

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2024] IEHC 366  
[Record No. 2024/114 JR]**

**BETWEEN:**

**TUMBLR INCORPORATED**

**APPLICANT**

**AND**

**COIMISIÚN NA MEÁN**

**RESPONDENT**

**JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 20th day of  
June, 2024.**

**TABLE OF CONTENTS**

<b>INTRODUCTION</b> .....	2
<b>REGULATORY FRAMEWORK</b> .....	4
<i>Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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)</i> .....	4
<i>The Need for a Revised Directive</i> .....	5
<i>Directive (EU) 2018/1808 of 14 November 2018 (hereinafter “the Revised AVMS Directive”)</i> .....	7
<i>European Commission 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)</i> .....	10
<i>The Role of Coimisiún na Meán</i> .....	13
<i>Online Safety Regulation under The Broadcasting Act, 2009 as amended by the Online Safety and Media Regulation Act 2022</i> .....	14
<i>Notice of Designation of VSPS</i> .....	17
<i>Decision Framework for the Designation of a Named Service as a VSPS and Communication with Service Providers</i> .....	17
<i>Consultation on Levy Order</i> .....	20
<i>Levy Order</i> .....	20
<i>Online Safety Code Consultation</i> .....	20
<b>DECISION MAKING PROCESS AND TUMBLR</b> .....	21
<i>Consultation regarding Quantitative Data</i> .....	21

<i>Consultation Response</i> .....	23
<i>Information Notice</i> .....	23
<i>Information Notice Response</i> .....	26
<i>VSPS Designation Decision Framework (“the Framework”)</i> .....	28
<i>Preliminary Designation</i> .....	29
<i>Preliminary Designation Response</i> .....	30
<i>Designation Decision</i> .....	33
<i>Final Statement of Reasons</i> .....	34
<i>Engagement with the Response of Tumblr</i> .....	40
<b>PROCEEDINGS</b> .....	48
<b>DISCUSSION AND DECISION</b> .....	49
<i>Factual Context</i> .....	49
<i>Interpretative Rules</i> .....	50
<i>What relevance or weight should be afforded to the ex post facto expert evidence?</i> .....	52
<i>Did An Coimisiún misinterpret and misapply the definition of a VSPS contained in Article 1(1)(aa) of the Revised AVMS Directive and section 2(2) of the 2009 Act in making its Designation Decision (Ground 1)?</i> .....	58
<i>Did An Coimisiún fail to provide adequate reasons for the Designation Decision, in breach of the right to fair procedures and Article 41 of the Charter (Ground 2)?</i> .....	83
<i>Did An Coimisiún fail to have any or any adequate regard to relevant considerations or place undue weight on irrelevant considerations in its Designation Decision (Ground 3)?</i> .....	90
<i>Did An Coimisiún fail to examine the relevant aspects of the evidence before it relating to this case (Ground 4)?</i> .....	93
<i>Is the Designation Decision vitiated by manifest errors of assessment (Ground 5)?</i> .....	97
<b>CONCLUSION</b> .....	101

## **INTRODUCTION**

1. Under the Broadcasting Act 2009 (as amended by the Online Safety and Media Regulation Act 2022) (hereinafter the “2009 Act”), the State seeks to provide for measures to protect young people from types of video or audio visual content which may impair their physical, mental or moral development as required by the provisions of Directive 2010/13/EU as amended by Directive (EU) 2018/1808 (the "Revised AVMS Directive"). Under the Revised AVMS Directive, Members States are also required to protect the general public from illegal

content and from content containing incitement to violence or to hatred available on video sharing platforms which are subject to regulation.

2. Consequent upon the provisions of the 2009 Act implementing the requirements of the Revised AVMS Directive, a Video Sharing Platform Service (hereinafter “VSPS”) within the meaning of the 2009 Act is identified as a form of relevant online service that the Irish competent authority, An Coimisiún na Meán (hereinafter “An Coimisiún”), must designate under the 2009 Act, both as a category of services and as a named service where the provider of the service or services is established in Ireland.

3. Not every platform which permits video sharing is subject to regulation under the 2009 Act. These proceedings concern a challenge to the designation by An Coimisiún of the Tumblr platform, described in the proceedings a microblogging platform that allows users to share content including video content, as a VSPS.

4. These proceedings are the second in time of two sets of proceedings instituted challenging designation as a VSPS by two separate social media platforms both with a presence in the State, the other case being *Reddit v. Coimisiún na Meán* (Record No. 2024/56 JR)(hereinafter “*Reddit*”). While there is some overlap between the two sets of proceedings and the two cases were heard before me consecutively, they were separately argued with different legal teams and the issues are not the same. Accordingly, it is necessary to deliver two separate judgments.

5. Unlike the parallel challenge in *Reddit*, in these proceedings it is not disputed that Tumblr is subject to regulation in Ireland pursuant to the provisions of Article 28a of the Revised AVMS Directive as given effect to by s. 2B of the 2009 Act if properly considered a VSPS.

6. The issue at the heart of these proceedings is whether by reason of the scale or amount of video content shared, Tumblr is properly designated as a VSPS. It is Tumblr’s case that it is not properly subject to regulatory control as a VSPS because its video functionality is minor or merely ancillary to its activities. Tumblr contends that the decision of An Coimisiún to designate Tumblr as a VSPS based on an application the “*essential functionality*” test prescribed under Article 1(aa) of the Revised AVMS Directive as implemented in Irish law by s.2(2)(c) of the 2009 Act (as amended) is vitiated by errors of law and fact and is

invalid on various grounds, most specifically that proper regard has not been had to the quantitative data provided which shows low rates of video on Tumblr.

## **REGULATORY FRAMEWORK**

7. Before turning to consider the designation of Tumblr as a VSPS, it is necessary firstly to consider the general regulatory framework and decision-making context, factually and legally.

*Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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)*

8. Directive 2010/13/EU (Audiovisual Media Services Directive)(hereinafter “the AVMS Directive”) adopted in March, 2010 aimed to create and ensure the proper functioning of a single European Union market for audiovisual media services, while contributing to the promotion of cultural diversity and providing an adequate level of consumer and child protection.

9. It was recognised in Recital 58 of the AVMS Directive that the availability of harmful content in audiovisual media services was a concern for legislators, the media industry and parents and that there would be new challenges, especially in connection with new platforms and new products. Recital 58 recorded that rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications, were therefore necessary.

10. The AVMS Directive was based on the 'country of origin principle' ("COO"). Under the COO, audiovisual media service providers were subject only to the rules of the Member State where they were established. By abiding by these rules they could freely provide services across the EU. The AVMS Directive applied to television broadcasts and on-demand services if all the following conditions were met (i) providers have editorial responsibility, (ii) providers have as their principal business purpose the provision of programmes to inform, entertain or educate the general public; and (iii) these programmes were comparable, in form

and content, to television ("TV-like"). The AVMS Directive did not cover activities that were primarily non-economic.

### The Need for a Revised Directive

**11.** The need for future revision of the AVMS Directive was heralded even in the terms of that Directive itself where reference was made to “*new technologies in the transmission of audiovisual media services*” (in Recital 4) and the requirement for a regulatory framework concerning the pursuit of broadcasting activities which takes “*account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business models,*” to “*technological developments*” which mean that “*subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation*” (in Recital 38) and “*there will also be new challenges, especially in connection with new platforms and new products. Rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services ... are therefore necessary*” (in Recital 59).

**12.** On the 6<sup>th</sup> of May, 2015, the European Commission adopted a communication entitled ‘A Digital Single Market Strategy for Europe’ in which it announced a review of Directive 2010/13/EU. The European Parliament passed a resolution towards a Digital Single Market of the 19<sup>th</sup> of January, 2016 on foot of a motion (2015/2147(INI)). The effect of the resolution was to urge the European Commission to revise the AVMS Directive to take into account changing viewing patterns and new ways of accessing audiovisual content by aligning linear and non-linear services and by setting out European-level minimum requirements for all audiovisual media services. In so doing the need to ensure and to promote diversity of audiovisual media and to set high standards for the protection of minors and consumers and personal data was cited (see section 3.2.: A media framework for the 21st century, para. 65, p. 18 of 78) and it was observed that:

*“everyone, including providers of online audiovisual media platforms and user interfaces, should be subject to the AVMS Directive as far as it concerns an audiovisual media service”*

**13.** During the hearing before me I was referred at some length to the subsequent European Commission Staff Working Document Impact Assessment (Brussels, 25.5.2016, SWD (2016)

168 final) accompanying the proposal for a Directive amending Directive 2013/13/EU (hereinafter “*the Commission’s Impact Assessment*”). The Commission’s Impact Assessment opened by stating the objective of the AVMS Directive as being to create and ensure both an adequate level of consumer protection (with a particular and clear emphasis on the protection of minors) and to safeguard media pluralism before proceeding to clearly identify the context for the proposed amended Directive as being that (p. 3):

*“the audiovisual media landscape is changing at a rapid pace due to ever increasing convergence between television and services distributed via the Internet. Consumers increasingly access on demand content via smart/connected TVs and portable devices. Consumers, in particular the young ones, watch videos, including audiovisual content generated by private users (“UCG”), on the Internet.”*

**14.** Throughout its text the Commission’s Impact Assessment uses words such as “*changing at a rapid pace*”, “*calls for modernization of the AVMSD to reflect market and technological developments*”, broadening the scope of the AVMS Directive to “*encompass new services and players*”, “*different treatment no longer justified in view of changing consumer habits*”, “*competitive disadvantage ...and to a lower level of consumer protection in on-demand services*”, “*changing viewing patterns and associated risks is a phenomenon, which will affect all the Member States*” all of which combine to reflect a driving impetus for the adoption of a Revised AVMS Directive as being the need to keep pace with rapid change to ensure effective protection.

**15.** Problems identified in the Commission Impact Statement as leading to the need for expansion of the AVMS Directive included: insufficient protection of minors and consumers when consuming videos on video-sharing platforms and the lack of a level playing field between traditional broadcasting and emerging on-demand services and the instant, free and unrestricted accessibility to hardcore pornographic videos and hate speech. Video-sharing platforms employing tools like Autoplay (see p. 5) were specifically identified as a concern because they enable “*direct exposure to potentially harmful content and incitement to hatred.*”

**16.** From the foregoing it is clear that the emergence of new business models extending activities online and new players offering audiovisual content via the Internet (e.g. on-demand

service providers and video-sharing platforms) prompted the call for a modernization and broadening of the scope of the AVMS Directive to reflect market and technological developments. This was in recognition of the fact that the audiovisual media landscape was changing at a rapid pace due to ever increasing convergence between television and services distributed via the Internet with consumers increasingly accessing on demand content via smart/connected TVs and portable devices. It was observed in the Commission Staff Working Document Impact Statement accompanying a proposal for a Directive amending the AVMS Directive, that consumers, in particular the young ones, watch videos, including audiovisual content generated by private users on the Internet. The need for an amendment or revision of the AVMS Directive was therefore firmly anchored in the original objective of that Directive, namely, the protection of minors, consumers and promotion of European works and the need to keep pace with change.

Directive (EU) 2018/1808 of 14 November 2018 (hereinafter “the Revised AVMS Directive”)

17. The needed revision of the AVMS Directive was given effect to by Directive (EU) 2018/1808 of the 14th of November, 2018 (referred to throughout these proceedings “the Revised AVMS Directive”) reciting in its title that the amendments were being adopted “*in view of changing market realities*”. In its own terms the Revised AVMS Directive made crystal clear that the revision was driven by the extent to which the audiovisual media services market had evolved “*significantly and rapidly due to the ongoing convergence of television and internet services*”.

18. From Recital 1, it is manifest that the convergence of media was considered to require an updated legal framework in order to reflect developments in the market and to achieve a balance between access to online content services, consumer protection and competitiveness. In Recital 1 to the Revised AVMS Directive itself reference is made to “*technical developments*” which have allowed for “*new types of services and user experiences*” and changes in “*viewing habits, particularly those of younger generations*”. The increasing importance of “*new types of content, such as video clips or user-generated content*” and “*new players, including providers of video-on-demand services and video-sharing platforms*” is identified as requiring “*an updated legal framework in order to reflect developments in the market and to achieve a balance between access to online content services, consumer protection and competitiveness.*”

**19.** Importantly, Recital 5 identifies that in order to ensure “*clarity, effectiveness and consistency of implementation*”, the European Commission should, where necessary, issue guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’. It is specified that those guidelines should be drafted with “*due regard for the general public interest objectives to be achieved by the measures to be taken by video-sharing platform providers and the right to freedom of expression*”. Guidelines envisaged under Recital 5 were introduced by the European Commission in 2020 (2020/C 223/02).

**20.** The Revised AVMS Directive defines a “*video-sharing platform service*” (at Article 1(aa)) as:

*“...a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.”*

**21.** In Article 1(ba) a “*user generated video*” is defined as:

*“...a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user”.*

**22.** Based on the definition under Article 1(1)(aa) of the Revised AVMS Directive, a video-sharing platform service may be identified on the basis of the following three criteria:

(I) Services whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;



- (II) Services of a wider nature offering, amongst other elements, a dissociable section whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- (III) Services for which *an essential functionality* is devoted to the provision of programmes, user-generated videos, or both, to the general public.

**23.** The following additional criteria must also be met:

- a) the video-sharing platform provider must not have editorial responsibility for the programmes and/or user-generated videos;
- b) the programmes and/or user-generated videos must be provided in order to inform, entertain or educate, by means of electronic communications networks; and
- c) the organisation of the programmes and/or user-generated videos must be determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

**24.** Articles 28a and 28b set out the provisions applicable to video sharing platform services. Article 28a deals with jurisdiction and sets down rules whereby it may be determined which Member State has jurisdiction to subject a service to regulatory control (not an issue in this case). In relevant part Article 28b requires Member States to ensure that video sharing platforms under their jurisdiction to take appropriate measures to protect minors from user-generated videos which may impair their physical, mental or moral development (Article 28b(1)(a)), the general public from user-generated videos containing incitement to violence or hatred against a person or group based on any of the grounds referred to in Article 21 of the Charter (Article 28b(1)(b)) and the general public from user-generated videos containing content the dissemination of which constitutes an activity which is a criminal offence under Union law (being provocation to commit a terrorist offence, offences concerning child pornography or offences concerning racism or xenophobia).

**25.** The Revised AVMS Directive provides at Article 28(b)(3) that appropriate measures shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate

interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest. Member States must also ensure that all video-sharing platform providers under their jurisdiction apply such measures but those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided.

**26.** Appropriate measures envisaged under Article 28b(3) include, *inter alia*, establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors (Article 28b(3)(f)) and providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors (Article 28b(3)(h)) and establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures (Article 28b(3)(i)). It is patent from its terms that the aim of the Revised AVMS Directive was to reinforce the protection of users, especially minors, from certain forms of illegal and harmful audiovisual content online by imposing certain obligations on video-sharing platform providers. Social media services fall within the scope of application of the new rules on video-sharing platforms when they meet certain prescribed criteria.

*European Commission 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)*

**27.** In July, 2020, the European Commission adopted Guidelines as contemplated in Recital 5 of the Revised AVMS Directive intended to guide the practical application of the essential functionality test in deciding to designate as a 'video-sharing platform service' under the Revised AVMS Directive (2020/C 223/02)(hereinafter "the EC Guidelines"). The EC Guidelines strive to ensure clarity, effectiveness and consistency in the implementation of this test under the Revised AVMS Directive. Although the EC Guidelines are themselves expressed to be "not binding", s. 139G(4) of the 2009 Act requires that regard be had by An Coimisiún, as Irish competent authority, to any guidelines issued by the European Commission

in respect of the practical application of the essential functionality criterion in the definition of a VSPS in Article 1(1)(aa) of the Directive.

**28.** The EC Guidelines offer guidance to national competent authorities in determining when a platform is subject to regulation by national authorities on foot of the Revised AVMS Directive in circumstances where that Directive envisages that there will be some platforms which share video content who are nonetheless not subject to regulation as a VSPS, principally where although otherwise within the scope of the Revised AVMS Directive, the video content in question is merely ancillary to or a minor part of the service.

**29.** Under the terms of the EC Guidelines, it is acknowledged that audiovisual content should be considered as ancillary to the activities of the service where it is exclusively accessory to an underlying activity or functionality provided by the platform concerned. It is stated that audiovisual content can be considered as a ‘*minor part*’ of the activity of the service whenever, on the basis of quantitative and/or qualitative considerations, it appears that it plays an insignificant role in the overall economy of the service. It is noted:

*“From a quantitative perspective, for example, the fact that the platform hosts a significant number of videos may suggest that audiovisual content is a non-minor part of the service. At the same time, irrespective of quantitative considerations, videos may constitute a non-minor part of the platform service whenever they contribute in an important manner to the attractiveness, functionality or market success of the service itself. This can be inferred from a number of elements, such as for instance the fact that users consume significant amount of videos or programmes or that the platforms invests in, or gives prominence to, audiovisual content.”*

**30.** The European Commission advise that in order to assess whether the audiovisual content functionality is essential, Member States should consider especially, the nature and the particular role played by user generated videos and programmes in the service offered by the platform. According to the EC Guidelines, national authorities should carry out an overall analysis of the service, taking into account qualitative and/or quantitative indicators, with a view to ascertaining whether the audiovisual content provided is merely ancillary to, or a minor part of, the activities of the service. It is noted that when assessing a certain service, particular

attention should be given to whether the audiovisual content is instrumental for the commercial success or positioning of the service on the market without being of such a crucial commercial relevance that, in its absence, the service would not be able to function or continue to be provided on the market.

**31.** The European Commission further considers that, in the application of the essential functionality criterion, Member States should also pay attention to the users' perspective and, in particular, to the degree of their exposure to audiovisual content when accessing the relevant services. In the EC Guidelines, the European Commission has identified some relevant indicators that national authorities should consider when applying the essential functionality criterion of the definition of a video-sharing platform service provider. These indicators (non-cumulative) are grouped into four categories broadly summarised as follows:

- (1) the relationship between the audiovisual content and the main economic activity or activities of the service including the overall architecture and external layout of the platform, the stand-alone nature of the audiovisual content, the specific functionalities of the service tailored for, or specific to, audiovisual content and the way the service positions itself on the market and the market segment it addresses;
- (2) quantitative and qualitative relevance of the audiovisual content available on the service including the amount of audiovisual content available on the platform, the use of audiovisual content on the platform and the reach of the audiovisual content;
- (3) monetisation of, or revenue generation from, the audiovisual content by the inclusion of commercial communications in or around audiovisual content, making the access to audiovisual content subject to payment, sponsorship agreements between brands and uploaders and tracking of users' platform activities; and
- (4) the availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content such as specific features or actions prompting the consumption of audiovisual content, tools available within or around videos that are designed to attract users and encourage their interaction, tools or systems allowing users to select the audiovisual content they wish to be offered and tools or systems to track the performance and manage content uploaded on the platform.

**32.** Within each of the four broad categories or indicators, a series of sub-indicators are identified totalling some fifteen separate features which may be used to guide a decision depending on whether they are present or not, the manner in which they are present and the extent to which they are present. The EC Guidelines note that the absence of one or more of these indicators should not automatically lead to the conclusion that the service is not a video-sharing platform. Instead, a service should be considered as fulfilling the test of essential functionality where, on the basis of an overall assessment:

*“a sufficient number of indicators analysed support the conclusion that the audiovisual content provided by a service is not merely ancillary to, or a minor part of, the activities of the service.”*

### The Role of Coimisiún na Meán

**33.** An Coimisiún na Meán was established in March 2023, further to s. 6 of the Broadcasting Act 2009 (as amended by the Online Safety and Media Regulation Act 2022). An Coimisiún is Ireland’s regulator for broadcasting, video-on-demand, online safety and media development. It is also a competent authority for the Terrorist Content Online Regulation EU 2021/784 and the digital services coordinator under the Digital Services Act Regulation EU 2022/2065. An Coimisiún is led by its Executive Chairperson and four Commissioners with responsibility for online safety, media development, broadcasting and digital services respectively. Each of the Commissioners has a significant degree of expertise in regulatory decision-making.

**34.** An Coimisiún has a range of responsibilities, including setting standards, rules, and codes for the different types of media services and relevant online services under the jurisdiction of Ireland and is the competent authority in Ireland for the purpose of the implementation the Revised AVMS Directive including through the designation of online services as VSPS. The functions of An Coimisiún are set out in s. 7 of the 2009 Act. An express power is provided for An Coimisiún to engage in evidence-based decision making in the exercise of its functions and promote evidence-based decision making by those with which it consults (s. 7(3)(h)). Under s. 21 of the 2009 Act, An Coimisiún may make an order imposing a levy on: (a) providers of audiovisual media services; (b) providers of sound broadcasting

services; (c) providers of designated online services.

**35.** Following its establishment, An Coimisiún engaged with stakeholders to support and enhance its understanding of the sector and sectoral and online safety issues. Engagement with stakeholders included consultation on the designation of VSPS as a category of relevant online services to which online safety codes may be applied. An Coimisiún published a Call for Inputs on its first Online Safety Code applicable to VSPS. In addition, An Coimisiún appointed independent consultants (PA Consulting) to undertake a literature review of available evidence pertaining to online harms on VSPS (report published in September, 2023). It also engaged with the European Commission, the Directorate-General for Communications Networks, Content and Technology (hereinafter “DG CNECT) and the European Regulators Group for Audiovisual Media Services (“ERGA”) in relation to the online safety features that VSPS providers are required to design and implement in line with the Revised AVMS Directive, the development of effective mechanisms to assess the appropriateness of the measures taken by VSPS providers, cross-border cooperation with other EU media regulators and procedural solutions for effective handling of complaints concerning matters with a potential interplay of the Revised AVMS Directive/DSA features.

**36.** In order to gather further information about the views of the public on the regulation of video-sharing platform services, An Coimisiún appointed IPSOS B&A to undertake two surveys on its behalf. The first survey focused on usage by the public of websites and applications that provide video. Questions addressed, amongst other matters, the frequency of use of websites and applications and frequency of watching, sharing or uploading videos. The second survey was focused more on the potential harms caused by video content and regulatory responses to these potential harms. The impact of potential harms on certain groups in society was explored and respondents were also asked for their opinion on who should be responsible for protection.

*Online Safety Regulation under The Broadcasting Act, 2009 as amended by the Online Safety and Media Regulation Act 2022*

**37.** Under the provisions of the 2009 Act (duly amended by the provisions of Online Safety and Media Regulation Act 2022), An Coimisiún na Meán took over the functions of the

Broadcasting Authority of Ireland as the regulator for broadcasting in Ireland in addition to newly prescribed functions in establishing and implementing a regulatory framework for online safety and updating the regulation of television broadcasting and audiovisual on-demand services.

