

TRIS notification (Draft Online Safety “Code” proposed for adoption by Coimisiún na Meán giving effect to Article 28b of the AVMS Directive)

- Notification Number: 2024/0283/IE (Ireland)
- Date of receipt: 27/05/2024
- End of Standstill: 28/08/2024

Technology Ireland’s position on compatibility of the notified draft with EU law

I. Introductory statement

Technology Ireland welcomes the opportunity to provide comments on Coimisiún na Meán’s (CnaM) Draft Online Safety Code (the Code), which is intended to give effect to Article 28b of the Revised Audiovisual and Media Services Directive (EU) 2018/1808 (AVMSD).

Technology Ireland is an association within Ibec, which represents the ICT, Digital and Software Technology Sector. Technology Ireland is committed to promoting trust in our industry, particularly as the online world has accelerated in its importance to our lives.

As a sector we strongly voice our support for the co-regulatory approach encouraged by the AVMSD, to achieve protection of all users, including children and young people, from harmful online content. Our members are committed to working closely with regulators and civil society to address evolving harms and to operating within a code that reflects the intentions of the AVMSD, which clearly defines the objectives which our sector must meet in order to achieve these goals.

Notwithstanding our members’ commitment in this regard and their general support of the goals of the Code, we do have concerns about Ireland’s transposition of the AVMSD via the Code. In particular, we have a number of concerns that certain areas of the Code go beyond the appropriate measures envisaged by AVMSD and overlap and conflict with requirements set out in the Digital Services Act (DSA), which was intended to be a full harmonisation instrument (as set out in Recital 9 DSA). We set these out below.

We outline below some key overarching observations and issues in this regard, which demonstrate a lack of alignment between the Code and EU legislative and regulatory priorities. We have also listed some additional issues of note in the appendix to this submission.

II. Issues

(A) *Parental Control Obligations*

The Code includes a number of obligations on video sharing platform service providers (VSPs) to offer parental control measures (Section 14). More particularly, it requires that parental controls must be offered which:

- restrict a user under the age of 16 from viewing content shared by users unknown to them;
- restrict all users from viewing content shared by a user under the age of 16 that is unknown to them; and
- requires that parental controls must be offered which give parents the ability to restrict a user under the age of 16 from viewing content based on language terms contained in the description of that content.

As such the Code requires parental controls that are able to prevent a minor under the age of 16 from viewing content based on these restrictions regardless of whether or not the content itself is actually or potentially harmful. This goes beyond what is required and envisaged by AVMSD, which requires measures providing for parental control systems be put in place as appropriate “with respect to content which may impair the physical, mental or moral development of minors” (our emphasis).

Further, assuming that these provisions will apply across the EU, such requirements also fail to reflect differing digital ages of consent applicable in varying Member States. Article 8(1) GDPR explicitly grants EU member states a discretion to set the digital age of consent at between 13 and 16 years.

We are also concerned about the compatibility of such broad prohibitions with the risk mitigation framework established by Article 35 of the DSA which will apply to a number of the very large online platforms which are also designated VSPS subject to the Code). Article 35 DSA requires that platforms put in place reasonable, proportionate, and effective mitigation measures tailored to the specific systemic risks identified pursuant to an Article 34 DSA risk assessment (which measures may include parental controls - Article 35 1 (j)) “with particular consideration to the impacts of such measures on fundamental rights”. The prescriptive measures required in the Code fail to take account of this careful balance and instead implements blanket prohibitions.

Further, the Code’s parental control requirements also conflict with Article 28 of the DSA, which requires platforms to put in place appropriate and proportionate measures to ensure a high level of safety for minors - where such an assessment of proportionality would necessarily require an assessment of the risks posed by the services rather than a prescriptive blanket ban approach.

(B) Terms and Conditions and Related Reporting and Flagging Obligations

The Code requires VSPS to preclude users from uploading or sharing certain content falling under the category of “regulated video content” and “restricted indissociable user-generated content” within their terms and conditions (Section 12).

The obligation to impose these restrictions applies to all users and not just where the user is a minor. However, AVMSD only requires that appropriate measures be put in place in T&Cs to protect minors from content which may impair their physical, mental or moral development. Further, the outright prohibition of this content exceeds the requirements of the AVMSD which requires that “appropriate

measures” would be taken to protect minors where such measures should be determined “in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake.”

The impact of this prohibition is compounded by Section 15 of the Code, which requires VSPS to establish and operate reporting and flagging mechanisms for all users in relation to this content. Again, this would appear to exceed what could be regarded as appropriate measures required under AVMSD. It is also worth noting that the DSA has also harmonised the rules around notice and action mechanisms, only requiring such mechanisms to be in place to notify illegal content (as opposed to the type of legal but harmful content prescribed by the Code).

Finally, the requirement to prohibit certain types of legal (but harmful) content in a VSPS’s T&Cs conflicts with the harmonisation achieved by Article 14 of the DSA which exhaustively harmonises a platform’s obligations with respect to their T&Cs.

