

TRIS NOTIFICATION PROCEDURE

Irish Online Safety Code

July 2024

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the notification of the Draft Irish Online Safety Code [2024/0283/IE](#) (Draft Online Safety Code or OSC).

The Draft Online Safety Code aims to transpose Article 28b of the Audiovisual Media Services Directive (AVMSD)¹ into Irish law. The Irish regulator Coimisiún na Meán (CnaM), highlighted the overall goal of the Draft OSC is to ensure that Video-Sharing Platform (VSP) providers “take appropriate measures to protect children from harmful content, including illegal content and adult-only video content”. The Draft OSC would apply to VSPs established in Ireland, on an EU-wide basis. However, as it stands, the Draft OSC contains obligations which go beyond the transposition of the AVMSD and which conflict with the Digital Services Act (DSA)².

The DSA fully harmonises the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, and within which fundamental rights enshrined in the Charter are effectively protected and innovation is facilitated. While the DSA is without prejudice to the rules laid down by other Union legal acts, including the AVMSD, national transpositions of these Union acts must strictly respect the Union act’s scope of application in order not to undermine the full harmonisation effect of the DSA.

CCIA Europe considers that the following obligations are at risk of creating contradictions between the Draft OSC and the DSA:

1. Overly prescriptive moderation obligations of illegal and harmful content
2. Suspension of repeat infringers for uploading harmful content
3. Inconsistent obligations on parental control measures
4. Overlap of transparency measures
5. Overreaching regulation of indissociable content

¹ Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, available [here](#).

² Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available [here](#).

This is why CCIA Europe would like to call on the European Commission to issue a detailed opinion requesting the CnaM to amend the Draft OSC to prevent overlaps and conflicts with the DSA's direct applicability and to ensure it does not exceed the scope of the AVSMD, in order to avoid the creation of technical barriers to trade between Member States.

I. Overly prescriptive moderation obligations of illegal and harmful content

The Draft Online Safety Code contains several overly prescriptive obligations on VSPs to moderate defined categories of illegal and harmful content. In particular:

- Section 12.2 of the Draft OSC requires that outright restrictions are included in VSPs' terms and conditions about the uploading and sharing of certain illegal and broad categories of harmful content. These categories are defined in Section 11 as "restricted video content" and "restricted indissociable user-generated content".
- Section 15.1 of the Draft OSC requires VSP providers to establish and operate reporting and flagging mechanisms for both illegal and harmful content and to provide users with an explanation of the effect given to user flags.

These prescriptive obligations go beyond Article 28b of the AVMSD which foresees "appropriate measures" to protect minors and all users from certain content and further specifies that appropriate measures must be determined in light of the nature of the content in question and the characteristics of the category of persons to be protected. The AVMSD requires appropriate measures to protect minors from content "which may impair their physical, mental or moral development". By its nature, the fact that AVMSD envisages a separate category of content that is potentially harmful to children, such content is not necessarily harmful to adults - yet the Draft OSC requires a restriction of this content for all users and as such constitutes a disproportionate measure.

While these obligations exceed AVMSD they also overlap with the DSA, especially Articles 14 on terms and conditions and 16 on notice and action mechanisms. Article 14 provides obligations for all providers of intermediary services - which encompasses the definition of VSPs - on the content and format of terms and conditions, leaving it to the provider to determine what restrictions should be enforced having due respect for users' fundamental rights. Similarly, Article 16 requires intermediary services to put in place notice and action mechanisms allowing users to notify them of content they consider to be illegal.

Further, the Draft OSC also fails to take into account areas of overlap between the requirements of the Draft OSC and the DSA. The Draft OSC should resolve this by deeming that in respect of areas of overlap compliance with the DSA is sufficient for VSPs who fall under both sets of rules.

II. Suspension of repeat infringers for uploading harmful content

Section 12.7 of the Draft Online Safety Code requires VSP providers to suspend the provision of their service to users who have frequently infringed their terms and conditions, including by sharing harmful content prohibited in such terms and conditions. However, suspension of users who repeatedly infringe on a VSP provider's terms and conditions is not one of the "appropriate measures" contained under the AVMSD. Accordingly, this provision of the Draft OSC goes beyond the requirements of the AVMSD.

Additionally, suspension of the provision of services to users who frequently provide manifestly illegal content is directly regulated under the DSA. Notably, Article 23 of the DSA only provides for the suspension of "recipients of the service that frequently provide manifestly illegal content" and entrusts online platforms to decide in their terms and conditions how to tackle harmful content, as they know best their services. The Draft OSC should therefore be aligned with the DSA in that regard to avoid potential conflicts.

