

Decision Framework for the Designation of a Named Service as a Video-Sharing Platform Service

1. Introduction

The Online Safety and Media Regulation Act 2022 amended the Broadcasting Act 2009, to provide for a regulatory framework for online safety and the establishment of Coimisiún na Meán (the “**Commission**”). The Commission was formally established on 15 March 2023.

The Broadcasting Act 2009 as amended (the “**Act**”) is applicable, on a European Union-wide basis, to broadcasting services, on-demand audiovisual media services, video-sharing platform services and other relevant online services.

The Act transposes the revised Audiovisual Media Services Directive (the “**AVMS Directive**”) into Irish law. The AVMS Directive requires Member States to ensure that video-sharing platforms providers under their jurisdiction take appropriate measures to protect young people from potentially harmful content and to protect the general public from illegal content and from incitement to violence or to hatred. It also requires Member States to ensure that providers of video-sharing platform services (“**VSPS**”) comply with advertising requirements and standards on provided services.

The Act confers designation powers upon the Commission. Section 139E of the Act provides that the Commission may designate a relevant online service as a service to which online safety codes may be applied. A designation can be made in relation to a named service or in relation to all services falling within a category of services described in the designation. A service may be designated both as a named service and as falling within a category.

Under the Act, VSPS are identified as a form of relevant online service that the Commission must designate, both as a category of services and as a named service where the provider of the service or services is established in Ireland.

Designation can be described as the process by which the Commission, pursuant to its statutory powers and obligations, determines that a given online service has the essential characteristics and meets the definition of a VSPS as set out in legislation.

On 14 August 2023, in accordance with the statutory provisions, the Commission published notice of its designation of VSPS as a category of relevant online services. This designation became effective on 11 September 2023.

2. What is a video-sharing platform service (“VSPS”)?

VSPSs are a type of online service where users can upload, share, and engage in video and other social media content. The provision of audiovisual programmes or user-generated video or both may be the principal purpose of the service or of a dissociable section of the service or an essential functionality of the service. In order to be designated as a VSPS, a service must meet the defining criteria or characteristics of a VSPS and the provider of the service must be under the jurisdiction of the State set out in the Act.

3. Purpose of this Decision Framework

The Commission has developed this Decision Framework (“**Framework**”) to inform providers of online services of its assessment and decision-making process to determine whether a named service meets the defining criteria of a “video-sharing platform service” and the provider of such service is under the jurisdiction of Ireland. The defining criteria of a VSPS are grounded in Articles 1(1)(aa), 28a, and 28b of

the revised Audiovisual Media Services Directive (the “**AVMS Directive**”), and in section 2 of the Broadcasting Act 2009 as amended (the “**Act**”).

The Commission’s Framework is informed by Irish and European regulations and legislation, consultation, data-gathering, and independent research. As part of the independent research underpinning the Framework, the Commission has published “A Decision Framework Report” on 10 November 2023 authored by PA Consulting.

A designation decision framework supports evidence-based, transparent, consistent, and proportionate decision-making by the Commission in the exercise of its statutory functions.

The Framework is not a substitute for any statutory provision(s) and does not constitute legal advice. Providers of online services that may be subject to designation are advised to obtain their own independent legal advice on the relevant statutory provisions.

4. Stages of the Decision Framework

The Commission’s decision-making process is prescribed in section 139 of the Act. Section 139 mandates the procedure by which both categories of services and named services may be designated as VSPS. This decision-making process can be divided into three (3) “stages”, as follows:

Stage 1: Legal and Evidential Review

- the Commission conducts a legal and evidential review in order to identify services potentially falling within scope of designation.
- following this review, the Commission may have reason to believe that an online service may be a VSPS.
- the Commission will issue a Notice to the provider of the service pursuant to section 139F of the Act.

Stage 2: Initial View and Consultation

- the Commission will conduct a review of all of the information available to it to support its assessment and form an initial view on whether the service appears to be a VSPS.
- the Commission will, following its assessment, take an initial view on whether the service appears to be a VSPS.
- before designating a service as a named VSPS, the Commission will consult with the provider of the service. The provider of the service will have a further opportunity to provide information to the Commission.

