

THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 367

[Record No.: 2024/56JR]

BETWEEN:

REDDIT INCORPORATED

APPLICANT

AND

COIMISIÚN NA MEÁN

RESPONDENT

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

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INTRODUCTION

1. These proceedings came before me for hearing as the first of two sets of proceedings listed consecutively concerning the proper interpretation of Directive 2010/13/EU as amended by Directive (EU) 2018/1808 (the “Revised AVMS Directive”) which was implemented in the State by the Broadcasting Act 2009 as amended by the Online Safety and Media Regulation Act 2022 (hereinafter “the 2009 Act”). The other proceedings concern a social media platform known as Tumblr (bearing record number: 2024/114 JR). As the legal issues arising in the two cases are not identical, despite considerable overlap, two separate judgments are required (see

separate judgment delivered today in *Tumblr v. An Coimisiún na Meán* [2024] IEHC 366 (hereinafter “the Tumblr proceedings”).

2. The service provided by the Applicant, Reddit, is described as a forum based social media platform. It enables users to create self-governing communities to express shared interests. These communities are called subreddits and facilitate discussion between users. Users enjoy videos on feeds on Reddit either as part of discussions or autonomously without recourse to any discussions; those feeds themselves being designed to surface autonomously enjoyable popular content to users.

3. The Respondent is the competent authority in Ireland for the purposes of the Revised AVMS Directive. Where a service appears to be a video-sharing platform service (hereinafter “VSPS”) within the meaning of the Revised AVMS Directive and jurisdiction is established, the Respondent is required to designate it as a service to which online safety codes may be applied.

4. On the 29th of December 2023, the Respondent designated (hereinafter the “Designation Decision”) Reddit as a named VSPS under s.139E and s.139G(2) of the 2009 Act having determined that the Applicant is under the jurisdiction of the State. As a designated VSPS in the State, Reddit may be subject to online safety codes adopted by the Respondent.

5. In these proceedings, the Applicant, as provider of the Reddit service, seeks to quash the Designation Decision.

6. The challenge is advanced on various grounds but, in essence, is grounded on two central planks. Firstly, it is contended that Reddit, as a US corporate body, is not properly subject to the jurisdiction of the State on a proper interpretation and application of article 28a of the AVMS Directive. Secondly, it is contended that the Respondent erred in its interpretation and application of articles 1(aa), 1(b) and 1(ba) of the Revised AVMS Directive and s. 2(2) of the 2009 Act by treating not just “*native video*” but embedded or hyperlinked video as a part of the video functionality of Reddit when determining whether an essential functionality of Reddit is devoted to video sharing such as to warrant its designation under the Revised AVMS Directive and the 2009 Act.

REGULATORY FRAMEWORK

7. Although the judgment in the *Tumblr* proceedings is addressed to the distinct legal issues arising in that case and there are important differences between the two cases, significant overlap exists most especially in terms of regulatory framework and background. To avoid unnecessary duplication, I refer to my judgment in the *Tumblr* proceedings for a more detailed outline of general background including the history to the adoption of the Revised AVMS Directive arising from an identified need to expand regulation in line with technological developments and the need to protect users and consumers, the role of the Respondent (including the preparatory consultation and research work undertaken before proceeding to exercise powers under the 2009 Act, most notably the PA Consulting Report and the Designation Decision Framework both of which were published and available to stakeholders and further consultation as part of the statutory process notably consultations in relation to an Online Safety Code and Levy Order in which Reddit also participated) and the applicable legal and regulatory framework. I adopt this more detailed summary of the background without repeating verbatim in this judgment. I propose in this judgment to focus only on relevant elements of the decision-making process concerning Reddit and to address the issues which are specific to the case made on behalf of the Applicant. For coherence it is nonetheless necessary to refer to a number of salient aspects of the regulatory framework more specifically.

Scope of Regulatory Control

Revised AVMS Directive

8. In relation to the substantive question, namely whether Reddit is a VSPS within the meaning of the Revised AVMS Directive as transposed by the 2009 Act, significance attaches to Recital 5 of the Directive which provides that the aim of the Revised AVMS Directive is “*not to regulate social media services*” save where programmes and user-generated videos constitute “*an essential functionality*” of the service. It is further stated that where programmes and user-generated videos constitute an ancillary or minor part of the service, they do not constitute an essential functionality of the service.

9. The substantive scope of the Revised AMVS Directive is addressed in Article 1(1)(aa) which provides that a VSPS includes a service where an “*essential functionality*” of the service

is “*devoted to providing programmes, user-generated videos or both*” for which the service provider does not have editorial control to the general public in order to inform, entertain or educate by means of electronic communication over the internet and the organisation of which is determined by the video sharing platform provider including by automatic means or algorithms in particular by displaying, tagging or sequencing. The reference to minor or ancillary is not repeated, and these terms are not further defined in the Revised AVMS Directive itself.

10. Article 1(1)(b) provides that “*programme*” means “*a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature length films, video clips, sports events, situation comedies, documentaries, children’s programmes and original drama*”.

11. Article 1(1)(ba) provides that “*user generated video*” means “*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*”. The term “*native*” video is not used in the Revised AVMS Directive.

Broadcasting Act, 2009 (as amended)

12. Section 2 of the 2009 Act seeks to transpose Article 1(1)(b) and (ba) of the Revised AMVS Directive.

13. Section 2(1) provides that “*audiovisual programme*” means a set of moving images with or without sound which, in the case of an audiovisual media service, constitutes an individual item, irrespective of its length, within a programme schedule or a catalogue (implementing the term “*programme*” as used in the Revised AVMS Directive).

14. Section 2(1) of the 2009 Act further provides that “*user-generated video*” means user-generated content, as that term has been defined, consisting of a set of moving images with or without sound and that “*user-generated content*” in relation to a relevant online service, means content created by a user of the service and uploaded to the service by that or another user. The term “*native*” video is not used in the 2009 Act.

15. Section 2(2) of the 2009 Act provides that a "*video-sharing platform service*" means a service within the meaning of art.56 and art.57 of the Treaty on the Functioning of the European Union where either the principal purpose of the service or a dissociable section of the service or an essential functionality of the service is devoted to providing audiovisual programmes or user-generated videos, or both, by electronic communications networks, to the general public, in order to inform, entertain or educate.

16. Under s. 2(3) a service is a VSPS within s.2(2) only if the provider of the service—

(a) does not have effective control over the selection of the programmes and videos referred to in that subsection, but

(b) determines their organisation, by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.