**38.** In implementing the Revised AVMS Directive into Irish law, the 2009 Act provides a definition in section 2(2) of "*video-sharing platform service*" which mirrors that contained in the Revised AVMS Directive. As no transposition issue arises in these proceedings, it is not necessary to repeat the wording of the domestic provisions in full. Suffice to observe that the protections prescribed in Irish law are in like terms to that contained in the Revised AVMS Directive such that no different meaning can be ascribed to Irish regulatory provisions with regard to the obligation to designate VSPS to that arising on a proper interpretation of the Revised AVMS Directive. Indeed, it is common case that in circumstances where s. 2(2) of the 2009 Act implements the Revised AVMS Directive into Irish law, an interpretation of this provision must be adopted which conforms with the Revised AVMS Directive.

**39.** Section 2 of the 2009 Act defines a "*designated online service*" as a service designated under s. 139E. The term '*video-sharing platform service*' is defined in ss. 2(2) and 2(3) of the 2009 Act, which give effect in Irish law to the definition of that term in Article 1(1)(aa) of the AVMS Directive. Thus, the definitions of concepts such as user-generated video and video sharing platform as provided for under s. 2 of the 2009 Act is closely aligned with and mirrors the language of the Revised AVMS Directive in Article 1(aa).

**40.** Online safety is addressed in terms of s. 139A-139ZF. Section 139 is located in Part 8A of the 2009 Act. This Part of the 2009 Act is divided into three chapters dealing respectively with online safety (chapter 1), designated online services (chapter 2) and online safety codes (chapter 3). Detailed provision is made in s. 139 of the 2009 Act for the procedures which apply in respect of the exercise of powers under Part 8A including as to a power to require information relevant to designation (s. 139F) and a requirement to consult before designating (s. 139H).

**41.** Section 139E of 2009 Act confers the power upon An Coimisiún to designate relevant online services as services to which online safety codes may be applied. While s. 139E confers a discretion to designate relevant online services, under s.139G, An Coimisiún is under an

obligation to designate a particular category of services, that is, VSPS. In particular, s. 139G(1) requires An Coimisiún to designate as a category of services under s. 139E "*the video-sharing platform services the provider of which is under the jurisdiction of the State*" while s. 139G(2) requires An Coimisiún to designate as a named service under s. 139E "*any relevant online service that appears to the Commission to be a video-sharing platform service the provider of which is under the jurisdiction of the State*".

**42.** Accordingly, s. 139G of the 2009 obliges An Coimisiún to designate VSPS the provider of which is under the jurisdiction of the State as a category of relevant online service with video sharing platform services as a category being designated pursuant to s. 139G(1) and named services within that category being designated pursuant to s. 139G(2) of the 2009 Act (as amended) . Pursuant to s. 139G(4) of the 2009 Act, for the purposes of ss. 139G(2) and 139G(3), the Respondent must have regard to guidelines issued by the European Commission in respect of the practical application of the essential functionality criterion to the definition of a video-sharing platform service in Article 1(1)(aa) of the Directive.

**43.** Section 139E(2) provides that a designation may be made in relation to a named service or in relation to all services falling within a category of services described in the designation and, further, that a service may be designated both as a named service and as falling within a category. It is under this provision that the Designation Decision impugned in these proceedings was made. The register of designated relevant online services is published by An Coimisiún pursuant to s. 139J of the Act.

**44.** Separately, An Coimisiún is charged with the development of an online safety code under s. 139K of the 2009 Act and this code is to be applied to designated services. Pursuant to section 139K(3), An Coimisiún is obliged to make an online safety code(s) to ensure that video sharing platform services take measures to provide the protections contained in Articles 9, 28b(1) and (3) of the Revised AVMS Directive. Under s. 139L(4)(a) and (b) of the 2009 Act, An Coimisiún is required, before making or revoking a determination under Section 139L(1) on the application of an Online Safety Code to a service or designated category of services to consult:

— where the designation is of a named service, the provider of the service,



— where the designation is of a category of services an organisation representative of providers of services falling within the category, if there is such an organisation, and the providers of those services, so far as An Coimisiún is able to consult them.

### Notice of Designation of VSPS

**45.** Following the period of consultation, engagement and research referred to above, on the 14th of August, 2023, in exercise of the powers and duties conferred on it by ss. 139E and 139G of the 2009 Act and after consultation with the persons specified in s. 139H of the 2009 Act, An Coimisiún published a notice of its designation of VSPS as a category of relevant online services to which online safety codes may be applied where the provider is under the jurisdiction of the State. Pursuant to s. 139H(3) of the 2009 Act this designation became effective on the 11th of September, 2023. In consequence, designated online services within the meaning of the 2009 Act includes VSPSs.

### Decision Framework for the Designation of a Named Service as a VSPS and Communication with Service Providers

**46.** The PA Consulting Report commissioned by An Coimisiún in anticipation of the exercise of its new statutory powers as referred to above was published and was available to all service providers, including Tumblr, in advance of any decision to designate it as a VSPS. As appears therefrom, the PA Consulting Report recommended a systematic approach to decision-making on designations of VSPS, which was summarised at Chapter 3 of the Report.

**47.** Under the recommended systematic approach, An Coimisiún would independently collect open-source information from the service website and, where such data was not available, from secondary third-party sources. The data thereby collected would be analysed by reference to certain VSPS indicators in order to make an initial assessment as to whether the service was a VSPS. An Coimisiún would then send information requests to the provider and, following its analysis of the data received, would corroborate the data provided as required. Chapter 11 of the PA Consulting Report specifically addressed the question of whether the provision of programmes or user-generated videos was an essential functionality of the service. In doing so, the PA Consulting Report referred in detail to the EC Guidelines.

**48.** In November, 2023, obviously drawing from the provisions of the 2009 Act and the PA Consulting Report and further elaborating on its intended process, An Coimisiún published a Designation Decision Framework for video-sharing platform services (hereinafter “*the Framework*”) to inform individual providers of online services of the assessment and decision-making process it intended to follow in order to determine whether a named service meets the defining criteria of a VSPS and whether the provider of such a service is under the jurisdiction of Ireland. The Framework was said to be informed, *inter alia*, by the statutory provisions of the 2009 Act and also the report prepared by the consulting body PA Consulting.

**49.** In the Framework, designation was described as the process by which An Coimisiún, 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. The purpose of the Framework was said to be to inform providers of online services of An Coimisiún’s 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. To this end, it was explained that the defining criteria of a VSPS are grounded in Articles 1(1)(aa), 28a, and 28b of the Revised AVMS Directive and in s. 2 of the 2009 Act (as amended) . It was further explained that the decision framework was informed by Irish and European regulations and legislation, consultation, data-gathering, and independent research.

**50.** It was indicated that An Coimisiún would draw on, among other sources, the data sources identified in the PA Consulting report, including questions, indicators, and metrics relevant to a VSPS designation, its own research and the European Guidelines on the application of the essential functionality criterion. Other sources of information identified included:

- A. 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.

B. Information submitted, and representations made, by the online service providers to the Commission.

**51.** It was further explained that the decision-making process could be divided into three stages, namely, Stage 1: Legal and Evidential Review; Stage 2: Initial View and Consultation and Stage 3: Final Decision and Designation. Each of these stages was explained in some considerable detail.

**52.** As regards the “*essential functionality*” criterion, extensive reference was made to the fact that in July, 2020 the European Commission had published Guidelines and the contents of the EC Guidelines were rehearsed in some detail. It was confirmed that as s. 139G of the Act requires An Coimisiún to have regard to the EC Guidelines, when applying the essential functionality criterion, An Coimisiún would therefore apply the indicators referenced in the EC Guidelines. It was further explained that the evidence, data-gathering and research stage would include independent verification by An Coimisiún that a service meets the characteristics and defining criteria of a VSPS and the jurisdictional criteria. It was stated that this research would 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.

**53.** An appendix to the Framework provides a decision tree to assist in determining whether a particular VSPS provider is under the jurisdiction of the State for the purposes of s. 2B of the 2009 Act (as amended), giving effect to Article 28a of the Revised AVMS Directive in Irish law. In the Framework, An Coimisiún made it clear that it would have particular regard to the users' perspectives and the degree of their exposure to audiovisual content when accessing the services.

**54.** As apparent from the foregoing, the Framework was largely in line with the recommendations of the PA Consulting Report which had recommended a systematic approach to decision-making on designations of VSPS comprising the independent collection

of open source information from the service website and, where such data was not available, from secondary third-party sources, analysis of data collected by reference to certain VSPS indicators (with express reference to the EC Guidelines) in order to make an initial assessment as to whether the service was a VSPS, followed by information requests to the provider and an analysis and corroboration of the data received, as required.

### Consultation on Levy Order

**55.** On the 2<sup>nd</sup> of October, 2023, An Coimisiún published a Consultation Document in relation to a consultation on a proposed levy order under s. 21 of the 2009 Act (as amended) in respect of the levy period from the 1st of January, 2024 to the 31st of December, 2024. As regards the proposed levy approach for providers of designated online services (including VSPSs), An Coimisiún indicated that its preliminary view was that the levy for providers of designated online services, including VSPSs, should be based on monthly active users and that the levy should be a fixed amount for each monthly active user rather than introducing any banding or coefficients. It was proposed that the levy would be based on a per user basis, with the charge per user for each service calculated based on the estimated costs of regulation of the sector and the total number of service users across the sector as a whole.

### Levy Order

**56.** While the decision-making process in relation to designation in the case of Tumblr as a VSPS referred to below was ongoing, An Coimisiún announced on the 22<sup>nd</sup> of December, 2023, that the Levy Order under s. 21 of the 2009 Act (as amended) would be effective from the 1<sup>st</sup> of January, 2024.

### Online Safety Code Consultation

**57.** In the meantime, in parallel with the designation process directly in issue in these proceedings and the levy order process, An Coimisiún developed a draft Online Safety Code for Video Sharing Platform Services (the "*Online Safety Code*"), which was launched for public consultation on the 8<sup>th</sup> of December, 2023.

**58.** The draft Online Safety Code sets out measures that a designated VSPS will be obliged

to implement to keep their users safe online. The stated purpose of the Code in draft form is to ensure that VSPS providers take appropriate measures to protect children from harmful content, including illegal content and age-inappropriate content. It is also intended to protect the general public from content which amounts to incitement to violence or hatred, provocation to commit a terrorist offence, dissemination of child sex abuse material, offences concerning racism or xenophobia as well as certain commercial communications. To this end, the draft online safety code proceeds to provide for measures to protect minors from cyberbullying, content which promotes self-harm or suicide, content which promotes eating or feeding disorders, content which incites hatred or violence on grounds of the protected characteristics provided for in Article 21 of the EU Charter as well as measures addressing terrorism, child sex abuse material, racism and xenophobia.

**59.** It is noted in the draft Code that it is intended that the Code will operate in tandem with other measures to protect users from harm, including the EU Digital Services Act Regulation (“DSA”) and the Terrorism Content Online Regulation (known as “TCOR”). It is stated that once finalised, the Online Safety Code will be binding on a designated VSPS based in Ireland. An Coimisiún will be able to impose fines of up to €20 million for breaches of the Online Safety Code (or, if greater, 10% of the relevant turnover of the provider in the preceding year).

**60.** As an aside, I should record that while protesting that it is not properly designated a VSPS, Tumblr has participated in the consultation process in response to an invitation to do so. Tumblr points to the terms of the draft Online Safety Code and the Levy Order to illustrate the significant implications of designation for it.

## **DECISION MAKING PROCESS AND TUMBLR**

**61.** Turning then from the general industry context to consider the specific engagement between An Coimisiún directly relevant to the Designation Decision challenged in these proceedings, it is important to start with the engagement between the parties in relation to data before turning to decision itself.

### *Consultation regarding Quantitative Data*

**62.** On the same day that An Coimisiún published notice of its designation of VSPS as a category of relevant online services to which online safety codes may be applied where the provider is under the jurisdiction of the State (see para. 45 above), namely the 14<sup>th</sup> of August, 2023, it also wrote to Tumblr to consult with it on information, specifically quantitative data, it might request from Tumblr pursuant to a statutory notice under section 139F of the 2009 Act relevant to a decision on designation of online services under section 139E of the Act. In this letter Tumblr was alerted to the fact that An Coimisiún had that day published a Notice of Designation of VSPS as a category of relevant online services to which online safety codes may be applied under section 139E of the 2009 Act.

**63.** Referring to its power under s. 139F of the 2009 Act to serve an information notice seeking information relating to that service that appeared to An Coimisiún to be relevant to a decision as to whether to designate a service as a named service, it was stated in this letter of the 14<sup>th</sup> of August, 2023 that in advance of issuing any Information Notice, An Coimisiún wished to provide service providers with an opportunity to comment on, quantitative data requests which it was considered could be helpful to it in the exercise of its regulatory functions. It was stated that it was important to An Coimisiún that the information requested, in particular data and metrics, was useful, readily available and not unduly burdensome or duplicative and could be provided within the requested timeframe (it was indicated that a four (4) week timeframe was proposed for the completion of an Information Notice).

**64.** No actual information was sought in this letter. Rather, it was made clear that the purpose of the correspondence was to identify whether there were any matters relevant to practical considerations such as the availability of information which might inform the terms of an eventual Information Notice.

**65.** The quantitative data identified in an appendix to the letter of the 14<sup>th</sup> of August, 2023 and upon which comment was invited included the average: number of monthly active users of the Service in the EU; number of users who post content of any type in any given month; number of users who post videos and/or programmes in any given month; number of videos and/or programmes posted in any given month; number of users who view: (i) no videos; (ii) 1- 10 videos; (iii) 10-30 videos; (iv) more than 30 videos in any given month; average time spent per user per day on the Service; average time spent per user per day interacting with audiovisual content; average time spent per user per day interacting with audiovisual content;

average number of user interactions with audiovisual content per user (i) per day and (ii) per month; average monthly user interactions for users aged under 18 years of age; the number or percentage of total complaints each month which relate to audiovisual content; the average monthly percentage of revenue generated from the monetisation of audiovisual content on the Service and where a dissociable section of the service contains audiovisual content, the proportion of user generated videos and/or programmes accessible in the Section also accessible through other parts of the Service and what data about users' use of the Section is used for profiling for any purpose related to other parts of the Service (e.g. as input to recommender systems used in other parts of the Service).

- 66.** Tumblr was specifically asked to confirm in relation to the data identified that:
- (i) the description of the data was clear; and
  - (ii) the data is readily available in respect of the relevant online services you provide such that it could be provided upon the issuing of an Information Notice.

#### Consultation Response

**67.** By email dated the 1<sup>st</sup> of September, 2023, Tumblr replied with observations on the data requests identified suggesting some changes, specifically, that the request in relation to video users would be better reframed to distinguish between posting original content and reposting content. Tumblr also identified areas where it did not track information identified and therefore would not be able to reply.

#### Information Notice

**68.** On the 15th of September, 2023, An Coimisiún issued a Statutory Notice (the "Information Notice") in respect of Tumblr pursuant to s. 139F of the 2009 Act. Section 3 of the Information Notice sought service details and stated that the information sought was required to inform An Coimisiún's analysis of whether the service (or a dissociable section of the service) was a VSPS for the purposes of s. 2(2) of the 2009 Act.

**69.** A range of detailed information was sought in the Information Notice. Questions asked included questions in relation to the purpose of the service, whether the service was

referred to as a VSPP, whether the service positions itself in the market as offering user-generated videos and/or programmes, whether the service positions itself against competitors based on offering user-generated videos and/or programmes, whether user-generated videos or programmes are the main draw for users, whether user-generated videos or programmes are given prominence on the site, whether the media/press/market analysts refer to the service as a VSPP, whether users commonly refer to the service as a VSPP and whether a significant proportion of user-generated videos or programmes are provided by the service.

**70.** On the question of effective control, Tumblr was asked if it had effective control over the selection of such videos and/or programmes on the service and whether it determines how such videos and/or programmes are organised on the service (organised defined as meaning Organised by means of automatic organisation or organisation by way of algorithms, displaying, tagging and sequencing).

**71.** Where it was contended that the service was dissociable, Tumblr was asked whether the Service have a dissociable section that provides audiovisual programmes or user-generated videos or both, whether any such dissociable section is different in content, form or purpose to the rest of the service, whether a section of the website allows user generated videos to be uploaded, whether videos are standalone, and separate from other content, whether videos are independent from the rest of the website, whether the section is a subdomain of a webpage, whether the section is a distinct part of an app, whether the section is only available to certain users, whether use, amount or reach of video content within the section is significant (in comparison with the rest of the service).

**72.** In Table 3C.1 further additional information was sought in tabular form which was directed to the issue of “*essential functionality*”. In relation to the relationship between the audiovisual content and the main economic activity or activities of the Service, details were requested relating to the main economic activity or activities of the Service, where on the Service, users can view and interact with videos e.g. main pages, user’s home/content feed, sharing interface, separate video feeds or applications, details were requested of the functionalities, features and systems of the Service tailored for, or specific to video content e.g. separate video feeds, applications, video search and sharing functions, recommender systems, personalisation options, auto-play and/or livestreaming.



**73.** In Table 3C.2 quantitative datasets were sought in relation to matters such as the average number per month of active users or recipients of the Service, the average number of users who post original content of any type in any given month (including content that is not audiovisual content), the average number of users who post native videos in any given month, the average number of native videos posted on the Service within the EU in any given month what this number is when expressed as a percentage of all content posted in any given month, the number of active minutes, on average, spent by the average user engaging with any content on the Service per day, the number of active minutes, on average, spent per day by the average user viewing native videos, the average number of audience engagements with native video content per user (i) per day and (ii) per month, of the total number of user reports relating to content in any given month, the average number of reports relating to native video content.

**74.** In Table 3C.3 data in relation to monetisation or revenue generation from the audiovisual content was sought including information in relation to whether access to video content is subject to payment on the Service e.g. subscription, pay per view, whether video content monetised on the Service e.g. commercial communications, advertising space, sponsorship and product placement of third party brands by uploaders, whether separate commercial arrangements apply to video-only feeds, applications or ‘experience’ on the Service e.g. advertisements delivered around live video experience, premium content streaming, what percentage of the service’s total EU revenue is generated from the monetisation of videos within the EU, when calculated relevant to other EU revenue streams and whether users’ or recipients’ engagement with audiovisual content tracked e.g. number of views per day, average viewable reach of videos.

**75.** In Table 3C.4 information was sought in relation to the availability of tools to enhance the visibility or attractiveness of the audiovisual content including details of whether posts which contain videos are treated differently to non-audiovisual content by the recommender systems on the Service, what functions, features and/or tools are available to prompt or encourage users’ engagement with videos on the Service e.g. video only feeds or apps, automatic video loops, “*take a video*” button, live chats linked to audiovisual content, link to phone camera or computer gallery, what features, tools, data and/or support are available for uploaders in relation to videos e.g. video editing tools, logistical and technical support and video performance tracking and monitoring tools.

**76.** It is immediately apparent from the terms of the questions asked in Table 3C of the Information Notice that An Coimisiún intended to conduct an assessment of “*essential functionality*” guided by those indicators identified in the EC Guidelines. As apparent, Table 3C was divided into four categories, each reflective of the category headings in the EC Guidelines considered in outline above (at para. 31). In turn, the questions asked within each part of Table 3C were directed to sub-indicators identified under each category heading in the EC Guidelines as indicative of whether a service should be considered to have an essential function devoted to video sharing for the purposes of the Revised AVMS Directive.

### Information Notice Response

**77.** On the 22<sup>nd</sup> of October, 2023, Tumblr submitted its Response to the Information Notice to An Coimisiún (the "Information Notice Response"). In its Information Notice Response, Tumblr provided detailed quantitative and qualitative information regarding the ancillary and minor nature of video in the Tumblr platform. In its Response, Tumblr confirmed that it allows users to post and share content in a variety of formats, of which user-generated video was described as “*a very small subset*”. It further confirmed that Tumblr did not have editorial control as “*users select the video content which is uploaded to the platform*”. It was indicated that users choose how they wish to engage with content on Tumblr and Tumblr employs algorithmic recommendations to help surface the most relevant and engaging content. According to Tumblr’s Information Notice Response, users may choose to view content in chronological order, according to an algorithmic recommendation system, or by searching for specific content. If a user chooses the algorithmic dashboard, content is ranked according to the user’s past actions on the platform (such as liking a post or following a tag).

**78.** It was further confirmed in the Information Notice Response that Tumblr is a microblogging platform that allows users to share small elements of content and connect primarily around common interests. It was stated that users can view and interact with videos on their homepage (“*Dashboard*”), on pages that aggregate popular or recommended content, on another user’s blog, or in search results ([https://www.tumblr.com/ dashboard](https://www.tumblr.com/dashboard); [https://www.tumblr.com/ explore/today](https://www.tumblr.com/explore/today) and <https://staff.tumblr.com/>). It was stated that none of the functionalities, features and systems are tailored specifically to video content but video

content is treated the same on Tumblr as other media types. A user creating a post can select “*Video*” as the post type in order to upload a video or share a video URL from <https://www.tumblr.com/new/> elsewhere on the web.

**79.** It was confirmed that users can explore content on Tumblr according to post type (text, photos, GIFs, quotes, chats, audio, videos, and asks).

**80.** In relation to monetisation or revenue generation from the audiovisual content it was confirmed that access to video content is not subject to payment on the Service and Tumblr does not include ads in video content e.g., ads which run before, during or after the video content plays. Users can choose to put specific content behind a paywall but this is not exclusive (or targeted to) video content. It is noted, however, that video content is indirectly monetised by virtue of being placed into the user's Dashboard alongside all other content, including ads. It was accepted by Tumblr that these advertisements monetise the service as a whole. (<https://postplus.tumblr.com/home>) but they pointed out that video is not monetised separately from other content (for example, Tumblr does not insert advertisements in the video player). Advertisements appear in the Tumblr feed and are not specific to media type. It was confirmed that Tumblr uses user actions on the platform as a signal to help provide relevant advertisements. For example, a user who engaged with a post tagged “*football*” might receive an ad related to sports. User activity is tracked across all post types for this purpose and is not specific to video, although Tumblr use view time as “*one signal among many*”.

**81.** In relation to the quantitative and qualitative data sought, information was provided over which commercial sensitivity was asserted and while the figures were provided to by An Coimisiún and to the Court, the papers were more widely available in redacted form only. It was, however, openly confirmed that the number of users posting videos each month in the EU was less than 8% of users who post original content, and less than 1% of all monthly active users. It was further openly confirmed that an average of 89,566 videos are posted on Tumblr in the EU each month and it was confirmed that videos make up 3.4% of all content posted on Tumblr in the EU. According to Tumblr’s Information Notice Response, the average active user in the EU spends 0.53 minutes (31.95 seconds) per day watching video on Tumblr. This was said to include any view that lasted 1 second or longer.