Stage 3: Final Decision and Designation

- the Commission will make a final decision based on the information available to it.
- the Commission will give the provider of the named service notice in writing of the designation.
- the designation becomes effective after the Commission has provided notice in writing of the designation to the provider of the service.
- the named service will be included in the public Register of Designated Services maintained by the Commission.

Stage 1: Legal and Evidential Review

In the first instance, the Commission will conduct a review of the legal provisions and the evidence and information available to it to identify services that may fall within scope of the designation procedure. This review may provide a ‘reason to believe’ that the service may be a VSPS the provider of which is under the jurisdiction of the State. The review therefore encompasses an assessment of the VSPS

defining criteria and the jurisdiction criteria as set out in the AVMS Directive and the Act. In accordance with section 139G(4) the Commission will also have regard to the European Commission [Guidelines](#) on the application of the essential functionality criterion of the definition of a VSPS under the AVMS Directive.

(a) Legislative Review

VSPS Definition

The Act defines VSPS as a service where: (i) the principal purpose of the service is devoted to, or; (ii), the principal purpose of a dissociable section of the service is devoted to, or; (iii), an essential functionality of the service is devoted to providing audiovisual programmes or user-generated videos, or both, by electronic communications networks, to the general public, in order to inform, entertain, or educate; and the provider of the service does not have effective control over the selection of the programmes or videos but determines their organisation, by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.¹

The following questions are therefore relevant to the Commission's assessment:

- i. Is the service over an electronic communications network;
- ii. Is the service provided on a commercial basis;
- iii. Does the service provide audiovisual programmes or user-generated videos or both;
- iv. Is the service provided to the general public;
- v. Does the provider of the service have effective control over the selection of programmes or user-generated videos available on the service;
- vi. Does the provider of the service determine the organisation of programmes or user-generated videos on the service; and
- vii. Is the principal purpose of the service devoted to providing audiovisual programmes or user-generated videos or both to the general public in order to inform, educate or entertain; or
- viii. Is the principal purpose of a dissociable section of the service devoted to providing audiovisual programmes or user-generated videos or both to the general public in order to inform, educate or entertain; or
- ix. Is the provision of audiovisual programmes or user-generated videos or both an essential functionality of the service (this is explained further below).

Essential Functionality Criterion

In July 2020 the European Commission published [Guidelines](#)² on the application of the essential functionality criterion of the definition of a VSPS under the AVMS Directive.

The application of essential functionality criterion recognises that it may be the case that an online service with a range of different functionalities has a content feed that only supplies videos or that a service has a videos "section" of such form and content as to make it independent of distinct from the rest of the services or functionality it provides. In such circumstances the assessment will focus on the standalone nature of the audiovisual content in that section, i.e. videos can be accessed and watched regardless of whether other content is accessed and the audiovisual content is not merely an

¹ Section 2 of the Act.

² Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive (2020/C 223/02).

indissociable complement to other non-video content or activity on the service. The Guidelines also note that the principal purpose test and the essential functionality test are not necessarily mutually exclusive. In particular, services having a dissociable section which could constitute a video-sharing platform under the principal purpose criterion, may at the same time also qualify as a whole as a video-sharing platform on the basis of the essential functionality criterion.

Section 139G of the Act requires the Commission to have regard to these Guidelines. When applying the essential functionality criterion, the Commission will therefore apply the indicators referenced in the Guidelines.

The Guidelines state that for audiovisual content to constitute an essential functionality of the service, the audiovisual content “*must not be merely ancillary to, or a minor part of, the activities to the service*”. Therefore, if videos and/ or programmes constitute a non-minor part of the service (for example by contributing in an important manner to the attractiveness, functionality or market success of the service) the provision of such programmes and/or videos would be deemed to be an essential functionality of the service. Determining this, however, requires an overall assessment of the service and the value of videos and/or programmes offered, taking into account both qualitative and quantitative indicators.

The Commission will have particular regard to the users’ perspectives and, in particular, to the degree of their exposure to audiovisual content when accessing the service/s.