Jurisdiction to Regulate

17. The question of jurisdiction arises in this case but not in the Tumblr proceedings. In this regard it is necessary to consider Article 28a of the Revised AMVS Directive and s. 2B of the 2009 Act and as well as Articles 2 and 3 of the E-Commerce Directive and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of the 22nd of June, 1998 as amended by Directive 98/48/EC of the European Parliament and of the Council of the 20th of July, 1998.

Provision for Jurisdiction under EU law

18. Article 28a of the Revised AVMS Directive specifically addresses member state jurisdiction in respect of a video sharing platform provider.

19. Article 28a1 provides in traditional terms that a video-sharing platform provider established on the territory of a Member State within the meaning of Article 3(1) of Directive 2000/31/EC (the E-Commerce Directive) shall be under the jurisdiction of that Member State. Article 3(1) of the E-Commerce Directive provides that each Member State shall ensure that the information society services provided by a service provider established on its territory

comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

20. As apparent from its terms, Article 3(1) of the E-Commerce Directive applies to an information society service provided by a service provider established in the territory of a Member State.

21. Article 2(a) of the E-commerce Directive provides that "*information society service*" has the same meaning as in Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of the 22nd of June, 1998 as amended by Directive 98/48/EC of the European Parliament and of the Council of the 20th of July, 1998. Article 2(b) of the E-Commerce Directive provides that "*service provider*" means any natural or legal person providing an information society service.

22. Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of the 22nd of June, 1998 as amended by Directive 98/48/EC of the European Parliament and of the Council of the 20th of July, 1998 provides that an information service is any service normally provided for remuneration at a distance by electronic means and at the individual request of a recipient of services.

23. Article 2(c) of the E-Commerce Directive further provides that "*established service provider*" means a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.

24. In a new and special provision, Article 28a2 of the Revised AMVS Directive goes on to address the more problematic situation of a video-sharing platform provider which is not established on the territory of a Member State. It is provided that in such a scenario the provider "*shall be deemed to be established on the territory of a Member State for the purposes of the Directive*" if that video-sharing platform provider:

- (a) has a parent undertaking or a subsidiary undertaking that is established on the territory of that Member State; or

(b) is part of a group and another undertaking of that group is established on the territory of that Member State.

25. Article 28a3 further provides that, for the purposes of applying Article 28a2, where the parent undertaking, the subsidiary undertaking or the other undertakings of the group are each established in different Member States, the video-sharing platform provider shall be deemed to be established in the Member State where its parent undertaking is established or, in the absence of such an establishment, in the Member State where its subsidiary undertaking is established or, in the absence of such an establishment, in the Member State where the other undertaking of the group is established.

26. Article 28a4 provides that, for the purposes of applying Article 28a3, where there are several subsidiary undertakings and each of them is established in a different Member State, the video-sharing platform provider shall be deemed to be established in the Member State where one of the subsidiary undertakings first began its activity, if it maintains a stable and effective link with the economy of that Member State.

Jurisdiction under Broadcasting Act 2009

27. Article 28a of the Revised AMVS Directive is faithfully transposed into Irish law by s.2B of the 2009 Act save that the reference to the E-Commerce Directive is not replicated in identical terms. Section 2B(3) of the 2009 Act states that the provider of a video-sharing platform service is under the jurisdiction of a Member State, although not itself established in the State, if:

(a) it has a parent undertaking or a subsidiary undertaking that is established in the territory of the State; or

(b) is part of a group and another undertaking of that group is established in the territory of the State.

28. Section 2B(4)(b) of the 2009 Act provides that, where there are different undertakings that are established in different Member States, the provider of a video-sharing platform service shall be deemed to be established in the State if it has a subsidiary undertaking established in the Member State.

29. Section 2B(5) of the 2009 Act provides that, where there are different subsidiary undertakings established in different Member States (as in this case), the provider of a video sharing platform service shall be deemed to be established in the Member State where one of the subsidiary undertakings first began its activity provided that it maintains a stable and effective link with the economy of that Member State.

30. Section 2B(7) of the 2009 Act provides that "*established*" has the same meaning as in article 3(1) of the E-commerce Directive. In this way the reference to the E-Commerce Directive provided under Articles 28a1 and 28a5 are transposed.

Domestic Power to Designate

31. As for the designation of a video sharing platform, the relevant provisions are referred to in detail in Tumblr. In summary, s. 139E of the 2009 Act confers a discretion on the Respondent to designate a relevant online service as a service to which online safety codes may be applied. Section 139G(1) of the 2009 Act provides that the Respondent shall designate as a category of service under s.139E the video-platform service the provider of which is under the jurisdiction of the State. Under s. 139G(4) of the 2009 Act, the Respondent is obliged to have regard to the EC Guidelines in making its Decision.

32. Section 139K(3) of the 2009 Act provides that, in the case of video-sharing platform services, the Respondent shall exercise its powers under that section with a view to ensuring that service providers:

- (a) take appropriate measures to provide certain protections referred to in Article 28b of the Revised AVMS Directive;
- (b) comply with the requirements set out in Article 9(1) of the Revised AVMS Directive with respect to audiovisual commercial communications that are marketed, sold or arranged by them; and
- (c) take appropriate measures to comply with the requirements set out in Revised Article 9(1) of the AVMS Directive with respect to audiovisual commercial communications that are not marketed, sold or arranged by them, taking into account the limited control they exercise over those communications.

33. Section 139Q of the 2009 Act provides that the failure by a provider of a designated on-line service to comply with an online safety code that applies to the service shall be a contravention for the purposes of Part 8B of the 2009 Act. Section 139ZS of the 2009 Act provides that the Respondent may impose an administrative financial sanction where it is satisfied on the balance of probabilities that a provider has committed the contravention to which the investigation relates. Under s. 139ZW(1) of the 2009 Act the amount of an administrative financial sanction shall not exceed €20,000,000 in the case of a provider, or, if greater, 10 per cent of the relevant turnover of the provider in the financial year preceding the date of the decision to impose the sanction.

EC Guidelines

34. The European Commission issued the EC Guidelines on the 7th of July, 2020 (hereinafter “the EC Guidelines”). The EC Guidelines were applicable at the date of the assessment conducted by the Respondent.

35. As made clear from their terms, the EC Guidelines aim *“to provide guidance”* on the practical application of the essential functionality criterion. Although the Respondent is bound to have regard to the EC Guidelines in making its decision by reason of s. 139G(4) of the 2009 Act, they are *“not binding”*. According to the EC Guidelines, the decision on whether, as a matter of fact, the service has the provision of audiovisual content as an essential functionality for the purposes of Article 1(1)(aa) of the Revised AVMS Directive lies with the Member State having jurisdiction over such service according to Article 28a of the Revised AVMS Directive. When performing the assessment of whether a service fulfils the essential functionality criterion, *“the national authority should work on a case by case basis and take into account the specificities of the relevant service”*.

