

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

The New EU and Irish Landscape for Online Content

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The New EU and Irish Landscape for Online Content

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New EU and Irish legislation



EU



Ireland

Revised AVMSD

OSMR Act

Digital Services Act

Digital Services Bill

TERREG

Proposed CSAM Regulation

Proposed EMF Act

Defamation (Amendment) Bill

Background to OSMR Act

Audiovisual and Media Services Directive (2010/13/EU) (the “**AVMSD**”)

- Sought to regulate television and video on demand services
- Significant changes in the media landscape – no longer fit for purpose

Revised AVMSD - (EU) 2018/1808

- Extended scope to Video-Sharing Platform Services (“**VSPS**”)
 - protect minors from harmful content which may impair their physical, mental or moral development;
 - protect the general public from content containing incitement to violence or hatred, content the dissemination of which is a criminal offence under EU law
- Country of Origin principle – very important for Ireland

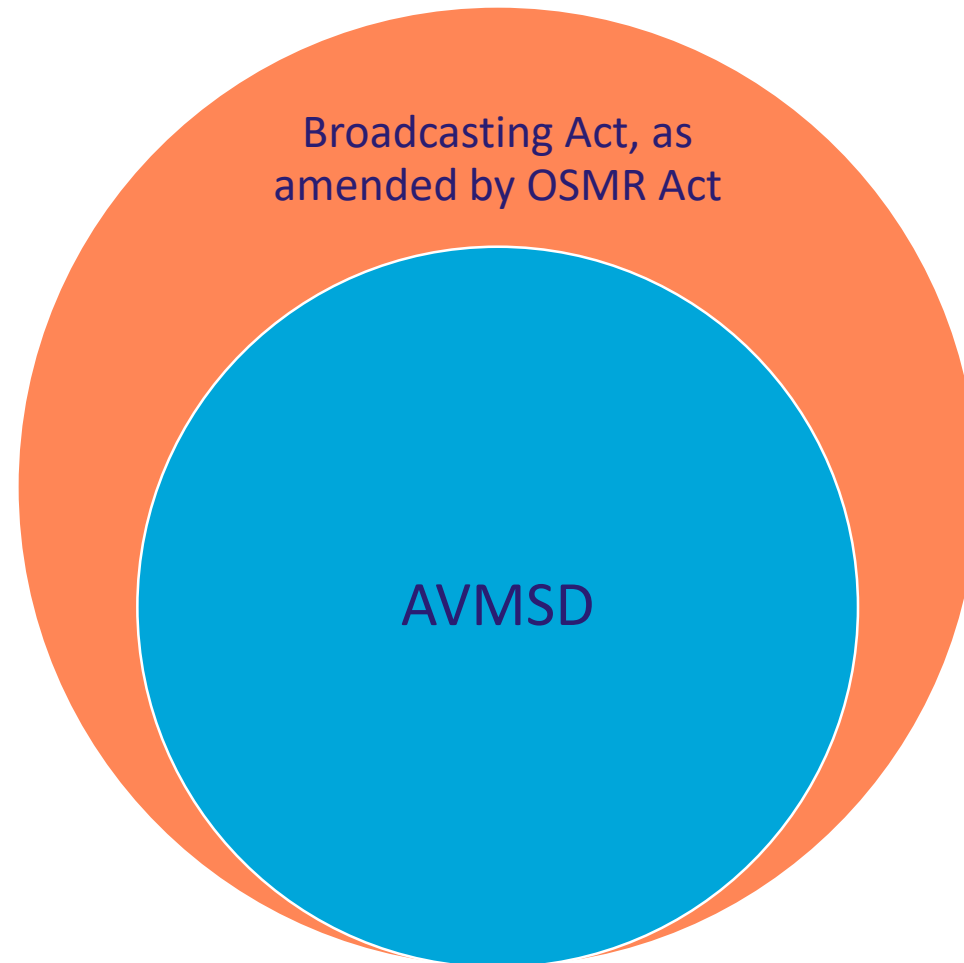


Ireland's response to Revised AVMSD

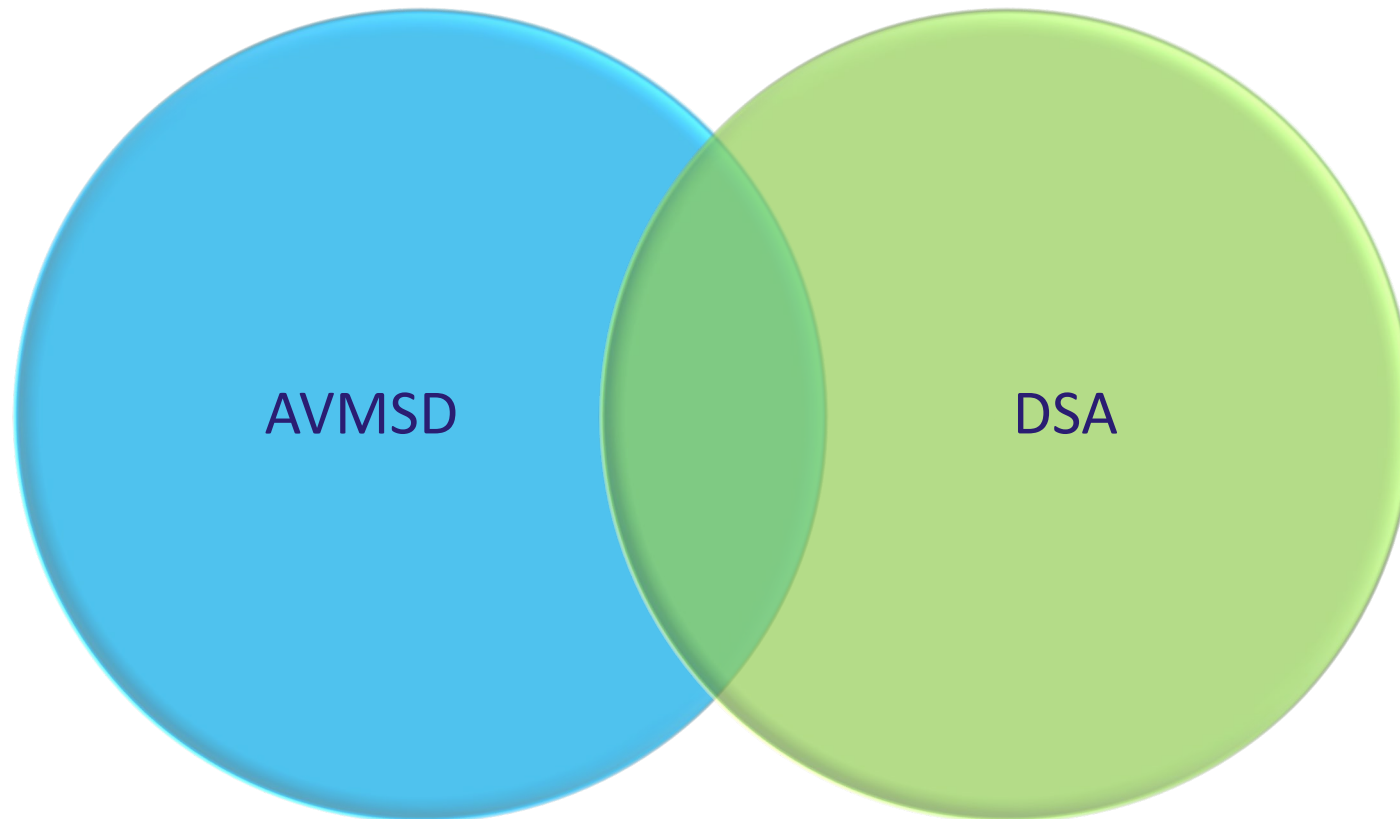


- Late transposition - infringement proceedings opened in November 2020 and referred to the CJEU in May 2022
- AVMSD is a minimum harmonization measure
- OSMR Act goes beyond what's required
- Meanwhile, Digital Services Act introduced, maximum harmonization measure, generally applicable from 17 February 2024