The Guidelines identify the following four relevant indicators:

1. *The relationship between the audiovisual content and the main economic activity or activities of the service*

Generally, if video content has value as a standalone item and is independent of other underlying economy activities on the platform service, it is unlikely to be merely ancillary to, or a minor part, of the service.

2. *Quantitative and qualitative relevance of audiovisual content for the activities of the service*

The greater the importance and amount of video content on a service, the less likely it is that the content is merely ancillary to, or a minor part of, the activities of the service. Both qualitative and quantitative assessments of the amount of video content on a service can be undertaken.

3. *Monetisation or revenue generation from the audiovisual content*

If a platform generates revenue or monetises video content on its service this generally indicates that the content is not merely ancillary to, or a minor part of, the services’ activities.

4. *Availability of tools aimed at enhancing the visibility or attractiveness of audiovisual content*

Specific tools designed to boost videos suggests the content is not merely ancillary, or a minor part of, the activities of the service.

It should be noted that the four indicators will not be applied cumulatively and the absence of one or more of them will not automatically lead to the conclusion that the service is not a VSPS. A service will be considered as fulfilling the test of essential functionality where, on the basis of the Commission’s overall assessment, a sufficient number of indicators analysed support the conclusion that the audiovisual content provided by the service is not merely ancillary to, or a minor part, of the activities of the service.

Jurisdiction

The Commission will have regard to the following questions in order to determine if a service appears to be under the jurisdiction of the State:

- Is the provider established³ (i.e. carrying out an economic activity) in the territory of Ireland?
- If the provider is not carrying out an economic activity, does it have a parent undertaking⁴ or subsidiary undertaking⁵ that is established in the territory of Ireland?
- If it does not have a parent or subsidiary undertaking carrying out an economic activity but is part of a corporate group⁶ structure, is any other undertaking in that group established in the territory of Ireland?
- Where the provider has different subsidiary undertakings established in the territory of Ireland and in different EU member states, the Commission will consider the following matters in respect of each undertaking:
 - i. place of establishment;
 - ii. details of the economic activity pursued by the undertaking;
 - iii. date on which the undertaking first began its activity; and
 - iv. whether the undertaking maintain a stable and effective link with the economy of the member state of establishment?

A Jurisdiction Decision-Tree illustrating the above is set out at *Appendix 1*.

(b) Evidential Review

Research

This evidence, data-gathering and research will include independent verification by the Commission that a service meets the characteristics and defining criteria of a VSPS (as set out above) and the jurisdictional criteria. This research will focus in particular on the service design, self-identification and branding, the import of audiovisual content and its relevance to the activities of the service as well as the functionalities, tools, systems and features tailored for, or specific to, audiovisual content from the perspective of the service user. The sources of information will include:

- Commissioned expert research. Coimisiún na Meán commissioned PA Consulting to report on the potential structure of a decision-making framework to assist An Coimisiún in its assessment of whether a provider is established in Ireland and the online service it provides meets the defining criteria of a video-sharing platform service (VSPS). The framework published [here](#) suggests a number of questions, indicators, and metrics that can be explored as part of decision-making to designate relevant online services. It

³ "established" has the same meaning as in Article 3(1) of the E-Commerce Directive.

⁴ "parent undertaking" means an undertaking that controls one or more subsidiary undertakings.

⁵ "subsidiary undertaking" means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking.

⁶ "group" means a parent undertaking, all its subsidiary undertakings and all other undertakings having economic and legal organisational links to them.

highlights a number of sources of information to which the Commission may have regard in its assessment of such services.

- Desk and other research including analyses of: (i) the service itself from a user perspective and of open-source information concerning the service, including information published by the provider of the service, e.g. Terms of Service, Terms and Conditions, User Agreements, Privacy Policies, Support webpages, Help Centre webpages, FAQ webpages etc. and third party information about the service; and (ii) the place of establishment of providers of a service, including company registration information, official documents referencing the place of establishment and information published by the provider of the service.
- Information submitted, and representations made, by the online service providers to the Commission.

Information Notice

Section 139G of the Act provides that, where the Commission has “reason to believe” that a relevant online service may be a VSPS, the provider of which is under the jurisdiction of the State, the Commission must issue an Information Notice or Notices, requiring the provision of any information that appears to the Commission to be relevant for the purpose of designation.

