

COMMERCIAL & TECHNOLOGY

Client Update: Digital Services Bill

The [Digital Services Bill](#) (the **DSB**) was published by the Oireachtas on 5 December 2023. It will give effect to the Irish national implementation of the Digital Services Act (**DSA**).

12 MIN READ

While many of the obligations imposed by the DSA will apply directly, it is necessary to give effect to some of the DSA's provisions with national legislative measures.

At a high level the DSB provides for:

- The appointment of An Coimisiún na Meán (**CnaM**) as Ireland's Digital Services Coordinator (**DSC**) under the DSA.
- The appointment of the Competition and Consumer Protection Commission (the **CCPC**) as the competent authority for the supervision and enforcement of Article 30-32 DSA only.
- Clarification of the supervisory and enforcement powers of the Irish competent authorities in respect of DSA obligations.
- The implementation of Irish national measures to allow for compliance with the DSA (e.g. establishing a complaints mechanism for CnaM, the designation of vetted researchers etc.).

In general the text of the Bill is in many respects in line with the General Scheme that was previously **published in March 2023**, though there are some differences.

A summary of the key provisions of the DSB is set out below.

Designation of Regulators

One of the most significant changes between the General Scheme and the DSB, is in respect of the authorities which the DSB designates as responsible for supervising and enforcing compliance with the DSA.

As expected, the DSB designates CnaM as the DSC and the competent authority primarily responsible for the general supervision and enforcement of DSA compliance. However, the DSB also designates the CCPC as a national competent authority responsible for supervision and enforcement of Articles 30, 31 and 32 of the DSA.

Articles 30-32 of DSA relate to the obligations of “online marketplaces” - a category of online platforms that allow users to conclude distance contracts with traders. These obligations include (i) requiring measures to ensure the traceability of traders using the platform; (ii) ensuring certain standards of design so that a platform’s interface is organised in a way that enables traders to comply with

their obligations regarding compliance and product safety information; and (iii) providing specified information to consumers if the platform becomes aware that the consumer has purchased an illegal product or service.

One can understand the reasoning in granting the CCPC competence to monitor such consumer-focused obligations. However, it comes with significant new powers of investigation and enforcement for the CCPC, mirroring many of those granted to CnaM in respect of other aspects of DSA compliance. It may be interesting to see how the two regulatory bodies will work in unison, especially in circumstances which may involve a suspected infringement of Article 30-32 together with other DSA obligations.

Investigations

In order to carry out their functions as competent authorities, CnaM and the CCPC require certain powers of investigation.

CnaM has existing powers of investigation and enforcement under the Broadcasting Act 2009 (as amended) (**BA 2009**), in respect of certain defined “*contraventions*” of the BA 2009. The DSB amends s.139ZG of the BA 2009 to expand the definition of “*contravention*” so that it includes an infringement by an intermediary service provider of the DSA (other than Articles 30-32). In this way, the DSB expands CnaM’s existing powers of investigation so that they can also be applied to possible infringements of the DSA.

The DSB also amends the existing investigative provisions by substituting the term provider with the term “*inquiry subject*”. As required per Article 51 of the DSA, this allows certain investigatory provisions to be utilised in relation to a wider class of persons than just service providers and include other persons who may be relevant to an investigation.

The DSB does not provide for CnaM’s powers of investigation to be replicated exactly for the CCPC. Instead it extends the CCPC’s existing powers of investigation under the Competition and Consumer Protection Act 2014, to allow for such powers to be utilised in respect of infringements of the DSA. It does provide some additional powers, for example allowing authorised officers of the CCPC to conduct oral hearings to investigate infringements of the DSA (similar to CnaM’s powers under 139ZK(3) of BA 2009).

Regulatory Process Following an Investigation

The amendments introduced to the BA 2009 by the Online Safety and Media Regulation Act 2022, established a regulatory process for CnaM to follow when its investigation of a suspected “*contravention*” (as defined in s.139ZG) has concluded and it is in a position to issue a decision (see sections.139ZQ - 139ZZC of the BA 2009).

This process touches on a number of elements including when a decision will take effect, how decisions must be communicated to parties under investigation, opportunities which must be provided to appeal a decision, obligations to obtain court confirmation of a decision and additional steps which must be taken to issue administrative financial sanctions etc.

As noted above, the DSB amends the definition of “*contravention*” in s. 139ZG so that this regulatory process will also apply where CnaM’s investigation of a suspected infringement of the DSA has concluded.

Sections 55-71 of the DSB almost exactly replicate the provisions of sections 139ZQ-139ZZC of BA 2009, (including amendments to those provisions under the DSB) providing the CCPC with a very similar regulatory process, once it has concluded its investigation of a suspected DSA infringement.

Regulatory Enforcement Powers

In line with the requirements of Article 51 and 52 of the DSA, the DSB provides for a number of new enforcement powers for both CnaM and the CCPC, or in some cases, extends powers which CnaM already has under the BA 2009 to be used in respect of DSA infringements and to be applied by the CCPC e.g. the power to issue a notice to end a contravention.

