or user representative group based in Ireland, concerns a provider that is established in another Member State, the Media Commission must assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator in that other Member State. The Media Commission may also form an opinion on the complaint and submit that with the complaint to the Digital Services Coordinator in that other Member State.

Finally, a complaint may be made by a user or a user representative group that is located in another Member State and has been transmitted to the Media Commission by the Digital Services Coordinator in that other Member State. Here the Media Commission must first take a view as to whether the complaint falls within its remit or needs to be forwarded to another competent authority in Ireland. Here too, there is an obligation to hear both parties and to keep them informed of progress.

Given these various ways in which a complaint should be handled, the Department considers that the Media Commission should have procedures in place for assessing the content of the complaint, identifying the appropriate authority to pursue the issues raised, keeping parties informed of progress, and ensuring any necessary follow up where a complaint has been referred elsewhere. Therefore, this head obliges the Media Commission to put in place a scheme to handle those complaints.

Subhead (1) is a general obligation to institute procedures for handling complaints made to the Media Commission pursuant to Article 53 of the Regulation.

Subhead (2) expands on that general obligation and sets out the essential elements of those procedures.

Subhead (2)(a) requires the Media Commission to devise the form and procedures for making a complaint. This is intended to cover matters such as setting out the

essential information that must be supplied by the complainant and the appropriate address for submission of the complaint.

Subhead (2)(b) is intended to oblige the Media Commission to devise criteria for assessing the complaint, either as the authority that is looking into the complaint or as part of forming an opinion to transmit to another Digital Services Coordinator.

Subhead (2)(c) is intended to oblige the Media Commission to devise criteria for determining whether the complaint should be handled by another authority in the State or transmitted to a Digital Services Coordinator in another Member State. The Regulation only speaks of “where appropriate”.

Subhead (2)(d) is concerned with the processes to be followed when the Media Commission is in receipt of a complaint from a Digital Services Coordinator in another Member State. In these cases, there may be additional requirements to keep that other Digital Services Coordinator apprised of developments, so that it can, in turn, keep the complainant or the provider located in its Member State informed. There may also be a need for some cooperation between the 2 Digital Services Coordinators as the complaint is progressed.

Subhead (2)(e) is intended to give effect to the requirement in Article 53 to inform both parties to a complaint, in all circumstances in which the complaint may be handled by the various authorities.

Exchange of information on a complaint with other DSCs

Where the Media Commission refers a complaint to another authority in the State, there will be a need for protocols between the Media Commission and that other authority to ensure that information on the status and outcome of the complaint is relayed back to the Media Commission and to any other Digital Services Coordinator that has been involved. This is in addition to the requirement in subhead (2)(d) above to ensure information gets to the complainant and the provider. It is intended that the obligation in Head 20 (cooperation with other bodies) will cover procedures for this particular form of information exchange.

Distinction from existing provisions in the Broadcasting Act 2009, as amended

This Head is modelled on the provisions of Chapter 4 of Part 8A of the Broadcasting Act 2009, as inserted by section 45 of the Online Safety and Media Regulation Act 2022. However, it inserts a separate and distinct provision, confined to the circumstances of Article 53, rather than building on those provisions of Chapter 4 of Part 8A. This is for the following reasons –

Firstly, the provisions of Article 53 of the Regulation oblige the Digital Services Coordinator to receive complaints, so subhead (1) here proposes an obligation on

the Media Commission to institute a complaint handling procedure for complaints that have been made under Article 53. The provisions of Chapter 4 of Part 8A on the other hand are enabling in nature.

Secondly, complaints under Regulation 53 relate to suspected infringements, by providers, of the obligations that are in the Regulation. These are not, therefore, complaints about individual pieces of content. The complaints covered by Chapter 4 of Part 8A are on the grounds that "harmful online content is available on a designated online service". This process is about content and is confined to a group of providers that is not necessarily the same as the cohort of providers that are in scope of the Regulation.

PART 3 – INVESTIGATIONS AND SANCTIONS

HEAD 13 – Definition of a contravention

To provide that:

To amend section 139ZG (a) of the Broadcasting Act 2009, inserted by section 47 of the Online Safety and Media Regulation Act 2022 as follows –

(1) amend the definition of ‘contravention’ to include “means a failure by an intermediary service provider to comply with an Article of the Digital Services Regulation may include an intermediary service provider -

- i. supplying incorrect, incomplete or misleading information,
- ii. failing to reply to a request for information or rectify incorrect, incomplete or misleading information,
- iii. failure to submit to an inspection

contrary to the obligations in the Digital Services Regulation”

(2) amend the definition of ‘provider’ to read “‘the provider’ means the person whose suspected contravention is the subject of the investigation and includes an intermediary service provider within the meaning of the Digital Services Regulation”

Explanatory Note

Article 51 (6) of the Regulation provides that member states shall lay down specific rules and procedures for the exercise of powers of investigation, enforcement and cessation outlined in Articles 51 (1), (2) & (3).

Part 8B of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022 provides for how the Media Commission will conduct investigations into a suspected contravention. Most of those provisions meet the requirements of Article 51 of the Regulation. Accordingly, this Head adds a breach of the Regulation to the list of contraventions in the Broadcasting Act that the Media Commission can investigate. In this way the Media Commission exercises its investigatory and sanctioning powers in, as far as possible, the same way regardless of the type of contravention at issue (whether a breach of the DSA or some other provision of the Broadcasting Act).

Subhead (1) extends the definition of a ‘contravention’ in section 139ZG of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022, to include a failure to comply with an obligation in the Digital Services Regulation that falls on an online intermediary service provider. All of the

Media Commission's powers to investigate and penalise are connected to suspected 'contraventions' and findings that 'contraventions' have occurred.

It also extends the definition to include a failure to provide correct and comprehensive information, a failure to reply to requests for information or to rectify errors and a failure to submit to inspections. This is to implement that part of Article 52 (penalties) of the Regulation that provides a specific financial sanction for these breaches, which is lower than the tariff for an infringement of a specific compliance obligation on an ISP. This addition to the definition of "contravention" is proposed in order to facilitate a distinction in the financial sanctions provisions in section 139ZW of the Broadcasting Act 2009, as amended.

The phrase "and may include" is used here as there is only one occasion identified in these Heads where the distinction is relevant, and that is with respect to financial sanctions.

Subhead (2) is proposed for prudence. By linking a failure to comply with the Regulation to the provider of an intermediary service in subhead (1), this may not be necessary here too.

HEAD 14 – Notifications of investigations and contraventions under the Digital Services Act

To provide –

(1) In section 139ZJ of the Principal Act, insert the following new subsection (4) -

“(4) Where the suspected contravention is a failure to comply with an Article of the Regulation, the authorised officer or a person authorised by the Commission for this purpose shall notify –

- a) The European Commission
- b) Each Digital Service Coordinator in another Member State, and
- c) The European Board for Digital Services,

that the Commission has commenced an investigation. That notice shall include any particulars that are required to be supplied by the Regulation.”.

(2) In section 139ZS of the Principal Act, insert the following new subsection (5) –

“(5) Where the contravention to which the investigation relates is a failure to comply with an Article of the Regulation, the Commission, or a person authorised by the Commission for this purpose, prior to taking a decision under subsection (1), shall notify –

- a) The European Commission
- b) Each Digital Services Coordinator in another Member State, and
- c) The European Board for Digital Services,

that the Commission intends to take a decision under subsection (1).”.

(3) In section 139ZT of the Principal Act, insert new provision into subsection (6) so that it provides –

“(6) The Commission may provide a copy of a notice referred to in subsection (1) to a person other than the provider where it considers it appropriate to do so. In any case, the Commission shall provide a copy of that notice to –

- a) The European Commission
- b) Each Digital Services Coordinator in another Member State, and
- c) The European Board for Digital Services.”.