An Information Notice will request information in relation to:

- (a) The provider’s place of establishment;
- (b) The content, purpose, and activities of the service and of any dissociable section of the service;
- (c) The provider’s level of editorial control over the service and any dissociable section of the service;
- (d) The relationship between the audiovisual content and the main economic activity or activities of the service;
- (e) The qualitative and quantitative relevance of audiovisual content for the activities of the service;
- (f) Monetisation or revenue generation from the audiovisual content;
- (g) The availability of tools to enhance the visibility or attractiveness of the audiovisual content.

Providers are required to provide accurate and complete information in response to statutory information requests by the specified deadline.

In advance of sending any Information Notice, the Commission will engage with the provider of the online service on any quantitative datasets requested to ensure the same are readily available, reasonable and proportionate for the purpose of this assessment. The Information Notice may also include a stipulation that:

- where the quantitative data cannot be made available within the timeframe requested, the provider may provide similar data that is available; and/or
- where no quantitative data is available the provider must state this to be the case; and
- indicate when the data requested or similar data can be made available.

This is without prejudice to the Commission's right to:

- proceed to Step 2 and take a view on whether a service appears to be a VSPS;
- require this or other information by way of a further Information Notice.

Stage 2: Initial View and Consultation

Stage 2 of the Commission's decision-making process will have regard to its legal and evidential review and the information provided by the provider of the service pursuant to an Information Notice which may include quantitative datasets and other evidence about the actual usage (if provided by the online provider) of user-generated videos and audiovisual programmes on the service.

It is important to note that the Information Notice is one, but not a critical or definitive, source of information in the decision-making process. The Commission notes that the information and evidence, about the actual use of user-generated videos and programmes on the service, if provided, has the potential to support or to rebut the Commission's initial reasons to believe the service may be a VSPS.

The Commission will, following its assessment of all of the information, data and evidence available to it at this stage, take an initial view on whether the service appears to it to be a VSPS.

In accordance with section 139G of the Act where it appears to the Commission that the service may be a VSPS the provider of which is under the jurisdiction of the State, the Commission must designate the service as a relevant online service under section 139E of the Act.

Section 139H of the Act provides that, *before* designating a service, the Commission shall consult the provider of the service.

At the conclusion of Stage 2, the Commission will therefore notify a provider of the initial view taken providing reasons for this view and consult with the provider accordingly. Where the information requested in the Information Notice was not provided by the provider within the specified deadline, the Commission will afford the provider another opportunity to provide such information during the consultation. The period of consultation will be three weeks unless otherwise agreed by the Commission.

Stage 3: Final Decision and Designation

Stage 3 of the Commission's decision-making process will have regard to its legal and evidential review, the information provided by the provider of the service pursuant to an Information Notice and / or during the statutory consultation process. The final decision of the Commission in Stage 3 will be taken on the basis of the information, data and evidence that is available to the Commission. Accordingly, in circumstances where a provider fails to provide the requested information and/or fails to engage in the consultation process, the initial view taken at Stage 2 will inform the final decision. This does not preclude a provider from applying for a revocation of designation on submitting information, data or evidence at a later date that demonstrates that the service does not satisfy the defining criteria of a VSPS. It should also be noted that the requirement to consult with the service provider does not apply if, after taking reasonable steps to consult it, the Commission is unable to do so.

A designation of a service as a VSPS takes effect on the Commission giving the provider of the service notice, in writing, of the designation. The statutory procedure for giving the provider a notice is set out in section 2D of the Act.