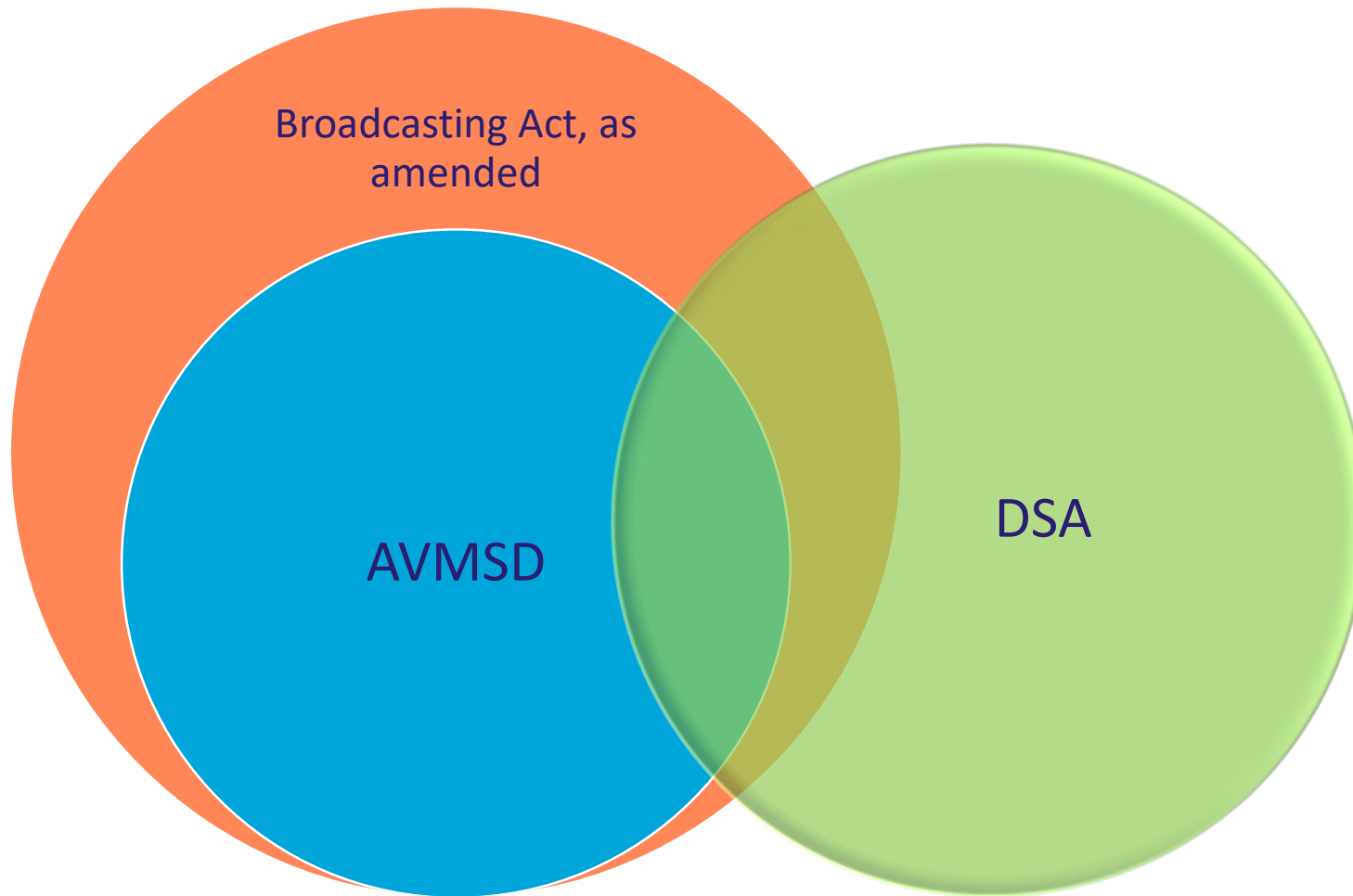
Overlap between AVMSD, Broadcasting Act and DSA



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Overlap between AVMSD, Broadcasting Act and DSA



Similarities and differences


Broadcasting Act, as amended	DSA
Harmful online content	Illegal content
Information society services (if designated)	Intermediary services
Video-sharing platform services (VSPS)	Online platforms, VLOPs
Enforceable by CnaM (only)	Enforceable by European Commission and DSCs
Administrative financial sanction of up to €20million or 10% of the turnover of the relevant service	<ul style="list-style-type: none"> - Fine of up to 6% of annual worldwide turnover - Periodic penalty payments of up to 5% of average daily worldwide turnover
Content limitation notice	Cessation order
	Users may seek compensation for breach

Main Obligations for non-VSPS

Broadcasting Act – designated information society services

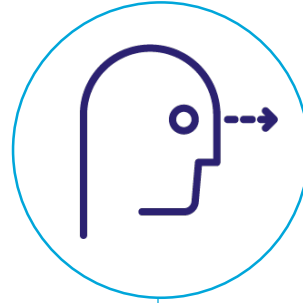
DSA – hosting services

Comply with online safety codes – may entail:	Comply with orders (illegal content, information)
- Minimise availability of harmful online content	Transparency – reports on content moderation
- Protect users against harmful online content	Terms of service – tools used for content moderation, dispute resolution
- Deal with user complaints	Notification mechanism for illegal content
Comply with CnaM guidance	Obligation to notify if aware threat to life or safety



What Regulatory and Litigation Activity can we expect in this area?

Who will Regulate the DSA?



- Supervision and enforcement of the DSA will be shared between national authorities (CnaM in Ireland) and the European Commission, shared powers of enforcement of the DSA against VLOPs and VLOSEs with a more prominent role for the European Commission.