(C) Transparency Reporting

The Code also imposes transparency reporting obligations on VSPS (which appear to be subject to adoption of further specifications) with regard to handling communications from users on complaints or other matters (Section 17.3).

We have concerns about how broad this obligation is drafted, particularly given the potential overlap with detailed and comprehensive transparency reporting requirements in Articles 15, 24 and 42 of the DSA.

At a minimum, clarity should be provided within the Code that this requirement should expressly exclude reporting on information outlined in Article 15 DSA (and more particularly Article 15 (1) (d) which sets out transparency requirements in relation to complaints received through a provider’s internal complaint handling system).

ADDITIONAL ISSUES OF NOTE

(a) Application of Code to “Children”

Section 10 of the Code is intended to reflect the requirements of Article 28b of the AVMSD, including the requirement for VSPS providers to take appropriate measures to protect minors from programmes, user-generated videos and audiovisual commercial communications that may impair their physical, mental or moral development.

Section 10 uses both the terms “children” and “minors”. “Children” is a defined term under the Code (albeit under Part B), meaning persons under the age of 18. However, the AVMSD applies in respect of “minors”, which is not a defined term (under the Code or the AVMSD). Adoption of the term “minors” throughout the Code would grant providers more flexibility (and aligns with the actual AVMSD wording).

Further, applying Section 10 requirements to older children may be disproportionate and oversteps the requirements of the AVMSD. The Code should allow for differential treatment for age groups under 18 (for example, 0 - 12 yrs / 13 - 15 yrs / 16 - 18 yrs).

(b) Suspension of Accounts

Section 12.7 - 12.10 and 13.7 - 13.10 of the Code requires VSPS to suspend user accounts for a reasonable period of time in certain circumstances. However, the list of “appropriate measures” provided under Article 28b(3) of the AVMSD does not include any obligation to suspend accounts which repeatedly infringe a provider’s T&Cs.

The obligations around the suspension of user accounts is fully harmonised by Articles 23 and 35(1)(b) of the DSA. While the Code recognises a carveout for the application of Articles 23 and 35(1)(b) of the DSA at ss. 12.10 and 13.10 of the Code, we disagree that the DSA leaves discretion to Member States to introduce national obligations which go beyond Articles 23 and 35(1)(b) of the DSA. Obligations in respect of account suspensions should continue to be dictated solely by the DSA framework.

(c) Transition Period Proportionality

The Code does not provide for a transition period to allow VSPS providers time for implementation. CnaM has said that a transition period may be considered further in relation to Part B of the Code only.

A proportionate minimum transition period of at least 12 months should be adopted to allow VSPS providers to adapt their systems, controls and processes to address the requirements of the Code. The DSA allowed a minimum transition period of 15 months for providers after the DSA text was finalised.

(d) Statutory Guidance

In its original consultation on the Code, CnaM noted that the guidance accompanying the Code does not form part of the Code but sets out CnaM’s expectations as to how VSPS can best implement the Code’s requirements. CnaM also noted that the guidance would be non-binding but failure to follow it

may be taken into account, to the extent it considers appropriate, when deciding whether to open an investigation or whether there has been an infringement. Clearly, these statements cannot be ignored by VSPS providers and inevitably gives the guidance produced by CnaM a degree of weight.

In its Response to Consultation document on the Code, CnaM notes that it “is still considering its position on statutory guidance material to be issued. This document does not contain revised statutory guidance or a response to the submissions raised. It is intended that the statutory guidance material will be finalised for publication in tandem with the final Online Safety Code”.

As a result, the European Commission will not have sight of this substantial guidance when considering the compatibility of the Code with EU law. We believe that the European Commission should call upon CnaM to submit this guidance under the TRIS procedure, along with the Code, once it has been finalised.

(e) Appropriate Measures

It is clear from wording of Article 28b that Member States are not required or expected to take a one size-fits all approach to the regulation of VSPS. In particular, Article 28b(3) of the AVMSD provides that measures should only be required and implemented where they are ‘appropriate’, this being “determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest”.

However, this important language is entirely absent from the Code which simply states at paragraph 10.7 that “If any issue arises as to the appropriateness of the measures, it will be a matter for the Commission to determine the same”.

To ensure compliance with the AVMSD, and in the interests of clarity and regulatory certainty, these requirements should be reflected directly within the Code.

Concluding statement

As noted above, Technology Ireland supports the goals of the Draft Online Safety Code. However, it should be noted that the EU legislature has sought to strike a careful balance between protecting EU citizens online with the protection of EU citizens’ fundamental rights in its adoption of the AVMSD and the DSA and has sought to do so in a practicable and proportionate way. Accordingly, it is important that Ireland’s transposition of the AVMSD neither disturb that careful balance, nor distort the internal market, by imposing obligations which go beyond what is required by the AVMSD and which potentially conflict with the DSA.