(4) After section 139ZZI, insert new Chapter 9 – Referrals to the European Commission as follows –

“Chapter 9 – Referrals to the European Commission

”139ZZJ(1)

If a person authorised by the Commission under subsection 139ZI(2) believes

-

- a) there is reason to suspect that there has been a contravention that is a failure to comply with an Article of the Regulation, and
- b) that the contravention may have been committed by a very large online platform or a very large online search engine, within the meaning of Article 33 of the Regulation, and
- c) that the contravention concerns a failure to comply with an Article in Section 5 of Chapter III of the Regulation or, in the case of any other Article in the Regulation, the contravention indicates systemic failure in a manner that seriously affects recipients, located in the State, of that very large online platform’s or very large online search engine’s services,

that person, shall notify the Commission of their belief.

(2) On receipt of a notification under subsection (1), the Commission shall form a view as to whether that the suspected contravention does meet the provisions of subsection (1)(a), (b) and (c) and, if so, shall notify the European Commission pursuant to Article 65(2) and in accordance with Article 65(3) of the Regulation.

(3) The person authorised by the Commission under subsection 139ZI(2) or the Commission may appoint an authorised officer to conduct an initial investigation to ascertain any information necessary for the Commission to form a view under subsection (2)“.

Explanatory Note

This Head is concerned with the various obligations on the Media Commission to notify matters connected with suspected infringements of the DSA to the 26 other Digital Services Coordinators, the European Commission, the European Board for Digital Services, or all three. These obligations are set out in Article 57 (mutual assistance) and Article 65 (enforcement of obligations of providers of very large online platforms and very large online search engines).

Subhead (1) amends section 139ZJ (inserted into the Principal Act by section 47 of the Online Safety and Media Regulation Act 2022), which provides for an authorised officer to notify the provider that an investigation into a suspected contravention by that provider is about to commence.

This subhead adds a specific requirement on the authorised officer to also notify the European Commission, the European Board for Digital Services and the other 26 Digital Services Coordinators in the specific situation where the suspected contravention is a failure to comply with the Regulation. It is intended to implement the obligation on a Digital Service Coordinator in Article 57 (1) (mutual assistance) to inform all of these bodies whenever it is opening an investigation.

Subhead (2) amends section 139ZS (inserted into the Principal Act by section 47 of the Online Safety and Media Regulation Act 2022), which provides that the Media Commission shall decide, on the basis of an authorised officer’s report, whether or not a contravention took place and, if so, whether to impose a financial sanction.

This subhead adds a specific requirement on the Media Commission, or someone authorised by it, to notify the European Commission, the European Board for Digital Services, and the other 26 Digital Services Coordinators, that it intends to take this decision. This is intended to implement the requirement in Article 57(1) of a Digital Services Coordinator to inform all of these bodies of its intention to take a final decision.

Subhead (3) amends section 139ZT (inserted into the Principal Act by section 47 of the Online Safety and Media Regulation Act 2022), which provides that the Media Commission shall issue a notice of its decision, including the reasons for it, to the provider and to publish it on its website.

This subhead adds a requirement on the Media Commission to issue that notice also to the European Commission, the European Board for Digital Services and the other 26 Digital Services Coordinators. This is to implement the requirement in Article 57(1) of the Regulation to provide the Digital Services Coordinator’s assessment on which the final decision was based.

Subhead (4) inserts a new Chapter into Part 8B of the Principal Act (as inserted by section 47 of the Online Safety and Media Regulation Act 2022). This new Chapter is to provide for the situation where the Media Commission has reason to suspect that there has been a failure to comply with an obligation of the Regulation and that failure should be referred to the European Commission because it is either –

- a failure to comply with an obligation in Section 5 of Chapter III of the Regulation, where the European Commission has exclusive competence to enforce, or

- a failure to comply with any other obligation in the Regulation, by a very large online platform or a very large online search engine and represents a systemic infringement that seriously affects recipients of the service in Ireland, where the European Commission may enforce

Accordingly, subhead (4) obliges the Media Commission to first form a view and, if it considers the suspected contravention does meet the threshold for referral, to then refer those suspected contraventions to the European Commission in line with the provisions of Article 65(2) and (3). Given that this amounts to a transfer of an investigation to another authority, it is considered appropriate that the Media Commission itself, rather than a person authorised, considers the issue.

HEAD 15 – Mutual assistance and cross-border cooperation

To provide -

Insert new section after section 139ZI of the Principal Act –

“New section 139ZI – A (mutual assistance)

(1) The Commission shall, for the purposes of Article 57 and Article 58 of the Digital Services Regulation -

(a) provide Digital Services Coordinators in other Member States with mutual assistance, and

(b) put in place measures for effective cooperation with those authorities and Board for Digital Services.

(2) The Commission, on receipt by it of a request of a Digital Services Coordinator in another Member State, or of the Board for Digital Services shall –

(a) without undue delay and no later than 2 months after receiving the request, take all appropriate measures required to reply to the request, and

(b) inform the requesting Digital Services Coordinator in another Member State and the Board for Digital services of the results of, or progress made in response to the request.

(3) The measures referred to in subsection (2)(a) include the appointment of an authorised officer and the conduct of an investigation under Part 8B of the Principal Act.

(4) (a) The Commission shall not refuse to comply with a request for mutual assistance, pursuant to Article 57 of the Digital Services Regulation, from a Digital Services Coordinator in another Member State unless –

(i) it considers that the scope or the subject matter of the request is not sufficiently specified, justified or proportionate with respect to the purposes of the investigation being conducted by the requesting Digital Services Coordinator in another Member State,

(ii) neither the Commission nor another authority in the State is in possession of the information sought, or can gain access to it, or

(iii) compliance with the request would infringe the law of the State or European Union

(b) The Commission shall provide the requesting Digital Services Coordinator in another Member State with the reasons for its refusal under paragraph (a) to comply with a request.

(5) In this section

“mutual assistance” includes –

(a) responding to requests for information, and

(b) undertaking supervisory measures, such as carrying out investigations under Chapter 2 of Part 8B

“request for mutual assistance” means a request for mutual assistance referred to in Article 57 of the Digital Services Regulation

“request for cooperation” means a request to assess a matter and take necessary investigatory and enforcement measures referred to in Article 58 of the Digital Services Regulation.

Explanatory Note

Articles 57(2) and (3) of the Regulation provide for the arrangements of mutual assistance between the 27 Digital Services Coordinators, where one DSC has launched an investigation into a suspected breach of the Regulation. They are specific, therefore, to the arrangements between DSCs (not the European Commission or the Board), and to the context of an investigation being underway.

In those circumstances, the DSC investigating may request another DSC to provide information and / or to use their investigatory powers to look for information in their Member State. The request is not to use enforcement powers, such as imposing a penalty. The DSC may refuse the request on any one of 3 stated grounds in Article 57(3). The DSC receiving the request has up to 2 months to comply or refuse.

Article 58 of the Regulation (cross-border cooperation) provides for the arrangements whereby one or more DSCs consider that the actions of an ISP established in another Member State are negatively affecting recipients of that ISP’s service in their own Member State (i.e. a Member State of destination). In this situation, the DSC of destination may request the DSC in the Member State of the ISP’s establishment to investigate and enforce. Alternatively, 3 or more DSCs of destination may ask the Board to issue a request to the DSC of establishment.

The DSC receiving the request, whether from a single DSC in another Member State or from the Board, must take utmost account of the request. Where it considers that

more information is needed, and that the DSC or the Board issuing the request could provide the additional information, it may either –

- seek that additional information with a mutual assistance request under Article 57, or
- launch a joint investigation under Article 60(1), at least involving the requesting DSC.

Article 58 also imposes a time limit of 2 months, unless the DSC of establishment looks for additional information, in which case there is the possibility of extension. There is no reference to the DSC of establishment being able to refuse a request for cross-border cooperation. However, Article 59 provides for referral to the European Commission and, if the EC considers that the DSC of establishment should review the matter, the DSC of establishment is under an obligation to take utmost account of that view.

This Head provides for the provisions of Articles 57(2) and (3) and of Article 58. It is modelled on section 103 of the Data Protection Act 2018, with modifications such as to take account of the fact that section 103 of the 2018 Act is transposing a Directive, while this Head is implementing a Regulation.

