

## Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht

### Written Submission by Ronan Lupton\*

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19 March 2021

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#### 1. Introduction and background

- 1.1 Chairperson and members of the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht (the “**Committee**”), I would like to thank you for the invitation to make a written submission and to contribute to your current deliberations and discussions on Internet Safety in Ireland and the General Scheme of the Online Safety and Media Regulation Bill (the “**OSMR**”).
- 1.2 I am a practicing barrister. I practice in the areas of commercial, competition, chancery, media, and regulatory law. I have taught criminal and constitutional law at professional level. I currently lecturer at UCD on the Data Protection and Privacy Diploma course on a part time basis, in complement to my practice at the Bar.
- 1.3 I chair the Association of Licensed Telecommunications Operators – ALTO, CLG. I am currently an independent advisor to the ISPCC advising on Internet content and online harm related issues.
- 1.4 Prior to commencing practice at the bar. I was Head of Regulatory Affairs at Verizon, the US telecommunications and internet company and was based here in Dublin. I also held a pan-European interconnect policy role.

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- 1.5 I commenced my career in telecommunications in 1998, and I have been involved in policy formulation and matters related to the Internet and telecommunications markets since around 2002.
- 1.6 I have served on the Department of Justice Internet Advisory Board – IAB, the Internet Safety Advisory Council and later the Internet Safety Advisory Committee – ISAC, from 2006 until 2014. Those committees are now reformed under the remit of the Minister for Communications and the group is called the National Advisory Council for Online Safety – NACOS.
- 1.7 I have also served as a non-executive director of the Internet Service Providers Association of Ireland – ISPAI, which operates and supervises the hotline.ie service.
- 1.8 I was appointed as a member of the Internet Content Governance Advisory Group – ICGAG,<sup>1</sup> in 2014 and I have also contributed to the work of the Law Reform Commission and the Report on Harmful Communications and Digital Safety.<sup>2</sup>
- 1.9 I have included references to the hearing transcript,<sup>1</sup> and to my Opening Statement,<sup>2</sup> made to the Oireachtas Committee on Justice and Equality on 16 October 2019 on the subject of Online Harassment and Harmful Communications. Where broadly similar points were made to those made in this submission.

## 2. Positioning

- 2.1 My submission to the Committee is made as an independent legal expert.
- 2.2 My evidence should not be attributed to ALTO or to any other organisation that I work with. I have not been asked to present any position in evidence for or on behalf of any organisation or body.

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<sup>1</sup> [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_justice\\_and\\_equality/2019-10-16/3/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2019-10-16/3/)

<sup>2</sup> [https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_justice\\_and\\_equality/submissions/2019/2019-10-16\\_opening-statement-ronan-lupton-barrister-at-law\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/submissions/2019/2019-10-16_opening-statement-ronan-lupton-barrister-at-law_en.pdf)

2.3 I intend to address four areas (two of which were specifically requested in your letter dated 8 February 2021):

- (i.) General remarks on the OSMR Bill;
- (ii.) The application of the content levy;
- (iii.) The protection of children across online services platforms; and
- (iv.) Conclusion and recommendations.

### 3. **General Remarks on the OSMR Bill**

3.1 The General Scheme of the OSMR Bill is designed to give effect to the revised Audiovisual Media Services Directive (“**AVMSD**”) a piece of European Legislation that was due to be transposed on or by 19 September 2020. The Government at the time chose to implement the AVMSD alongside imperative online safety measures, or the National Legislative Package (“**NLP**”) to include measures aimed at child and broader societal protection online.

3.2 Having been involved in two of the reports and various Government sponsored stakeholder forums giving rise to the OSMR Bill, I suggest that the Committee should take note that work commenced in this area in 2014 and disappointingly has moved at a very slow pace.

3.3 Indeed, that good work and this current review work has already been passed out by the much more cumbersome EU legislative organs who have recently introduced a Europe-wide Digital Services Act (“**DSA**”)<sup>3</sup> primarily aimed at reforming (on a wholesale basis) the Ecommerce Directive 2000/31/EU or as transposed in Ireland under S.I. 68 of 2003.

3.4 It is my opinion that the mechanism chosen by the previous Government to legislatively marry the AVMSD and the NLP is no longer relevant.

3.5 The State should now proceed to legislate separately and distinctly for AVMSD and the DSA. I make this point with some hesitation, as the NLP contains

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<sup>3</sup> Proposal for a regulation of the European Parliament and of the Counsel on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

legislation that has been found to be wanting for quite some time, particularly in the area of child protection online. There are a number of reasons why I have reached this conclusion.