36. For the purposes of carrying out this assessment, the EC Guidelines identify *“some relevant indicators that national authorities should consider”* but make it clear that the indicators *“should not be applied cumulatively”* and that *“the absence of one or more of them 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”.

37. In its EC Guidelines, four broad categories of relevant indicators are identified by the Commission for consideration by national authorities when applying the essential functionality criterion in the definition of a video-sharing platform service as follows:

- Category 1 of the EC Guidelines: consideration of the overall architecture and external layout of the platform.
- Category 2 of the EC Guidelines: consideration of the quantitative and qualitative relevance of audiovisual content for the activities of the service. The EC Guidelines state that audiovisual content can be considered 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. Further, 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.
- Category 3 of the EC Guidelines: consideration of the monetisation or revenue generation from the audiovisual content including indirect monetisation having regard to factors such as the presence of advertisements in and around video content, any commercial arrangement in relation to such content.
- Category 4 of the EC Guidelines: consideration of the availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content.

DECISION MAKING PROCESS AND REDDIT

38. Following its establishment, the Respondent identified a number of service providers as potentially falling within the scope of the 2009 Act, including the Applicant.

Notice of Designation of VSPS

39. On the 14th of August, 2023, the Respondent published a notice of its designation of VSPS as a category of relevant online services. This designation became effective on the 11th of September, 2023. In consequence, designated online services falling within the meaning of the 2009 Act includes VSPSs.

Consultation regarding Quantitative Data

40. Also on the 14th of August, 2023, the Respondent wrote to Reddit thanking it for its engagement up to that date and to consult with it on information, specifically quantitative data, it might request from Reddit pursuant to a statutory notice under s. 139F of the 2009 Act relevant to a decision on designation of online services under s. 139E of the Act. It was indicated that the Respondent 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 s. 139E of the Act.

41. Referring to its power under s. 139F of the 2009 Act (as amended) to serve an information notice seeking information relating to that service that appeared to it to be relevant to a decision as to whether to designate a service as a named service, the Respondent offered Reddit an opportunity to comment on quantitative data requests which it indicated had been identified as potentially helpful to it in the exercise of its regulatory functions. It was stated that it was important to the Respondent that information when requested, in particular data and metrics, was useful, would be 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).

42. The quantitative data identified in an appendix to the letter of the 14th of August, 2023 and upon which comment was invited included:

- i. the average number of monthly active users of the Service in the EU;
- ii. the average number of users who post content of any type in any given month;
- iii. the average number of users who post videos and/or programmes in any given month;
- iv. the average number of videos and/or programmes posted in any given month;

- v. the average 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;
- vi. the average time spent per user per day on the Service;
- vii. the average time spent per user per day interacting with audiovisual content;
- viii. the average number of user interactions with audiovisual content per user per day;
- ix. the average number of user interactions with audiovisual content per user (i) per day and (ii) per month;
- x. the average monthly user interactions for users aged under 18 years of age;
- xi. the number or percentage of total complaints each month which relate to audiovisual content;
- xii. 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,

- xiii. the proportion of user generated videos and/or programmes accessible in the Section also accessible through other parts of the Service; and
- xiv. 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).

43. Reddit was specifically asked to confirm in relation to the data identified that:

- (i) the description of the data was clear; and
- (ii) the data was 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

44. In a document which I understand to have been provided on the 4th of September, 2023, Reddit replied with some observations on the data requests identified requesting some clarity and identifying information it could provide and information not readily available pointing out that while it is generally able to provide the average number of users

who post “*native*” video to the site in any given month, it allows users to post text, images, videos and links to third party sites and does not have readily available data regarding the nature of content available via the link on the third party site. This was the first reference to “*native*” video in exchanges with Reddit in evidence before me and the Respondent had not distinguished between “*native*” and other videos available on the platform in its original consultation request.

Information Notice

45. An Information Notice was first served on the 15th of September, 2023 and copied by email to Reddit leading to an exchange of correspondence in relation to Reddit Ireland Limited’s corporate status, clarification that Reddit Ireland was not the provider of a relevant online service, nor was it the provider of any of Reddit services to users. Reliance was placed on the Reddit User Agreement which was described as explaining that, for users that live in the EEA, UK or Switzerland, Reddit, Inc. is the provider of the Services. It was stated that Reddit, Inc. is a company incorporated in the United States and is, accordingly, not a legal entity established in Ireland. Clarification was sought in relation to proceeding with the matter in circumstances where it was stated that “*Reddit Ireland cannot provide an accurate response to the Reddit Ireland Notice in its current form.*”

46. By letter dated the 10th of October, 2023, the Respondent replied referring, *inter alia*, to confirmation that Reddit Inc. is the service provider for Reddit noting that Reddit Inc. is the sole shareholder and parent company of Reddit Ireland Limited, according to the Reddit Ireland Limited’s constitution and most recent annual report for the period to 30th of September 2022. Attention was drawn to s. 28(3) of the 2009 Act which states that if the provider of a VSPS is not established in a Member State, then the provider is nonetheless under the jurisdiction of a Member State in certain circumstances which include if it has a subsidiary undertaking that is established in the territory of that state. The Respondent indicated a view that Reddit Inc. may be the provider of a VSPS under the jurisdiction of the State, by virtue of it having a subsidiary (Reddit Ireland Limited) established in Ireland.

47. On the 11th of October, 2023, having corresponded in relation to service issues and received confirmation from Reddit Ireland Limited (it reserving its position on the issues raised in relation to s. 28(3) of the 2009 Act) that it had authority to accept service of documents on

behalf of its parent entity (and also copying the Reddit legal team), the Respondent issued a Statutory Notice (the "Information Notice") in respect of Reddit pursuant to s. 139F of the 2009 Act.

48. Section 1 of the Information Notice sought provider and service contact details. Section 2 of the Information Notice sought information in relation to Reddit's place of establishment relevant to the jurisdiction of the State. Section 3 of the Information Notice sought service details and stated that the information sought was required to inform the Respondent's analysis of whether the service (or a dissociable section of the service) was a VSPS for the purposes of section 2(2) of the 2009 Act. A range of detailed information was sought in this part of the Information Notice.

49. Questions asked included questions in relation to the purpose of the service, whether the service was referred to as a VSPS, 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 VSPS, whether users commonly refer to the service as a VSPS and whether a significant proportion of user-generated videos or programmes are provided by the service.