**82.** As for the availability of tools to enhance the visibility or attractiveness of the

audiovisual content it was stated that Tumblr's recommender systems do not treat posts containing videos differently to other posts. Tumblr uses view time as one signal in generating recommendations; view time was explained to be specific to videos as it is not applicable to other media types. As with other post types, users can like, reblog, or reply to a post containing a video. Posts with videos do not have tools or features that differ from other post types. Tumblr users can create video posts by uploading a video file, by providing a URL, or, in the Tumblr app, by giving the Tumblr app access to the device's camera and recording a video. If the user records a video using the Tumblr app, Tumblr volunteered in their response that they could apply a filter or convert the video to a GIF.

**83.** Tumblr further confirmed that at that time it offered a livestream video service, Tumblr Live, in a dissociable section but planned to discontinue this service in early 2024 due to low adoption. It was stated that on average, less than 300 unique EU users stream on Tumblr Live per month, less than 30,000 EU users viewed the streams, and EU users that view Tumblr Live spend on average less than 2 minutes per day watching streams. It was confirmed that the responses given in respect of the questions asked at 3C of the Information Notice related only to other video on Tumblr and excluded data about the soon-to-be discontinued livestream video.

*VSPS Designation Decision Framework ("the Framework")*

**84.** As noted above, following receipt of the Information Notice Response but before the communication of a Preliminary Designation Decision, on the 10<sup>th</sup> of November, 2023, in the stated interests of evidence-based, transparent, consistent and proportionate decision making, An Coimisiún published its decision framework for the designation of a named service as a VSPS. The Framework provided considerable detail on the three-stage process being followed by An Coimisiún (more fully described at paras. 48-54) including a process whereby, following receipt of the response to the information notice, and the other information available to it, it communicates an initial view as to whether the service is a VSPS under the jurisdiction of the State and thereafter, in accordance with s. 139H of the 2009 Act, consults the service provider before making a final decision on the designation of the service. This Framework was available generally, including to Tumblr, in advance of both the Preliminary Designation Decision and the subsequent Designation Decision.

### Preliminary Designation

**85.** On the 17<sup>th</sup> of November 2023, the Online Safety Commissioner wrote to Tumblr on behalf of An Coimisiún, indicating that it had reached the preliminary conclusion that Tumblr appeared to meet the criteria of a VSPS and appended:

- (a) a Statement of Reasons - which sets out the reasons why it appears to An Coimisiún that the Tumblr service is a VSPS (running to eight pages); and
- (b) a draft designation notice in that regard (collectively, the "*Preliminary Designation*").

**86.** In arriving at this provisional view as more fully explained in its letter and the accompanying Statement of Reasons, An Coimisiún made the following provisional findings:

- In relation to jurisdiction, An Coimisiún expressed the preliminary view that Tumblr is deemed to be established in the territory of Ireland under section 2B of the 2009 Act. No issue arises in this regard in these proceedings (unlike proceedings heard immediately before this case in *Reddit Incorporated v. Coimisiún na Meán*, Record No. 2024 / 56 JR, where jurisdiction has been put in issue and is addressed in a judgment also delivered today [2024] IEHC 367).
- In relation to the service, An Coimisiún expressed the preliminary view that Tumblr ought to be designated a VSPS on the basis of the "*essential functionality*" limb of the test set out in s. 2(2) of the 2009 Act (as amended) .

**87.** The covering letter to the Preliminary Designation invited Tumblr to consult on these preliminary conclusions, as required by section 139H of the 2009 Act and outlined in the Framework, and to provide comments and/or information which Tumblr believed to be relevant to An Coimisiún's final decision. In the Statement of Reasons, the basis for the provisional conclusions reached on an application of the relevant provisions, the EC Guidelines, the information and data furnished by Tumblr and An Coimisiún's own analysis of the Tumblr service, was set out in some detail under four headings mirroring those used in the EC Guidelines.

### Preliminary Designation Response

**88.** Tumblr responded to An Coimisiún on the 8<sup>th</sup> of December, 2023 (the "Preliminary Designation Response"), setting out why it considered that the Preliminary Designation was incorrect. It was submitted that there were a number of instances where An Coimisiún did not apply the EC Guidelines correctly, did not give due regard to relevant information provided by Tumblr, or considered irrelevant information in its analysis and in arriving at its preliminary conclusion.

**89.** It was submitted that Tumblr's video-sharing functionality is ancillary to and a minor part of the Tumblr service and it could not reasonably be determined that a sufficient number of indicators supported An Coimisiún's preliminary conclusion. It was noted that while An Coimisiún was correct that Tumblr's main activity is to provide users with access to user-generated content, it was contended that no evidence had been provided to support the conclusion that *"videos appear to play an integral role in the user-experience on Tumblr,"* nor that *"audiovisual content contributes in an important manner to the attractiveness and functionality of the service."*

**90.** Emphasis was placed on the low incidence of video content on Tumblr relative to other types of content (videos make up less than 4% of posts). It was contended that An Coimisiún's had disregarded important relevant information in relation to the low level of video use in its analysis and in arriving at its preliminary conclusion. It was pointed out that An Coimisiún has included Tumblr Live in its assessment despite the fact that it had been made clear in the Response that Tumblr plan to discontinue this service in early 2024 due to low adoption. It was contended that the fact that Tumblr Live did not succeed as a product was also itself evidence of how video is viewed by Tumblr users and it was asserted that *"videos simply are not a preferred format amongst our user base, and placing videos in a more central position on the platform received a significant negative response."*

**91.** It was further submitted that in noting that Tumblr TV is a stream of videos and GIFs, An Coimisiún failed to factor in that per Recital 6 of the Revised AVMS Directive, GIFs are outside the scope of the Directive and so it was inappropriate to consider them for the purposes of the designation decision.

**92.** It was protested that the links relied upon by An Coimisiún as demonstrating the promotion of video on Tumblr did not in fact show the promotion of video and in some cases are evidence of video's ancillary nature to Tumblr. In this regard complaint was made with regard to specific links relied on by An Coimisiún. In one case it was stated that the link was an internal communication to staff rather than a communication to users. In another it was said that the link related to embedded video rather than native video which it was contended was irrelevant. The Preliminary Designation was deprecated on the basis that An Coimisiún had failed to provide evidence in support of the criteria outlined in this section of the Guidelines but instead the preliminary designation was said to make a "*conclusory statement*" that videos are integral to the user-experience, relying on irrelevant information in lieu of more pertinent information evidencing the minor and ancillary nature of video on Tumblr.

**93.** It was further noted that while An Coimisiún considered the quantitative data provided by Tumblr was not determinative of a significant amount of video content being viewed on Tumblr, An Coimisiún was then said to have dismissed without explanation the quantitative data in favour of other qualitative factors. It was contended that the Guidelines are clear that meaningful quantitative data, such as that supplied by Tumblr, should be carefully considered by An Coimisiún. Specifically, it was contended that An Coimisiún must consider: the amount of audiovisual content available on the platform, the use of audiovisual content on the platform and the reach of the audiovisual content on the platform.

**94.** It was contended that the quantitative data provided meaningful and reliable evidence that Tumblr does not include a significant amount of videos (90,000 videos per month being less than 4% of all posts), users do not make substantial use of videos (less than users post videos each month being less than 1% of active users), and videos don't reach large numbers of users (average user spends 32 seconds per day watching video on Tumblr and has engagements with video per month). Despite this, Tumblr complained that the Statement of Reasons simply notes the quantitative information provided by Tumblr without carrying out any assessment of this data. It was further contended that by so doing An Coimisiún had arbitrarily disregarded the significant quantitative evidence weighing against the existence of an essential functionality devoted to the sharing of videos without providing a reasoned explanation for why qualitative factors overrode strong quantitative data. It was submitted

that the EC Guidelines indicate that qualitative evidence is a “*recourse*” in the absence of precise data but that in this case significant and precise data had been provided yet An Coimisiún still chose to rely primarily on qualitative data.

**95.** With regard to monetisation, it was pointed out that the Guidelines specifically call out “*pre-, mid- or post-rolls*” as especially indicative of commercial communications in or around audiovisual content, yet Tumblr does not place pre-, mid-, or post-roll advertisements on videos. Nor does Tumblr facilitate sponsorship agreements between brands and uploaders, one of the key requirements under the Guidelines. By way of update since the Response, it was stated that it would no longer be the case that creators could put video content behind a paywall. It was confirmed that the service that enabled subscription content, Post+, was being discontinued and would be fully discontinued in January, 2024. As for tipping, it was stated that acceptance of tips is enabled in only 5 countries in the EU and only a small number of accounts have signed up. It was stated that data indicates that under 2,300 total accounts in the EU have enabled tipping. Given the *de minimis* number of accounts participating, the small amounts of revenue generated, and the paucity of video content that drives tipping, it was urged that An Coimisiún should not consider tipping as an indicator of Tumblr’s indirect monetisation of video.

**96.** Addressing the availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content, Tumblr complained that An Coimisiún had relied on insufficient or irrelevant evidence to conclude that Tumblr provides specific tools aimed at enhancing the visibility or attractiveness of audiovisual content, or that any such tools lead to greater exposure to audiovisual content. It was observed that while An Coimisiún was correct in noting that videos are shown to users on prominent functions without any specific requests or inputs on Tumblr’s primary functions such as the user dashboard, it was contended that the content available on such functions roughly reflects the content generally available on Tumblr, which is overwhelmingly non-video content. It was contended that An Coimisiún did not further consider “*whether audiovisual content could be considered as being actively pushed to the users.*” It was accepted that while Tumblr makes filters available for images and videos, it was contended that the mere existence of a filter is not sufficient evidence for the indicator in the Guidelines, which lists a wide range of potential tools that could attract users and encourage their interaction. In conclusion it was stated:



*“To conclude, it cannot reasonably be said that “a sufficient number of indicators” support the preliminary conclusion that video-sharing is an essential functionality of the Tumblr service. The evidence provided in the Response and in this letter evinces a clear lack of emphasis on video as a reason to use Tumblr; a low proportion of video on Tumblr; low user engagement with video and limited time spent watching video; minimal and indirect monetisation; and limited tools provided to users to upload and engage with video. As the Commission’s own expert advisors recently recommended (at page 43), the Commission should consider whether the absence of video would significantly reduce the amount of content on their service, the service’s utility or function, or its level of use by or attractiveness to users. For Tumblr, the evidence is clear that the answer to those questions is no. This letter has provided new information, such as the end date for Tumblr Live, the discontinuation of Post+, and the statistics for the tipping feature. We appreciate your consideration of this new information and are available to answer any questions you may have.”*

### Designation Decision

**97.** By correspondence dated the 29<sup>th</sup> of December, 2023, Tumblr was advised of An Coimisiún’s decision to designate it as a VSPS (hereinafter “the Designation Decision”) on the 28<sup>th</sup> of December, 2023. In the letter communicating the Designation Decision, Tumblr was advised that An Coimisiún had reached the conclusion that the service Tumblr appeared to be a VSPS the provider of which is under the jurisdiction of the State.

**98.** In addition to concluding that Tumblr is under the jurisdiction of the State because it is deemed to be established in Ireland (not in issue in these proceedings), the Designation Decision found that:

*“Pursuant to section 2(2) of the Act, an essential functionality of the service Tumblr is devoted to providing audiovisual programmes and/or user-generated videos by electronic communications networks, to the general public, in order to inform, entertain or educate; and the provider of Tumblr, Tumblr Inc., does not have effective control over the selection of those audiovisual programmes and/or user-generated videos, but determines their organisation by automatic means or algorithms or otherwise.*

**99.** It was stated that in arriving at its Designation Decision An Coimisiún had regard to its statutory obligations, the European Commission Guidelines on the application of the essential functionality criterion, the Response to the Information Notice, the Consultation Response, and An Coimisiún's own analysis of the service Tumblr in forming its view. Having formed this view, An Coimisiún decided to exercise its powers pursuant to section 139E and section 139G of the Act to designate Tumblr as a named service to which online safety codes may be applied and was giving notice to Tumblr Inc. pursuant to section 139H(3)(a) of the Act that Tumblr has been designated as a named VSPS.

**100.** Appended to the cover letter for the Designation Decision was:

- a final Statement of Reasons summarising An Coimisiún's reasoning in making its determination, appended to which was a separate document consisting of An Coimisiún's response to the issues Tumblr raised in its Consultation Response; and
- a final Designation Notice.

**101.** The Final Statement of Reasons is a detailed document some eight pages long. The additional response to the issues raised by Tumblr appended to same ran to a further five closely typed pages. These documents were considered in great detail during the hearing before me. Given their central importance to the issues in these proceedings in identifying considerations informing the decision and the reasons for the decision, it is necessary to address its contents in some further detail.

#### *Final Statement of Reasons*

**102.** In its Final Statement of Reasons, An Coimisiún first describe the main characteristics of Tumblr and sets out the reasons why it appears to An Coimisiún to be a service within the meaning of Articles 56 and 57 of the Treaty on the Functioning of the European Union which is provided over an electronic communications network. No issue is taken with its approach in this regard.

**103.** Secondly, An Coimisiún set out the reasons why it appears to it that Tumblr provides audiovisual programmes and/or user-generated videos that fall within the scope of the

definition of a video-sharing platform service.

**104.** Thirdly, An Coimisiún sets out the reasons why it appears to it that an essential functionality of Tumblr is devoted to providing the audiovisual programmes and/or user-generated videos.

**105.** Finally, An Coimisiún sets out the reason why it appears to it that Tumblr is under the jurisdiction of the State, also not in issue in this case.

**106.** The Final Statement of Reasons records the fact, said to be verified by An Coimisiún's own observations and not disputed, that Tumblr provides audiovisual programmes and/or user-generated videos through various functions on Tumblr, such as the Dashboard, on pages that aggregate popular or recommended content, on users' blogs and in search results. It is noted that these audiovisual programmes and/or user-generated videos are provided on Tumblr through functions which are openly accessible and available to the public at large, such as on the For You Feed and on Tumblr TV.

**107.** It is further noted that there is "*the potential*" for these videos on Tumblr to be viewed by large numbers of people and the data supplied by Tumblr in its Response indicated that this is the case in fact. It is recorded that there are no restrictions limiting access to Tumblr to particular individuals or groups of individuals or preventing sectors of the public from signing up to Tumblr and thus the content is considered by An Coimisiún to be available to the general public.

**108.** An Coimisiún's conclusion that Tumblr provides the functions on the service that organise posts containing audiovisual programmes and/or user-generated videos, together with other forms of content and has control over the functionality that distributes and determines how videos are delivered on Tumblr when users upload or share them, irrespective of the particular form or means by which those users access Tumblr (including variations in its user-interface) is clearly set out. Examples of these kinds of functions given by An Coimisiún in its decision were listed as including Tumblr's feeds and users' Account pages.

**109.** It is noted by An Coimisiún that in its Response Tumblr had described how it uses algorithmic recommendations to help surface the most engaging and helpful content for users.

On this basis An Coimisiún concludes that Tumblr has overall power to control the organisation of the platform (including the ability to change or remove the options available to users) notwithstanding the fact that users may be given a degree of control over the organisation of content in circumstances where the concept of “*organisation*” in the Act includes by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.

**110.** In considering whether audiovisual programmes and/or user-generated videos inform, entertain or educate, the Final Statement of Reasons which accompanied the Designation Decision records that An Coimisiún itself examined parts of Tumblr where users can post audiovisual programmes and/or user generated videos to the general public and the organisation of which is determined by Tumblr.

**111.** It is noted that the majority of the videos that users post on these functions as examined by An Coimisiún inform, entertain and/or educate rather than being wholly designed to support economic transactions. To illustrate this, it is recorded that An Coimisiún had found videos shared for general entertainment, informative and educative purposes such as clips from shows, humorous videos and videos containing crafting tips and tricks.

**112.** It is noted that An Coimisiún's view that the videos on Tumblr are provided to inform, entertain and educate is also supported by the manner in which Tumblr categorises its content through thematic and trending tags. It is observed that tags on the service generally relate to pop culture matters like movies, tv shows, video games, Dungeons & Dragons etc., which it is observed “*are typically associated with “fandom”*”. In support of its Designation Decision, An Coimisiún also referred to the description of the user-experience on Tumblr in its FAQs:

*“[...] you’ll find some posts that make you chuckle; maybe some that make you think; posts that make you feel something, and posts that make you feel nothing. You’ll make friends. You’ll make enemies. You’ll fall in love (sometimes with your enemies). You’ll become unrecognizable to your friends and family. They’ll worry about you. You’ll be okay. You’re on Tumblr.”*

**113.** In its assessment of “*essential functionality*”, An Coimisiún in its Final Statement of Reasons stated:

*“It appears to the Commission that an essential functionality of the service Tumblr is devoted to providing audiovisual programmes and/or user-generated videos to the general public in order to inform, entertain or educate. On the basis of the Commission’s overall assessment, a sufficient number of indicators analysed support the conclusion that the audiovisual content provided by Tumblr is not merely ancillary to, or a minor part, of the activities of the service. The Commission notes that the videos appearing on Tumblr have an intrinsic informational, entertainment and/or educational value; that Tumblr Inc. monetises and generates revenue from videos; and Tumblr Inc. provides tools to enhance the visibility and attractiveness of videos. Accordingly, the Commission concludes that providing videos is not a merely ancillary or minor part of the activities of the service.”*

**114.** An Coimisiún goes on to note that the relevance of videos can be assessed on the basis of both quantitative and/or qualitative indicators. An Coimisiún further notes that irrespective of quantitative considerations, videos may constitute a non-minor part of the service whenever they contribute in an important manner to the attractiveness, functionality or market success of the service itself. An Coimisiún records its view that the audiovisual content contributes in an important manner to the attractiveness and functionality of the service by enabling users to interact and engage with one-another. An Coimisiún also notes that it considers, based on the evidence before it, that videos are instrumental for the positioning of the service Tumblr on the market because it is a social media service designed to encourage users to consume different forms of user-generated content.

**115.** In reaching its view on “*essential functionality*” it is stated that An Coimisiún has considered in particular the indicators of “*essential functionality*” set out in the *European Commission Guidelines on the application of the essential functionality criterion*. An

Coimisiún’s reasoning is set out under four headings, which are identified by An Coimisiún as reflecting the main categories of indicator in the European Commission Guidelines. It is noted by An Coimisiún that these are not cumulative.

**116.** Under the first heading, it is recorded that An Coimisiún has considered the relationship between the audiovisual content on Tumblr and the main economic activity or activities of the service. It is noted that it appears to An Coimisiún that Tumblr’s main activity is to provide users with access to user-generated content. It is said that this is evident from the layout of the service which prominently uses feeds and various functions to distribute Posts made by Tumblr users. An Coimisiún observes:

*“Videos appear to play an integral role in the user-experience on Tumblr and it appears to the Commission that these videos have an intrinsic informational, entertainment and educational value that is “stand alone” in nature (i.e. the videos do not merely support economic transactions). Posts by users can contain videos they upload directly from their devices, which they record through Tumblr or which they share from other services. The Response also describes how users can filter their searches for video content. Tumblr Inc.’s Response describes how Tumblr Inc. integrates Posts containing videos interchangeably with other kinds of Posts on Tumblr, distributes Posts containing videos across the service and provides tools to allow users to engage with them. In particular, the service uses recommender systems to surface popular Posts, including those containing videos. The Commission has observed videos on the various feeds Tumblr provides and notes that users cannot use Tumblr without being exposed to videos and without being exposed to its video-sharing functionality, because it has thoroughly integrated videos into its user-experience.”*

**117.** An Coimisiún separately refers to its observation of Tumblr TV function on the mobile version of Tumblr which includes both videos and GIFs which autoplay. It is noted that An Coimisiún has observed that videos autoplay on Tumblr’s feeds. Further reference is made to the fact that Tumblr specifically promotes Tumblr as a platform for sharing videos and several examples of when this has occurred are referenced (and hyperlinked).

**118.** Under the second heading, *“The quantitative and qualitative relevance of the audiovisual content available on the service”* it is noted that An Coimisiún has considered the quantitative and qualitative relevance of videos on Tumblr based on the information Tumblr has provided in its Response. This information is set out, some in redacted format due to commercial sensitivity (but available to the Court at hearing where redacted) broken down as to average numbers of logged-in monthly active users in the EU, the average numbers of users who post original content of any type each month in the EU and the average numbers of users post videos each month in the EU.

**119.** As regards the average numbers of users who post video content each month it is noted that Tumblr has highlighted in its Response these figures represent less than 8% of its original users who post original content, and less than 1% of all active monthly active users. An Coimisiún records that, on Tumblr’s figures, an average of 89,566 videos are posted on Tumblr in the EU each month. Videos make up 3.4% of all content posted on Tumblr in the EU. It is noted that Tumblr has highlighted that this makes up less than 4% of posts. The median number of active minutes spent on Tumblr per day by active users is then considered (redacted) and it is noted that the average active user in the EU spends 31.95 seconds per day watching video on Tumblr. The average number of engagements with video content per active user per day and per month is noted (redacted). It is further noted that Tumblr has stated that it does not break reports of video content out from reports of other content types.

**120.** Having set out the quantitative data furnished by Tumblr, An Coimisiún notes that it is not in itself determinative of the indicators concerning the relevance of audiovisual content on the service under this heading of the Guidelines being satisfied. Despite this, An Coimisiún is of the view as recorded in its Final Statement of Reasons that:

*“there are other significant factors which demonstrate the importance and relevance of the audiovisual content on the service under other headings of the Guidelines. These factors include those videos’ informational, educational and/or entertainment role on*

*the service; how they are monetised; and the tools Tumblr makes available to enhance the visibility and attractiveness of videos.”*

**121.** Under the third heading of “*monetisation or revenue generation from audiovisual content*”, it is noted that it appears to An Coimisiún from the manner in which audiovisual content on the service is monetised and generates revenues that such content has commercial relevance for the service. It is considered that video content is indirectly monetised on the service by virtue of being placed into the user’s Dashboard alongside all other content including ads, and that users’ engagement with audiovisual content is factored into decisions about which advertisements are shown to users. An Coimisiún further notes that Tumblr uses view time to assess what ads are shown to users, a form of indirect monetisation. Although reference is made to the fact that certain creators can put video content behind a paywall to charge for it and the service has a tipping feature where users can pay tips to support blogs and related content, it is noted that this feature is available in only five EU countries and “*take-up is low*”.

**122.** Finally, under a fourth heading of “*Availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content*” An Coimisiún referred to the provision of specific tools, described in Tumblr’s Response aimed at enhancing the visibility and attractiveness of videos on the service to users which it is considered indicates that such content is not merely ancillary to, or a minor part of the activities of the service. It is noted that the Response described how videos are shown on Tumblr to its users on prominent functions without any specific requests or inputs by users. It is observed that the Response further explained that if a user records a video using the Tumblr app, the user can apply a filter to the video.

#### *Engagement with the Response of Tumblr*

**123.** An Coimisiún engages with the Response of Tumblr to its Preliminary Designation both in the body of the Final Statement of Reasons and in a separate document entitled “*Tumblr - Commission response to issues raised in Tumblr, Inc.’s Consultation*”, which accompanied the Final Statement of Reasons.