Subhead (1) empowers the Media Commission to respond to requests for mutual assistance from a Digital Services Coordinator in another Member State and for requests for cross-border cooperation.

Subhead (2) obliges the Media Commission to respond to the request, and inform the other DSC of progress, within the deadlines provided for in the Regulation. Both Articles 57 and 58 set limits of 2 months, subject to the potential for extension in Article 58 where more information is required.

Subhead (3) empowers the Media Commission to use its investigatory powers in connection with a request for mutual assistance or cross-border cooperation. In the case of mutual assistance, this is because the Regulation provides that a DSC in another Member State may request the Media Commission to use its investigatory powers to ascertain specific information. In that situation, the Media Commission has not formed a view that a contravention has occurred, which is the starting point for using its investigatory powers in Part 8B of the Broadcasting Act 2009, as amended. Accordingly, specifically enabling the Media Commission to appoint authorised officers, with their powers, in the case of mutual assistance is considered a useful clarification.

In the case of cross-border cooperation, once the Media Commission has determined that the request is clear and provides sufficient information, it launches its own investigation in the usual way. However, the terms of the request are that it “assess

the matter and take the necessary investigatory and enforcement measures". So, an assessment is a first step. In any case, it may consider that it wants to conduct some preliminary investigative work, to ascertain if more information is needed from another Digital Services Coordinator or if a joint investigation is appropriate. This provision is intended to give the Media Commission the flexibility to conduct that initial investigation.

Subhead (4) implements the provisions of Article 57(3), setting out the grounds on which the Media Commission may refuse a request from another DSC to provide information in its possession or use its investigatory powers to ascertain information. These match the provisions of Article 57(3) and are proposed for clarity.

Subhead (5) defines the terms used in this Head and links them explicitly to the Articles in the Regulation that are being given effect here.

Note Section 104 of the Data Protection Act 2018 also provides for the situation where the authority in Ireland seeks mutual assistance from an authority in another Member State. The Department would welcome OPC advice as to whether a similar provision is necessary here too.

Head 16 Joint investigations

To provide –

Insert new section after section 139ZI into the Principal Act -

“139ZI – A (Joint investigations)

(1) The Commission shall put in place procedures for commencing a joint investigation with one or more Digital Services Coordinators in another Member State, where -

- (a) the joint investigation concerns a suspected contravention that is failure to comply with the Digital Services Regulation, and
- (b) the Commission considers a joint investigation to be appropriate given the circumstances of the suspected contravention and the cross-border nature of the provider being investigated.

(2) The procedures referred to in subsection (1) shall include -

- (a) the criteria for assessing whether to lead a joint investigation, whether following a request for cross-border cooperation or on its own initiative, on the basis of the nature of the suspected contravention,
- (b) the criteria for assessing whether to lead joint investigation following a recommendation from the Board for Digital Services, or a referral from the European Commission,
- (c) the criteria for assessing requests from Digital Services Coordinators in another Member State to join a joint investigation that is led by the Commission,
- (d) the criteria for assessing whether to join a joint investigation that is led by a Digital Services Coordinator in another Member State, and
- (e) procedures for the exchange of information in confidence,
- (f) procedures for preparing the preliminary report in consultation with all participating Digital Services Coordinators.

(3) The Commission shall put in place measures to ensure the effective cooperation with Digital Services Coordinators in another Member State in the course of a joint investigation.

(4) The measures referred to in subsection (3) include the exercise by the Commission of its powers of investigation under Chapter 2 of Part 8B.

Explanatory Note

The Regulation provides that there are 3 circumstances in which a joint investigation between 2 or more Digital Services Coordinators may arise. They are –

- Following a request for cross-border cooperation (Article 58), where the DSC receiving the request (the DSC of establishment) considers DSC issuing the request could provide more information, the DSC of establishment may launch a joint investigation,
- Following a recommendation from the Board (Article 60), the DSC of establishment may launch and lead a joint investigation,
- On its own initiative (Article 60)

Recital 130 indicates the type of activities that should be covered by a joint investigation, and they include –

- Coordinated data gathering exercises,
- Pooling of resources,
- Task forces,
- Coordinated requests for information, or
- Common inspections of premises

Section 139ZI of the Broadcasting Act, 2009 as inserted by section 47 of the Online Safety and Media Regulation Act 2022 provides that the Media Commission may commence an investigation if it has reason to suspect that there has been a contravention. The purpose of this Head is to provide for the specific situation where that contravention is a breach of the Regulation and the Commission considers that it is appropriate to join forces with other Digital Services Coordinators. The view that a joint investigation is appropriate may be formed on its own initiative, following a request for cross-border cooperation or on the recommendation of the Board.

Subhead (1) is intended to oblige the Media Commission to institute the procedures it will follow when deciding if a joint investigation is appropriate for pursuing a suspected breach of the Regulation. It provides that the Media Commission shall institute procedures for determining whether a joint investigation is appropriate. Subhead (1)(b) reflects the objectives of the joint investigations in the Regulation, which are to facilitate cross-border supervision and investigations of the obligations in the Regulation, where several Member States are affected.

Subhead (2) sets out the minimum content for the measures referred to in subhead (1). These are intended to cover both the situation where the Media Commission, as Digital Services Coordinator of establishment, leads and where it joins, as DSC of destination, a joint investigation that is led by another DSC. Subhead (1) (c) supports the Media Commission determining the point at which it would consider the number

of DSCs participating to be excessive, risking the effectiveness of the investigation. Subhead (1)(e) may be unnecessary given the provisions elsewhere in this General Scheme on exchange of information. Subhead (1)(f) is proposed given the obligation in Article 60(2) to prepare a preliminary position that takes account of the views of all the other participating DSCs.

Subhead (3) is modelled on section 103(2) of the Data Protection Act 2018, to enable the Media Commission to use its powers to cooperate effectively in a joint investigation. This is a requirement of Article 60(4).

Subhead (4) clarifies that the Media Commission may use its investigatory powers in a joint investigation. This is intended for those cases where it is not leading a joint investigation (in those cases, the existing powers are considered sufficient) and, therefore, may not be the DSC that concludes the case.

HEAD 17 – Failure to comply with notice to end contravention – Action Plan

To provide that:

Insert new section, after section 139ZZB of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022, as follows –

“**139ZZB – A:** Where the Commission has decided that it is satisfied that a contravention that is a failure to comply with an Article of the Regulation has not been remedied or is continuing and the intermediary service provider in contravention has failed to comply with -

- (a) A notice to end the contravention issued under section 139ZZB (1),
- (b) Any steps required by the Commission in that notice, and the time period set, pursuant to section 139ZZB (2); and
- (c) All other efforts by the Commission to seek the cessation of the contravention, and

the contravention is causing serious harm that cannot be avoided through the exercise of powers under another enactment, the Commission shall require the directors of that intermediary service provider to examine the situation, adopt and submit a plan setting out the measures the intermediary service provider will take to end the contravention.

Explanatory Note

This Head is intended to give effect to part of Article 51(2).

Article 51(2) of the Regulation provides five enforcement powers that the Digital Services Coordinator has vis-à-vis intermediary service providers. One of those powers is the power to order the cessation of infringements and to impose remedies necessary to bring the infringement to an end. It also provides that the DSC shall have the power to enforce against specified categories of other people for failure to comply with orders, such as an order to cease an infringement.

Section 139ZZB of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022, provides the Media Commission with the power to issue a notice to end a contravention. Section 139ZZB (2) provides that the notice shall state the steps that the Commission requires the provider to take to put an end to the contravention. Subject to the amendment of the term ‘contravention’ in these Heads, section 139ZZB(2) appears to be sufficient to implement the requirements of Article 51(2) of the Regulation that the Digital Services Coordinator

may impose terms on the provider. Accordingly, no Head is proposed for this part of Article 51.