50. On the question of effective control, Reddit was asked if it had effective control over the selection of such videos and/or programmes on the service, 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).

51. Where it was contended that the service was dissociable, Reddit was asked whether the Service has 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).

52. Also in section 3 a series of questions were posed in tabular form about the essential functionality of the Service. In this part of the Information Notice, some of the data requests are directed specifically to “*native*” video (as defined in the Information Notice), reflecting an apparent appreciation of the limitation on Reddit’s ability to provide quantitative data save as regards “*native*” video as previously communicated. Many other information requests were directed to video and audiovisual content more generally and were not confined to “*native*” video.

53. In Table 3C.1 further additional information was sought, was directed 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, details were requested of the functionalities, features and systems of the Service tailored for, or specific to video content.

54. 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.

55. In Table 3C.3 data in relation to monetisation or revenue generation from the audiovisual content was sought including information in relation to whether commercial arrangements apply to video-only feeds, apps or ‘*experience*’ on the service, what percentage

of the service's total EU revenue was 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 was tracked for marketing or commercial purposes.

56. 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 and what features, tools, data and/or support are available for uploaders in relation to videos.

57. It is immediately apparent from the terms of the Information Notice in part 3C that it draws very significantly on the EC Guidelines in identifying the further information required. In this part of the Information Notice the Respondent adopts the same category headings as appear in the EC Guidelines and the questions asked are directed to seeking information in relation to sub-indicators identified by the European Commission under each category heading of the EC Guidelines.

58. It is also important to record that the Information Notice contained definitions of terms used in it including a definition of "*native video*", "*user generated video*", "*programmes*" and "*audio-visual content*". Native video was defined as "*user-generated video directly posted to the service or dissociable section of a service.*" In this way it was made clear that "*native video*" was considered a type of user generated video. Notably, the definition of "*user generated video*" mirrored exactly the definition contained in the Revised AVMS Directive. Relevant legislative provisions were annexed.

Response to Information Notice

59. A Response to the Information Notice was received by the Respondent on the 1st of November, 2023.

60. In the Response it was indicated that Reddit, Inc. is incorporated in the United States. It was confirmed that Reddit, Inc. had a subsidiary undertaking in Ireland, namely, Reddit Ireland Limited, a company incorporated in the State on the 21st of February, 2019. Its principal

purpose was described as providing support and outsourced services to Reddit, Inc as its ultimate parent company. It was contended, *inter alia*, with reference to the terms of ss.2B(3)(a) and 2B(7) of the 2009 Act and Article 3(1) of Directive 2000/31 EC (namely the E-Commerce Directive) that Reddit Ireland Limited is not the provider of a relevant online service and that for the purposes of the jurisdiction test under s.2B(3)(a) of the 2009 Act, Reddit, Inc. should not be regarded as under the jurisdiction of Ireland because it does not have a subsidiary undertaking that is established in the territory of Ireland where established should be construed as referring to an established service provider of an information society service within the meaning of the E-Commerce Directive.

61. Information provided in relation to subsidiary undertakings in other EU member states confirmed five other EU member states (Netherlands, France, Spain, Germany and Portugal). It was confirmed that all other subsidiary undertakings were incorporated after Reddit Ireland Limited. All other EU subsidiary undertakings were also described in identical terms to Reddit Ireland Limited as providing support and outsourced services to Reddit and as not being service providers to end users. All were described as employing minimal personnel in that country.

62. In response to section 3 of the Information Notice, it was confirmed that Reddit's principal purpose was not video sharing. It was stated that any video content on Reddit is user-generated content and users select videos. It was stated that Reddit determines how content (e.g. posts made by users which can include videos) is organised on the site in certain contexts and Reddit's role includes providing features (e.g. allowing sorting and filtering) and algorithms that support user interactions. It was confirmed that Reddit utilises machine learning algorithms to personalise the order in which users see posts and includes personalised content recommendations.

63. In response to a question as to where on the service users can view and interact with videos, Reddit replied that when uploading content, users can choose to create a text post, a link post, an image post, or a video post. If a video post is created, it can be viewed in the subreddit where it was originally posted, and other users may comment on and discuss the video on the post page.

64. It was further confirmed that a video post from an individual community may also be displayed in a user's home feed, Reddit's "*popular*" or "*all*" feeds, or, for mobile app users (android and iOS), on the "*news*" or "*watch*" feed (a personalized feed filtered to show only

video post types). From any of these feeds, a user may click into the post page to read and join the discussion. In addition, mobile app users can click on a specific video post (from the post page only) to view the video in a full screen view, from which the user can swipe left to find other video posts (e.g., from the same or similar subreddits). From those videos, the user can click on the comment icon to go to the post page and view or engage in the discussion.

65. In response to the question that it describe the functionalities, features and systems of the Service tailored for, or specific to video content, Reddit stated that it was predominantly focused on providing a platform for user commentary and discussion and given the very small percentage of video content on the site, the functionalities tailored to video are minimal observing that <3% of posts from the EU and <1% of posts/comments from the EU constitute native video content. It was noted that when uploading content, users can choose to upload images or videos in addition to posting text posts or links.

66. It was confirmed that Reddit had no live-streaming functionality.

67. In terms of viewing content, in addition to Reddit's "*home*," "*popular*," "*all*," and "*news*" feeds, it was stated that users of Reddit's native mobile applications had the option of accessing a "*watch*" feed, which is limited to posts that are of the video post type. Mobile application users can also view video posts via a full screen view (accessible from the post page only) and can filter search results by "*media*" to find image or video posts related to a search.

68. In response to questions in relation to monetisation or revenue generation from audiovisual content, it was confirmed that access to video content is not subject to payment. Advertisers may serve video advertisements to the platform. According to the Response, Reddit does not have the capability to display advertisements within videos themselves. It was accepted that video content drives some engagement on the site but this was described as "*relatively minimal*". Reddit confirmed, however, that it had recently started a pilot program where eligible users can monetize their contributions (including video content) in certain subreddits on the platform, subject to Reddit's Contributor Terms and Contributor Monetization Policy. Users may purchase gold (a virtual item) from Reddit to award contributions, and eligible users may receive payouts for qualifying contributions depending on the number of karma (general user score) and gold they receive. Currently, only US users

are eligible to participate in the contributor program.

69. It was confirmed that there were no special commercial arrangements that apply only to the “*watch*” feed or full screen view.

70. In response to the question as to 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, it was stated that Reddit does not currently have this data. It was stated that Reddit does not currently display advertisements within videos themselves. Rather, advertisements generally appear around or between other pieces of content on a page or feed. It was confirmed that advertising is Reddit’s primary revenue stream.