- 3.6 First, the State was obliged to transpose the AVMSD by 19 September 2020, it did not do so and is likely to be subject to infringement proceedings by the European Union as a result. I suggest that the Government should move to take steps in conjunction with the Minister, to transpose the AVMSD as a separate legislative instrument and if practicable or even legally possible by means of secondary legislation, taking into account national margins of appreciation. A logical home for such a suggestion and change in tactics would see the Broadcasting Authority of Ireland (“BAI”) taking on the regulatory obligations set out in AVMSD.
- 3.7 Second, since the announcement of the OSMR Bill by Minister Richard Bruton on 4 March 2019, matters concerning the regulation of online media have moved on in Europe at a very significant pace. The DSA was published on 15 December 2020 and will be implemented within a similar if not identical timeline to the OSMR Bill. In my estimate by 2023 or at the latest 2024.
- 3.8 Third, the impact of DSA to the OSMR Bill is so significant and overlapping with the DSA that if the OSMR Bill passed in its current form, it will be required to be redraw many if not all aspects of the OSMR package as it is currently drafted today. That represents a very significant burden on the Oireachtas and indeed the officials charged with managing legislation at EU and national level.
- 3.9 Fourth, the vast majority of the drafting in the NLP aspects of the OSMR Bill can be quickly repurposed and saved for when the DSA text is approved for national transposition.
- 3.10 Fifth, the Committee is likely to hear evidence to the extent that: “*it is better to have something on the Statute Book, than nothing*” and while that is a good sentiment, it is specious. It would be remiss of the Committee to not heed the very significant legislative and practical overlaps in the DSA which will impact heavily on the General Scheme as it is published today and in particular in the NLP aspects of the package that will be subject to mandatory change.

3.11 Finally, the clear interweaving of European-wide Video Sharing Platform Service (“VSPS”) regulation with the more focused Irish NLP is not useful and currently gives rise to commercial confusion within the General Scheme as published (confusion reigning strongly in the areas of: (1) levies; (2) codes of conduct; (3) enforcement; and (4) the models for regulation – all of which will be highly contentious, if not legally challenged upon implementation, and all of which are likely to be superseded in short order after the implementation of the DSA).

#### 4. **The application of the content levy**

4.1 The State has experience in relation to levies in the Communications Regulatory environment and to that end there is no reason why the levy proposals as published at Head 40 cannot be implemented.<sup>4</sup>

4.2 An example piece of legislation exists by means of a Regulations made under the Communications Regulation Act 2002.<sup>5</sup>

4.3 Section 29 of the Communications Regulation Act 2002 provides that the Commission for Communications Regulation (“ComReg”) may for the purpose of the performance of its functions borrow money, but shall only do so with the consent of the Minister for Communications and the Minister for Finance. Section 30 provides for levies and fees.

4.4 Any surplus of levy income over the expenses incurred by ComReg in the discharge of its functions relevant to this levy in the levy period will either be retained to be offset against levy obligations for the subsequent year, or refunded proportionately to the applicable undertakings on whom the levy is imposed.

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<sup>4</sup> Considering that I also believe in an imperative uncoupling of the AVMSD from the NLP.

<sup>5</sup> S.I. 346/2003 – Communications Regulation Act, 2002 (Section 30) Levy Order, 2003

- 4.5 Licence fees are also payable in respect of licences issued in accordance with the Wireless Telegraphy Acts. The amount of these fees varies. Some spectrum licence fees – for example 3G licences – are substantive.
- 4.6 To date, ComReg has made a surplus each year and that surplus is remitted to the Minister for Finance. An annual levy is also payable in respect of broadcast transmission networks.
- 4.7 In relation to Electronic Communications, the closest analogue to the OSMR Bill proposals, annual levies are payable in accordance with s.30 of the Communications Regulation Act 2002 by operators of an Electronic Communications Network (“ECN”) and providers of an Electronic Communications Service (“ECS”), excluding broadcasting transmission networks. The amount of the annual levy for an ECN or an ECS is set out in a levy order.<sup>6</sup>
- 4.8 The amount payable is 0.2 per cent (or 1/5<sup>th</sup> of 1%) of relevant turnover in the relevant financial year of the authorised service provider, unless relevant turnover is less than €500,000, in which case no levy is payable. The ‘relevant turnover’ is the gross Irish revenue excluding VAT in respect of the provision of an ECN and/or ECS.
- 4.9 It is difficult to make more meaningful remarks in the absence of further information on this Government’s plans in this area. However, the above analogy works well in the Communications area. One disadvantage of having the AVMSD and NLP travel together here is a lack of clarity over what will be a regulated entity for the purposes of the Levy (VSPS or on Demand Services)?
- 4.10 Clarity around the levy might well be best dealt with by separating the AVMSD from the NLP as has been suggested previously.