Article 51(3) of the Regulation, however, goes on to provide for the situation where an intermediary service provider established in its Member State has not remedied an infringement or is continuing to infringe and –

- All other powers of the DSC to bring about a cessation of the infringement have been exhausted, and
- The infringement is causing serious harm that cannot be avoided through the exercise of other powers available under Union or national law

Then the DSC has the power to take additional measures. Those measures are –

- (a) To require the management of the provider to examine the situation, adopt and submit an action plan to terminate the infringement;
- (b) To ensure that the provider takes those measures and reports on them;

This head gives effect to that part of Article 51(3) of the Regulation. It is structured to follow the process and circumstances set out in that Article.

Article 51(3) goes on to provide that, if the provider does not comply with these requirements, the DSC may, in specified circumstances, request the courts to order temporary restriction of access (access blocking order). Head 17 amends section 139ZZC of the Broadcasting Act 2009 to take account of this requirement.

HEAD 18 – Access blocking orders

To provide that –

Insert new section 139ZZC-A (Access blocking order – Digital Services) into the Principal Act as follows –

“(139ZZC – A)

(1) The Commission may apply to the High Court for an order requiring an intermediary service provider, including an internet service provider or a provider of an application store, to block access in the State to a relevant online intermediary service.

(2) Prior to making an application to the High Court under subsection (1), the Commission shall first notify –

- a) the internet service provider or the provider of the application store service concerned, and
- b) the provider of the relevant online intermediary service concerned,

of its intention to make an application under subsection (1), including information on the order it intends to apply for and the addressees of that order, and shall allow them a period of not less than 2 weeks to submit written observations to the Commission.

(3) Subsection (2) shall not apply where the Commission is making an application to the High Court under subsection (1) if the Commission is making that application pursuant to a request from the European Commission pursuant to Article 82 of the Digital Services Regulation and the European Commission has invited written submissions.

(4) The Commission shall adopt procedures for identifying in advance third parties and assessing their legitimate interest in relation to any specific application to the High Court under subsection (1).

(5) An application to the High Court under subsection (1) shall be made on notice to –

- a) the internet service provider or the provider of the application store service concerned,
- b) the provider of the relevant online intermediary service concerned, and
- c) any other third party that has demonstrated a legitimate interest, pursuant to the procedures adopted under subsection (3)

(6) The court may make an order requiring the blocking of access to a relevant online intermediary service if it is satisfied that –

a) the relevant online intermediary service has failed to comply with the Digital Services Regulation, and that failure is continuing,

b) the relevant online intermediary service has failed to remedy the infringement or comply with an action plan adopted under Head 16,

c) the failure to comply with the Digital Services Regulation entails a criminal offence involving a threat to the life or safety of persons,

d) the Commission or another competent authority designated under Article 49 of the Digital Services Regulation or another authority in the State have made all reasonable efforts to end infringement through other enforcement methods,

e) having regard to the nature, gravity, recurrence, and duration of the infringement, an order under this section is proportionate and will not unduly restrict access to lawful information by recipients of the online intermediary service concerned.

(7) 7(a) The High Court shall provide that an order under this section is for a period not longer than 4 weeks.

(b) The High Court may provide that the Commission can extend the period in subsection (7)(a) for further periods of the same duration, subject to any maximum number of extensions as the court sees fit.

(8) The High Court may provide in an order under this section that a requirement imposed by the order is subject to such conditions as it considers necessary.

(9) The following persons may apply to the High Court to vary or discharge an order under this section in the event that there is any material change in the circumstances which gave rise to the order:

(a) the internet service provider or provider of an application store service the subject of the order;

(b) the provider of the online intermediary service which is required to be blocked under the order.

(10) In this section, references to a provider of an application store service blocking access to an online intermediary service include references to the provider blocking access the downloading of software used to provide the service or access the service.

(11) For the purposes of this section:

'internet service provider' means a person who provides access to the internet at endpoints of the internet (including, for example, on a smartphone);

'provider of an application store service' means a person who provides a service the main purpose of which is to facilitate the download of, or access to, application software at endpoints of the internet.

Explanatory Note

This Head is connected to, and follows, from Head 17 on an action plan.

Article 51(3) of the Regulation provides that the Digital Services Coordinator may apply to the courts for an access blocking order in certain circumstances. Here, an access blocking order may be described as an order directed at a service, such as a broadband provider or an app store, to block that access with respect to a specific online interface such as a platform or search engine. The Regulation is clear that it is intended to be a course of last resort. As Recital 119 says, it is intended for situations where there is a need to protect collective interests of consumers or to ensure prompt removal of web pages containing or disseminating child pornography, and other enforcement options are not reasonably available.

Accordingly, the Regulation provides that an access blocking order should only be considered where –

- all other powers to bring about the cessation of the infringement have been exhausted,
- the provider has not sufficiently complied with the requirements of the action plan (see Head 17),
- the infringement has not been remedied or is continuing,
- the infringement is causing serious harm and entails a criminal offence involving threat to the life or safety people, and
- the infringement cannot be avoided through the exercise of other powers available under Union or national law

Where a Digital Services Coordinator applies to the courts for an access blocking order, Article 51(3) imposes some procedural requirements. They are –

1. Before applying, the DSC must contact the interested parties, describing to them the measures it intends to apply to the courts for and identifying the intended addressees of the blocking order.

2. DSC must also invite the interested parties to submit written observations and allow a period of not less than 2 weeks for those submissions. There is an exemption from this obligation where the DSC has been requested by the European Commission, under Article 82, to seek an access blocking order.
3. The ISP, the intended addressees of the order and any other third party demonstrating a legitimate interest shall be entitled to participate in the proceedings before the courts.
4. Any issuing court order must be proportionate to the nature, gravity, recurrence and duration of the infringement, without unduly restricting access to lawful information by recipients of the service concerned.
5. The duration of the order restricting access shall be 4 weeks. The courts may specify in the order that the DSC may extend it for further periods of 4 weeks, subject to a maximum number of extensions set by the court.

Article 51(3) also imposes conditions for the DSC to be able to avail of the extension. Furthermore, once the DSC has exhausted the number of extensions permitted in the original order, if any, but considers that the conditions for an order still obtain, it must submit a new application to the courts.

Section 139ZZC of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022, provides the Media Commission with the power to apply to the High Court for an access blocking order. However, the criteria for securing that order do not match the criteria set out in Article 51(3) and the scope of application is different from those in scope of Article 51(3). Accordingly, this Head proposes adding a new section, after 139ZZC, to cover for the specific situation where the infringement is a failure to comply with the Regulation. It is, nevertheless, closely modelled on section 139ZZC.

Subhead (1) is closely modelled on section 139ZZC(1) and is intended to give the power to the Media Commission to apply to the High Court for an access blocking order. The order is to require those addressees to block access to a particular infringing online intermediary service. This is in line with Article 51(3) (b). The order is to be addressed to an intermediary service provider, which includes an “internet service provider”, such as broadband provider and “provider of an application store service”. Both terms are defined in subhead (10). This is broader than the scope of section 139ZZC(1), as it is not confined to just an internet service provider or an application store service. This is to match the scope of Article 51(3) and is intended to enable the courts to address an access blocking order to all the services that enable access to the infringing intermediary service.

Subhead (2) obliges the Media Commission to notify both parties to the order, namely the online intermediary service that it will ask the court to block and the

provider or providers it will require to implement the blocking. This notification must be done before application is made to the courts, per the provisions of paragraph 2 of Article 51(3) of the Regulation. Those provisions also set out the matters which the Media Commission must inform the parties of, and that a period of no less than 2 weeks must be allowed for written submissions from those parties.

Subhead (3) disapplies the requirement to notify parties and given them an opportunity to submit written observations if the European Commission has asked the Media Commission to apply for the access blocking order under Article 82 of the Regulation. This implements the provisions of Article 51(3).

Subhead (4) is concerned with the obligation in paragraph 2 of Article 51(3) whereby any other third party demonstrating a legitimate interest in the proceedings shall be entitled to participate in those proceedings before the court. It is not clear how those third parties will be identified, so it is proposed here for the Media Commission to adopt procedures to make public its intentions to apply for an access blocking order, so that third parties can identify themselves and come forward. The intention is that the Media Commission can adopt procedures for public announcements that take account of the need to protect confidentiality while meeting the objective of finding relevant third parties. The procedures will also cover an assessment of “legitimate interests” of those third parties.