71. As for measurement of users’ or recipients’ engagement with audiovisual content tracked for marketing and commercial purposes, Reddit confirmed that it does not use metrics related to users’ engagement with audiovisual content for marketing purposes. Reddit tracks an individual account’s engagement with any content on Reddit for purposes of informing future content recommendations. Its feed recommendation system ranks content based on many features: including whether it is an image post and how much a particular user appears to engage with image posts, and whether it is a native video post and how much a particular user appears to engage with native video content.

72. Addressing the availability of tools to enhance the visibility or attractiveness of the audiovisual content, it was confirmed that in feeds where Reddit recommends both video and non-video content to users – e.g., a user’s home feed, Reddit’s systems are aware of whether a post contains video and will take this into account when making recommendations, but the system does not expressly favour or disfavour a post solely based on its status as video. Both the “*watch*” feed and the full screen video view include only video posts and therefore only video posts are eligible for recommendation.

73. As for functions, features and/or tools available to prompt or encourage users’ engagement with videos on the Service, it was indicated that users of Reddit’s native mobile applications (android and iOS) have the option of accessing a “*watch*” feed, which is limited to posts that are the video post type. Mobile application users also have the option of viewing video posts via a full screen view, from which the user can swipe left to find other video posts

(e.g., from the same or similar subreddits). Further, when uploading content, users can choose between posting text, image, video, or links. On Reddit’s native mobile applications (android and iOS), via the video post option, users can elect to create gifs out of their videos (and upload the gif instead of a video), or to shorten their videos and post only a clip.

74. In terms of numbers, it was confirmed that Reddit has no more than 11.3 million monthly active recipients of the service in the European Union, calculated as an average over the period of 1st of January 2023 to 30th of June 2023 (hereinafter “the specified sample period”), in accordance with the EU Digital Services Act (DSA). During this period of time, the average number of accounts associated with EU users that posted content per month is:

- 498,211 accounts with a post
- 1,051,626 accounts with a comment
- 432,200 accounts with a chat
- 1,217,968 accounts with a post or comment
- 1,481,655 accounts with a post, comment, or chat

75. These figures were said to be based on content associated with unique user accounts, rather than unique individuals. For the specified sample period , on average, 33,131 accounts associated with EU users posted native videos per month. For the same period , on average, 87,187 native videos were posted on the service within the EU per month. Expressed as a percentage, native video posts made up:

- 2.81% of all monthly posts from the EU;
- 0.51% of monthly posts and comments from the EU; and
- 0.21% of monthly posts, comments, or chats from the EU.

76. For the specified sample period, on average, 16.1 unique minutes are spent on Reddit per day per EU account. Unique minutes are measured by counting the number of unique minutes in which an account is considered “*active*.” It was stated that Reddit does not have the capability to track average time spent per day per user interacting with audiovisual content. However, Reddit can provide the average number of native videos watched per user for 2 seconds, for 5 seconds, for 10 seconds, and to completion. It was indicated (although figures were subsequently corrected) that for the period of 1st of January 2023 to 30th of June 2023,

on average per EU account per day:

- 12.2 videos were watched for at least 2 seconds;
- 8.2 videos were watched for at least 5 seconds;
- 5.8 videos were watched for at least 10 seconds;
- 4.3 videos were watched to completion.

77. For the specified sample period, the average logged-in EU account had the following engagements per day:

- 0.58 votes on videos
- 0.06 shares of videos (clicks on the “share” button)
- 0.01 comments on videos

78. For the same period, the average logged-in EU account had the following engagements per month:

- 5.46 votes on videos
- 0.59 shares of videos (clicks on the “share” button)
- 0.1 comments on videos

79. For the period of specified sample period, the average number of EU reports of site-wide terms or policy violations relating to native video content was:

- 84,327 reports per month
- 2,795 reports per day

80. According to Reddit by far the most common report reason is spam. It was indicated by Reddit that the number of reports does not correlate to the number of pieces of content reported; counting the number of pieces of content reported would result in smaller numbers.

VSPS Designation Decision Framework (“the Framework”)

81. On the 10th of November, 2023, in the stated interests of evidence-based, transparent, consistent and proportionate decision making, the Respondent published its decision framework for the designation of a named service as a VSPS. The Framework was designed to inform individual providers of online services of the assessment and decision-making process it was 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. It is more fully described in my judgment in the *Tumblr* proceedings. An appendix to the Framework provided 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.

82. Of note, nothing in the Framework or the PA Consulting Report upon which it relied suggested that “*user generated video*” which was subject to control under the Revised AVMS Directive was confined to “*native*” video and that term is not used. Instead, the definitions in the Revised AVMS Directive are repeated and are not departed from.

Preliminary Designation

83. On the 17th of November 2023, the Online Safety Commissioner wrote to Reddit on behalf of the Respondent, indicating that it had reached the preliminary conclusion that Reddit appeared to meet the criteria of a VSPS and appended:

- a Statement of Reasons - which sets out the reasons why it appeared to the Respondent that the Reddit service is a VSPS; and
- a draft designation notice in that regard (collectively, the "*Preliminary Designation*").

84. In arriving at this provisional view, the Respondent made the following provisional findings:

- ***Jurisdiction*** - the Respondent expressed the preliminary view that Reddit, Inc. is deemed to be established in the territory of Ireland under section 2B of the 2009 Act.

- **Service** - the Respondent expressed the preliminary view that Reddit 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).

85. The covering letter to the Preliminary Designation invited Reddit to consult on these preliminary conclusions, as required by s. 139H of the 2009 Act, and to provide comments and/or information which Reddit believed to be relevant to the Respondent's final decision. A detailed Statement of Reasons running to eight pages accompanied the letter. 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 Reddit, Inc. and the Respondent's own analysis of the Reddit service was set out thereby affording Reddit the opportunity to address these matters in their Preliminary Designation Response.

Preliminary Designation Response

86. Reddit responded to the Respondent on the 8th of December, 2023 (the "Preliminary Designation Response") setting out why it considered that the Preliminary Designation was incorrect. The submissions made by way of Preliminary Designation Response continue to form a central part of Reddit's challenge to its designation as a VSPS and warrant close attention for this reason. The case it makes before me is closely aligned with the case already advanced to the Respondent and Reddit has been wholly consistent in its position.