**124.** In its Final Statement of Reasons, An Coimisiún notes that the Response from Tumblr had stated that none of the functionalities, features and systems are tailored specifically to video content and that video content is treated the same on Tumblr as other media types. Addressing this, it is noted that:

*“The Commission is of the view that integrating videos interchangeably with other forms of content in a service’s user-experience does not diminish the relevance of those videos in determining whether a service is a video-sharing platform service.”*

**125.** An Coimisiún also notes that in its Response Tumblr has identified Tumblr Live as a dissociable section of its service with a principal purpose devoted to providing audiovisual programmes or user generated videos or both, to the general public in order to inform, entertain or educate. It is stated that An Coimisiún has considered the points raised by Tumblr in respect of Tumblr Live in the Response (namely that it was to be discontinued from January, 2024) and the Consultation Response and has based its decision to designate Tumblr on other factors. It is made clear therefore that Tumblr Live’s functionality or activity was not a consideration in the decision to designate in view of the Tumblr’s Response. Similarly, An Coimisiún notes Tumblr's submission that its service that enabled subscription content Post+, was also being discontinued in January, 2024 and was no longer accepting new users and stated that it was basing its decision to designate Tumblr on other factors.

**126.** Separately, in its separate document entitled *“Tumblr - Commission response to issues raised in Tumblr, Inc.’s Consultation Response”* An Coimisiún addresses in some detail the Consultation Response from Tumblr dated 1<sup>st</sup> of December 2023 in which Tumblr set out the basis for its disagreement with An Coimisiún ’s Preliminary Decision that Tumblr is a VSPS because an essential functionality of the service is devoted to providing videos by electronic communications networks, to the general public, in order to inform, entertain or educate. It was stated:

*“The Commission has considered and taken account of Tumblr, Inc.’s Consultation Response in making its decision and preparing its final Statement of Reasons. This appendix contains the Commission’s response to the specific points raised by Tumblr,*

*Inc. It does not repeat in full all the points raised but refers in general to those points. However, points raised have been considered in their entirety.”*

**127.** Thereafter, An Coimisiún engaged in what amounted to almost a point-by-point response to submissions which had been made by Tumblr explaining either why it did not accept the submission or alternatively, how it adapted reasoning in light of the submissions. As regards the relationship between the audiovisual content and the main economic activity or activities of the service, Tumblr had submitted that An Coimisiún did not provide any evidence to support the conclusion that videos appear to play an integral role in the user experience on Tumblr, nor that audiovisual content contributes in an important manner to the attractiveness and functionality of the service. It was explained that An Coimisiún disagrees with this submission because:

*“The evidence provided in the Statement of Reasons, including the Commission’s descriptions of the functionality on Tumblr, supports the conclusion that videos play an integral role in the user experience on Tumblr and contribute in an important manner to the attractiveness and functionality of the service. The Commission has included clarificatory language in its Statement of Reasons in its introduction to the essential functionality section and in the “relationship between the audiovisual content and the main economic activity or activities of the service” heading in the Statement of Reasons, in particular by describing how the Commission considers Tumblr has integrated video-sharing into its user-experience.”*

**128.** Tumblr’s submission that An Coimisiún had erred in including Tumblr Live in its proposal to designate the service as a video-sharing platform service where the product had failed and the service would be discontinued in January 2024 was further addressed noting that although An Coimisiún is required to consider the qualities of services at the time it makes its designation decision, it had nevertheless had due regard to the representations made by Tumblr regarding Tumblr Live and based its decision to designate the service on other factors; namely, those other factors described in the Statement of Reasons. It was nonetheless explained that the fact that a function of the service may be unpopular with certain existing users is not a

determinative basis for concluding that videos are not commercially relevant to the service; although the failure of a function indicates it was not popular with Tumblr's users, as Tumblr suggests. It was observed that Tumblr's decision to include a video function on the service, and to do so prominently, speaks to the relevance of videos to the service (despite its ultimate failure).

**129.** Tumblr's submission that An Coimisiún's reference to "*videos and GIFs*" on its Tumblr TV platform in its preliminary decision indicated it had relied on irrelevant information and considerations in its analysis, as GIFs are outside the scope of the Directive, was addressed by An Coimisiún noting that it had described Tumblr TV as having both GIFs and videos. It was pointed out that the fact that GIFs are outside the scope of the Directive does not detract from the fact that videos that fall within scope of the Directive are provided on the function. It is explained that the function brings videos into more of a focus than is otherwise the case on functions where text posts are also present, for example with the result that the presence of videos on Tumblr TV remained relevant information to its analysis.

**130.** An Coimisiún also recorded its rejection of Tumblr's submission that the links An Coimisiún had provided as evidence that Tumblr promotes Tumblr as a platform for sharing videos, indicate that this function is ancillary. It was explained that the posts in question identify promotion by Tumblr of video-sharing functionality and An Coimisiún considered relevant to its assessment. An Coimisiún then addressed the content of each of the posts in turn.

**131.** The first post was a public communication by Tumblr celebrating its video-sharing functionality. The wording of the post states TV Takes (now Tumblr TV) is "*your one-stop shop for discovering the latest videos and GIFs directly from your dashboard*" and that users should "*Binge to [their] heart's desire!*". It is noted that this communication falls within the sort envisioned by the European Commission's Guidelines. An Coimisiún further notes the subsequent blog post by Tumblr which states that "*we won't be auto-playing videos*" but observes that Tumblr includes an autoplay function for videos on the service, as noted in the Statement of Reasons, supporting An Coimisiún's conclusion the service is a video-sharing

platform service.

**132.** It was acknowledged by An Coimisiún that the second Post it had relied upon (dating to 2012) had some historical value concerning the longevity of video-sharing functionality being present on Tumblr but added “*no significant emphasis has been placed on it in the Commission making its overall determination - but it is relevant nonetheless.*”

**133.** The third Post, An Coimisiún refers to is described as a recent public communication by Tumblr celebrating its video-sharing functionality. An Coimisiún references the following wording from the Post: “*Potatoes are neat, right? You know what else is neat? Expanding video upload limits. So we went ahead and did that.*” An Coimisiún explains that this Post emphasises the benefits of improved video-sharing functionality on the service and it is confirmed that An Coimisiún had appropriate regard to it.

**134.** The fourth Post instanced is also described as “*a recent public communication celebrating the service’s video-sharing functionality*”. An Coimisiún refers to the following text from the Post: “*We are launching Twitch embeds on web! Simply select the video post option on your dashboard, grab the embed link from the stream you want to share, and paste it into the “Add video from web” field. Click “Post,” and the stream will appear magically on...your post, duh. If you’re a Twitch streamer, you might boost your audience and even make a little pocket money broadcasting here on Tumblr.*” Of this post and Tumblr’s Response, An Coimisiún observes that in relation to Twitch embeds, the definition of audiovisual programme and user generated video under the Act and the Directive is not limited to ‘*native video*’. It is explained that when a user uses the functionality Tumblr provides to embed a video they create and upload a set of moving images with or without sound constituting an individual item on the service within the meaning of the Act and the Directive. It is explained that An Coimisiún had focused its information notice on native videos because it received feedback from services suggesting that providing information on non-native video would be difficult in the time available / services did not store this information but that did not make non-native video irrelevant.

**135.** Addressing Tumblr's claim that An Coimisiún had disregarded quantitative evidence without giving a reasoned explanation for why qualitative factors override strong quantitative data, and cited the Guidelines as stating that qualitative evidence is a "*recourse*" in the absence of precise data where in this instance data is available to demonstrate that the average user is not readily exposed to video content on the Tumblr platform, An Coimisiún disagrees that it dismissed the quantitative data. It states that it had regard to the indicators under this heading and determined that the quantitative data did not support the conclusion that an essential functionality of the service was devoted to providing videos.

**136.** It is further pointed out that the Statement of Reasons did not indicate that the quantitative data provided supported the argument that an essential functionality of the service was devoted to providing videos under these indicators. This notwithstanding, An Coimisiún confirms its view that there are other significant factors which demonstrate the importance and relevance of the audiovisual content on the service under other headings of the Guidelines. These factors were identified as including those videos' informational, educational and entertainment role on the service; how they are monetised; and the tools Tumblr makes available to enhance the visibility and attractiveness of videos.

**137.** With regard to Tumblr's reference to the survey result commission by IPSOS and as published by An Coimisiún, An Coimisiún notes that the information in the released figures was from a sample of 1,000 Irish participants and reflected the fairly low use levels of Tumblr among the participants sampled. It is further noted, however, that the data of the same survey indicated that 53% of the Tumblr users sampled either completely agreed or agreed that videos were an important feature of the service – suggesting strong reach / use of videos by users on Tumblr. It is confirmed that An Coimisiún had disregarded this information when making its determination in view of the superior nature of the quantitative information provided by Tumblr (which supported the position Tumblr had taken in relation to the indicators under this heading).

**138.** As for Tumblr’s submission that that there is no direct or specific monetisation of video; there is only indirect monetisation in that Tumblr derives revenue from ads placed in content feeds and these ads may or may not be near video content, and typically will not be due to the low frequency of video content in feeds and ads are not placed pre/post/mid-roll advertisements on videos, An Coimisiún notes that the Act, Directive or Guidelines do not suggest that the indirect monetisation of videos is subordinate to the direct monetisation of videos for the purposes of applying the essential functionality criterion. An Coimisiún further disagrees that ads would not typically be near video content observing that Tumblr recommender systems are used to surface popular Posts, including those containing videos. An Coimisiún notes that Tumblr’s customers buy ads on the service because they expect users to be exposed to them when they view content on the service, including video content.

**139.** An Coimisiún proceeds to record that it accepts Tumblr’s submission that its service that enabled subscription content, Post+, is being discontinued in January, 2024. Noting that 5 EU countries enable users to accept tips with its 'Tipping' feature and a minimal number of accounts have signed up, An Coimisiún agrees with Tumblr that it should not be considered an indicator of indirect monetisation of video and confirms that it is not relying on these factors in its decision to designate Tumblr as a video-sharing platform service.

**140.** In relation to the “*Availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content*”, An Coimisiún refers to Tumblr’s submission that while video content is available on Tumblr's primary functions such as the user dashboard, the content available on such functions roughly reflects the content generally available on Tumblr, which is overwhelmingly non-video content. An Coimisiún further refers to the submission that video content on Tumblr is not prioritised relative to other content and the fact that videos are generally available does not mean that they are "*actively push[ed]*". Engaging with this submission, An Coimisiún observes that an assessment of video content as a proportion of the overall content available is not required by the Guidelines. Furthermore, An Coimisiún did not indicate in its’ Statement of Reasons that Tumblr was promoting or prioritising video content specifically so this was not a factor to which weight was attached in designating Tumblr.

**141.** An Coimisiún refers to Tumblr’s submission that although it makes filters available for videos, the mere existence of a filter is not sufficient for the indicator in relation to the availability of tools in the Guidelines to be satisfied as well as its submission that there is no evidence presented as to the development or investment in innovative, more immersive and interactive ways of sharing and consuming audiovisual content and in response notes that it had appropriate regard to filters as they are an indicative tool in the Guidelines. Furthermore, An Coimisiún had not identified evidence of innovative, more immersive and interactive ways of sharing and consuming audiovisual content and so did not reference them in the Statement of Reasons.

**142.** Acknowledging that GIFs are outside the scope of the Directive, An Coimisiún confirms that it was removing reference to the fact that users can convert video to a GIF from its Statement of Reasons.

**143.** With reference to Tumblr’s submission that An Coimisiún does not address other indicators outlined in this section of the Guidelines, which reflect features or tools that it does not employ, An Coimisiún responded that it had appropriate regard to the tools provided by Tumblr in making its overall determination. It pointed out that it had not concluded that the tools had “*significant*” relevance but had concluded that they enhance the visibility and attractiveness of audiovisual content on the service.

**144.** In response to Tumblr’s invitation, in reliance on An Coimisiún’s expert report on VSPS designations (understood to be a reference to the PA Consulting Report), to consider how the absence of video would significantly reduce the amount of content on their service, the service’s utility or function, or its level of use by or attractiveness to users, An Coimisiún confirms that it had considered its expert report and has addressed these factors in its Statement of Reasons in the introduction of the essential functionality section and in its observations about the service under the indicators of essential functionality in the Guidelines and in his consideration of Tumblr’s Response. It reiterates that its observations support the conclusion that Tumblr appears to be a video-sharing platform service the provider of which is under the jurisdiction of the State.

## PROCEEDINGS

**145.** These proceedings were commenced following an *ex parte* application on the 24<sup>th</sup> of January, 2024 for leave to proceed by way of judicial review to challenge the designation of Tumblr as a VSPS which application was adjourned on notice to An Coimisiún to the 26<sup>th</sup> day of February, 2024 when leave was granted. In granting leave, the Court fixed a timetable for the exchange of pleadings and fixed hearing dates for the 9<sup>th</sup> and 10<sup>th</sup> of May, 2024.

**146.** The Statement of Grounds identifies six broad grounds of challenge (the first five of which were pursued at hearing) as follows:

- Ground 1: In making the Designation Decision, An Coimisiún misinterpreted and misapplied the definition of a VSPS contained in Article 1(1)(aa) of the Revised AVMS Directive and section 2(2) of the 2009 Act.
- Ground 2: An Coimisiún failed to provide adequate reasons for the Designation Decision, in breach of the right to fair procedures and Article 41 of the Charter, such that Tumblr is unable to understand why it was designated a VSPS.
- Ground 3: An Coimisiún failed to have any or any adequate regard to relevant considerations and placed undue weight on irrelevant considerations.
- Ground 4: An Coimisiún failed to examine carefully and impartially all of the relevant aspects of the evidence before it relating to this case, as required by Article 41 of the Charter.
- Ground 5: The Designation Decision is vitiated by manifest errors of assessment.
- Ground 6: The Designation Decision is incompatible with the general principles of EU law.

**147.** In a detailed Statement of Opposition filed on the 19<sup>th</sup> of March, 2024, An Coimisiún fully stands over the Designation Decision. Opposition is grounded on a detailed affidavit of Ms. Niamh Hodnett, the Online Safety Commissioner in which she explains the role of An



Coimisiún, elaborates on the expertise of its members, sets out the process for designation of VSPS, then summarises engagement with Tumblr prior to designation and responds to the grounds of challenge identified in some considerable detail including (i) to deny that the relative or comparative size of Tumblr *vis-a-vis* other designated VPSP does not preclude its designation and (ii) to point out contradictions in Tumblr's challenge, for example, insofar as it is claimed both that inadequate regard was had to the European Commission's Guidelines and on the other hand, that there has been an over-reliance on same.

**148.** Despite the fact that no expert third party opinion was sought by An Coimisiún for the purpose of making the Designation Decision or relied on by Tumblr in mounting this challenge, An Coimisiún took the unusual step of introducing an Affidavit from an expert (Mr. Sykes, a Chartered Electrical Engineer and Chartered IT Professional) in opposition. Although, Tumblr for its part has filed an Affidavit in response from an expert retained on its behalf (Professor Emmerich, Professor in Distributed Computing, Department of Computer Science at University College London), serious issue is taken on behalf of Tumblr with the admissibility of *ex post facto* affidavit evidence from experts when no such evidence was available to An Coimisiún in making the Designation Decision.

## **DISCUSSION AND DECISION**

**149.** Tumblr contends that An Coimisiún erred in law by misinterpreting and misapplying the definition of a VSPS in section 2(2) of the 2009 Act and Article 1(1)(aa) of the Revised AVMS Directive and, in particular, the requirement that the provision of programmes or user-generated videos must constitute an essential functionality of the service in order for a platform to be designated as a VSPS where the provision of user generated videos is merely ancillary to and/or constitutes a minor part of the activities of Tumblr. This case is squarely advanced in reliance on the size of the platform and quantitative data relating to video usage on the platform. Before proceeding to address the legal issues which arise for determination, it is appropriate to firstly identify areas of agreement between the parties which are relevant to my decision on these issues.

### *Factual Context*

**150.** There is little factual dispute in these proceedings. It is common case that the Tumblr platform is enabled for and permits video sharing. It is not disputed that users can view and interact with videos on their homepage ("dashboard"), on pages that aggregate popular or recommended content, on another user's blog, or in search results. It is accepted that there are 10 different categories of content and post type on Tumblr: text, photos, GIFs, quotes, links, chats, audio, videos, asks and polls. Users can like, reblog, or reply to a post containing a video. A user creating a post can select "*video*" as the post type to upload a video or share a video URL from elsewhere on the web, or, in the Tumblr app, by uploading a video or by giving the Tumblr app access to the device and recording a video. If the user records or uploads a video using the Tumblr app, they can apply a filter (or indeed convert the video to a GIF, it being accepted that GIFs fall outside the Revised AVMSD).

**151.** An Coimisiún's view that Tumblr does not have effective control over the selection of the audiovisual programmes and/or user-generated videos provided on Tumblr as such videos are uploaded and shared by Tumblr's users is not disputed. It is also common case that the video functionality is more limited than on some other platforms in that Tumblr's maximum data level is 500mb and maximum video time to 10 minutes. It is accepted that access to video content is not subject to payment. It is not in dispute that Tumblr does not include advertisements in video content e.g., advertisements which run before, during or after the video plays (pre-, mid-, or post-roll ads). It is similarly accepted, however, that video content is indirectly monetised by virtue of being placed into the user's dashboard alongside all other content, including advertisements, albeit these advertisements monetise the service as a whole and video content is not monetised separately from other content. It is established that Tumblr relies on user actions on the platform as a signal to help provide relevant advertisements. User activity is tracked across all post types for this purpose and is not specific to video.

### Interpretative Rules

**152.** Helpfully, the parties are also in agreement as to the principles which guide the interpretation of obligations which derive from EU law. It is well established that where domestic legislation transposes an obligation imposed by a directive, it must be interpreted, insofar as possible, so as to give effect to the aims and objectives of that directive (see, *inter alia*, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, Case C-106/89 *Marleasing*

[1990] ECR I-4135, Joined Cases C-397 to 403/01 *Pfeiffer & Others* [2004] ECR I-8835, at para. 110 and Case C-573/17, *Poplawski* ECLI:EU:C:2019:530) at paras. 53 to 55. This principle is designed to ensure that national courts can ensure the full effectiveness of EU law when it determines the dispute before it.

**153.** The interpretative duty on the Irish Courts has been recognised by the Supreme Court in a series of cases including *Nathan v Bailey Gibson Ltd*, [1998] 2 IR 162 and *Callaghan v. An Bord Pleanála* [2017] IESC 60 and *NAMA v Commissioner for Environmental Information* [2015] 4 IR 626.

**154.** In *NAMA*, the principle was explained by O'Donnell J. (as he then was) as referable to the rules for the interpretation of legislation introduced implementing an international treaty and the specific obligation undertaken by Ireland as a member of the EU which requires that the courts approach the interpretation of legislation in implementing a directive, so far as possible, teleologically, in order to achieve the purpose of the directive. Accordingly, it is agreed that it is necessary to interpret s. 2 of the 2009 Act in conformity with Article 1(1)(aa) of the Revised AVMS Directive and to adopt a teleological approach, so as to give effect to and achieve the purpose of the Directive.

**155.** It is further agreed, and I accept, that in interpreting a provision of EU law, it is necessary to consider, not only its wording, but also the context in which it occurs and the objectives pursued by the legislation of which it forms part (C-570/19 *Irish Ferries*, at para. 22). The legislative history (*travaux préparatoires*) is relevant (C-258/99 *BASF*, at paras. 43, 51 and 56) and assistance may be derived from different language versions (C-64/95 *Konservenfabrik Lubella Friedrich Bilker GmbH & Co KG*, at para. 17). Furthermore, the titles to provisions are relevant (C-216/96 *Conserve Italia Soc Coop* at para. 96). The Recitals in the preamble to a regulation may cast light on the interpretation to be given to its provisions (C-215/88 *Casa Fleischhandels-GmbH* at para. 31) but cannot be relied on to interpret those provisions in a manner clearly contrary to their wording (C-136/04 *Deutsches Milch-Kontor v Hauptzollamt Hamburg-Jonas* at para. 32).

**156.** The parties are also *ad idem* that EU legislation must be interpreted to comply with the Charter of Fundamental Rights of the European Union (hereinafter the "Charter") (C-293/12 *Digital Rights Ireland Ltd v Minister for Communications*). It is also necessary to interpret

EU legislation by reference to the general principles of EU law (C-413/99 *Baumbast and R v Secretary of State for the Home Department*, paras. 91 to 93) which includes the principle of effectiveness. It is further important to note in this respect that the Commission is not entitled to any curial deference in respect of the correct interpretation of the Revised AVMS Directive, which is a question of law (*Usk and District Residents Association Ltd v An Bord Pleanála* [2009] IEHC 346).

**157.** Turning then to what is in dispute. Although, as noted, there is no dispute in relation to the principles which must guide the proper interpretation and application of the Revised AVMS Directive as implemented in Irish law and most specifically Article 1(1)(aa) of the Revised AVMS Directive and s. 2(2) of the 2009 Act, the parties diverge fundamentally as to the outcome on an application of these principles in this case. In this regard, I am bound to observe that the Statement of Grounds is, in my view, unnecessarily prolix (running to more than 83 separate paragraphs setting out “*legal grounds*” of challenge). There is considerable overlap and repetition as between the broad grounds identified and similar factual and evidential issues are raised under a range of different legal complaints. This has made my task in preparing a judgment more difficult.

**158.** In responding to the grounds of challenge identified in oral submissions a thematic approach was adopted on behalf of An Coimisiún. While this approach has much to commend it, I have elected to use the broad headings identified in the Statement of Grounds in the interests of clarity and completeness. Although I endeavour to avoid repetition, this has not been fully possible in view of the manner in which the case is pleaded. Added to the issues identified under broad headings in the Statement of Grounds is the question of admissibility and weight to be attached to *ex post facto* expert evidence in this case which I propose to address first as strong objection is taken to the admissibility of this evidence at all.

*What relevance or weight should be afforded to the ex post facto expert evidence?*

**159.** In his Affidavit the expert retained by An Coimisiún for the purpose of these proceedings, Mr. Sykes, purports to offer an opinion supportive of the Designation Decision. Without reproducing the contents of his affidavit or report in this judgment, suffice it to say that he appears to have been invited, *inter alia*, to comment on essential functionality indicators

present in the Tumblr Platform, provide an opinion on how the Tumblr App and website would function if video capability were not available on the Platform and provide his view on whether the provision of videos on Tumblr (including hyperlinked and embedded videos) is ancillary to or constitutes a minor part of the service provided by Tumblr.

**160.** Reporting in line with this invitation he confirms that in his opinion there are areas of the Tumblr Service where video sharing is a major part of the functionality, rather than an ancillary element and that it is inconceivable to imagine any social media platform including Tumblr having any market share if it did not feature good video capability and the provision of videos on the Platform is not ancillary or a minor part of the Service provided by Tumblr.