Subhead (5) follows closely section 139ZZC (2) of the Broadcasting Act 2009, as amended with the addition of any third parties that have been identified as having a legitimate interest.

Subhead (6) sets out the matters that the court must take into account in determining whether to grant an access blocking order or not. These follow closely the criteria in paragraph 2 of Article 51(3), as set out above.

Subhead (7) sets out the duration for an access blocking order. This follows the requirements of paragraph 3 of Article 51(3) of the Regulation. It provides for extensions, at the initiative of the Media Commission and without the need to return to the court, which are also mandated by paragraph 3 of Article 51(3). That paragraph, at points (a) and (b), prescribes the circumstances in which the Media Commission may avail of this option to extend. The Department considers this is sufficiently precise that it does not require any further legislative provision.

Subhead (8) is a repeat of section 139ZZC (6).

Subhead (9) is an adaptation of section 139ZZC (7).

Subheads (10) and (11) are repeats of sections 139ZZC (9) and (10) respectively.

HEAD 19 – Financial Sanctions

To provide –

(1) In section 139ZW of the Principal Act, to insert new subsection (1A) as follows-

“(1A) Where the decision under section 139ZS is a decision to impose an administrative financial sanction on an intermediary service provider in respect of a contravention that is a failure to comply with the Digital Services Regulation, the financial sanction imposed under section 139ZS shall not exceed 6 percent of the annual worldwide turnover of the provider in the financial year preceding the date of the decision under section 139ZS to impose the sanction.

(2) In section 139ZW of the Principal Act, to insert new subsection (1B) as follows -

“(1B) Where the decision under section 139ZS is a decision to impose an administrative financial sanction on an intermediary service provider in respect of a contravention that is –

- (a) supplying incorrect, incomplete or misleading information,
- (b) failing to reply to a request for information or rectify incorrect, incomplete or misleading information, or
- (c) failure to submit to an inspection

the financial sanction imposed under section 139ZS shall not exceed 1 per cent of the annual income or worldwide turnover, whichever is the greater, of the provider in the financial year preceding the date of the decision under section 139ZS”

Explanatory Note

Article 52 (Penalties) of the Regulation provides that Member States shall lay down the rules, in accordance with the provisions of Article 51 (Powers of Digital Services Coordinators) on penalties. So, there is a close connection between the 2 Articles, and they must be read together.

Persons in scope of financial sanctions

Article 52 provides that penalties are applicable to infringements of the Regulation made by providers of intermediary services established in their Member State.

Article 51 provides that fines and periodic payments may also be imposed on specified other persons.

These are -

- Any person acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to the suspected infringement, including organisations performing audits referred to in Article 37 and Article 75(2)
- Any member of staff or representative of the intermediary service provider or of the above-named people.

However, these penalties are for failures to comply with orders issued by the Digital Services Coordinator, such as orders to provide information or for inspection of a premises. These are not infringements of obligations in the Regulation, which are obligations on providers of intermediary services. Accordingly, the Regulation makes a distinction between providers of intermediary services and other people who have connections to those providers or may possess information relevant in an investigation. Slightly different penalties attach depending on this distinction.

The levels of financial sanctions

Article 52(2) requires penalties to be effective, proportionate and dissuasive, subject to the provisions in Articles 52(3) and (4), which set maximum fines for service providers.

Article 52(3) sets limits on the maximum penalties that can be imposed on a provider of intermediary services, as follows –

- For a failure to comply with any obligation in the Regulation, the maximum fine is 6% of the provider's annual worldwide turnover of the preceding financial year
- For the supply of incorrect, incomplete or misleading information, for a failure to reply or rectify incorrect or misleading information, for a failure to submit to an inspection, the maximum fine is 1% of the provider's annual income or worldwide turnover of the preceding financial year. This should be read as a failure to provide information in any context where the DSA obliges a provider to supply information to the DSC or other competent authority and not just in the context of an investigation.

In the case of the 1% tariff, the Regulation is silent as to whether the greater of turnover or income should be the maximum.

There is also provision here for periodic penalty payments, which is covered in Head 20.

With respect to the fines that may be imposed on the persons listed in Article 51, the DSC may impose fines and periodic penalty payments on these people where there

has been a failure to comply with an order issued pursuant to Article 51(1), such as an order to provide information. These are situations connected to an authority using its powers of investigation, so is in slight contrast to the similar fining powers vis-à-vis service providers, outlined above, where a provider may be penalised for a failure to comply with any obligation in the Regulation. With respect to these individuals, Article 51(2) further provides that the DSC must first supply information such as the level of the potential fines and the options for redress before exercising these fining powers with respect to individuals. So, there are specific procedural requirements here.

Here too, there is provision in the Regulation for imposing periodic payment penalties, and these are also covered in the Head 20.

Requirements for the Regulation's financial sanction regime

In summary, it is necessary to provide for the following financial sanctions in order to implement the Regulation –

1. A power to impose a fine of up to 6% of global turnover on an intermediary service provider where that provider has been found to breach an obligation in the Digital Services Act
2. A power to impose a fine of up to 1% of global turnover or annual income on an intermediary service provider where that provider has failed to comply with requests for information, whether in the context of meeting an obligation in the DSA to provide information or in the course of an investigation or has failed to comply with other obligations to cooperate with an investigation, such as submitting to an inspection.

Articles 52(3) and (4) are clear that the maximums for the percentage fines on service providers must be available. There is no option for Member States to set the ceiling lower.

The power to impose a fine that is effective, proportionate and dissuasive on a person listed in Article 51(1)(a), (b) or (c) for failure to comply with an investigatory order, following the supply of specific information by the Media Commission to that person, are provided separately, under the provisions on offences.

For example, the 2009 Act, as amended, already has provisions for failure to provide information or otherwise cooperate with an investigation. The Department considers these sufficient to meet the requirements of the Regulation without any further provision.

The exception is the periodic payment penalty, which is covered in Head 20.

Authority imposing financial sanctions

Articles 51(2)(c) and (d) of the Regulation provide that the Digital Services Coordinators shall have the power to impose the fines themselves or to apply to the courts to impose the fines.

As the Media Commission already has the power to impose equivalent levels of fines, subject to confirmation of the courts, the policy is to extend that power, also subject to confirmation of the courts, to infringements of the Regulation. Furthermore, the cohort of service providers that are already in scope of the 2009 Act has clear overlap with the cohort of intermediary service providers in scope of the Regulation.

This Head adds to the existing provisions in section 139ZW (Limitations on amount of administrative financial sanction) of the Broadcasting Act, 2009 as inserted section 47 of the Online Safety and Media Regulation Act 2022. In this way, the existing provisions in that Act on court approval of financial sanctions will apply to these additions. They are sections 139ZZX and 139ZY, as inserted by section 47 of the Online Safety and Media Regulation Act 2022.

Subhead (1) inserts a new subsection into section 139ZW. This is to implement a requirement in Article 52(3).

The current maximum fine provided in section 139ZW is 10% of relevant turnover. On the face of it, this could be a higher limit than the maximum in the Regulation. In that case, it is arguable that the provisions of section 139 ZW do not need amending as this ceiling enables the Commission to impose lesser fines and the application of the Regulation would preclude the Commission from going beyond the limits in the Regulation when it comes to contraventions that are breaches of that Regulation.

However, there is an important distinction between the maximum in the Regulation and the limit in the 2009 Act that mean the 6% in the Regulation could be a figure higher than the 10% in the Act. The Regulation speaks of the turnover of the service provider that has been found in breach, while the Act uses only the turnover of the service provider that is attributable to the breach. Clearly, the former would be greater than the latter where a provider provided more than one service.

Accordingly, the Department proposes, at subhead (1) above, to amend section 139ZW for the specific instance of an intermediary service provider having been found to breach an obligation in the Regulation. In this instance, the Regulation provides that the maximum is 6% of annual turnover in the preceding financial year.