87. First, it was submitted that Reddit, since its inception in 2005, had been a website focused on the sharing of text and hyperlinks. It was pointed out that for over a decade, Reddit did not even support audiovisual functionality and video is a minor part of Reddit, as demonstrated by the metrics which had been provided. It was submitted that video is ancillary to the other functionality provided by Reddit, and is not an "*essential functionality*." It was submitted that the Respondent had interpreted the Act and the Revised AVMS Directive incorrectly and contrary to the principles of legal certainty. In particular, the Respondent had wrongly interpreted the concepts of "*audiovisual programmes*" and "*user generated videos*" as defined by the 2009 Act and it had misapplied the "*essential functionality*" test.

88. Secondly, it was submitted that the Respondent’s assessment did not satisfy the EC Guidelines and that the Respondent had erred by either not considering indicators explicitly outlined in the EC Guidelines or by otherwise failing to ensure that its assessment satisfied the standards as set out by the European Commission. In particular, it was contended that the Commission had erred in failing to follow the EC Guidelines provision that the

“assessment should be based on meaningful and reliable evidence” and take into account *“the number of the proportion of videos on the platform as compared to other types of available content”*

– and,

“with a view to ascertaining whether the audiovisual content provided is merely ancillary to, or a minor part of, the activities of the service”.

89. Thirdly, it was pointed out with regard to the Respondent’s own assessment of Reddit described as based on observation and/or use of Reddit, relied on for the purpose of provisionally finding that Reddit is an essential functionality VSPS, that the Respondent had not provided Reddit, Inc., by way of exhibit or otherwise, with documentary evidence grounding the assessment carried out by the Respondent. It was submitted that as a consequence, Reddit, Inc. was prevented from properly responding to the Respondent’s assessment and the deductions that it had made through its observation and use of Reddit. Reddit, Inc. called on the Respondent to furnish it with all relevant documents (including screenshots from Reddit) which had informed the Respondent’s assessment of Reddit, and requested that Reddit, Inc. be afforded a further opportunity to respond.

90. Fourthly it was submitted that the Respondent had not substantiated the factual basis for material aspects of its provisional decision giving some examples where findings had been made based on observation but without furnishing copies of the material observed.

91. Fifthly, it was contended that the Respondent had not provided adequate reasons for its provisional decision to designate Reddit as an essential functionality VSPS. It was submitted

that for the most part, the reasons provided by the Respondent were circular and/or merely declaratory of the relevant statutory requirement. It was submitted that the Respondent had not sufficiently, or at all, particularised *why* it believed that (a) Reddit is a service whose essential functionality involves the provision of audiovisual programmes and user generated videos to the general public in order to inform, entertain or educate; or that (b) Reddit, Inc. determines their organisation by automatic means or algorithm.

92. In their Preliminary Designation Response, Reddit further indicated that as a preliminary matter, it wished to clarify what, in fact, constituted audiovisual programmes and user generated videos provided via Reddit for the purposes of determining whether Reddit constitutes a VSPS within the meaning of the 2009 Act and the Revised AVMS Directive. It was contended that the Respondent’s preliminary conclusion was predicated on an assumption that whenever a user uploads a post to Reddit containing or linking to audiovisual content, that Post is considered relevant for the purpose of assessing whether Reddit is an Essential Functionality VSPS. In Reddit’s submission, this reflected a fundamental error of interpretation and assessment by the Respondent – and the Respondent’s related observations indicated a failure to properly assess the specific features of Reddit. In particular, it was contended that the Respondent had wrongly treated Posts that contain links to audiovisual content that is hosted on a third-party service (whether as hyperlinks or as embedded video links), as relevant video content provided on Reddit and it had erroneously relied on such content in issuing its preliminary designation.

93. It was submitted that in the context of Reddit, relevant video content is limited to user generated video uploaded via Reddit’s native video hosting service referred to by Reddit as “*native video*”. It was contended that the provision of a service that allows users to share video links did not constitute the provision of either “*audiovisual programmes*” or “*user generated videos*” within the meaning of the 2009 Act and the Revised AVMS Directive. It was contended that if the provision of a service that allows the sharing of video links was to be considered the activity of a VSPS, then any website or app that enables users to share website or app links would be regulated as a VSPS under the 2009 Act and the Revised AVMS Directive. Such an interpretation would result, it was submitted, in a vast array of online services and forums being classified and regulated as VSPS e.g. chat rooms, blogs, review websites or any forum on the internet where links are shared.

94. It was further submitted that it was not the intention of the Revised AVMS Directive that a service which facilitates the sharing of video links should be considered a VSPS in its own right. It was submitted that such an approach would result in “*double*” regulation of relevant video content i.e. both the “*host*” and the “*sharing*” service would assume obligations under the 2009 Act and the Revised AVMS Directive in respect of the same content. It was further submitted that it would be impossible or very difficult for the “*sharing*” service (such as Reddit) to implement content moderation as required under Article 28b of the Revised AVMS Directive over relevant video content that is hosted by a third-party service.

95. It was contended that it was clear from the use of language in the EC Guidelines that video links are not intended to be included in the assessment of whether a service is a VSPS, whether an essential functionality VSPS or otherwise. By way of example reference was made to page 4 of the EC Guidelines where, in the assessment of the first indicator (*relationship between the audiovisual content and the main economic activity or activities of the service*), the EC refers to services which “*facilitate live broadcasting, listing of video categories, a ‘take a video’ button or a direct link with the phone or computer gallery feature and the content stored therein*”. Additionally, the EC Guidelines continually refer to the “*uploading*” of video content to services; for example, at page 7, in the context of the fourth indicator (*availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content*), the EC Guidelines refer to services which offer “*uploaders*” tools or systems to track and manage the performance of the content “*uploaded*” to a service.

96. It was submitted that the provision by users of video links in Posts or otherwise on Reddit should have been excluded from the Respondent’s assessment of whether Reddit is an essential functionality VSPS and the Respondent’s inclusion of and reliance on Posts containing or comprising video links in its assessment was in error. Reddit maintained that native video is the only form of relevant video content provided via Reddit and that while other platforms are designed almost exclusively to allow and encourage users to record, upload, share, and interact with native videos, Reddit was simply not such a platform. It was contended that by wrongly treating video links as relevant video content, the Respondent had overstated

the amount and significance of such content on Reddit.

97. Notably, it was further submitted that even if relevant video content is deemed to include video links, video content would nonetheless represent a minor and insignificant portion of overall content which is posted to viewed, and/or shared on Reddit and the Respondent's assessment of Reddit as an essential functionality VSPS would still be unfounded.