**161.** It bears note that in arriving at the opinion expressed on Affidavit and in his report as exhibited, Mr. Sykes does not confine himself to material which was before An Coimisiún when it made the Designation Decision but relies on a host of new material. He carries out an analysis which is distinct from that carried out by An Coimisiún in its Designation Decision albeit arriving at a conclusion which supports the Designation Decision. Indeed, he went so far as to develop what he describes as a “*Python*” script to interrogate the Tumblr App, to parse Tumblr posts and ascertain whether the posts are native video posts, contain embedded video content from other sources or do not contain video content. He provides an analysis of his results. This was clearly material which was not before An Coimisiún when it made its Designation Decision.

**162.** Tumblr take strong objection to reliance on the Sykes Report in defence of these judicial review proceedings but have filed a replying affidavit addressed to an eventuality that a decision might be made to admit the Sykes Report. Having summarized the evidence of Mr. Sykes, it is only fair that I would equally reflect a summary of the nature of the evidence offered by Professor Emmerich.

**163.** In the Affidavit from Professor Emmerich filed in reply on behalf of Tumblr, it is noted that in Mr. Syke’s analysis a very low proportion of posts represented “native” video (between 1.4% and 0.9% depending on whose figure is accepted). Professor Emmerich offered the opinion that removing video functionality from the Tumblr Platform would affect less than 1.4% of the posts on the Platform and the impact would therefore be very limited in his view. He contends that a user base of 135 million monthly active users which Mr. Sykes attributes to

Tumblr is small in comparison to other social media and video sharing platforms e.g. one well known platform referred to had in excess of three billion users. He attaches significance to the fact that Tumblr's rate of growth slowed after the launch of video functionality in 2016, suggesting that the provision of audiovisual is marginal compared to other factors. He observes that the video functionality provided in Tumblr's mobile App is inferior to that provided by competing social media platforms and suggests that video functionality could be switched off on Tumblr without causing users to abandon the Tumblr site, albeit this view is somewhat tentatively expressed and is predicated on users being able and willing to share video content through Tumblr as embedded video hosted on other sites, presumably on the assumption that such embedded video would not constitute user generated video which would itself warrant treating the platform as requiring regulation under the Revised AVMS Directive (an issue considered in the Reddit proceedings where it arises as a substantive issue and is addressed in the judgment in *Reddit Incorporated v. Coimisiún na Meán* [2024] IEHC 367).

**164.** On the question of what weight, if any, can be attached to these affidavits presenting new evidence, Tumblr submits not only that the Sykes Report is irrelevant and inadmissible; it goes so far as to suggest, in a new ground of review which did not form part of its pleaded case, that it is a breach of fair procedures in the decision-making process itself.

**165.** An Coimisiún defend their decision to seek to introduce expert evidence on a number of grounds. Firstly, it is their position that the central thrust of Tumblr's challenge in these proceedings is to the merits and substance of An Coimisiún's assessment of essential functionality within the Designation Decision. Acknowledging that its fundamental and overarching position is that, absent irrationality or manifest error of assessment (neither of which they consider to be present in this case), it is not permissible for me to review the merits of the Designation Decision in these proceedings and that the legality of the Decision must be assessed by reference to that Decision and the decision-making process itself, An Coimisiún contend that they are nonetheless justified in seeking to introduce expert evidence because Tumblr has invited me to engage in a review of the merits of the assessment carried out by An Coimisiún in designating Tumblr as a VSPS in fundamental respects.

**166.** An Coimisiún separately maintain that the complex nature of the assessment undertaken by An Coimisiún, including by reference to the EC Guidelines, raises *inter alia*

technical issues relating to the operation of the platform and service of a kind which fall outside the ordinary knowledge or expertise of the Court and for this reason it is appropriate to introduce expert evidence directed to explaining technical matters in a manner which allows me to understand the evidence.

**167.** On the basis, therefore, of a perceived need to defend a merits-based challenge to the Designation Decision and a concern in relation to my ability to understand the technical evidence relied upon, An Coimisiún submit that the requirements of Order 39, rule 58(1) of the Rules of the Superior Court, 1986 (as amended) which provides that expert evidence shall be restricted to that which is "*reasonably required to enable the Court to determine the proceedings*" are met. Reliance is placed on the established position in law that expert evidence can be admitted in respect of matters requiring specialised knowledge and expertise which fall outside the ordinary knowledge and experience of the Court recognized in cases such as *AG (Ruddy) v. Kenny* (1960) 94 ILTR 185 and *People (DPP) v. Bowe* [2017] IECA 250 at para.104.

**168.** Whilst An Coimisiún acknowledge that in the context of judicial review proceedings, the need for expert evidence will not ordinarily arise because such proceedings are in principle concerned with the legality, as opposed to the merits, of a decision (see *Sliabh Luachra Against Ballydesmond Windfarm Committee v an Bord Pleanála* [2019] IEHC 888; *Used Car Importers v. Minister for Finance* [2020] IECA 298), nonetheless it is maintained that an exception may be made for cases involving technical evidence or where the Court is dealing with a merits based challenge.

**169.** There is no hard and fast rule that expert evidence, not before the decision maker at the time the decision was made, is not admissible in judicial review proceedings but the circumstances in which this may occur are limited. Indeed, it is acknowledged by Tumblr that there are circumstances in which such evidence may be admissible in judicial review proceedings. Whether such evidence is admissible depends on the specific issues raised in the proceedings and the extent to which such evidence may be reasonably required to enable the Court to determine those issues.

**170.** I have been referred to various authorities on the issue including *R (Lynch) v The Dental Council* [2003] EWHC 2987 (Admin), *Kenyon v Secretary of State for Housing Communities*

*and Local Government* [2020] EWCA Civ 302, *Venuscare Ltd v Cumbria County Council* [2019] EWHC 3268 (Admin), *R (YH) v SSHD* [2010] 4 All ER 448, *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 and an extract from Lewis, *Judicial Remedies in Public Law*, 6<sup>th</sup> ed., [9-134]. Separately, the parties were invited to address the decision of Humphreys J. in *Reid v. An Bord Pleanala* [2021] IEHC 230.

**171.** As seen from these authorities, it is established that a Court can receive evidence to show what material was before the Minister or inferior tribunal. Where jurisdiction depends on a question of fact or where the question is whether essential procedural requirements were observed, the Court may also receive and consider additional evidence to determine the jurisdictional fact or procedural error. Furthermore, where proceedings are tainted by misconduct on the part of the Minister or member of the inferior tribunal or the parties before, new evidence may be admitted. An exception may also be made to admit new evidence where the evidence is necessary to explain technical matters to the court to enable the court to understand the material.

**172.** In *Reid*, Humphreys J. helpfully identified the types of situations in which it is permissible, by way of exception, to admit new evidence which was not before the decision maker. Insofar as a rationality challenge is concerned, however, he observed that the general position is that whether a decision is irrational or not falls to be determined on the basis of the material before the decision-maker (albeit this was in the context of an applicant seeking to adduce new evidence to challenge the decision of an expert body).

**173.** In *Lynch*, the High Court of England and Wales (Collins J.) accepted that irrationality is an error of law which can lead to a decision being quashed but stated that, if the decision in question "*is made by an expert tribunal or indeed by anyone dealing in a field involving consideration of matters which would not obviously be fully understood by a layman without some assistance from an expert in that field, it may be necessary at the very least to have some explanation of any technical terms*". Without such evidence, "*the Court might well be unable to consider properly any irrationality argument*", including a failure to have regard to a material matter or a taking into account of an immaterial matter.

**174.** While the High Court of England and Wales in *Lynch* emphasised that the Court's functions must not be usurped and caution must be exercised, it took the view that "*the*



*Court must be enabled to carry out its function" and "understand the material which is put before it".* In other words, where the Court is being asked to review technical issues on the grounds of irrationality, and an understanding of these issues is necessary to enable it to carry out its task, expert evidence will be admissible in judicial review proceedings. Collins J. added, however, where the tribunal or body is itself composed of experts or has been advised by an expert assessor (para. 25):

*“it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert. That is something which is inappropriate for a reviewing court.”*

**175.** This observation was made in proceedings involving an attempt to adduce new evidence by an applicant but it must be equally apposite to an attempt by a decision maker who seeks to introduce the new evidence to show that its decision was correct. The long-established position in this jurisdiction is that the decision should speak for itself and it is not appropriate to seek to supplement the orders and written judgment of a decision maker through affidavit which introduces reasoning and material which was not part of the decision (see *State (Crowley) v. The Irish Land Commission* [1951] IR 250, *Jackson way Properties v The Information Commissioner* [2020] IEHC 73 and *Utmost Paneurope DAC v Financial Services and Pensions Ombudsman* [2020] IEHC 538). In the ordinary course a decision must stand or fall on its own terms, subsequent elaboration should not be required and is not permissible.

**176.** While it is true that a portion of the Syke’s Report is dedicated to explaining technical terms (e.g. HTML, CSS, JavaScript and an explanation of the difference between Native Video, Embedded Video and Hyperlinked Video), for the most part these terms are not used in the Designation Decision or did not obviously inform that decision and therefore do not need to be explained in order for me to understand that decision or the basis for it.

**177.** Having considered the terms of the expert evidence, I am satisfied that there is no benefit to me in better understanding the evidence in this case or the Designation Decision by admitting either report as relevant to any issue I have to determine. Furthermore, insofar as Mr. Syke’s Affidavit is directed to supporting the Designation Decision in reliance on new material, I consider that it would be quite improper and unfair for Tumblr’s challenge to the

Designation Decision to be defeated on the basis of information which tends to support the decision made as the correct one when this information was not considered as part of the decision-making process.

**178.** I have concluded that the Designation Decision must stand or fall on its own terms. Accordingly, I do not propose to attach any weight to the *ex post facto* expert evidence adduced in this case. This addresses any perceived concern as to unfairness raised by Tumblr who challenge stands to be determined on the basis of the material before An Coimisiún when it made its decision, the process engaged in which involved Tumblr and the terms of the Designation Decision. My comments made in my judgment in *Reddit* ([2024] IEHC 367 at paras. (circa 179-181)) in relation to the significance of better evidence being available than that before the decision maker apply equally here and I do not interpret the fact that better evidence could have been available had further investigation or assessment been done in advance of the decision as necessarily meaning that the evidence relied upon was inadequate. The central issue is whether there was a sufficiency of evidence before the decision maker at the material time without overlooking or excluding relevant matter.

*Did An Coimisiún misinterpret and misapply the definition of a VSPS contained in Article 1(1)(aa) of the Revised AVMS Directive and section 2(2) of the 2009 Act in making its Designation Decision (Ground 1)?*

**179.** Issue is taken in these proceedings with the correctness of the decision that Tumblr provides audiovisual programmes and/or user-generated videos that fall within the scope of the definition of a video-sharing platform service and that “*an essential functionality*” of Tumblr is devoted to providing the audiovisual programmes and/or user-generated videos. This is a mixed question of law and fact. It is clear Tumblr disagrees with the decision made on its merits and I will return to this under Ground 5 in relation to the plea of manifest error, while focusing under this heading on the interpretation and application of the legal test of “*essential functionality*”.

**180.** While a variety of arguments are advanced, the overarching basis on which Tumblr challenges its designation as a VSPS in these proceedings is the size of its platform and proportion of video content on the service relative to other forms of content, including the size

of the platform and proportion of video content relative to other, larger services designated as a VSPS. At the heart of the Tumblr's contention that there is an error of law in the application of the essential functionality test in the designation of Tumblr is what it sees as the central and overriding importance of the quantitative data to the determination of whether a function is essential or not. The argument as to error of law is squarely premised on the importance which Tumblr attaches to the quantitative data which it argues should be determinative of the issue or, if not determinative, should prevail in this case, even if other qualitative factors support designation.

**181.** It is clear from the interpretative principles identified above that in properly construing the obligations created under the Revised AVMS Directive it is important to keep in focus not only the language of the Directive itself and the transposing domestic legislation but also the objectives and purpose of the Revised AVMS Directive. In this regard there is no doubt but that the Revised AVMS Directive aims to protect users from certain forms of illegal and harmful audiovisual content online.

**182.** The AVMS Directive was revised in order to extend its application to newer types of video sharing and to impose obligations on video-sharing platform providers as a means of keeping pace with technological developments with a view to ensuring that protections provided are effective having regard to changing ways in which video content is accessed online. Even the AVMS Directive before revision in 2018 referred to new technologies in the transmission of audiovisual media services (in Recital 4) and the requirement for a regulatory framework concerning the pursuit of broadcasting activities which takes account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business models with the result that subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation (in Recital 38). As long ago as 2010 and ever before the AVMS Directive was revised to broaden its scope of application, it was recognised that there would be new challenges, especially in connection with new platforms and new products and that rules protecting the physical, mental and moral development of minors as well as human dignity in all audiovisual media services are therefore necessary (in Recital 59 of AVMS Directive in 2010 pre-revision).

**183.** The fact that the intention of the EU Legislature in adopting the Revised AVMS Directive

was to ensure that appropriate safety measures are adopted to protect users and consumers from unlawful video content in a rapidly changing environment is clear from the terms of the Revised AVMS Directive itself and reinforced by its legislative history summarised above (at paras. 11-16). Manifestly, the AVMS Directive was revised expressly for the purpose of taking into account changing viewing patterns and new ways of accessing audiovisual content by aligning linear and non-linear services and by setting out European-level minimum requirements for all audiovisual media services. From its legislative history, it is clear that the objective of the Revised AVMS Directive was to create and ensure both an adequate level of consumer protection (with a particular and clear emphasis on the protection of minors) and to safeguard media pluralism before proceeding to clearly identify the context for the proposed amended Directive (as borne out by the European Commission’s Impact Assessment at p. 3) where the rapid pace of change in the audio media landscape and access to video content generated by private users on the internet were specifically pinpointed as giving rise to a need for wider regulation in different terms.

**184.** It was no secret but clearly stated that revision was required to broaden the scope of the AVMS Directive to encompass new services and players not least because different treatment was no longer justified in view of changing consumer habits and the competitive disadvantage resulting from a lower level of consumer protection in on-demand services. The proposed revision was intended to capture within the remit of the modified Directive changing viewing patterns and associated risks. It was acknowledged that the need for an expansion of the Directive arose from an identified insufficient protection of minors and consumers when consuming videos on video-sharing platforms and the lack of a level playing field between traditional broadcasting and emerging on-demand services and the instant, free and unrestricted accessibility to hardcore pornographic videos and hate speech. Of particular note given Tumblr’s functionality in this regard, video-sharing platforms employing tools like Autoplay (see p. 5 of Commission Impact Statement) were specifically identified as a concern because they enable direct exposure to potentially harmful content and incitement to hatred.

**185.** In its own terms the Revised AVMS Directive made crystal clear that the revision was driven by the extent to which the audiovisual media services market had evolved “*significantly and rapidly due to the ongoing convergence of television and internet services*”. In Recital 1 to the Revised AVMSD reference was made to *technical developments* which have allowed for

*“new types of services and user experiences”* and changes in *“viewing habits, particularly those of younger generations”*. The increasing importance of *“new types of content, such as video clips or user-generated content”* and *“new players, including providers of video-on-demand services and video-sharing platforms”* was identified as requiring an updated legal framework to achieve a balance between access to online content services, consumer protection and competitiveness.

**186.** The proposed breadth of application of the Revised AVMS Directive is signalled by the terms of Recital 4 which refers to the fact that VSPS provide audiovisual content which is increasingly accessed by the general public, in particular by young people. It is observed that this is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. It is stated that those social media services need to be included in the scope of Directive 2010/13/EU because *“they compete for the same audiences and revenues as audiovisual media services”* and because *“they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users.”* The inclusion of VSPS (as defined in the Revised AVMS Directive) within the scope of regulation was said to be required:

*“in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism”.*

**187.** Further Recitals which shed a light on the objective of the Revised AVMS Directive include:

- Recital 5 - a social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service and are not merely ancillary to or do not constitute a minor part of the activities of the social media service;
- Recital 6 - video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs should not be covered;

- Recital 10 - restriction of rights permitted by reason of overriding public interest in obtaining a high level of consumer protection so long as restrictions are justified, proportionate and necessary;
- Recital 17 - concern about incitement to hatred and violence;
- Recital 18 - concern about public provocation to commit a terrorist offence;
- Recital 45 - proportionate rules necessary in order to protect minors and the general public from harmful content and hate speech provided on video-sharing platform services;
- Recital 47 - while content not under editorial responsibility of the video sharing platform provider, typically they determine the organisation of the content including by automatic means and algorithms and should therefore be required to take appropriate measures to protect minors from content which may impair their physical, mental or moral development.

**188.** As made even more apparent from these Recitals, the driving objective of the Revised AVMS Directive was to protect minors and the general public from harmful content by subjecting video-sharing platforms to proportionate rules and controls, subject to an acknowledgement that not all social media services required to be subjected to regulation as a video sharing platform where the nature of the video sharing present on the site was minor and ancillary to the activities of the service provider. Therefore, while it is clear that in order for the new rules required under the Revised AVMS Directive to apply to it, a platform must meet certain criteria and not every platform on which video content appears constitutes a VSPS, it is also clear that it was intended that the Revised AVMS Directive would be sufficiently broad in its scope of application to be effective in a real way in protecting against the consequences of exposure to harmful video content shared on-line.

**189.** In Recital 45 the underlying theme of the Directive in achieving protection for users who consume audiovisual content through platforms which enable video sharing is returned to through a reference to:

*“new challenges, in particular in connection with video-sharing platforms, on which*

*users, particularly minors, increasingly consume audiovisual content. In this context, harmful content and hate speech provided on video-sharing platform services have increasingly given rise to concern. In order to protect minors and the general public from such content, it is necessary to set out proportionate rules on those matters.”*

**190.** In this and in many other provisions, the clear focus is on the harmful content and the need to protect rather than the precise means in which access is provided to this harmful content. A further indicator of the intended breadth of the Revised AVMS Directive is apparent from the language of Recital 47 which notes that a significant share of the content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider but:

*“those providers typically determine the organisation of the content, namely programmes, user-generated videos and audiovisual commercial communications, including by automatic means or algorithms. Therefore, those providers should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development. They should also be required to take appropriate measures to protect the general public from content that contains incitement to violence or hatred directed against a group or a member of a group on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union (the ‘Charter’), or the dissemination of which constitutes a criminal offence under Union law.”*

**191.** It is clear from the foregoing that the Revised AVMS Directive was intended to apply even in circumstances where the platform did not have control over video or audio-visual content but had organisational power in respect of the content by automatic means or algorithms. The existence of such organisational powers, but without actual editorial control, was itself identified as an indicator, not just in the subsequent EC Guidelines, but in the terms of the Revised AVMS Directive itself that a platform comes within its scope. This is borne out by the reference to organisational control through automatic means or algorithms in particular by displaying, tagging and sequencing in the definition of a VSPS given in Article 1(1)(aa) of the Revised AVMS Directive. The Revised AVMS Directive specifically highlights the central importance of the particular platform’s involvement in the organisation of video content as giving rise to a requirement on Member States to designate as a VSPS.

**192.** The definition in of a VSPS in Article 1(1)(aa) of the Revised AVMS Directive provides in unambiguous terms for designation when “*an*” essential functionality is devoted to video sharing. It seems to me that this sets a relatively low threshold for designation, a view which is consistent with a broad application of regulatory controls in respect of harmful content in the pursuit of a protection objective. It is apparent that there is no need for video sharing to be a major or even important part of a service in order for the service to have an essential functionality devoted to video sharing. Indeed, the contrasting language of “*ancillary*” and “*minor*” (in Recital 5) is used to denote the type of video content which results in a platform being excluded from designation, from which it may be inferred that all but purely ancillary or minor video content is liable to regulation.

**193.** Reflecting on the language of “*ancillary*” and “*minor*” in their plain English meaning, it seems to me that for something to be “*ancillary*”, it requires to be incidental and of no real independent significance. It ensues as a matter of chance rather than by design, it is random and peripheral and purely secondary to other content or a by-the-by product of other content.

**194.** Likewise, for it to be “*minor*”, it needs to be considered of no real importance. A “*minor*” matter is inconsequential, of little account, negligible, petty or trivial.

**195.** Seen through the prism of the natural meaning of these words, video sharing which is excluded from regulation under the Revised AVMS Directive as ancillary or minor requires to be really insignificant. The corollary is not true, however. To be regulated as a requirement of EU law, it is not necessary for video sharing functionality to be major, important or considerable.

**196.** The fact that it is not necessary for the functionality to be major or important in order for it to be an “*essential*” functionality within the meaning of the Revised AVMS Directive weighs against an overriding importance of the type contended for on behalf of Tumblr being attached to the scale and quantity of videos available on the platform to the exclusion of other considerations in deciding whether a platform requires to be designated for the purpose of ensuring it is regulated as a VSPS.

**197.** The terms of Article 28b(1) of the Revised AVMS Directive also serve to highlight its intended wide scope of the Directive insofar as control of VSPS is concerned. Article 28b(1)



requires Member States to ensure that VSPS under their jurisdiction adopt appropriate measures to protect users from certain types of video content. Under Article 28b(2), VSPS are also subject to certain obligations regarding audiovisual commercial communications while Article 28b(3) requires that measures imposed shall be *“practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided”*. In this way the size of the platform is identified as likely to be relevant to considerations of practicability and proportionality under the Revised AVMS Directive recognising that smaller sized platforms whose principal function is not video sharing but where it has an essential function devoted to video sharing may nonetheless be subject to regulation as a VSPS, albeit measures required in such circumstances should be tailored to be practicable and proportionate.

**198.** From Article 28(b) it is plain that the fact that the platform is small is not considered a barrier to designation. This is why the Revised AVMS Directive provides for account to be taken of both size and the nature of the service in Article 28(b). The language of the Revised AVMS Directive in addressing measures to be adopted does not support an interpretation of the Revised AVMS Directive which turns on control applying on the basis of quantity and scale of video content alone either as a proportion of the platform’s overall content or by comparison with other platforms and is therefore not consistent with the interpretation urged on behalf of Tumblr both before An Coimisiún during the decision-making process and before me on the hearing of these proceedings.

**199.** It seems to me to be clear from the language of the Revised AVMS Directive, therefore, that the scale and quantity of video content, whilst a relevant consideration, is never a determining factor as it could not truly be said that video content is wholly insignificant and incidental without regard being had to other considerations which tend to determine the relative significance of the video content and potential for harm of the kind contemplated under the Revised AVMS Directive arising therefrom. This much must be evident from the purpose and objectives of the Revised AVMS Directive where it is sought to provide effective protection against harmful content in a broad manner so as to capture in an even way the various and evolving means by which video content is accessed. This objective requires an interpretation and application of the scope of the Directive in a manner which evaluates the service as a whole.