Subhead (2) inserts a second new subsection into section 139ZW. This is to implement a requirement of Article 52(3) that the maximum fine for failing to comply

with these specific obligations entails the lesser maximum tariff of 1% of turnover or income. See Head 13 (definition of a contravention).

As mentioned above, the Regulation does not indicate whether the greater of turnover or income should be the maximum. In the context of the maximum for a breach of an Article of the Regulation being 6%, and the maximum for the related fines already in the Broadcasting Act 2009, as amended being 10%, providing that the greater of the turnover or income is the maximum is considered appropriate and proportionate. Moreover, this is a maximum available to the Media Commission and in setting the fine in any particular case, it must take into account the factors in section 139ZW(3). For this reason too, this flexibility for the Media Commission is considered appropriate.

Article 52(2)'s final paragraph requires the Digital Services Coordinator to have a power to impose a on a person listed in Article 51(1)(a), (b) or (c) for failure to comply with an investigatory order, following the supply of specific information by the Media Commission to that person. Article 53(2) expands that these penalties must be effective, proportionate and dissuasive.

HEAD 20 – Periodic Penalty Payments

To provide –

(1) Where the Commission has issued a notice to end a contravention that is a failure to comply with an Article of the Digital Services Regulation to an intermediary service provider under section 139ZZB of the Principal Act, and the Commission has reason to believe that it is necessary to impose a periodic penalty payment on that intermediary service provider in order to ensure that the contravention is terminated in compliance with that notice, the Commission may impose a periodic penalty payment on that intermediary service provider in order to compel such intermediary service provider to end its failure to comply with an Article of the Digital Services Regulation.

(2) The Commission may impose a periodic penalty payment on an intermediary service provider or a 'relevant person' in order to compel such an intermediary service provider or 'relevant person' to one or more of the following –

(a) comply with a search conducted by an authorised officer, or otherwise allow for the exercise of the powers of an authorised officer, under section 139 ZK of the Principal Act;

(b) provide complete and correct information in response to a requirement under section 139 ZK of the Principal Act;

(c) attend before the authorised officer, attend an oral hearing, or otherwise give evidence or produce information or documentation, pursuant to section 139 ZK;

(3) Before imposing a periodic penalty payment on an intermediary service provider in accordance with either subsection (1) or (2), the Commission shall notify that intermediary service provider of the following information -

(a) specify the date by, or period within, which the intermediary service provider shall comply with the obligation concerned,

(b) state the intention of the Commission to impose a periodic penalty payment and the reasons for that intention,

(c) specify the maximum daily amount of the periodic penalty payment that will be imposed from the specified date,

(d) invite the intermediary service provider to make written submissions to the Commission in relation to the reasons for, or the level of, the periodic penalty payment.

(4) Before imposing a periodic penalty payment on a 'relevant individual' in accordance with subsection (2), the Commission shall notify that person of the following information -

- (a) specify the date by, or period within, which the relevant person shall comply with the obligation concerned,
- (b) state the intention of the Commission to impose a periodic penalty payment and the reasons for that intention,
- (c) specify the maximum daily amount of the periodic penalty payment that will be imposed from the specified date,
- (d) invite the relevant person to make written submissions to the Commission in relation to the reasons for, or the level of, the periodic penalty payment,

(5) The maximum amount of a periodic penalty payment imposed on an intermediary service provider per day during which the failure is ongoing in accordance with subsection (1) or (2) shall not exceed 5 per cent of the average daily worldwide turnover or income of the intermediary service provider concerned in the preceding financial year.

(6) The maximum amount of a periodic penalty payment imposed on a relevant person shall not exceed €1,000 per day.

(7) Where the intermediary service provider or relevant person has failed to comply with the obligation concerned before the date, or before the expiration of the period, specified in a notice issued under subsection (1) or (2), the Commission shall –

- (a) determine the amount of the periodic penalty payment to be imposed, and the date on which it is to commence,
- (b) notify the intermediary service provider or relevant person of its intention to impose the periodic penalty payment,
- (c) the date on which the periodic penalty payment will commence.

(8) In this section 'relevant person' means a person whom an authorised officer has identified as

- (a) any person reasonably likely to be in possession of information that is relevant to an investigation by reason of their trade, business, craft or profession,

(b) an employee or representative of the intermediary service provider that is under investigation reasonably likely to be able to provide explanations in respect of information that is relevant to an investigation, or

(c) any person at a premises that is being searched as part of an investigation,

And that investigation is concerned with a contravention that is failure to comply with the Digital Services Regulation.

Explanatory Note

This Head is intended to fulfil the requirements of Article 51(2)(d) and the second paragraph of Article 51(2) of the Regulation by providing a power for the Media Commission to impose a periodic penalty payment in the circumstances required by those provisions.

Article 51(2) (d) is the power to impose a periodic penalty on an intermediary service provider.

Article 52(4) then sets the maximum tariff for a periodic penalty that can be imposed on an intermediary service provider. In that case, the maximum amount is 5% of the provider's average daily worldwide turnover or income in the preceding financial year, per day, calculated from the date specified in the decision to impose a periodic penalty payment.

The second paragraph of Article 51(2) provides that the Digital Services Coordinator shall have the power to impose a periodic penalty payment on specific persons.

Those are -

- Any person acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to the suspected infringement, including organisations performing audits referred to in Article 37 and Article 75(2)
- Any member of staff or representative of the intermediary service provider or of the above-named people.

Periodic payment penalties arise in the following contexts –

- Where an order to cease an infringement is issued (on intermediary service providers only)
- Where there has been a failure to comply with an investigative order (on both intermediary service providers and individuals)

There are no provisions in the 2009 Act, as amended, for periodic payment penalties. Accordingly, this Head adds something new to that Act. It is intended to fulfil the requirements of Article 52(2)(d) and 53(2).

Subhead (1) gives the Media Commission the power to issue a periodic penalty payment against an intermediary service provider if it has reason to believe that this is necessary to ensure that an infringement of the Regulation is terminated by that provider. The power is in the context of the Media Commission having issued a notice to end a contravention under section 139ZZB of the Broadcasting Act 2009, as the Regulation also makes this connection. It is confined to the situation where the contravention is an infringement of the Regulation and not any other type of infringement. This gives effect to the requirement in Article 52(2)(d) that the Digital Services Coordinator can impose a periodic penalty payment “to ensure that an infringement is terminated in compliance with an order issued pursuant to point (b) [power to order the cessation of an infringement]”.

Subhead (2) gives the Media Commission the power to issue a periodic penalty payment against an intermediary service provider where that provider has failed to comply with an investigative order. It is modelled on section 15AD (1) of the Competition Act 2002, as inserted by section 13 of the Competition (Amendment) Act 2022. This is to give effect to the second condition in Article 51(2)(d) that says the Digital Services Coordinator shall have the power to impose a periodic penalty payment on a provider for “failure to comply with any of the investigative orders issued pursuant to paragraph 1 of this Article”. Paragraph 1 of Article 51 provides the following investigative powers –

- a) Power to require information
- b) Power to carry out an inspection of premises and seize information
- c) Power to request explanations and record the answers

Accordingly, this subhead ties the power to impose the periodic penalty payment to those powers of an authorised officer carrying out an investigation. Those powers are provided for in section 139 ZK of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022.

As the second paragraph of Article 51(2) further provides that the Digital Services Coordinator shall also have the power to impose periodic penalty payments on specific categories of individuals where those individuals fail to comply with an investigative order, subhead (2) also refers to ‘relevant person’. The term is defined later in the Head.

Subhead (3) obliges the Media Commission to notify an intermediary service provider of its intention to impose a periodic penalty payment. This is modelled on

the provisions of section 15 AD (2) of the Competition Act 2002, as inserted by section 13 of the Competition (Amendment) Act 2022. The requirement in subhead (3)(a) is to follow the procedures for imposing financial sanctions as set out in Chapter 4 of Part 8B of the Broadcasting Act 2009, as inserted by section 47 of the Online Safety and Media Regulation Act 2022. It is intended to provide for fair procedures.