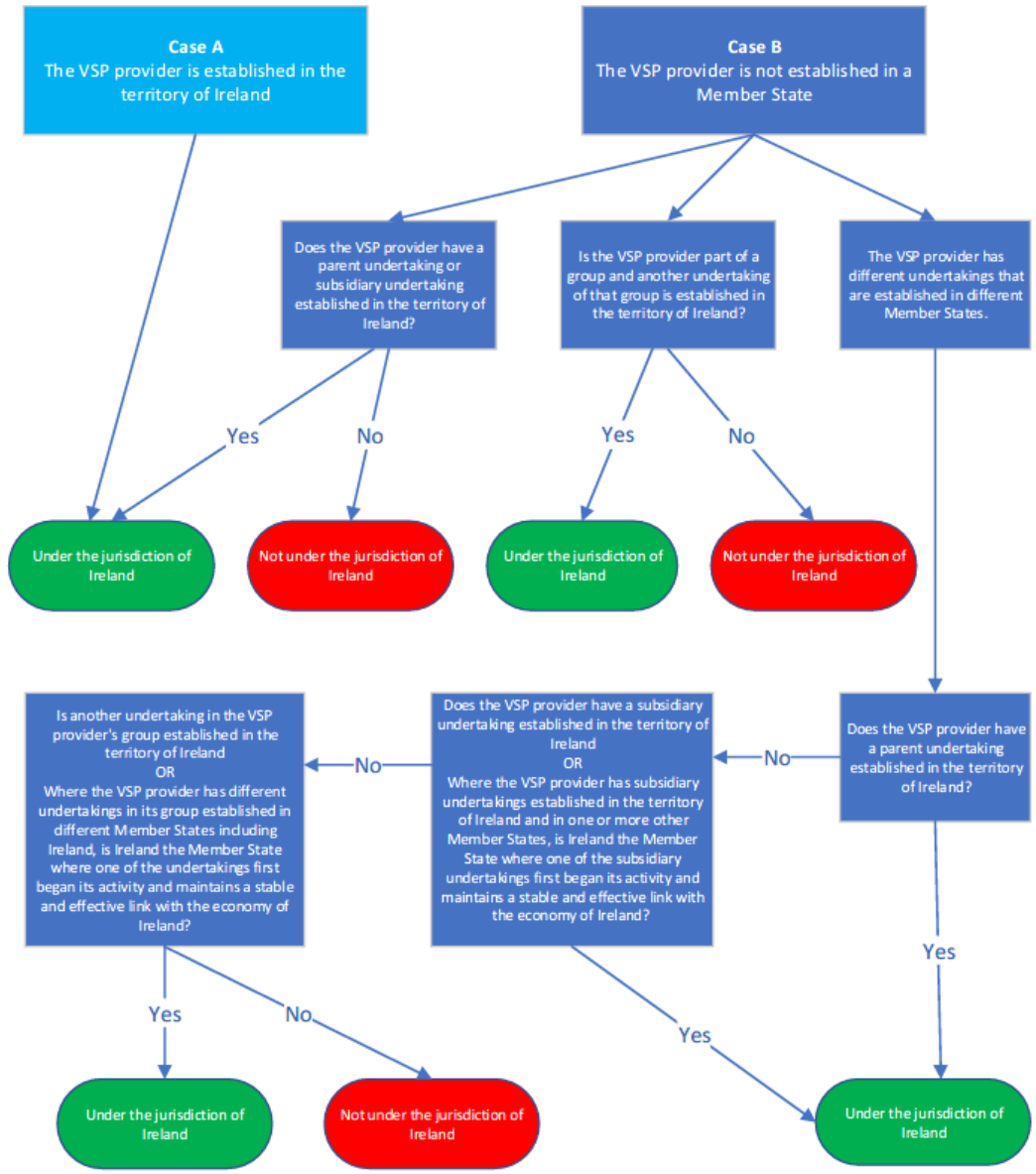
After a service has been designated as a VSPS, the details of the provider and the service shall be included in the Register of Designated Online Services published and maintained by the Commission pursuant to the requirements of section 139J of the Act.

The provider of a service may supply information to the Commission in support of the revocation of the designation decision. The Commission has the power pursuant to section 139I of the Act at any time to revoke a designation under section 139E.

Appendix 1

Jurisdiction Tree

VSP Jurisdiction



Note 1 : This diagram is based on Section 2B of the Broadcasting Act 2009 (as amended) and is for illustrative purposes only.

Note 2 : A provider is "established in the territory of Ireland" if it pursues an economic activity using a fixed establishment in the State for a definite or indefinite period.