- Each Member State is required to designate a national authority as its Digital Services Coordinator (DSC), who will bear primary responsibility for overseeing the supervision and enforcement of the DSA in that Member State.

How will the DSA be enforced and supervised?



- Both the Commission and DSCs (CnaM in Ireland) are granted investigative and enforcement powers under the DSA
- These powers will depend to some extent on how they are practically implemented by Member States (the Digital Services Bill in Ireland)
- Delegated Regs for technical standards expected; guidelines from the EBDS
- An infringement of the DSA has the potential to expose intermediaries to:
 - fines for non-compliance of up to 6% worldwide turnover
 - Periodic penalty payments of up to 5% of average daily worldwide turnover
 - Cessation order
- Users may also seek compensation for breach

The Digital Services Bill 2023 – enforcement



- The Digital Services Bill 2023 will give effect to some of the DSA's provisions with national legislative measures. For example, the designation of Ireland's Digital Services Coordinator, to supervise and implement the DSA, (the CnaM).
- It will also provide for CnaM's supervisory and enforcement powers under the DSA, and some other matters incl.:
 - liability regime for providers of online intermediary services,
 - the harmonisation of court orders to take down illegal content from online services
 - procedures for awarding "trusted flagger" status
 - certifying entities as out of court dispute settlement bodies and
 - procedures for dealing with complaints from users or bodies mandated to act on their behalf

What Happens once designated by CnaM under OSMRA?



- VSPS – particular obligations (industry levy, EU works)
- Binding Online Safety Codes to minimise harmful content and the protection of minors from harmful content
- CnaM will also publish non-binding online safety guidance materials and advisory notes to promote good general market practices in this sector
- Powers of CnaM to ensure compliance with Online Safety Codes

Powers of CnaM

- By written notice, can require the provider of a designated online service to **provide information** in relation to its compliance with an online safety code;
- **search, seize and compel the production or preservation of material**, and to conduct ‘oral hearings’ as part of investigations undertaken by the Commission;
- appoint persons to carry out **audits of complaints** and internal complaint handling systems;
- make **injunction-style orders** to end non-compliance with an online safety code;
- apply for injunctions to **block access** to certain online services or audio-visual on-demand media services; and/or
- **require a service provider to remove or disable access** to certain harmful online content.
- impose administrative fines of up to **€20 million or 10% of relevant turnover** in the financial year preceding the date of the decision;
- The CnaM will also have responsibility for an **individual complaints mechanism**

Appeals of decisions of CnaM

- S38 of the OSMR Act provides that leave will not be granted for judicial review of: (i) any decision by the Commission that a service provider was in contravention of the Act; or (ii) a decision of the Commission to impose a financial sanction upon the service provider as a result of such contravention.
- Decisions can be appealed on either or both of the following bases: (i) any ground that could, but for section 38, be relied upon by the service provider in an application seeking judicial review of the Commission's decision; and/or (ii) on the grounds that any sanction imposed by the Commission is not proportionate.
- The High Court is designated by the Act as the appropriate court for the hearing of appeals (unless no fine or fine is less than €75k)



Intermediary Liability – private and regulatory

- Safe harbour rule for intermediaries remains
- The DSA also introduces a ‘good Samaritan’ protection which allows intermediary services to carry out own-initiative investigations to identify and remove illegal content without losing safe harbour
- However new regimes do introduce positive steps: e.g. VLOPs/VLOSEs need to take into account their risk assessments in ongoing content moderation policies (DSA) and codes will require the restriction of harmful content (OSMRA)
- Unclear what impact the individual complaints mechanism proposed under the OSMRA and/or the compensation mechanism for breaches of the DSA will have – for consumers and intermediaries



General Scheme of Defamation (Amendment) Bill (the General Scheme)



- Still currently in draft

- Indication that full bill will be before the Oireachtas by the end of the year.

- The earliest point at which the above recommendations will be enforced will be end of 2023.

General Scheme of Defamation (Amendment) Bill (the General Scheme) - Main Changes

- Abolishing juries
- Rules regarding the publication of a correction
- Provisions to address the issue of ‘libel tourism’
- Live broadcast defence
- Strategic lawsuits against public participation (SLAPPS)
- Creating a new statutory power for the Circuit Court to make a ‘Norwich Pharmacal’ order
- Obligations of intermediary service providers when handling complaints regarding defamatory content



Action points



- Identify whether are, or likely to be, subject to:
 - Part 8A Broadcasting Act (designation by CnaM)
 - DSA
 - intermediary service (particularly hosting service)
 - online platform
 - VLOP or VLOSE (designation by European Commission)
- Prepare and implement compliance measures
- Consider document management around compliance
- Consider how to protect privilege

Questions?