Subhead (4) obliges the Media Commission to notify an individual of its intention to impose a periodic penalty payment. This follows the provisions in subhead (3). The distinction is that the Media Commission may only issue a periodic penalty payment to an individual for a failure to comply with an investigative order. Also, as well as the requirement to provide for fair procedures, the second paragraph of Article 51(2) states that a penalty can only be imposed on an individual after the Digital Services Coordinator has provided the person, in good time, with all relevant information, including the applicable period, the fines or periodic penalty payments that may be issued for failure to comply and the possibilities for redress.

Subhead (5) sets the maximum for a periodic penalty payment that can be imposed on an intermediary service provider. Article 52 of the Regulation stipulates that it shall be 5% of the average daily worldwide turnover or income of the provider in the preceding financial year. It begins from the date specified by the Digital Services Coordinator in the decision.

Subhead (6) sets the maximum for a periodic penalty payment that can be imposed on an individual. The figure proposed is a daily rate of €1,000. The context for a periodic penalty payment on an individual is where that individual fails to cooperate with an investigation. Section 139 ZK of the Broadcasting Act 2009, as amended provides that such a failure is a category 2 offence. Section 139 ZZH of the Broadcasting Act 2009, as amended, provides that a category 2 offence on summary conviction, attracts a class A fine, which is a fine not exceeding €5,000. Accordingly, a daily maximum rate of €1,000 is considered appropriate. The Competition (Amendment) Act 2022 does not provide a precedent here.

Subhead (7) is an obligation on the Media Commission to determine the amount and period of the periodic penalty payment. It also imposes a further notification obligation.

Subhead (8) is intended to define the categories of person on whom the Media Commission may impose a periodic penalty payment. It follows closely the categories of people, and the circumstances in which they could have a periodic penalty payment imposed on them, that are set out in Article 51(1).

PART 4 – MISCELLANEOUS PROVISIONS

HEAD 21 – Disclosure of information to the Commission

To provide –

“(1) Notwithstanding any other law –

- (a) a market surveillance authority,
- (b) a member of the Garda Síochána, or
- (c) such authority or other person as may be prescribed,

may disclose to the Commission, an officer of the Commission, or the European Commission, information to which this subsection applies.

(2) Subsection (1) applies to information that, in the opinion of the Commission, the European Commission or other person referred to in either paragraph (a) or (b) of that subsection disclosing or seeking to disclose the information –

- (a) relates to the commission of a contravention that is a failure to comply with an Article of the Digital Services Regulation,
- (b) is information that could materially assist the Commission, an officer of the Commission, or the European Commission in investigating whether a contravention that is a failure to comply with an Article of the Digital Services Regulation has been committed,
- (c) is information relevant in the context of a request for mutual assistance under Article 57 of the Regulation, made to the Commission or issued by the Commission, or is
- (d) information that could materially assist the Digital Services Coordinator in another Member State in investigating whether a breach of the Regulation has been committed by an online intermediary service provider established in that other Member State

Explanatory Note

This Head facilitates the reporting to the Media Commission of information relating to breaches of the Regulation. It uses section 944Q of the Companies Act 2014, as inserted by section 10 of the Companies (Corporate Enforcement Authority) Act 2021 as its template.

Subhead (1) sets out the authorities that are authorised to disclose the information.

Subhead (2) clarifies the type of information that may be disclosed, and is intended to cover confidential information.

Subheads (2)(a) and (2)(b) are self-explanatory.

Subhead (2)(c) is intended for the situation where the Media Commission has been asked by a Digital Services Coordinator in another Member State to use its investigatory powers to ascertain information needed for that other Digital Services Coordinator's own investigation (Article 57 Mutual assistance). In those cases, Article 57 is specific that the Media Commission may involve other public authorities in Ireland.

Subhead (2)(d) is intended for those situations where an authority in Ireland has information about a provider that provides services here but is established in another Member State.

Media Commission as supervisory and enforcement body in Ireland

The Media Commission will be the lead competent authority for the supervision and enforcement of the Regulation in Ireland. Under the Broadcasting Act 2009, as amended, and following these Heads, it will have the power to investigate suspected breaches of the Regulation and impose fines.

Although the Regulation does not regulate content directly, it is likely that public authorities that have a role in combatting illegal content will come across information that could indicate a breach of the Regulation, for example the obligation to respond to take down orders in Article 9 or the obligation to have internal complaints mechanisms under Article 20 of the Regulation. Therefore, the Department considers it necessary to permit those bodies to pass on that information to the Media Commission.

Other authorities that have a role in combatting illegal content include the market surveillance authorities and the Garda Síochána.

Subheads (1) (a) and (b) provide, therefore, that a market surveillance body or a member of the Gardaí may disclose that information to the Media Commission.

The Department considers that there may be other authorities whose remit could bring them into possession of relevant information too. For example, the Communications Regulator, COMREG. This will become clearer as the Regulation starts to be implemented in Ireland. Therefore, subhead (1)(c) provides that the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media may prescribe other authorities under this Head in future.

European Commission as an enforcement body investigating providers established in Ireland

The European Commission has exclusive powers with respect to breaches of Articles 33-43, inclusive, of the Regulation. Where there has been a breach of any other Article by a very large online platform or a very large online search engine and that breach has a systemic effect, the European Commission will lead the investigation.

Subhead (1) provides that the disclosure of information may be made to the European Commission in the context of the European Commission investigating a provider that is established in Ireland.

HEAD 22 – Co-operation with other bodies

To provide –

(1) In section 32 of the Broadcasting Act 2009, as inserted by section 8 of the Online Safety and Media Regulation Act 2022, to insert new subsection (3A) after subsection (3) as follows –

“(3A) Without prejudice to the generality of subsection (2), a body which is a Digital Services Coordinator in another Member State, and the Board for Digital Services, shall be considered to be a body which performs similar functions to the Commission.”

(2) In section 32 of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022, to insert new subsection (3B) after subsection (3A) as follows –

“(3B) Where the Commission enters into a cooperation agreement with a body established in the State and that agreement concerns cooperation with respect to the discharge of the Commission’s functions under the Digital Services Regulation, that agreement shall include procedures for –

- a) Effective cooperation and coordination with respect to exchange of information that the Commission is obliged to provide to the European Commission, Digital Services Coordinators in other Member States, and the European Board for Digital Services,
- b) Effective cooperation and coordination with respect to investigating any suspected contraventions that are failures to comply with an Article of the Digital Services Regulation,
- c) Informing parties to a complaint lodged pursuant to Article 53 of the Digital Services Regulation of the progress and outcome of that complaint where the complaint has been transmitted by the Commission to that body established in the State.”.

Explanatory Note

As the term “Digital Services Coordinator” suggests, a key role of the Media Commission under the Regulation will be to coordinate implementation of the Regulation across different regulators. For example, authorities such as the market surveillance bodies already have a role in issuing take down orders while the Media Commission will have a role, under Articles 9 and 10 of the Regulation, in circulating

information on those orders and ensuring that providers meet their obligations under the Regulation to inform how they gave effect to those orders. Article 55 obliges the Media Commission to include information on those orders in its annual activity report.

The Department expects that some of this work will require the Media Commission to establish protocols and other working arrangements with those other authorities to give effect to its coordination role as required by the Regulation.

Similarly, there may be elements of a breach of the Regulation that raise issues under the remit of another body. Article 53 requires the Digital Services Coordinator to transmit a complaint to another competent authority in the State, with a consequent obligation to keep the parties to the complaint informed (see Head 12).

This Head is intended to expand on the cooperation provisions already in section 32 of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022 for the specific cooperation requirements on the Digital Services Coordinator provided for in the Digital Services Regulation.

As it stands, section 32(1) (co-operation with other bodies) of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022, empowers the Media Commission to cooperate and enter into cooperation agreements with another body established in the State. The Department considers that no further legislative provision is required here for the purposes of the Regulation.