98. Reddit, Inc. went on to address submissions to the Respondent's assessment of each of the specific indicators from the EC Guidelines and disputed the Respondent's "*overarching position that the potential reach of relevant video content*" is a relevant factor/indicator to consider when determining if a service should be named as a VSPS pursuant to the Act. It was submitted that the legislation and EC Guidelines were intentionally drafted to exclude services from the scope of the Revised AVMS Directive where relevant video content constituted a minor part of that service notwithstanding the potential reach which that content may or may not have. In this regard, reliance was placed on the empirical data which had been provided in respect of user engagement with relevant video content and what that data revealed about the insignificance of relevant video content to the overall user experience on Reddit.

99. It was contended that a proper assessment of this data – having regard to the relevant indicators detailed in the EC Guidelines and the specific features, functionality and market positioning of Reddit compared to truly video-focused platforms would clearly reflect the fact that relevant video content is ancillary to and a minor part of Reddit and, as such, it should not be designated as an Essential Functionality VSPS.

100. Reddit further submitted that the Respondent erred in failing to have sufficient regard to the quantitative data supplied in circumstances where the EC Guidelines provide that, in determining whether a platform hosts a significant amount of relevant video content, "*this assessment should be based on meaningful and reliable evidence*". It was complained that there had been no meaningful engagement with the data and metrics. Additional information

was provided which it was contended further illustrated that the use of relevant video content is a minor part of, and ancillary to, the overall activities on Reddit

101. In terms of the indicators of essential functionality Reddit disagreed with the Respondent's assessment that "*videos appear to play an integral role in the user experience on Reddit and the Commission considers 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)*" contending that the data and product descriptions provided showed that relevant video content played an ancillary, minor, and insignificant role in the user experience at Reddit – and it therefore played not only a non-integral role to the overall activities and user experience on Reddit but it was negligible to the commercial success of Reddit or its market position.

102. In their submissions Reddit also disagreed with the Respondent's view that Reddit, Inc., as the provider of Reddit, is under the jurisdiction of the State and is deemed to be established in Ireland under section 2B of the Act. Reddit, Inc. maintained the position that it should not be regarded as under the jurisdiction of Ireland because it does not have a subsidiary undertaking that is established in the territory of Ireland, where "*established*" should be construed as referring to an established service provider of an information society service within the meaning of Directive 2000/31/EC.

Designation Decision

103. By correspondence dated the 29th of December, 2023, Reddit was advised of the Respondent's decision to designate it as a VSPS (hereinafter "the Designation Decision"). In the letter communicating the Designation Decision, Reddit was advised that the Respondent had reached the conclusion that the service Reddit appeared to be a VSPS the provider of which is under the jurisdiction of the State.

104. In addition to concluding that Reddit is under the jurisdiction of the State because it is deemed to be established in Ireland, the Designation Decision found that:

"Pursuant to section 2(2) of the Act, an essential functionality of the service Reddit 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 Reddit, Reddit 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."

105. It was stated that in arriving at its Designation Decision, the Respondent had regard to its statutory obligations, the EC Guidelines on the application of the essential functionality criterion, the Consultation Response, the Preliminary Designation Response and the Respondent's own analysis of the service Reddit in forming its view. Having formed this view, the Respondent decided to exercise its powers pursuant to s. 139E and s. 139G of the Act to designate Reddit as a named service to which online safety codes may be applied and gave notice to Reddit, Inc. pursuant to s. 139H(3)(a) of the Act that Reddit had been designated as a named VSPS.

106. Appended to the cover letter for the Designation Decision was:

- a final Statement of Reasons summarising the Respondent's reasoning in making its determination together with the Respondent's response to the issues Reddit raised in its Consultation Response; and
- a final Designation Notice.

107. The Final Statement of Reasons Appendix is a detailed document. Given its central importance to the issues in these proceedings, it is necessary to address its contents in some detail.

Final Statement of Reasons

108. In its Final Statement of Reasons, the Respondent first describes the main characteristics of Reddit and sets out the reasons why it appears to the Respondent 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 in these proceedings.

109. Secondly, the Respondent set out the reasons why it appears to it that Reddit provides audiovisual programmes and/or user-generated videos that fall within the scope of the definition of a video-sharing platform service.

110. Thirdly, the Respondent sets out the reasons why it appears to it that an essential functionality of Reddit is devoted to providing the audiovisual programmes and/or user-generated videos. In this part of its Final Statement of Reasons, the Respondent follows the headings adopted in the EC Guidelines and addresses indicators identified in those Guidelines.

111. Finally, the Respondent sets out the reason why it appears to it that Reddit is under the jurisdiction of the State.

112. In describing the “*Main Characteristics of Reddit; Reddit as a service*”, the Final Statement of Reasons records the fact, said to have been verified by the Respondent’s own observations, that users of the service Reddit can access, create, share and engage with user-generated content provided on Reddit. It is noted that the main way Reddit, Inc. appears to facilitate this is by providing a function that allows users to make “*Posts*”. A Post is described as an item of content on Reddit that may comprise text, image-based, audio or video content or combinations thereof. Reddit, Inc. is said to distribute the Posts users make on Reddit to different parts of its service, including the various feeds it provides and including those feeds on Communities (formerly known as “*Subreddits*”). When users access Communities they can see collections of Posts, typically relating to the subject matter area which is the focus of those Communities.

113. The Respondent notes that Reddit, Inc. provides functions on Reddit that allow users to find, access, create and share Posts. Reddit, Inc. also provides a function that allows users to select and focus on particular Posts. Users who do so can make comments connected to those particular Posts. Reddit, Inc. provides other functions on Reddit such as search functions and direct messaging. It is observed that the user-interface through which Reddit, Inc. provides

Reddit can vary depending on the way it is provided (e.g. via mobile device etc.).

114. It is noted that in the information it had submitted, Reddit, Inc. confirmed that Reddit generates remuneration from various sources and that advertising is its primary revenue stream. Reddit, Inc. is further noted to provide the service Reddit in different forms and by different technical means over the internet including on web browsers and mobile applications. It is thus provided over electronic communications networks.

115. In terms of audiovisual programmes and/or user-generated videos on the service, the Respondent recorded that it appears to it that Reddit provides audiovisual programmes and/or user-generated videos that are available to the general public to inform, entertain or educate. It is noted that it appears to the Respondent that Reddit, Inc. determines the organisation of such videos but does not have effective control over the selection of them. In this regard it is noted that Reddit, Inc. had confirmed that it provides access to audiovisual content on Reddit from its users. The Respondent notes that it had itself confirmed this from its own observations of the service. The Respondent further notes that Reddit, Inc. provides audiovisual programmes and user-generated videos on Reddit through functions where they are openly accessible and available to the public at large, such as the various feeds provided (including Communities). It is observed that there is the potential for these videos on Reddit to be viewed by large numbers of people and the data supplied by Reddit, Inc. indicates that this is the case in fact. There are no restrictions limiting access to Reddit to particular individuals or groups of individuals, or preventing sectors of the public from signing up to Reddit. These videos are thus, in the Respondent's view, available to the general public.