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<sup>6</sup> S.I. 346/2003

## 5. **The protection of children across online services platforms**

- 5.1 As mentioned elsewhere in this submission, child protection online is an area where a legislative vacuum has existed for some years, 23 years to be precise, and where self-regulation can no longer be said to be either desirable or tolerable.
- 5.2 As mentioned elsewhere in this submission, legislatively splitting the AVMSD and NLP instruments may make for more manageable, clearer, and less complex obligations on entities or undertakings charged with regulating and those entities and undertakings subject to new regulation.
- 5.3 Head 49A – Categories of harmful online content – is somewhat vague as drafted. That is not to suggest that we should adopt the UK strategy of interminably endeavouring to define online harm(s). That would not be good use of time. The vagueness I raise may give rise to constitutional issues and challenges in relation to the interplay between Article 40.6.1 and Article 40.3.1 of the Constitution.
- 5.4 Head 49C – Definition of age-inappropriate online content – and Head 51 – Online safety guidance materials – may be entirely impractical to regulate. While it is of course sensible and useful to see the matters set out at Head 49C, which to any reasonable person are correct, they are subjective, particularly those at (a) and (b). Whereas (c) is a clear and obvious ground for regulation and intervention. Consultation must occur prior to settling on how to define an Irish definition for age-inappropriate online content with the relevant regulatory body and all relevant stakeholders at the correct time.
- 5.5 Head 50 – Online safety codes – provides for an example of a clash with DSA when one reads Head 50(2)(a) and the clear conflicts and overlaps with *inter alia* DSA Articles 14, 17, 19, 20, 24, 26, 27, 30, 32, 33 and 43.
- 5.6 Head 51 (A – Online safety guidance materials and B – Advisory Notices) content rating and age-gating may be an impossible task to regulate given the pervasive and nascent nature of the Internet. Separately, provision should be made for consultation with stakeholders concerning online safety guidance materials and advisory notices. This Head reads as though the Internet is an Irish

phenomenon, under Irish only control, a walled garden almost. This is clearly not the case.

- 5.7 Head 54A – Sanctions for non-compliance – provides for another concrete example of a clash with the DSA. In particular with DSA Articles 41, 42, 55, 56, and 58 – 62.
- 5.8 Head 54B – Senior Management Liability – some issues arise under this Head and may require that a statutory defence be provided for. In the context of the internet content, regulatory directions may be impossible to comply with even if the officers of an undertaking are required to take steps. There is a clear deterrent value to such a provision, however it may place the Courts in a difficult position, in the absence of a defence and in any event such an offence may be difficult to prove to the criminal standard and to prosecute.
- 5.9 It is also observed that the OSMR Bill does not, and never will exercise what is criminal control over online content, for that is a matter entirely for the Gardai.<sup>7</sup>
- 5.10 The General Scheme does not contain a timed review clause in a wider context than that proposed at Head 33. Legislation in this area will require constant revision and updating – in line with societal and technological developments. This is an obvious structural omission from the General Scheme.<sup>8</sup>
- 5.11 Finally, and somewhat regrettably, my position on this particular area is that it is better to suspend the work on the OSMR Bill, transpose the AVMSD and retain aspects of the NLP for early integration into the DSA package. As this will occur at roughly around the same time as the OSMR Bill is due to travel through the Oireachtas. Adopting this suggestion will stop the requirement for Government to debate, redraw and refit the OSMR Bill as it is published today to comply with DSA.

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<sup>7</sup> [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_children\\_and\\_youth\\_affairs/2018-02-21/3/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_children_and_youth_affairs/2018-02-21/3/)

<sup>8</sup> See Section 5 of the Defamation Act 2009, for an example of a legislative review clause:  
<http://www.irishstatutebook.ie/eli/2009/act/31/section/5/enacted/en/html#sec5>

6. **Conclusion and recommendations**

- 6.1 Taking account of the four areas that I have made submissions on. I call on the Committee to take utmost account of currently published and emergent European DSA package, the general policy trends concerning online commerce, and child safety online developments prior to taking any further steps with the OSMR Bill or making any recommendations to proceed with the General Scheme as published.
- 6.2 The Committee should consider recommending the immediate uncoupling of the AVMSD from the OSMR Bill as a matter of course, for general legislative efficiency and for the saving of cost to the State.
- 6.3 Ireland should not bring forward legislation in the area of online safety and media regulation at the same time as having to transpose the DSA package that contains the clearest of overlaps that will result in an immediate unpicking of the OSMR Bill in its current form. There are inherent risks in proceeding with the OSMR Bill and General Scheme in its current form given the position and stage of European Union legislative developments at this time.
- 6.4 I make myself available to the Committee to clarify anything arising and I confirm that I am happy to give oral evidence in the event that it is called for.

**Ronan Lupton B.L.**

**19<sup>th</sup> March 2021**