Section 32(2) empowers the Media Commission to cooperate with a body established outside of the State, where that body performs similar functions to the Media Commission. This, subject to the argument for subhead (1) below, will support the Media Commission in its cooperation with the other 26 Digital Services Coordinators for any case where that coordination is not expressly required by the Regulation but is necessary for effective implementation of the pan-EU supervisory framework.

As section 32(3) explicitly provides that a member of the European Regulators Group for Audiovisual Media Services shall be considered as a body that performs similar functions to the Media Commission, it is considered prudent to provide a similar clarification with respect to the 26 Digital Services Coordinators in the other Member States.

Accordingly, **subhead (1)** provides a similar clarification with respect to the Digital Services Coordinators in the other 26 Member States. The term “Digital Services Coordinator in another Member State” is defined in Head 2 of this General Scheme. It also adds the “Board for Digital Services”. Although Digital Services Coordinators are

members of the Board, the Board does have a distinct personality and, pursuant to Article 63 of the Regulation, has a role in coordinating joint investigations between 2 or more Digital Services Coordinators and issuing opinions and requests. The term “Board for Digital Services” is defined in Head 2.

Subhead (2) is proposed to ensure that the Media Commission can effectively discharge its coordination functions with respect to other authorities in the State, that are not designated as competent authorities under Article 49 of the Regulation.

HEAD 23 – Disclosure of personal data

To provide –

Amend section 33 of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022, as follows

(1) In subsection (1), after (b), insert new (ba) and (bb) as follows –

“(ba) a Digital Services Coordinator in another Member State or a competent authority in another Member State;

(bb) the European Commission;”

(2) In subsection (1), after (d), insert new (da) as follows –

“(da) a provider of an online intermediary service;”

(3) In subsection (2), after (b), insert new (ba) as follows –

“(ba) in the case of subsection (1) (ba), where the Commission considers that a complaint, or part of a complaint, made that there has been a failure to comply with an Article of the Regulation, is made in relation to a provider of an online intermediary service which is under the jurisdiction of another Member State, and the Commission considers that the disclosure is necessary and proportionate for the purposes of transferring the complaint or part of the complaint to the Digital Services Coordinator in that other Member State or to a Digital Services competent authority in that other Member State, or for pursuing coordinated investigation or consistency mechanisms pursuant to Section 2 of Chapter IV of the Regulation;”

(4) In subsection (2), after new (ba), insert new (bb) as follows -

“(bb) in the case of subsection (1)(bb), where the Commission considers that a complaint, or part of a complaint, made there has been a failure to comply with an article of the Regulation, is made in relation to failure that is within the competence of the European Commission considers that the disclosure is necessary and proportionate for the purposes of transferring the complaint or part of the complaint to the European Commission:”

(5) In subsection (2), after (d), insert new (da) as follows –

“(da) in the case of subsection (1)(da), where the Commission considers that a complaint, or part of complaint, made that there has been a failure to comply with an Article of the Regulation, is made in relation to a provider of an online intermediary service provider, and the Commission considers that the

disclosure is necessary and proportionate for the purposes of transferring the complaint or part to the provider of an online intermediary service;”

Explanatory Note

Under the Regulation, the Digital Services Coordinator must be able to transfer complaints to other Digital Services Coordinators (Article 58) and the European Commission (Article 65), to provide information in the course of either its own investigations or during the investigation of another Digital Services Coordinator (Article 57) or as part of a joint investigation (Article 60) or in support of an investigation by the European Commission (Article 66). In some cases that information may include personal data.

All parties to this information sharing are bound by professional secrecy requirements pursuant to Article 84 of the Regulation. Furthermore, section 36 (confidential information) of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022, prohibits the unlawful disclosure of confidential information.

In the course of an investigation or in the discharge of its other supervisory functions, it may also be necessary for the Media Commission to disclose personal data to a provider of an online intermediary service.

Section 33 (disclosure of personal data) of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022 already provides that the Media Commission may disclose personal data to specified people (such as the Data Protection Commission or a member of the Garda Síochána) in specified circumstances. The purpose of this Head is to expand the provision to enable the Media Commission to share personal data also with a Digital Services Coordinator or the European Commission in circumstances where that is necessary for the performance of its obligations under the Regulation.

Subhead (1) inserts a new subsection into section 33 to specifically name the 26 other Digital Services Coordinators, the other authorities in other Member States that have been designated by those Member States as competent authorities for the DSA, and the European Commission. It does not mention the European Board for Digital Services as the Department has not yet identified any situation where personal data may need to be furnished to the Board by the Media Commission. This will be explored further during the drafting process.

Subhead (2) inserts a provision to allow the Media Commission to disclose personal data to a provider of an online intermediary service. Section 33 already permits the Media Commission to disclose to a broadcaster or provider of an audiovisual on-

demand media service. This subhead extends that provision to cover all intermediary service providers that are in the scope of the Regulation.

Subhead (3) provides the circumstances in which the Media Commission may disclose personal data to another Digital Services Coordinator or a designated competent authority in another Member State.

Subhead (4) provides the circumstances in which the Media Commission may disclose personal data to the European Commission.

Subhead (5) provides the circumstances in which the Media Commission may disclose personal data to a provider on an online intermediary service.

As well as personal data, the Media Commission may need to disclose confidential information to discharge its duties to investigate, support the investigations of others in the overall supervision framework of the Regulation, investigate jointly and otherwise exchange information. The Department considers that section 36 (confidential information) of the Broadcasting Act 2009, as substituted by section 8 of the Online Safety and Media Regulation Act 2022 already provides for that exchange of confidential information without any further amendment.

HEAD 24 – Amendment to the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022

To provide –

In Schedule 1, to add –

Reference Number	Union measures	National measures	Department
67	Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)		Department of Enterprise, Trade and Employment
68	Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)	Broadcasting , Other Media Regulation and Digital Services Acts 2009-2023	Department of Enterprise, Trade and Employment & Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media

Explanatory Note

This Head gives effect to Article 90 of the Regulation, which inserts a reference to the Digital Services Act into Annex 1 of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

Directive (EU) 2020/1828 will be transposed into Irish law by the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2023.

The General Scheme of the Bill was published by the Department of Enterprise, Trade and Employment on 22 March 2022 and the Joint Oireachtas Committee on Enterprise, Trade and Employment issued its pre-legislative scrutiny report on 1 December 2022.

Head 6 of that General Scheme provides that a representative action may only be brought in respect of "*an alleged infringement by a trader of any of the provisions of Union law as transposed into national law, listed in Schedule 1, that harm or may harm collective interests of consumers*".

This Head also gives effect to Article 52 of Regulation (EU) 2022/2065 known as the Digital Markets Act, which inserts a reference to itself into Annexe 1 of Directive (EU) 2020/1828.

Appendix

Designation of other regulators as competent authorities under the Regulation

Article 49 of the Digital Services Act Regulation provides that each Member State shall designate one or more competent authorities to be responsible for the supervision of providers of online intermediary services and enforcement of this Regulation, subject to just one authority being designated as the Digital Services Coordinator. Any additional competent authority may be assigned certain specific tasks or sectors, and the respective tasks of the Digital Services Coordinator and any other competent authorities must be clearly defined.

This General Scheme of the Digital Services Bill 2023 implements the Government's Decision to designate Coimisiún na Meán as the Digital Services Coordinator. It does not allocate specific tasks or sectors to any other regulator.

It is the Government's intention to avail of the option in Article 49 to designate other competent authorities where those authorities' remits are close to, or match, aspects of the Digital Services Act Regulation. This is to build on existing expertise and avoid both duplication and potential gaps. It is also to meet the Government's objective, set out in *Harnessing Digital: The National Digital Framework* (Published February 2022), of having a coherent regulatory framework for digital in Ireland.

Accordingly, the Department of Enterprise, Trade and Employment is assessing the functions and mandates of other existing relevant regulators and analysing the provisions of the Digital Services Act Regulation. The Department will then make proposals to the Government for the appropriate allocation of responsibilities to authorities other than Coimisiún na Meán.

Those proposals will be in the form of draft legislation and will take account of the fact that the Digital Services Act Regulation will come into full effect on 17 February 2024.