**200.** Issues identified as ones which the Revised AVMS Directive was designed to address include concerns about insufficient protection of minors and consumers when consuming videos

on video-sharing platforms, the lack of a level playing field between traditional broadcasting and emerging on-demand services, the instant, free and unrestricted accessibility to hardcore pornographic videos and hate speech and a concern that tools such as Autoplay enable direct exposure to potentially harmful content and incitement to hatred. As these were the kinds of issues which resulted in the requirement for regulation, it follows that they were intended to fall within the scope of the Revised AVMS Directive.

**201.** Whether there is requirement for regulation is measured through a range of indicators which certainly include size and number amongst other consideration, but are not limited to or indeed by these considerations. In assessing whether the provision of audiovisual content to the general public is an essential functionality of a particular service with a view to addressing the identified issues of concern which were the focus of the Revised AMVS Directive a range of factors, informed by the nature of these issues, are relevant. Relevant factors include those which prompt concern about insufficient protection of minors and consumers, the lack of a level playing field between traditional broadcasting and emerging on-demand services, the instant, free and unrestricted accessibility to hardcore pornographic videos and hate speech and the existence of tools such as Autoplay of a kind which enable direct exposure to potentially harmful content and incitement to hatred.

**202.** A blinkered focus on quantitative data to the exclusion of other factors of the kind urged on behalf of Tumblr in argument fails to acknowledge the need to construe the concept of essential functionality in the light of the terms of the Directive as a whole and in a manner which gives effect to the purpose of the Revised AVMS Directive in protecting against online harm and the identified issues which the Directive was designed to address.

**203.** It is self-evidently the case on the application of conventional principles of statutory interpretation that if quantitative data alone were to be treated as determinative in assessing whether a service is a VSPS, this would significantly undermine the regulation of online safety contrary to the statutory purpose evident in the provisions of the 2009 Act and the AVMS Directive. It seems to me therefore that exclusive reliance on quantitative data to determine scope of application cannot represent a proper interpretation and application of the “*essential functionality*” requirement.

**204.** In view of the purpose of the Revised AVMS Directive, an unduly restrictive or narrow

interpretation of its field of application undermining of that purpose is to be eschewed. Effective protection of vulnerable users against online safety risks, which is at the very heart of the Revised AVMS Directive, requires a broad, expansive and liberal application of prescribed protections in a manner reflective of the dynamic and evolving environment which requires to be regulated. Thus, while the new rules prescribed under the Revised AVMS Directive apply where the principal purpose or essential functionality of the service, or a dissociable section of it, is devoted to providing user generated video content, for the rules to be effective they must be interpreted and applied in a manner which is capable of responding to the protection need which inspires it.

**205.** The identified risk to users and consumers which led to the expansion of the regulation is of a nature that the very purpose of the expanded regulation would be defeated by a narrow or strict construction of the field of application of the expanded regulation. An interpretation which seeks to undermine the protection provided for with reference only to size of the platform and the numbers of videos posted without regard to other indicators of potential risk of harm from video sharing which drive the requirement for regulation would be incompatible with the requirements of the expanded Directive and in breach of EU law in consequence.

**206.** The exclusion of services as demonstrating only minor or ancillary video functionality from the scope of application of the Directive properly only arises if the exclusion is compatible with achieving the overarching protective purpose of the Directive. As the exclusions reduce the protections available for the benefit of users and consumers, I am satisfied that insofar as an expansive approach to the essential functionality criterion is mandated by the Directive, a narrow approach must similarly apply to consideration of what constitutes “*minor*” or “*ancillary*” of video functionality properly falling outside the scope of regulation having due regard to the purpose of expanded regulation.

**207.** I am reinforced in my view as to the correct interpretation of the Revised AVMS Directive by the terms of the EC Guidelines. While the European Commission is not entitled to curial deference when it comes to a question of law, I am nonetheless satisfied the EC Guidelines have a special weight and value as an aid to proper interpretation in this context. This is so where the EC Guidelines clearly signal how the European Commission interpret the Revised AVMS Directive in a context where the European Commission has been vested with a specific function in developing guidelines under the terms of the Revised AVMS Directive

itself for the purpose of ensuring clarity and achieving consistency in its interpretation and application.

**208.** It is important to note that it has not been suggested in any concrete or specific way that the EC Guidelines, which were opened in full before me, are inconsistent with the terms of the Revised AVMS Directive or have somehow misconstrued the scope and proper application of that Directive. I do not consider any serious or real issue has been raised in this regard on the case before me. Having carefully studied the EC Guidelines, it seems to me that they are entirely consistent with the terms of the Revised AVMS Directive. The EC Guidelines do not deviate from the terms of the Revised AVMS Directive by seeking to improperly change the meaning of the Directive but are faithful both to the language and purpose of the Directive.

**209.** Where interpretation and application of the Revised AVMS Directive is aligned with the guidance provided under the EC Guidelines, as I am satisfied it is in all ways material to these proceedings, then in my view the terms of the EC Guidelines themselves are of persuasive value in deciding whether there has been an error of law or fact in this case. This must be so as the EC Guidelines are designed to ensure an even application of the legal obligations most particularly as between Member States, in order to achieve the consistency of application mandated as a matter of EU law. Afterall, it would be undermining of the whole purpose of the Revised AVMS Directive if a different approach were taken by individual member states to the concept of “*essential functionality*.”

**210.** My view, based on the language of the Revised AVMS Directive interpreted in the light of its intention and purpose, that to qualify as “*ancillary*” or “*minor*” in a manner which takes a service outside the scope of regulation under the Revised AVMS Directive requires it to be demonstrated to the satisfaction of the competent authority that video sharing is incidental or insignificant and therefore non-essential, as set out above, is consistent with and supported by the interpretation of the European Commission as reflected in the EC Guidelines. This is illustrated in a series of different ways.

**211.** It is illustrated, firstly, by the example the European Commission provided in the EC Guidelines of what constitutes “*ancillary*”, namely videos uploaded exclusively with a view to supporting economic transactions, for instance videos presenting particular goods or services with a view to a potential or actual sale.

**212.** Similarly, while the EC Guidelines acknowledge that quantitative data is relevant to an assessment of whether video sharing is a minor part of the platform’s activity, they make clear that so too are qualitative considerations. This is conveyed in express terms through reference to “*quantitative and/or qualitative considerations*” making it clear that both may be important. This juxtaposed reference to quantitative and/or qualitative factors occurs more than once in the EC Guidelines. Further, it is unambiguously stated by the European Commission that national authorities should carry out an overall analysis of the service, taking into account qualitative and/or quantitative indicators. Quantitative considerations are not identified as more important than qualitative considerations in the assessment of what is “*minor*” and qualitative factors may make video sharing a non-minor part of the service “*irrespective*” of the quantitative data.

**213.** All of the language of the EC Guidelines is directed towards explaining, in line with the Revised AVMS Directive itself, that a range of factors determine whether an activity can be properly treated as “*minor*” and it is not necessary that video sharing be a purpose, it may be incidental but it is captured within the scope of the Directive where it contributes to the service in the manner illustrated in the Guidelines. To be non-minor the Guidelines recognise that video sharing need only “*contribute*” in an important manner to the attractiveness, functionality or market success. To establish a contribution, it is not required that the video content be crucial to the commercial success of the platform as the European Commission considers that:

*“such a narrow interpretation would not guarantee an adequate level of protection of users and minors when they consume audiovisual content on many popular platforms, such as certain social media services, and would thus not be in line with the aim pursued by the Directive.”*

**214.** As clear from the EC Guidelines, the essence of the activity captured by the Directive and which requires to be measured is dual – consumption by consumers and making available for consumption by the platform (by investing in or giving prominence to audiovisual content). It matters not whether this is as host or as provider of the video content, the relevant metrics are consumption and making available or exposing (all words used almost interchangeably in the Guidelines).

**215.** Between the four categories of indicators identified under separate headings in the EC Guidelines a total of approximately 15 sub-indicators are given between the various headings with some inevitable overlap between sub-categories. The EC Guidelines expressly state that these indicators should not be applied cumulatively, consistent with ensuring the objective of the Revised AVMS Directive is achieved. As stated in the EC Guidelines “*the absence of one or more of them should not automatically lead to the conclusion that the service is not a videosharing platform.*” What is required is an “*overall assessment*” and a “*sufficient number of indicators.*” Sufficiency, not significance or substantiality, is the threshold. This is entirely in line with the language and purpose of the Revised AVMS Directive itself.

**216.** Under the first category of indicator, “*relationship between the audiovisual content and the economic activity or activities of the service*”, the point of departure for the European Commission in the Guidelines is that:

*“if the audiovisual content has value on its own on the platform, users may consume videos and programmes as standalone items i.e. independently of another underlying economic activity. In these cases, it is likely that such audiovisual content is not merely ancillary to or a minor part, the activities of that service and that users will be exposed to an important degree to such content”.*

**217.** On a literal interpretation of these words, it seems that irrespective of other indicators, exposure to video content present on a platform other than for e-commerce purposes means that it is “*likely*” that this content is not merely ancillary to or a minor part of the activities of the site. This is a broad statement which makes clear how wide the scope of the Revised AVMS Directive is in a manner which I consider entirely consistent with the terms and purpose of the Revised AVMS Directive itself. The attribution of the word “*likely*” gives a pre-eminence to this indicator, irrespective of other factors.

**218.** The first sub-indicator under the first category heading requires regard to be had to the “*overall architecture*” of the platform, the question being whether the platform is geared towards the sharing of content in view of informing, educating or entertaining users rather economic transactions. Where it is, the EC Guidelines again use the language of “*likely*” stating:

*"It is likely not to be considered as merely ancillary."*

**219.** In looking at the overall structure and external layout examples of matters to consider are given in the EC Guidelines as follows:

*"...whether or not its main pages (including the sharing interface) or platform timeline include prominent video-sharing features (as opposed to mere e-commerce), such as the presentation or suggestion of new or popular videos or live broadcasting, listing of video categories, a 'take a video' button..."*

**220.** It seems from the EC Guidelines that the presence of video sharing features of the kind identified is a matter to which significant weight attaches. These features properly bear heavily in assessing whether an essential functionality is devoted to video sharing, quite independently of quantitative data, having regard to the language and purpose of the Revised AVMS Directive. Features of this kind are present on Tumblr and were considered by An Coimisiún (including, for example, recommender functionality and the presence of video on the Dashboard) in its Designation Decision.

**221.** The next sub-indicator is the "*stand-alone nature of the audiovisual content*". In this context "*stand-alone*" is contrasted with facilitating an economic transaction in the EC Guidelines. Videos which are watched for their intrinsic informational, entertainment or educational value are identified as "*more likely*" to be a particular relevance for the activities of the platform. Videos of this kind are present on Tumblr and were considered by An Coimisiún in its Designation Decision.

**222.** The third sub-indicator under this first category relates to specific functionalities. Features tailored to or specific to audio-visual content are noted as an indication of the importance of video function to the overall activity of the platform. Illustrating what is meant, the Guidelines state "*particularly relevant would be elements such as the existence of an auto-play functionality.*" or "*filtering the results of a particular search by showing only videos....*" Of course, autoplay functionality had already been identified as a particular consideration in the *travaux préparatoires* leading to the adoption of the Revised AVMS Directive and was referred to in specific terms in the Commission's Impact Assessment. Autoplay and filtering are just two examples of specific functionalities given in the EC

Guidelines but I am quite satisfied that these types of considerations are fully embraced by the Revised AVMS Directive as bearing on a determination of essential functionality. It bears note in this regard that both autoplay and filtering functionality is present on Tumblr and was considered by An Coimisiún in its Designation Decision

**223.** The final sub-indicator in this first category of indicators is “*the way the service positions itself on the market*”. It is notable here that it embraces both marketing and self-identification in public communication as a video-sharing platform. It is clear that it is intended to capture more than market promotion and accordingly even internal communications can be relied upon as an indicator of how a platform positions itself on the market. This is important given the objection taken by Tumblr to reliance on certain communications identified by An Coimisiún in its Designation Decision where these were not considered to constitute a communication to the world at large.

**224.** The second category of indicators is entitled “*the quantitative and qualitative relevance of audio-visual content for the activities of the service*”. Even the title to the category, however, demonstrates that relevance of audio-visual content to the activities of the service can be demonstrated by both quantitative or qualitative means. Quantity of data is undoubtedly a relevant factor and the EC Guidelines provide that “*if meaningful data is available, national authorities may frame this assessment in quantitative terms, by taking into account for example the number or the proportion of videos present on the platform as compared to other type of available content.*”

**225.** The EC Guidelines therefore clearly recognise that it is important to take account of number. In this context, however, the EC Guidelines allow that “*in the absence of precise data, national authorities may have recourse to relevant qualitative evidence...*” This recourse is in the context of the sub-indicator headed “*the amount of audio-visual content available on the platform*” and any limitation on recourse to qualitative data relates only to this sub-category. The wording used, properly read in its context, does not give pre-eminent importance to quantitative data over qualitative data except in relation to assessing “*amount*” in respect of this one sub-indicator. Quantity is also of particular relevance in the second sub-indicator in this category which relates to the extent of the use of videos on the platform but no over-riding importance is ascribed to it in terms of the weight to be attached.



**226.** The third and final sub-indicator in this second category which is headed “*reach of the audiovisual content*”, is framed somewhat differently. It says “*popular videos, even if limited in number...*” making clear that quantity is not determinative in deciding on reach as the clear implication is that a small number of videos can have a wide reach and this, in itself, is an indicator of video sharing as an essential functionality.

**227.** In this way, the EC Guidelines expressly recognise, in a manner which in my view is entirely in line with both the language and objectives of the Revised AVMS Directive, that a limited number of videos can nonetheless still reach a large number of users via sharing or recommender functionality. Recital 5 of the Revised AVMS Directive is recalled to urge due regard to the general public interest in the assessment of the reach of the video content because “*even if the relative amount of such content on the platform is limited*” there may still be an important number of vulnerable users exposed to that content. The reference to “*degree of risk of exposure to minors*” included under this sub-indicator makes it clear that this sub-indicator embraces both qualitative and quantitative considerations.

**228.** The third category of indicators relates to “*monetisation*”. The monetisation of video content is said to weigh against a finding that it is “*ancillary*” or “*minor*” and monetisation of such content is said to “*generally*” indicate its commercial relevance to the service. Footnote 9 to the EC Guidelines referable to monetisation makes clear that the notion of monetisation of audiovisual content encompasses direct revenues and indirect gains obtained by the service. Both are relevant. Under the first sub-indicator in this category which is headed “*Inclusion of commercial communications in or around audiovisual content*” examples given include the presence of advertisements pre-, mid- or post-rolls but a decision that the indicator is present is not confined to the presence of advertisements pre-, mid- or post- rolls and clearly allows for the indicator to be satisfied where advertisements are present “*in and around*” the video content. Other indicators under this category include whether access to audiovisual content is subject to payment, sponsorship agreements and/or tracking. What is abundantly clear is that the presence of advertising on the site, even if not directly connected with video content itself, is sufficient to meet a monetisation criterion in determining whether video sharing is an essential functionality of a service.

**229.** In the light of the foregoing I do not accept the contention urged in argument on behalf

of Tumblr that advertisements present on Tumblr should not be considered as evidence that the monetisation indicator is satisfied because they do not immediately precede, interrupt or follow the video feed on Tumblr, being examples given in the EC Guidelines. Contrary to what was urged on behalf of Tumblr, this is not what is required by the EC Guidelines. It is clear from the EC Guidelines that advertisements which monetise the service as a whole, including the videos, are relevant once they are placed “*in and around audiovisual content*”. Accordingly, I find no error in An Coimisiún’s reliance on the presence of advertisements in and around the content, even though not part of the video content itself, in finding indirect monetisation.

**230.** The final category of indicators identified in the Guidelines is entitled “*the availability of tools enhancing the visibility or attractiveness of the audio visual content*”. The tools indicated as examples under the first sub-indicator of “*specific features prompting consumption of audiovisual content*” requires national authorities to consider features of the user interface. Specifically, the Guidelines state that where videos are suggested or shown by the platform on the main page or in the platform’s timeline, without any specific request or input by the user this indicates the relevance of content. This indicator may be satisfied by the presence of videos on the dashboard. It is further noted that “*a national authority could take into account where there is a prioritisation of videos.*” The use of the word “*could*” here suggests, however, that promotion or prioritisation is incidental rather than core to the central issue which is whether videos are suggested or shown by the platform on the main page or in the platform’s timeline, without any specific request or input by the user.

**231.** The next sub-indicator under this final category refers to the presence of tools or systems such as filters, sharing options or live chats that might encourage or attract users to interact with audiovisual content and might be facilitating the audio-visual experience on the platform and the popularity of the audio-visual content. Further sub-indicators identified include the presence of tools or systems allowing users to select the audiovisual content they wish to be offered, personalising the service and finally tools or systems to track performance and manage content.

**232.** Having thus identified a whole series of indicators, the EC Guidelines reiterate in conclusion that what is required is case-by-case analysis taking into account the specificities of the relevant service, thereby reinforcing the point that it is not necessary for all indicators to be

present.

**233.** In summary, a number of central themes emerge from the EC Guidelines as a whole, reflecting themes which I am satisfied may also be located in the purpose and objectives of the Revised AVMS Directive. Firstly, it is noteworthy that the benchmark of “*ancillary*” is the concept of the e-commerce. This gives a clear indication of the type of video sharing activity which it is intended should be excluded from the scope of application of the Revised AVMS Directive. Secondly, it is repeatedly made clear that quantitative considerations are not determinative and quantity or amount is relevant to only a small number of sub-indicators, none of which apply to the exclusion of other considerations. Thirdly, as one would expect having regard to the purpose and objectives of the Revised AVMS Directive, a narrow interpretation of scope is advocated against in the EC Guidelines. It is urged that in applying the “*essential functionality*” test, the national authority have regard to the objectives of the Revised AVMS Directive. It is stressed that all indicators need not be present and they do not require to be applied cumulatively.

**234.** The EC Guidelines make clear, completely in line with the Revised AVMS Directive in both its terms and purpose, that a range of indicators should be considered – in carrying out an overall assessment of the service with a view to ascertaining whether the audiovisual content provided is merely ancillary to, or a minor part of, the activities of the service. These considerations undoubtedly include both the quantitative and qualitative relevance of audiovisual content for the activities of the service as more fully set out in the Guidelines themselves. Nonetheless, while no one indicator is determinative, great weight attaches to the presence of some, even where the number of videos and scale of video usage is small in relative terms when compared with bigger platforms.

**235.** As the EC Guidelines are designed to achieve consistency of application as between the competent authorities of different member states and as consistency of application is itself an objective of the Revised AVMS Directive, it is important as a matter of EU law that authorities in the Member States apply the Revised AVMS Directive in the light of the EC Guidelines. They should do so unless by so doing they fail to give proper effect to the Revised AVMS Directive, having regard to its true meaning and effect. This does not mean that national competent authorities are confined to consideration of the indicators identified in the EC

Guidelines. Nonetheless, the interests of consistency of application as between Member States are such that in my view a competent authority should be slow to depart from consideration of the types of indicators identified in the EC Guidelines and should only do so where this is consistent with a proper application of the Directive.

**236.** Moreover, the fact that national authorities should have regard to the EC Guidelines and endeavour to apply the Guidelines, this clearly does not mean that the competent authority must slavishly consider each and every indicator when applying the essential functionality test. Where compelling factors are present (such as the use of recommender systems based on viewing time and monetisation through advertisement), the need to engage in a critical or extensive evaluation of other factors diminishes. It stands to reason that where the position is sufficiently compelling a competent authority may be easily satisfied as to the proper application without detailed consideration or scrutiny of more than a small number of indicators. The more borderline the question of essential functionality, however, the greater the need to consider a broad range of indicators. In this regard, it is noteworthy that some platforms have been designated by An Coimisiún without at all contesting that an essential function of their platform was devoted to video sharing within the meaning of the Revised AVMS Directive.

**237.** Indeed, the fact that the presence of some indicators can attract particular weight is clear from the terms of the EC Guidelines themselves. The particular significance attached to exposure to video content present on a platform other than for e-commerce purposes through the use of the word “*likely*” in suggesting that this content is not merely ancillary warrants mention in this regard as does the similar weight attributed to the presence of video sharing features. The fact that the user-interface contains feeds that recommend popular videos to their users is also identified in the EC Guidelines as clearly significant and the power on the part of the platform to determine the organization of video content including by automatic means or algorithms is identified as an important indicator that the platform comes within the scope of the Revised AVMS Directive. Likewise, the fact that indirect monetisation of video content is said to “*generally*” indicate its commercial relevance to the service connotes that it carries a particular weight.

**238.** Where a feature which is “*likely*” to suggest an essential functionality is present, the need to engage in a deep interrogation of other less compelling indicators wanes. This does not

mean that they are irrelevant but their presence or absence may not be very material to the decision in the face of the strength of the indicator(s) found to be present. It bears repetition, the test is “*sufficient*” indicators, not substantial or significant or still less all indicators.

**239.** Fundamentally, it is clear from both the Revised AVMS Directive and the EC Guidelines that the assessment carried out by the competent authority must be based on an overall analysis of the service, guided by the matters addressed under all categories of indicators set out in the EC Guidelines which relate to its video-sharing functionality. As a matter of law, An Coimisiún must therefore be correct in its view that the fact that Tumblr may be a smaller platform compared to other platforms that have been designated does not necessarily mean that the video sharing component of the service is minor or ancillary, and even though the platform may be small with a low quantity of video sharing, this cannot properly be regarded as precluding the designation of Tumblr as a VSPS if it satisfies the requirements of the 2009 Act and the Revised AVMS Directive on the basis of indicators other than size.

**240.** The assessment and conclusion as to whether a particular service constitutes a VSPS must be carried out on a case-by-case basis taking account of the specificities of the particular service and the evidence before An Coimisiún in each case. As elaborated on in the EC Guidelines and identified above, while quantitative data is significant, there are other significant non-quantitative factors which demonstrate the importance and relevance of the audio-visual content on the service, including how videos are monetised, the tools made available by the service to enhance the visibility and attractiveness of videos and the manner in which videos are selected for recommendation to users.

**241.** Where there has been faithful application of indicators of essential functionality identified under the EC Guidelines in the assessment carried out, then it seems to me that an argument that there has been an error of law on the part of the decision maker is one which is unlikely to succeed unless it can be demonstrated that some patent error in application of the EC Guidelines has occurred. When one turns then to the reasoning provided by An Coimisiún to explain its decision that Tumblr was a VSPS within the meaning of s. 2(2) of the 2009 Act notwithstanding its view that the quantitative data leaned against designation and in addressing

the question of essential functionality, it is immediately apparent that An Coimisiún had regard to the EC Guidelines and engaged in what might properly be termed a “*faithful*” consideration of the indicators identified in the EC Guidelines. This is manifest both from the terms of the Information Notice which directed questions to each of the four categories of indicators identified in the EC Guidelines and the Designation Decision which also adopted a format whereby indicators were considered under the same four headings which appear in the EC Guidelines.