Investigative enforcement powers:

- **Administrative fines:** The DSB provides that, where, during the course of investigating a suspected infringement of the DSA, a person obstructs or impedes an authorised officer of CnaM or the CCPC, (a) fails to comply with a request

for information; (b) provides false or misleading information in response to a request for information; or (c) fails to remedy any failure to respond to a request for information; that person may be liable for an administrative fine.

- **Daily penalty:** The DSB also provides for CnaM and the CCPC to impose a daily payment penalty to enforce an obligation imposed by the exercise of their investigatory powers. In line with the DSA, the maximum penalty that may be imposed is 5 per cent of the person’s average daily income or turnover, in the preceding financial year.

Compliance enforcement powers:

- **Power to require interim measures** - This is another change from the General Scheme, which did not make specific provision for interim measures. Under the DSB, where, during an investigation, the relevant regulator finds prima facie evidence of:
 - » a continuing infringement of the DSA, and
 - » that gives rise to a risk of serious harm before a decision is reached

that regulator may issue a notice to the subject of the investigation, setting out requisite measures to address the infringement within a specified time period.

A person who, without reasonable excuse, fails to comply with such a notice shall be guilty of a criminal offence. If the offence is committed by a company, a director, manager, secretary or other officer of the company can also be found guilty of the offence.

- **Notice to end a contravention** - Under the DSB, where, following an investigation:
 - » the relevant regulator reaches a formal decision that an infringement of the DSA has occurred
 - » the decision finds that the infringement is ongoing, and
 - » the decision has been confirmed by an appropriate courtthe relevant regulator may issue a notice to the relevant service provider, setting out requisite measures to address the infringement within a specified time period.

A person who, without reasonable excuse, fails to comply with such a notice shall be guilty of a criminal offence. Similar to the power to require interim measures, if the offence is committed by a company, a director, manager, secretary or other officer of the company can also be found guilty of the offence.

Where a provider has been given a “*notice to end a contravention*” in respect of an infringement of the DSA and it appears to the relevant regulator that the infringement is continuing and the infringement is causing serious harm that cannot be avoided through the exercise of other powers, then the relevant regulator may request the management body of the provider to propose steps to put an end to the contravention and issue a “*further notice to end a contravention*”, stating the steps the provider must take within a specified time period. Failure to comply with such a notice can also incur criminal liability for a service provider and the company officers of a service provider.

- **Access Blocking Orders** - The BA 2009 already provides for CnaM to issue access

blocking orders in respect of “designated online services” for certain infringements of the BA 2009, under section 139ZZC. However, the DSB implements a new section in respect of CnaM’s power to issue a blocking order specifically in response to DSA infringements (the new section 139ZZCB) and implements largely similar provisions in respect of the CCPC’s powers to issue a blocking order (Section 71 of the DSB).

Under the DSB, where the “further notice to end a contravention” process has been engaged and either:

- » a management body of a provider fails to make a proposal for steps to end a DSA infringement following a request, or
- » a provider does not comply with a “further notice to end a contravention”

then the relevant regulator may apply to the High Court for an order requiring that a relevant service provider (e.g. an internet service provider) block access in the State to the service which is the source of the continuing infringement.

- **Daily Penalty** - Further to issuing a notice to end an infringement of the DSA, the DSB provides that the regulators may impose a daily penalty payment on the provider for the purpose of enforcing the notice. In line with the DSA, the maximum penalty that may be imposed is 5 per cent of the person’s average daily income or turnover, in the preceding financial year.
- **Compliance Notices** - Where an “authorised person” (as defined in the DSB) of either CnaM or the CCPC is of the opinion that an intermediary service provider has infringed one or more of certain specified Articles of the DSA, it may serve a compliance notice on the provider requiring the provider to take steps to stop the specified infringement. The service provider may appeal against the notice. Where no appeal is brought, or where the relevant court affirms the notice and the service provider does not comply with the compliance notice by the due date, it shall be guilty of a criminal offence. Compliance notices were not provided for in the General Scheme.
The sections relating to compliance notices do not make provision for criminal

liability to potentially **attach** to company officers where a company has been found to be guilty of an offence.

- **Commitment Agreements** - Similar to compliance notices, commitment agreements were not provided for in the previous General Scheme, but do form part of the powers granted under Article 51(2) of the DSA. Under the DSB, at any time, the relevant regulators may enter into an agreement with a relevant intermediary service provider under which the provider agrees to take measures that would address an issue related to compliance by the provider of any of the relevant Articles of the DSA. Such a “commitment agreement” will be binding on the provider and may be amended or terminated by agreement in writing. The regulator may also terminate a commitment agreement in the case that the provider does not comply with the agreement or information provided for the purpose of entering into the agreement is found to be misleading or false. Where a provider fails to comply with a commitment agreement it may be subject to an administrative sanction.