Section 12.10 of the Draft OSC clarifies that the requirements for suspension of repeat infringers should "apply only insofar as the consequences for the user are not covered by measures adopted pursuant to Articles 23 and 35(1)(b)" of the DSA, respectively on measures against misuse for online platforms and mitigation of risks for very large online platforms (VLOPs).

The inclusion of such an obligation within the Draft OSC is contrary to the DSA's objective of fully harmonising the rules applicable to intermediary services within the EU. In particular, Recital 9 of the DSA expressly states that Member States should not adopt or maintain additional national requirements relating to matters falling within its scope, as this would affect the direct and uniform application of the fully harmonised rules applicable to providers of intermediary services in the EU.

In circumstances where the suspension of repeatedly infringing accounts (1) is not one of the appropriate measures specified under the AVMSD and (2) is already a matter falling within the scope of the DSA, this should not be a measure included within the Draft OSC.

Therefore, the suspension of repeat infringers for uploading harmful content creates a contradiction with the DSA which will be complex to resolve in practice. The DSA only requires the suspension of repeat infringers for uploading manifestly illegal content and entrusts online platforms to enforce other restrictions in their terms and conditions "acting in a diligent, objective and proportionate manner with due regard to the rights and legitimate interests of the parties involved". The Draft DSC should be aligned with the DSA in that regard to avoid potential conflicts.

III. Inconsistent obligations on parental control measures

Section 14.2 of the Draft Online Safety Code obliges VSPs which allow users under the age of 16 to use their services, under their terms and conditions to put in place parental control systems, with the following functionalities:

- “i) enable parents or guardians to restrict a child from viewing video content uploaded or shared by users that are unknown to the child;
- ii) enable parents or guardians to restrict viewing of video content uploaded or shared by the child by users that are unknown to the child; and
- iii) give parents or guardians the ability to restrict a child from viewing video content or audiovisual commercial communications based on language terms contained in the description of the video or commercial communication or based on metadata about the video or commercial communication;”

This prescriptive approach to the functionalities of parental control systems is again going beyond the requirements of the AVMSD which requires only appropriate measures providing for parental control systems. As such, these obligations are inconsistent with the DSA Articles 28 and 35. Article 28 requires that the measures put in place by online platforms to ensure a high level of safety for minors should be appropriate and proportionate. Article 35 on VLOPs’ mitigation of risk requires reasonable and proportionate measures including parental control tools which are tailored to the specific systemic risk identified pursuant to DSA risk assessments and “with particular consideration to the impacts of such measures on fundamental rights”.

The prescriptive obligations of Section 14.2 of the Draft OSC would prevent VSPs/VLOPs from tailoring the parental control solution to their services and the specific risks identified. To ensure alignment with the requirements of the DSA, the Draft OSC should state that these functionalities should be applied as appropriate and proportionate in line with the risks identified by VSPs.

IV. Overlap of transparency measures

Section 17.3 of the Draft Online Safety Code requires VSP providers to provide a report to the CnaM, every 3 months, on their handling of communications from users raising complaints or other matters. The DSA contains broader transparency reporting obligations for all intermediary services in Article 15, which specifically covers user complaints in paragraph 1(d).

This transparency measure is a substantial overlap with the DSA, which could be burdensome for companies without bringing significant new information to regulators. To ensure alignment with the EU law, the Draft OSC could simply make these transparency measures applicable to VSPs who are not already covered by the same obligations under the DSA.

V. Overreaching regulation of indissociable content

Sections 12.2 and 15.1 of the Draft Online Safety Code extend beyond the scope of the AVMSD by regulating “indissociable” user-generated content, as defined in Section 11. The AVMSD only requires that VSP providers take measures that protect against harm caused by user-generated content itself. However, the Draft OSC not only regulates user-generated content but also content that is “indissociable” from it (e.g., captions). This approach risks creating a technical barrier to trade for VSP providers, as such content is not regulated under the AVMSD in other EU Member States.

Conclusion

CCIA Europe asks the European Commission to issue a detailed opinion so that the CnaM changes the Draft Online Safety Code in order to remain fully aligned with the AVMSD and the DSA. These changes would greatly help VSPs to gain legal clarity and would ensure there are no technical barriers to trade being created between Member States, allowing VSPs to continue to innovate and flourish in the European Single Market.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

Visit ccianet.org/hub/europe/ or x.com/CCIAEurope to learn more.

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