**242.** It is clear from the terms of the Designation Decision that quantitative data was not ignored because it weighed against designation as contended on behalf of Tumblr. Instead, it was duly considered in accordance with the EC Guidelines and An Coimisiún treated it as a consideration which weighed against rather than in favour of designation. The figures were set out in some detail. An Coimisiún did not rest there, however, but proceeded, entirely correctly in my view, on the basis that the quantitative data needed to be considered in conjunction with other identified indicators before a proper decision in accordance with the Revised AVMS Directive could be made. There is no need for a narrative describing consideration of figures to confirm that regard has been had to them when the figures speak for themselves.

**243.** From the reasoning provided it is clear that, whereas An Coimisiún considered that the quantitative data weighed against designation, it was satisfied that many other factors weighed in favour and that on a final analysis the balance was tipped in favour of designation. Indicators supporting a finding that Tumblr was a VSPS as apparent from the reasoning provided with the decision included the important fact that video content is indirectly monetised by virtue of being placed into the user's dashboard alongside all other content, including advertisements. These advertisements monetise the service as a whole but that monetisation relates in part also to videos as part of the service. The EC Guidelines further indicate that where monetisation, including indirect monetisation, is present this “*usually indicates that such content is not merely ancillary to, or a minor part of, their activities.*” I have already rejected Tumblr’s argument that there was an error in treating the monetisation indicator as present on the basis of advertisements in and around video content as opposed to present in the video roll. It is clear to me that this was a factor to which An Coimisiún was entitled to attach considerable weight once satisfied on the evidence that indirect monetisation occurred. As made clear from the terms of the Designation Decision, An Coimisiún was so satisfied and this finding has, in fact, been accepted by Tumblr.

**244.** In addressing Tumblr's argument before me that video functionality is ancillary or minor and therefore outside the ambit of the Revised AVMS Directive, I am unable to ignore the compelling fact that while quantitative considerations were not determinative, it is nonetheless common case that there is an average of 89,566 videos posted on Tumblr in the EU each month giving a total of more than a million videos a year shared on that platform in the EU. I find it difficult to reconcile an argument that video functionality is minor and incidental with the presence of user generated videos on this scale on the platform. Bearing in mind that Tumblr, in common with other VSPS, has a user-interface which contains feeds that recommend popular videos to their users, the figures, even if relatively modest compared to other platforms referenced by Tumblr, nonetheless clearly evidence the potential for a similar type of risks for young people and vulnerable persons to that presented by larger platforms where there are other indicators which confirm the attractiveness and functionality of the platform for sharing user generated videos.

**245.** The potential reach of these videos (over a million annually) was a therefore a factor to which An Coimisiún was clearly entitled to attach weight when considering indicators identified under the EC Guidelines including reach. Accordingly, An Coimisiún did not err in finding that factors such as the reach of videos shared on Tumblr and the use of recommender functionality indicated that video sharing was an essential functionality. This is so notwithstanding that An Coimisiún was satisfied that quantitative data did not indicate that an essential functionality of Tumblr was devoted to video sharing having regard to the overall content on the site in terms of numbers and amount. The presence of functionality such as recommender functionality carries compelling weight, in accordance with the EC Guidelines and the scheme of the Revised AVMS Directive, without there necessarily being significant numbers of videos uploaded. Even relatively modest numbers of videos relative to other content may contribute in an important manner to the attractiveness and functionality of a service.

**246.** As for the information submitted by Tumblr in respect of other platforms designated as VSPS, the relevance of the comparative position in relation to size or even functionality does is not immediately obvious as it does not bear on the question of whether An Coimisiún was correct as a matter of law in deciding to designate Tumblr as a VSPS. The only circumstances in the facts pertaining to a comparator presents to me as being potentially relevant is where the

similarity between two platforms is such that the designation of one and not the other is so inconsistent as to be arbitrary. This is not part of the case made on behalf of Tumblr. For this reason, the emphasis attached by Tumblr in their affidavit evidence to the position in respect of other services that have been designated by An Coimisiún and the fact that it shares less videos than any other service designated to date is misplaced.

**247.** Furthermore, while Tumblr protests that because of its size and resources designation presents significant regulatory compliance challenges, this is not in itself a factor which is directly relevant to the question of whether it constitutes a VSPP within the meaning of the 2009 Act and the AVMS Directive. It would be wrong in law for An Coimisiún to proceed on the basis that a platform was “*too small to regulate*”. This does not mean that in its application of measures to a smaller designated platform that An Coimisiún is not governed by a requirement to have regard to issues of practicability and proportionality (and this is mandated by the terms of the Revised AVMS Directive most specifically in Article 28b(3) but this is not the immediate concern when it comes to designation.

**248.** Adherence to the EC Guidelines by An Coimisiún in the decision-making process in this case is apparent from the manner in which the Designation Decision, through the reasoning provided, sequentially and seriatim addresses the indicators identified in the European Commission Guidelines in turn. While the quantitative data was considered and it was acknowledged that it did not support designation, quite properly the Designation Decision did not rest on this finding. The fact that video-sharing features contributed in an important manner to the functionality and attractiveness of the service was an important aspect of the Designation Decision, as is clear from its terms. In her replying affidavit to these proceedings, the Online Safety Commissioner points out that a common characteristic shared by all of the platforms designated as VSPP to date, including Tumblr, is that their user-interfaces contain feeds that recommend popular videos to their users.

**249.** It seems to me that when regard is had to the purpose of the Revised AVMS Directive and the approach advocated in the EC Guidelines consistent with the Revised AVMS Directive, this is properly an indicator to which particular weight attaches and An Coimisiún did not err in attaching weight to this feature of Tumblr in its application of the “*essential functionality*” test in this case. This indicator is not affected by the number of videos shared and quantitative data does not detract from its significance to the question of an essential functionality.



**250.** Having carefully considered the definition of a VSPS contained in Article 1(1)(aa) of the Revised AVMS Directive and s.2(2) of the 2009 Act and the EC Guidelines to the assessment of essential functionality, I am satisfied that the fundamental premise for Tumblr's contention that there has been an improper interpretation and application of the essential functionality test in their case is based on a mistake in law on their part. Their argument is very clearly flawed insofar as it is predicated on an overriding importance being attached to quantitative data to the exclusion of other indicators.

**251.** I am quite satisfied that An Coimisiún was correct in law in considering a broad range of factors in line with the EC Guidelines before arriving at a decision. It would have been wrong for An Coimisiún to make a determination that designation was not required based on quantitative data alone without considering whether other factors leaned in favour of designation. I consider Tumblr's contention that "*recourse*" can be had to qualitative data only "*in the absence of precise data*" to be manifestly wrong in law and a misinterpretation of the EC Guidelines arising from a failure to read these words in their context.

**252.** I do not accept as factually sustainable or true Tumblr's submission that An Coimisiún then proceeded to disregard the quantitative data, without identifying any basis for doing so and instead had recourse to subjective "*qualitative data*". On any reading of the Designation Decision, this is not a fair or accurate representation of the approach taken. Far from disregarding the quantitative data, this data was considered and it was concluded that it did not support designation. The decision to designate was therefore made on the basis that while quantitative data weighed against designation, sufficient other indicators weighed in favour. This was an entirely legitimate approach for An Coimisiún to take given that the quantitative data was not determinative of the application as a matter of law.

**253.** Furthermore, the contention that the user perspective is not given any, or sufficient or appropriate, weighting in the Designation Decision is not borne out in the terms of the reasoning offered where repeat references were made to the user and the user's perspective in support of the Designation Decision. This complaint is simply untenable in the face of an open reading of the reasoning offered. The claim is at odds with the express terms of the Designation Decision, which pay particular attention to the user perspective (see generally pp.8-11 within the Statement of Reasons and pp. 13, 17-18 of the response to Tumblr's

Consultation Response).

**254.** Nor can I accept that there was an over reliance on the EC Guidelines to the detriment of reliance on the plain wording of the definition of VSPS, as set out in Article 1(1)(aa) of the Revised AVMS Directive. An Coimisiún is statutorily obliged to have regard to the EC Guidelines. As noted above, on my reading of them, the EC Guidelines are entirely consistent with and in line with the provisions of the Revised AVMS Directive and there is no basis for concluding that they provide for any other or different test to that prescribed under the Revised AVMS Directive, as contended by Tumblr, albeit at a level of vague generality and without identifying any specific point of departure in concrete terms.

**255.** Insofar as it is suggested that there is a failure in the EC Guidelines to attach proper weight to the language of “*essential*” or “*devoted*”, I do not agree. Firstly, “*an essential function*” clearly means something different to “*principal*”. I have indicated my view above that a function may be one of many and still be “*essential*”. What is centrally in issue is its importance to the service as a whole and whether it adds important value to the service. The Guidelines were directed to the factors the national authority can look to as indicators of whether the video sharing function is “*essential*” or a part of the service is “*devoted*” to video sharing. The true meaning of these words are not lost in the Guidelines, rather the EC Guidelines serve to give meaning to these words as they appear in the Revised AVMS Directive through factors which allow for their importance or value to be determined.

**256.** In a contradictory submission, Tumblr move from suggesting a flawed over-reliance on the EC Guidelines to contending for a failure to properly carry out the overall assessment required by the said Guidelines, with a view to determining whether a sufficient number of indicators analysed support the conclusion that video is not merely ancillary to, or a minor part of, the activities of Tumblr. This submission flies entirely in the face of the actual record of the Designation Decision and is untenable in the face of the text which demonstrates a very careful consideration of the full range of indicators identified in the Guidelines.

**257.** Finally, I should record that I consider the correct interpretation of Article 1(1)(aa) of the Revised AVMS Directive to be *acte clair* and do not consider that a preliminary reference to the CJEU is warranted in accordance with Article 267 TFEU.

Did An Coimisiún fail to provide adequate reasons for the Designation Decision, in breach of the right to fair procedures and Article 41 of the Charter (Ground 2)?

**258.** As with the pleaded error of law, the contention that there was a failure to provide adequate reasons for the Designation Decision in breach of the right to fair procedures and Article 41 of the Charter is laboriously pleaded in repetitive fashion. The grounds pleaded span 14 separate grounds in the Statement of Grounds.

**259.** The law in relation to the obligation of an administrative body to give reasons for its decisions as an aspect of fair procedures is now clear and the written submissions reflect a broad measure of agreement as to the relevant authorities and guiding principles. In submissions reference was made to a series of cases starting with the seminal decision in *Meadows v. Minister for Justice* [2010] 2 IR 701; *Mallak v. The Minister for Justice* [2012] 3 IR 297 and including *YY v. Minister for Justice* [2017] IESC 61; *Connelly v An Bord Pleanála* [2018] IESC 31, *Balz v An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 367, *Crekav Trading GP Ltd v. An Bord Pleanála* [2020] IEHC 400, *NECI v The Labour Court* [2021] IESC 36, [2021] 2 ILRM 1, *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7 and *Facebook Ireland Ltd v Data Protection Commission* [2021] IEHC 336. From the foregoing it is clear as a matter of Irish law that there is a duty on the part of the decision maker to communicate the reasons for the decision.

**260.** The duty to give reasons has two separate but closely related requirements (see *Connelly v. An Bord Pleanála* [2021] 2 IR 752):

- (i) First, any person affected by a decision "*is at least entitled to know in general terms why the decision is made*".
- (ii) Second, a person is "*entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision*" and, by extension, the reasons "*must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review*".

**261.** The duty to give reasons is not without its limits and reasons need not be discursive but relevant submissions should be addressed and an explanation given as to why they were not

accepted (if this is the case). The caselaw shows little tolerance for reasoning which constitutes no more than box-ticking or which is formulaic.

**262.** The obligation to provide reasons as a matter of EU law arises in similar terms which I am satisfied go no further than Irish law. In Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte*, the CJEU held at [para. 26] that the statement of reasons *must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction*". In Case C.-230/18 *Pl v landespolizeidirektion Tirol* (EU:C:2019:383), the CJEU held that, while Article 41 of the Charter is not applicable to the acts of Member State institutions, the general principles of Union law of good administration and of respect for the rights of the defence were relevant considerations where the Member State concerned is implementing Union law (paras. 56 and 57). From the foregoing, it seems to me that there is no discernible heightened duty to give reasons in EU law over and above that which already arises as a matter of domestic law, in result of which arguments based on the Charter do not require to be separately determined.

**263.** Tumblr contends that the reasoning offered in this case is formulaic, terse and opaque, amounting to an exercise in box-ticking and a recitation of issues raised, rather than actual engagement with the submissions made by Tumblr. I cannot agree. On the contrary, the Decision - which runs to a total of 18 pages, including the cover letter and Designation Notice - involves a clear and detailed statement of the reasons why, in the circumstances of the particular case, the Commission considered that Tumblr ought to be designated as a VSPS. It is established that the Designation Decision must be understood in the context of the process of consultation and engagement which had taken place with Tumblr (see *Connelly*, paras. 5.1 to 5.2, 6.17 and 7.6).

**264.** As confirmed in the affidavit evidence and summarised above, prior to taking a final decision on designation, An Coimisiún had provided Tumblr with its preliminary designation, which set out in detail its preliminary conclusion on designation and afforded Tumblr an opportunity to make submissions. Tumblr availed of this opportunity and set out in some detail why it disagreed with the preliminary decision and the reasons for it. As well as the detailed core Statement of Reasons which accompanied the Designation

Decision and clearly identifies An Coimisiún's assessment of the statutory criteria, An Coimisiún also provided a detailed response to issues raised in Tumblr's Consultation Response as an exercise of direct engagement in relation to the issues raised.

**265.** Despite what is obviously a high level of reasoning, Tumblr persists in claiming that the reasoning in the Decision is "*deficient and inadequate*". The following deficiencies in the reasoning in the Designation Decision are identified by Tumblr which, for completeness, I propose to address in turn.

**266.** First, it is contended by Tumblr there is no adequate explanation as to the basis upon which An Coimisiún concluded that the quantitative data supplied by Tumblr was not determinative, or why it considered it necessary and appropriate to have recourse to qualitative data. It seems to me that this complaint suffers from the same fundamental frailty as Tumblr's submission in respect of the asserted error of law in the application of the essential functionality test. An Coimisiún's position, consistent with both the Revised AVMS Directive and the EC Guidelines is that what is required is an assessment of the specific service across a broad range of indicators. Quantitative data is relevant but not determinative.

**267.** There was no need for An Coimisiún to explain why it was proceeding to assess the question of designation on an application of the statutory test having regard to all factors and not just the quantitative data. It was manifestly clear that it took this approach because that is what proper consideration of the legal test, guided by the EC Guidelines, required. An Coimisiún was entitled, indeed obliged, to have regard to both quantitative and qualitative indicators and evidence as part of its overall assessment of essential functionality. There was no requirement on An Coimisiún to identify precisely what weight was afforded to either specific quantitative data or general quantitative data or to justify its recourse to qualitative data.

**268.** Having regard to Tumblr's position that the quantitative data was dispositive, An Coimisiún was entitled to express the view set out in the Designation Decision that the quantitative data was not in itself determinative and to make an overall assessment based on both quantitative and qualitative indicators. While Tumblr clearly disagrees with An Coimisiún's position, this does not involve any breach of the duty to give reasons and it ought to be clear to Tumblr that An Coimisiún does not share its view as to the overriding importance

of the quantitative data.

**269.** Second, in very similar terms, it is contended by Tumblr that no explanation is provided as to how An Coimisiún formed the view that the qualitative data outweighed the quantitative data, or the weight given to either. This contention stretches the duty to give reasons too far in my view and is not supported by any authority. Nothing in either the statutory test or in the EC Guidelines required an Coimisiún to identify in its reasoning the weight to be ascribed to specific indicators. An Coimisiún clearly set out its views and reasons by reference to the different categories of indicators and, in line with the EC Guidelines, carried out an overall assessment of the service. The fact that some indicators may carry particular weight is clear from the terms of the EC Guidelines. In the balancing exercise what is required is a sufficiency of indicators. This allows for the fact that some indicators are not present or even weigh against a finding of essential functionality but that a decision to designate may still be made on the basis of other indicators which are found to be present and identified in the reasoning. It is clear from the reasoning that together these factors were considered a sufficient indicator of an essential functionality. This constitutes proper discharge of the duty to give reasons without calibrating precisely or in scientific terms how the factors were weighed.

**270.** Third, it is contended by Tumblr that no reasoning at all is provided in respect of the weight ascribed to any of the indicative factors relied on by An Coimisiún, or how An Coimisiún concluded that, taken as a whole, they have the result that the essential functionality requirement is satisfied. This is in large measure a reformulation of the first two complaints and it does not require to be separately addressed. Suffice to repeat that nothing in either the statutory test or in the EC Guidelines required An Coimisiún to identify in its reasoning the weight to be ascribed to specific indicators. An Coimisiún clearly set out its views and reasons by reference to the different categories of indicators and, in line with the Guidelines, carried out an overall assessment of the service. The duty to give reasons does not extend to a duty to measure out the relative weight being ascribed to different indicators identified in the reasoning.

**271.** Fourth, it is also asserted by Tumblr that there is no explanation of whether, and if so how, An Coimisiún reassessed the position having accepted that Tumblr intended to discontinue Tumblr Live and Post+ in the Preliminary Designation Response. This is a clear misrepresentation of the reasoning offered in support of the Designation Decision when these

factors were addressed in express terms. An Coimisiún made it clear that it had regard to Tumblr's submissions and did not base its Designation Decision on Tumblr Live and Post+.

**272.** In circumstances where the preliminary conclusion on designation did not depend on, and/or was not determined by, the position in respect of any of these matters, An Coimisiún was not required to provide any further reasons in this regard beyond noting that it had accepted Tumblr's submission. It was clear that these considerations had not been influential in the first place and therefore the acceptance of the submission did not result in a different outcome.

**273.** Fifth, it is argued by Tumblr that there is no indication of which features of Tumblr were determined by An Coimisiún to be relevant to its conclusion that an essential functionality of the Tumblr service is devoted to providing videos. Again, it seems to me that this complaint is based on a mischaracterisation of the facts and an unfair reading of the Designation Decision. Reading the decision as a whole and having regard in particular to the PA Consulting Report, the Framework, the Statement of Reasons, the engagement with Tumblr's response and the EC Guidelines, I am satisfied that contrary to Tumblr's submission, the Designation Decision adequately identifies the features of Tumblr which were relevant to its conclusion on essential functionality, as well as the reasons for its views as to the contribution of video to the attractiveness and functionality of the service and its' positioning on the market. In contending that a greater level of reasoning than the high level of reasoning actually provided is required, Tumblr relies on an over-extended and unrealistic conception of the duty to give reasons which I do not consider to be supported by precedent or principle.

**274.** Sixth, Tumblr argues that in finding that video "*contributes in an important manner to the attractiveness and functionality of the service*", An Coimisiún fail to identify the reasons for this conclusion. In point of fact, An Coimisiún states that the reasons for this finding are set out in its analysis under the "*relationship between the audiovisual content and the main economic activity or activities of the service*" indicator. Here it is stated, in what Tumblr suggests is circular reasoning, that "*videos appear to play an integral part of the user-experience on Tumblr*".

**275.** It seems to me that what Tumblr largely overlooks in the complaints levelled in these proceedings is that An Coimisiún is an expert body which has the benefit of both in house expertise and the external report from PA Consulting obtained as part of its processes post

establishment. Its' assessment of Tumblr is based not only on the material furnished by Tumblr but also on its own assessment and observation of the platform. That this is so is clear from the terms of the Designation Decision. The Decision must be read as a whole. Contrary to Tumblr's submission, the Designation Decision does identify the features of Tumblr which were relevant to its conclusion on essential functionality, as well as the reasons for its views as to the contribution of video to the attractiveness and functionality of the service and its positioning on the market.

**276.** Seventh, it is complained by Tumblr that An Coimisiún expresses the view in the Decision that it *"considers, based on the evidence before it, that videos are instrumental for the positioning of the service Tumblr on the market because it is a social media service designed to encourage users to consume different forms of user-generated content"* but that no explanation is provided as to how An Coimisiún came to this conclusion and it does not identify the empirical evidence said to support it. I cannot agree with this submission.

**277.** Read as a whole the Designation Decision identifies the features of Tumblr which were relevant to its conclusion on essential functionality, as well as the reasons for its views as to the contribution of video to the attractiveness and functionality of the service and its positioning on the market. These features, identifiable from the reasoning given an Coimisiún, included the presence of videos on the dashboard, the availability of filters, the presence of organisational features using algorithms and the existence of an auto-play feature.

**278.** Eighth, it is contended by Tumblr that in the Preliminary Designation, An Coimisiún appeared to have regard to the use of GIFs in assessing the amount of video content on Tumblr. In its response, Tumblr pointed out that GIFs, which are popular with Tumblr users, are outside the scope of the Revised AVMS Directive. It is now complained that while An Coimisiún removed references to GIFs from the Designation Decision, no explanation is provided as to how this impacted on the overall assessment or conclusions reached.

**279.** The complaint made in this regard is without any real substance when the terms of the Designation Decision are properly read and understood. An Coimisiún not only expressly



addressed Tumblr's submission on GIFs in the Designation Decision but further explained that the preliminary conclusion on designation did not depend on, and/or was not determined by, the position in respect of GIFs. This being the stated position, there was clearly no requirement to provide any further reasons in this regard. Simply put the presence of GIFs while it had been noted in the preliminary designation was not a factor to which any weight had been given. The removal of a reference to GIFs acknowledged that GIFs fall outside the scope of the Revised AVMS Directive but could not logically therefore have any bearing on An Coimisiún's reasoning as the matter removed was simply not material in the first place.

**280.** Ninth, and finally, Tumblr contends that the Designation Decision recites but does not engage substantively with the submissions made by Tumblr during the decision-making process which preceded it. It is contended that this failure is particularly acute in respect of the qualitative data. I completely reject this submission as being without factual foundation. Not only did An Coimisiún engage substantively with the submissions in relevant places in the Statement of Reasons, it reformulated parts of its Statement of Reasons in response to the submissions made and to clarify its position. In addition it prepared a further document specifically for the purpose of setting out its response to the submissions made. More than this it could not reasonably have been expected to do. The engagement was real and considered. It simply cannot properly be suggested that An Coimisiún was merely box ticking in the approach it adopted.