Criminal Liability of Company Officers

In the pre-draft submissions on the DSB, there was a significant degree of focus on the possibility for provision to be made for the company officers to be found criminally liable for a service provider's failure to comply with the requirements of the DSA.

The existing Section 139ZZB of BA 2009 already makes provision for company officers to be found guilty of a criminal offence where the corporate subject of a notice to end a contravention fails to comply with the directions in a notice to end a contravention and there was some debate as to whether this would or should be extended to failures to comply with notifications in respect of DSA infringements.

Ultimately the DSB does provide for criminal liability to attach to the company officers of companies which fail to comply with either (i) interim measures requested to address serious infringements of the DSA or (ii) notices to end contravention of DSA.

The offence is a "category 1 offence" which attracts: (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or (b) on conviction on indictment, to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years, or both.

In both cases, the company officer will be found guilty of the offence where the offence is "*proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of*" the relevant executive.

Interestingly, in circumstances where a company has committed an offence under the Data Protection Act 2018 (the **DP Act**), section 146 of the DP Act provides for a very similar test to be applied to determine if the executives of that company are guilty of an offence.

Given the significant number of regulatory steps required under the DSB and the BA 2009 before criminal liability of a company officer can arise (including providing opportunities to appeal decisions and the requirement for decisions to be confirmed

by an appropriate court), it would seem likely that in practice, the risk of criminal liability actually attaching to a company officer will not regularly arise - as is the case under the DP Act regime.

There is one notable difference between the CnaM and CCPC regime in respect of criminal liability for company officers. Under the CnaM regime, there is a requirement for the consent of the Director of Public Prosecution to be obtained in advance of proceedings being issued against a company officer. However, the CCPC regime does not include the same requirement. No explanation is provided in the memorandum to the DSB for this distinction.

Financial Sanctions

In line with the provisions of Article 52 of the DSA, the DSB provides that the maximum fine which CnaM or the CCPC may impose for infringements of the DSA is:

- 6 per cent of annual turnover of the provider in the preceding financial year for relevant Articles of the DSA or non-compliance with orders to take interim measures or for failure of a provider to comply with a commitment agreement.
- 1 percent of annual turnover of a person in the preceding financial year for obstructing or impeding an investigation through a failure to provide information or through the provision of false or misleading information.

Section 139ZW of the BA 2009 does provide for CnaM to impose a maximum fine of 10 per cent of annual turnover, but this is only in respect to a specific list of “contraventions” that do not include infringements of the DSA.

The existing provisions in place under the BA 2009 in sections 139ZU - 139ZW, which dictate how CnaM should determine the administrative financial sanction to be imposed, are extended to administrative financial sanctions relating to DSA infringements and are similarly replicated in respect of administrative financial sanctions which may be issued by the CCPC.

Miscellaneous Matters

The DSB also addresses a number of other miscellaneous matters, as required under the DSA, namely:

- **Complaints System** - The DSB inserts a new Section 199 into the BA 2009, requiring CnaM to establish a complaints mechanism to allow individuals to submit a complaint in respect of a suspected infringement of the DSA by intermediary services providers. CnaM is permitted to dismiss a complaint that it considers frivolous, vexatious, trivial or made in bad faith.
- **Liability Regime for Intermediary Service Providers** - The DSB amends section 139ZF of the BA 2009, to reflect the new liability regime replacing the eCommerce Directive Articles 12, 13, 14 and 15, with Articles 4, 5, 6, 8 of the DSA to provide for the exemption from liability for intermediary online services.
- **Vetted Researchers** - The DSB inserts a new Section 187-189 to provide for the designation of “vetted researchers” under the DSA, and the termination of vetted

researchers’ access to data.

- **Trusted Flaggers** - The DSB inserts a new Section 190-192 to provide for CnaM to award, and the revocation of, “trusted flagger” status under the DSA. (Under the DSA, where a “trusted flagger” submits a content report, it must be treated in compliance with a higher standard than an “ordinary” report.)
- **Certification of Out of Court Settlement Bodies** - The DSB inserts a new Section 193 - 195 of the BA 2009, to provide for CnaM to certify entities as “out of court dispute settlement bodies” under the DSA.

Further Contrasts with the General Scheme

Previously, in Heads 7 and 8, the General Scheme had proposed the inclusion of provisions related to Article 9 (*Orders to act against illegal content*) and 10 (*Order to provide information*) of the DSA. However, the DSB does not include such provisions. The Memorandum to the DSB does not provide an explanation for this change in approach.

In any event, it should be noted that Articles 9 and 10 do not create new powers for authorities to issue orders. Rather, they provide that where authorities already have powers to issue such orders, and those orders fulfil the criteria set out in the respective Articles, then this creates a DSA obligation for intermediary service providers to respond (but not necessarily comply) to such order “*without undue delay*”. Accordingly, the Articles do not require some further transposition in order to have a direct effect on intermediary service providers.

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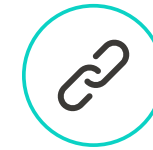


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