**281.** Furthermore, contrary to Tumblr's submission, An Coimisiún's attempted reliance on expert evidence in these proceedings whilst unorthodox does not in truth have any bearing on whether it discharged its duty to give reasons in the Designation Decision, albeit one might be forgiven for querying whether the recourse to expert opinion is based on a concern as to the adequacy of the assessment carried out. The belated attempt to rely on expert evidence has no bearing on my assessment of the adequacy of the reasons for the impugned decision because I take the view that the Designation Decision must stand or fall on the strength of what is discernible from the record of the decision itself in accordance with *dicta* in *State (Crowley) v. The Irish Land Commission* [1951] IR 250, *Jackson way Properties v The Information Commissioner* [2020] IEHC 73 and *Utmost Paneurope DAC v. Financial Services and Pensions Ombudsman* [2020] IEHC 538 addressed above.

**282.** As I am satisfied that the question of whether the duty to give reasons has been discharged falls to be assessed by reference to the Designation Decision alone and the materials before An Coimisiún and as there was no report from Mr. Sykes which Tumblr ought to have been given a right to respond to, I am satisfied that no unfairness of the type contended for in written submissions were the expert evidence allowed arises. I note that An Coimisiún's response in this regard is that they have never sought to rely on the expert evidence for the purpose of buttressing the reasoning in the Designation Decision but rather the expert evidence has been adduced in circumstances where Tumblr has sought to challenge not only the legality of Designation Decision but also the merits of its assessment in that Decision, which raises *inter alia* issues of technical operation of Tumblr's service. I have already concluded that I am satisfied that the Designation Decision should stand or fall on its own terms and that I do not require advice from an expert to understand the evidence before An Coimisiún or the reasons for the Designation Decision made on foot of this evidence. In this regard I am further satisfied that the contested Designation Decision is reasoned to the requisite degree.

*Did An Coimisiún fail to have any or any adequate regard to relevant considerations or place undue weight on irrelevant considerations in its Designation Decision (Ground 3)?*

**283.** Tumblr complains that in making its decision, An Coimisiún failed to have regard to relevant considerations, specifically, it is contended that it failed to have any or any adequate regard to:

- i.* “*the overwhelming quantitative evidence*” pointing towards video being an ancillary and minor part of Tumblr;
- ii.* The concrete evidence available in respect of the perspective of users on the Tumblr platform, including the evidence that users had failed to embrace video on the platform illustrated that Tumblr Live did not succeed as a product and the data provided to it by Tumblr, which established a low incidence of video content and low user engagement with video content;
- iii.* the qualitative evidence provided by Tumblr concerning the relative lack of sophistication of its video architecture in terms of tools and the limited data level

- enjoyed by uploaders, particularly relative to other platforms, and in placing undue weight on the availability of the ability to place a filter on a video – the sole tool provided by Tumblr to users uploading video content;
- iv.* the fact that Tumblr does not offer uploaders specific tools or systems to analyse or manage the performance of video content they upload;
  - v.* whether the absence of video would significantly reduce the amount of content on Tumblr, the utility or function of the service, or its level of attractiveness to users in circumstances where Tumblr's position was that its users prefer less video;
  - vi.* video content is not prioritised, relative to other content, in any manner;
  - vii.* placing undue weight on the indirect monetisation of video on Tumblr and in failing to have regard to the fact that Tumblr does not directly monetise video;
  - viii.* the submissions made by Tumblr in the Preliminary Designation Response;
  - ix.* the absence of any valid indicators which support a finding of essential functionality, notwithstanding that this was pointed out by Tumblr in its Preliminary Designation Response.

**284.** While presented as a failure to have regard to relevant considerations, it is manifest from reading the Designation Decision and the reasoning underpinning it that there was no failure to have regard to any of these matters, all of which are referenced in the record of the decision. Each of the matters identified by Tumblr were in fact considered and the fact that An Coimisiún did not agree with Tumblr's position in respect of these factors does not amount to a failure to have regard to them. The complaint that there was a failure to have regard to Tumblr's submissions is without any substance whatsoever in circumstances it is clear from the Designation Decision, and in particular, the detailed written response to the issues raised in Tumblr's Consultation Response that regard was had to all material matters raised.

**285.** What is readily apparent from the foregoing is that Tumblr disagrees with the Designation Decision made and the weight attached to the factors identified. I agree with the submission made on behalf of An Coimisiún that it is difficult to avoid the conclusion that Tumblr's challenge under this heading is in truth and substance a challenge to the merits of An Coimisiún's assessment in the Designation Decision, to the weight afforded to various considerations in making that assessment, and, in particular, to the fact that An Coimisiún did not agree with Tumblr's position and/or submissions on certain issues. It is clear that in reality what Tumblr seeks to do under the guise of a claim of failure to have regard to relevant

considerations is to mount an impermissible challenge to the merits of the decision.

**286.** It is long established that this is not a proper basis for judicial review. In the absence of irrationality and/or a manifest error of assessment, it is a matter for An Coimisiún, as decision-maker, to determine the weight to be attributed to the wide range of considerations to which it was required to have regard in reaching its decision, *a fortiori* in the context of a complex assessment of the kind at issue in this case. As confirmed in *Scrollside Ltd v Broadcasting of Ireland* [2007] 1 IR 166, the issue of the weight to be applied to a factor which is relevant to the considerations of a specialist body is quintessentially a matter for the specialist body. Where it is sought to quash a decision of a specialist body essentially on the issue of the weight to be applied to a factor in the decision-making process Denham J. said it “*hardly needs to be pointed out that this is a heavy burden for the applicant*”. Tumblr falls well short of meeting this burden in this case in the face of the carefully reasoned Designation Decision.

**287.** A similar complaint is made by Tumblr that regard has been had to irrelevant considerations. Factors which are referenced in the record of the Designation Decision are traversed (para. 89 (a)-(g) of the Statement of Grounds) but in terms from which it is again manifest that the substance of the complaint is not that regard was not had to the matters identified, and this is an untenable position in the face of the terms of the Designation Decision, but rather with the merits of the ultimate decision to designate.

**288.** In part, the ground of challenge in this part of the Statement of Grounds is advanced on the incorrect basis that factors are not relevant because of Tumblr’s construction of the essential functionality test which has already been found to be in error. For example, Tumblr insists under this ground of challenge that qualitative data is not relevant if there is meaningful quantitative data but I have already found that Tumblr’s identification of relevant and irrelevant considerations on the basis of a premise that quantitative data is determinative is wrong in law and that the assessment must be conducted following a full assessment of the video sharing function on the platform. For this reason, I do not find that there was any error in treating qualitative data as relevant considerations. Rather, Tumblr is wrong in law in contending that qualitative factors are not relevant.

**289.** Likewise, the contention that a finding of indirect monetisation was made on the basis

of an irrelevant consideration is predicated on Tumblr's flawed construction of the legal test as requiring that advertisements be part of the video as opposed to in and around the video content. On the basis of a correct interpretation and application of the legal test governing the assessment of essential functionality, it is clear that the presence of advertisements in and around the video content was in fact a relevant consideration in considering whether this content was indirectly monetised and was properly considered in line with the European Commission's Guidelines. Furthermore, the identification of the reference to GIFs in the Preliminary Decision as an irrelevant consideration is a complete "*red herring*" and without a *bona fide* basis in fact in circumstances where the reference to GIFs was removed in the Designation Decision and it was explained that they were not relied upon as a factor in that decision.

**290.** In conclusion, I am satisfied that Tumblr has failed to identify any relevant consideration to which An Coimisiún ought to have had regard but did not, or any irrelevant consideration to which An Coimisiún improperly had regard, in making the Designation Decision. The various matters identified by Tumblr are all properly addressed within the Designation Decision. The fact that Tumblr may disagree with An Coimisiún's substantive assessment of these matters does not, at least in the absence of irrationality and/or a manifest error of assessment, provide a basis for granting the relief sought in these proceedings.

*Did An Coimisiún fail to examine the relevant aspects of the evidence before it relating to this case (Ground 4)?*

**291.** Tumblr argues that An Coimisiún failed to examine carefully and impartially all material aspects of the evidence before it, as an aspect of the right to good administration under EU law protected under Article 41 of the Charter. While the parties are not in agreement as to the applicability of Article 41 of the Charter - which is directed to the institutions, bodies, offices and agencies of the Union - is applicable to it in the discharge by An Coimisiún of its statutory functions, this is not an issue which need trouble me in circumstances where it is not disputed that there is a duty to examine carefully and impartially the evidence before a decision-maker deriving as a general principle of Union law with the result that nothing turns on whether Article 41 applies or not.

**292.** In this regard, it is important to underline that, while this duty implies that a decision-maker must ensure that the evidence relied upon is factually accurate, reliable and consistent, contains all the necessary information, and is capable of substantiating the conclusions in the decision, it is not my role in assessing compliance with this duty to substitute my substantive assessment of the evidence for that of the primary decision-maker. As stated in C-525/04 P *Spain v. Commission and Lenzig*, C-525/04 P, at para. 57:

*“According to the case-law of the Court of Justice, not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, Case 98/78 Racke [1979] ECR 69, paragraph 5; Case C-16/90 Nölle [1991] ECR I-5163, paragraph 12; Commission v Tetra Laval, paragraph 39; and Case C-326/05 P Industrias Químicas del Vallés v Commission [2007] ECR I-0000, paragraph 76). However, when conducting such a review, the Community judicature must not substitute its own economic assessment for that of the Commission (order in Case C-323/00 P DSG Dradenauer Stahlgesellschaft v Commission [2002] ECR I-3919, paragraph 43).”*

**293.** It is further apparent from the decision T-211/16 *Caviro Distillerie and Others v Commission*,, that my role in reviewing whether there was an error of assessment amenable to relief in these proceedings, is confined to ensuring that An Coimisiún examined the relevant factors on the basis of evidence and having examined all the factors and weighed up the positive and negative aspects of the factors arrived at a reasoned decision which was open on that evidence. The CJEU observed at para. 101 of its judgment in that case that:

*“In so far as the applicants criticise the Commission for having failed to provide a sufficient statement of reasons for the contested decision as regards explaining how the declining performance of the Union industry was offset by improvements in general profitability, the applicants’ line of argument seeks, in reality, to challenge the actual assessment of the economic data carried out by the Commission. The Court considers that an examination of recitals 119 to 139 of the contested decision shows that the Commission did not commit any manifest error of assessment regarding the evaluation*

*of those elements.”*

**294.** It is manifest from the terms of the Designation Decision that contrary to Tumblr’s submission, An Coimisiún did engage with the quantitative data furnished by Tumblr. This data is expressly referenced and considered in the Designation Decision and a decision is recorded that in terms of quantity of video material, the data did not support a finding of an essential functionality devoted to video sharing. I agree with submissions made on behalf of An Coimisiún that the fact that it disagreed with Tumblr's position on that evidence, and considered that the quantitative data was not in itself determinative, does not disclose any breach of the duty of diligent and impartial examination where this does not disclose an error of law as I have already found.

**295.** Similarly, the qualitative data was considered and weighed including those elements identified by Tumblr in its complaint under this head as concerned the functionalities, features and systems relating to video content on Tumblr, the tools available on Tumblr in respect of video posts including tools or systems to analyse or manage the performance of the video content they upload (e.g. application of a filter), the limitations on data level and use, the location of advertisements and the absence of sponsorship agreements between brands and uploaders, the tracking of user activity and the use of recommender systems (albeit not specific to video), view time as a signal in generating recommendations of user content, the failure of Tumblr Live and data demonstrating the very low levels of video uploaded and consumed by users. There is no obligation on An Coimisiún to adopt a position on all the arguments relied on by Tumblr. It is sufficient to set out the facts and the legal considerations having decisive importance in the context of the decision and I am satisfied that An Coimisiún did this to a requisite degree.

**296.** Tumblr has not identified any basis for its submission that the Designation Decision is *"contrary to quantitative and qualitative evidence pointing away from essential functionality"* or at the very least any basis that would not involve the Court substituting its assessment for that of An Coimisiún. In this regard, it is relevant to emphasise that, on its own evidence and as set out, an average of 89,566 videos are posted on Tumblr in the EU each month, amounting to over a million videos per year.

**297.** Moreover, in respect of the other matters identified by Tumblr, An Coimisiún clearly engaged with these matters in its Designation Decision. Once again, the fact that An Coimisiún disagreed with Tumblr's position on these matters, which is in truth the case being made here, does not disclose any breach of the duty of diligent and impartial examination of the evidence. For similar reasons, the argument that An Coimisiún failed to engage meaningfully with Tumblr's submissions, an argument made under more than one heading in the Statement of Grounds, is unfounded. It is very clear from the express terms of the Designation Decision - and in particular the detailed response to the issues raised in Tumblr's Consultation Response - that An Coimisiún more than adequately engaged with the submissions made.

**298.** Of note, Tumblr has not identified any specific evidence which it is claimed An Coimisiún has not examined, still less identified any factual error, inaccuracy or inconsistency in the Designation Decision. Instead, it asserts in the most general terms, and without itself engaging with the detailed reasons in the Designation Decision, that An Coimisiún "*failed to engage, whether adequately or at all*" with the evidence before it. As with ground 3 addressed above, this is in substance a challenge to the merits or substance of An Coimisiún's assessment, but it is not whether or not it carefully and impartially examined the evidence before it in the sense used in the case-law of the CJEU.

**299.** I am satisfied that An Coimisiún relied on evidence which is factually accurate, reliable and consistent and I have not identified any information which should have been taken into account improperly excluded. The evidence relied upon as apparent from record of decision making is capable of substantiating the conclusions reached. No failure on the part of an Coimisiún to carefully and impartially examine the evidence before it in determining whether Tumblr ought to be designated as a VSPS has been established. In particular, there has been no failure on the part of An Coimisiún to properly engage with or have regard to the quantitative evidence. On the contrary, An Coimisiún engaged with this evidence and concluded that it did not support designation of Tumblr by reason of the number of videos shared on the platform.

**300.** Having concluded that the quantitative evidence did not support or warrant designation, An Coimisiún correctly determined that quantitative evidence is not determinative and it must have regard to all indicators of "*essential functionality*" before deciding whether it is proper to designate as a VSPS or not. This correct approach to the applicable legal test cannot fairly or



accurately be categorised as a failure to engage with or have regard to the quantitative evidence. In deciding whether to designate An Coimisiún must have regard to a wide range of factors. It having been concluded that the quantitative data did not in itself suggest a scale of video usage which warranted designation, An Coimisiún properly exercised the power to designate if on a proper assessment of other factors established on the evidence before it, there was sufficient basis to conclude that video sharing was “*an essential functionality*” of the platform.

**301.** Presuming a sufficient evidential basis for the decision taken, it is not for me to substitute my assessment of the evidence for that of An Coimisiún based on my assessment of the merits of the case for and against designation. Notwithstanding the established role of the Court in proceedings in which a challenge is brought to the evidence, it seems to me that Tumblr seeks to persuade me to trespass beyond the proper parameters of my role by substituting my assessment of the evidence for that of An Coimisiún as specialist body with expertise in the area of online regulation and safety. I am satisfied that no appropriate basis for me to do so has been demonstrated. In particular, no error on the part of An Coimisiún in its examination of the evidence before it has been established and I am satisfied that the Designation Decision is properly grounded in the evidence on a proper application of the legal test for an essential functionality informed by relevant considerations.

*Is the Designation Decision vitiated by manifest errors of assessment (Ground 5)?*

**302.** Tumblr argues that An Coimisiún made a manifest error of assessment in its Designation Decision. I have already concluded, however, that I am satisfied that there has been no error of law in the interpretation and application of the essential functionality test, the decision is properly reasoned and regard has been had to all relevant considerations and the decision is untainted by irrelevant considerations.

**303.** On a claim of manifest error, a high threshold must be reached and an error clearly established before I would be entitled to intervene (see *SIAC Construction Ltd. v. Mayo County Council* [2002] 3 IR 148, *Word Perfect Translation v. Minister for Public Enterprise* [2021] 1 IR 698, Case C – 120/97 *Upjohn v. Licensing Authority* and Case C-525/04 P *Spain v. Commission*). My function on an application of this nature is to guarantee legality in the manner elaborated upon by the CJEU in *Upjohn*. In *Upjohn* the

CJEU referred to that court's case-law which provides that when a community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned.

**304.** In these proceedings it is clearly not my function to carry out my own assessment of the facts and of the quantitative and qualitative data relied upon. My function is restricted to examining the accuracy of the findings of fact and law made by An Coimisiún and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers, that it did not clearly exceed the bounds of the conferred discretion and that the decision-making process was procedurally fair. Further, in satisfying myself as to the findings of fact in a claim of manifest error the authorities establish that I should examine whether the evidence relied upon is factually accurate, reliable and consistent and includes all the evidence which must be taken into account to make the assessment required and is capable of substantiating it (see Case C-525/04 P *Spain v. Commission* at paras. 56 to 57).

**305.** Notwithstanding the threshold which applies in establishing manifest error, Tumblr does not identify any specific error(s) of assessment in the Designation Decision. Instead, Tumblr's challenge is to An Coimisiún's overall assessment of essential functionality, as a whole, effectively duplicating the complaints advanced under other heads. It is, however, maintained that the evidence before An Coimisiún "*clearly established that the provision of user generated videos is merely ancillary to and/or constitutes a minor part of the activities of Tumblr*" and that there "*was no evidence before the Commission, quantitative or qualitative, upon which it could reasonably base the conclusions it arrived at*", meaning that the Decision was "*at variance with the evidence and is irrational and unreasonable*". To this extent, a claim is made that the decision is not adequately supported by the evidence.

**306.** I have taken some time to summarise the evidence in this case so that it is clear why it is that I cannot agree with Tumblr's categorisation of the evidence thus. To suggest that there was no evidence before An Coimisiún upon which it could reasonably base the conclusions arrived at, as Tumblr does, is not a tenable proposition in the circumstances of this case when due regard is had to the careful process followed and the facts as established in this

process, the preponderance of which are undisputed and have not been challenged as mistaken in these proceedings.

**307.** As to whether there was an inadequacy in the evidence relied upon, it is my view that the decision to designate or not requires an assessment of a range of indicators, some of them relatively complex and requiring technical knowledge. As such, An Coimisiún is entitled to deference as an expert body in relation to its assessment of the evidence in this case. In this regard, it bears emphasis that it is clearly stated on several occasions in the Designation Decision that conclusions reached were based on a range of information including information gleaned from An Coimisiún's own observation of the Tumblr platform and the openly observable characteristics of the site (e.g. it was stated that An Coimisiún had observed tags on the service, that An Coimisiún had observed videos on the various feeds Tumblr provides and it was noted some users may receive audiovisual content more frequently because they deliver personalised content to users).

**308.** On the basis of the agreed facts (summarised at paras. 150 to 151 above) and cogent factual findings set out in the Designation Decision as well as the material documented as being before An Coimisiún, it is my view that it cannot plausibly be maintained that there was no evidence before An Coimisiún upon which it could conclude that video sharing was an essential functionality of Tumblr such that they required to be designated as a VSPS.

**309.** Insofar as Tumblr protest that the fact that An Coimisiún saw fit to introduce an expert report detailing further assessment of issues pertinent to its decision to designate in defending these proceedings demonstrates that better information could have informed that decision had An Coimisiún retained the expertise of Mr. Sykes at an earlier stage and Tumblr point to this new material as begging the question as to the adequacy of the information actually available when the decision was made. I am not persuaded that there is any merit to a claim that there was inadequate information before An Coimisiún referable to the late expert evidence sought to be adduced. The fact that better evidence might be available in many situations does not necessarily render the evidence relied upon inadequate.

**310.** Of course, the position might be otherwise in a given case if the evidence relied upon is weak. In this case, however, an extensive information gathering process had been

engaged in and, whatever concerns An Coimisiún may have harboured as to whether it had put its best foot forward when the Designation Decision was challenged in these proceedings, I am satisfied that there was no inadequacy of evidence before An Coimisiún when deciding to designate. The findings of fact made were made on the basis of evidence which was factually accurate, reliable and consistent. There was no deficiency of evidence and all the evidence which must be taken into account to make the assessment was available to An Coimisiún when the Designation Decision was made and the evidence available was capable of substantiating the decision taken without more. Although the Sykes Report adds to that evidence, as does the evidence of Professor Emmerich, this does not mean that it was not open to An Coimisiún to designate on the basis of the information it had, even though better evidence could have been obtained.

**311.** The fact that Tumblr contends that a different conclusion might be reached by placing greater weight on other aspects of the evidence or attributing different significance to pertinent factors in the assessment process cannot properly ground a conclusion by me that An Coimisiún was in error in the decision it reached where that decision is amply supported by and consistent with sufficient evidence properly before An Coimisiún when it made its decision. Accordingly, Tumblr has failed to establish that there has been any error of assessment in the Designation Decision, still less a manifest error of the kind that would entitle me to intervene and, in particular, to quash that decision.

**312.** From the terms of the Designation Decision, I am satisfied that An Coimisiún has, without committing significant or clear error, exercised its specialist judgment in making a decision to designate having regard to the presence of relevant indicators established on the evidence before it.

**313.** As Ground 6, involving a complaint of breach of the general principles of EU Law, was not separately advanced but was subsumed in argument under each of the other headings in the Statement of Grounds, there is no necessity for me to address it further here other than to record my conclusion, for completeness, that it has not been established that there was a breach of any identified principle of EU law in the Designation Decision impugned in these proceedings.

## CONCLUSION

**314.** For the reasons set out above, I have decided that An Coimisiún did not err in law in concluding that quantitative data was not in itself determinative of an essential functionality test. In arriving at the Designation Decision, it is my view that An Coimisiún properly interpreted and applied the “*essential functionality*” criterion applicable under the Revised AVMS Directive, as implemented, and had due regard to the EC Guidelines by assessing essential functionality with reference to the wide range of indicators identified in the EC Guidelines. It has not been established that An Coimisiún based its decision to designate Tumblr as a named VSPS on other than a proper consideration of relevant factors and characteristics of the service having had due regard to the information provided and the representations made by Tumblr.

**315.** On the basis of its overall assessment, An Coimisiún concluded that sufficient indicators were present to support a conclusion that that essentiality functionality of Tumblr was devoted to video sharing such that it should be treated as a VSPS within the meaning of the 2009 Act and the Revised AVMS Directive and subject to regulatory measures on this basis. No want of fairness has been substantiated in relation to the manner in which An Coimisiún engaged with Tumblr’s submissions and explained its reasoning. A clear evidential basis for the Designation Decision is identified in a careful, reasoned decision following a process which enabled full engagement around the issues. Matters identified by Tumblr as relevant to the Designation Decision were considered and addressed.

**316.** An Coimisiún were entitled to conclude on the evidence before it that sufficient indicators were present to conclude that video sharing was an essential function of Tumblr for the purposes of Article 1(1)aa of the Revised AVMS Directive and s. 2(2) of the 2009 Act. No error, still less “*manifest error*” has been demonstrated in the designation of Tumblr as VSPS.

**317.** In the light of my findings as set out above, I refuse the relief sought and dismiss these proceedings. I invite the parties to endeavour to agree any consequential matters having regard to the terms of my decision as set out in this judgment but I will hear the parties in relation to any outstanding matter upon which agreement is not reached.