116. In terms of the selection of audio-visual programmes and/or user generated videos, it is noted that Reddit, Inc. had confirmed in the Response that it does not select the audiovisual programmes and user-generated videos that are posted on the platform by its users but it provides the functions on the service Reddit that organise Posts containing audiovisual programmes and/or user-generated videos, together with other forms of content. In this way it was noted by the Respondent that Reddit, Inc. has control over the functionality that distributes and determines how videos are delivered on Reddit when users upload or share them,

irrespective of the particular form or means by which those users access Reddit (including variations in its user-interface). Examples of these kinds of functions include the “All” feed, the “Home” feed and the functionality Reddit, Inc. provides to support Communities.

117. It is noted that Reddit accepts that it determines how content is organised on the site in certain contexts, albeit users are also involved in this determination and have a significant amount of control over the organisation of content. The Respondent states that it takes the view that Reddit, Inc. determines the organisation of all of the user-generated content it provides on Reddit through Posts and other means by virtue of its control of the underlying functionality through which that content is delivered to users. It indicates its view that the fact that users or community moderators utilise the functionality Reddit, Inc. provides to remove, curate or moderate content does not alter the conclusion that Reddit, Inc. as the provider of the Reddit service determines the organisation of that content. Reddit, Inc. has overall power to control the organisation of the platform (including the ability to change or remove the options available to users) notwithstanding users may be given a degree of control over the organisation of that content. The Respondent notes that the concept of organisation in the definition of a video-sharing platform service includes, but is not limited to, automatic means.

118. Under the heading “*the audiovisual programmes and/or user-generated videos inform, entertain or educate*”, it is stated that the Respondent examined parts of Reddit where users can post videos to the general public and the organisation of which is determined by Reddit, Inc. It appears that the majority of the audiovisual programmes and/or user-generated videos that users post on these functions inform, entertain and/or educate rather than being designed to wholly support economic transactions.

119. The Respondent observes that this is also clear from how Reddit categorises Communities thematically on its home page with a view to directing users towards those focusing on subject matter areas that inform, entertain and/or educate them, for example: Gaming; Sports; Business; Crypto; Television; Celebrity; Animals and Pets; Anime; Art; Cars and Motor Vehicles; Crafts and DIY; Culture, Race and Ethnicity; Ethics and Philosophy; Fashion; Food and Drink; History; Hobbies; Law; Learning and Education; Military; Movies;

Music; Place; Podcasts and Streamers; Politics; Programming; Reading, Writing, and Literature; Religion and Spirituality; Science; Tabletop Games; Technology and; Travel.

120. Significantly, the Respondent observes that Reddit also provides access to several communities focused on pornographic content, including pornographic videos.

121. The Respondent further notes that Reddit provides a functionality for users to subscribe to particular Communities so those users can continue to receive content from those Communities that informs, entertains and/or educates them.

122. The Respondent refers to and quotes from Reddit, Inc.'s descriptions of Reddit on [Redditforbusiness.com](https://www.redditforbusiness.com) to support this view as follows:

“Where your audience finds their community

“Whether the topic is sports, shower thoughts, personal finance, makeup addiction or just good, old-fashioned dad jokes, chances are you can dive right into a conversation [conversation] about it somewhere among the 100K+ active communities on Reddit. There’s even a community to find specific communities. While passions and interests bring nearly half a billion people to Reddit each month, it’s the sense of belonging that makes them stay. And they don’t just stay to lurk on Reddit, they engage, ask questions, offer advice, and even a little encouragement.”

Reddit is where opinions are formed

“People come to Reddit with purposeful intention: to find out more about a topic from those who know it best, whether peers or brands. They trust the information they find here, discuss it with others in the community, and use it to form perspectives of their own. It’s these trusted community perspectives that drive real-world decisions.”

123. The Respondent quotes the following text from Reddit’s help-centre which states:

“We use information about you (such as your location, device info/browser) and your activity on the site (your communities, votes, browsing info, etc) to make some educated guesses about what other content you might find interesting, funny, or useful and we surface those recommendations to you in your feed.”

124. Under the heading “*essential functionality*” it is stated that it appears to the Respondent that an essential functionality of the service Reddit is devoted to providing audiovisual programmes and/or user-generated videos to the general public in order to inform, entertain or educate. It is indicated that on the basis of the Respondent’s overall assessment, a sufficient number of indicators analysed support the conclusion that the audiovisual content provided by Reddit is not merely ancillary to, or a minor part, of the activities of the service. It is noted that it appears to the Respondent that the videos Reddit provides have an intrinsic informational, entertainment and/or educational value; that Reddit’s users use videos frequently and videos have a significant reach; that Reddit, Inc. monetises and generates revenue from videos; and that Reddit, Inc. provides some tools on the service Reddit to enhance the visibility and attractiveness of videos. Accordingly, it is recorded that it did not appear to the Respondent that providing videos is a merely ancillary or a minor part of the activities of the service.

125. The Respondent refers to but indicates that it does not accept Reddit, Inc.’s position, as stated by it, that Reddit is not a VSPS. Specifically, the fact that Reddit may be “*a forum-based platform for people to create self-governing communities (or Subreddits) of shared interests, where they can engage in discussions with others based on shared interests*” was found not to preclude Reddit being a VSPS. Furthermore, the Respondent expressly sets out that it does not accept that integrating videos interchangeably with other forms of content in the Reddit user-experience diminishes the relevance of those videos in determining whether Reddit is a VSPS.

126. It is stated that in reaching this conclusion the Respondent had considered in particular the indicators of essential functionality set out in the EC Guidelines on the application of the essential functionality criterion. The Respondent's reasoning thereafter was set out under four

headings, reflecting the main categories of indicators in the EC Guidelines noting expressly “*these are not cumulative*”.

127. Under the first heading, “*the relationship between the audiovisual content and the main economic activity or activities of the service*”, it is stated that the Respondent had considered the relationship between the audiovisual content on Reddit and the main economic activity or activities of the service. It is noted that it appeared to the Respondent that Reddit’s main activity was to provide users with access to user-generated content. This is said to be evident from the layout of the service which prominently uses feeds and Communities to distribute Posts made by Reddit users. It is observed that videos appear to play an integral role in the user experience on Reddit and the Commission considers that these videos have an intrinsic informational, entertainment and/or educational value that is “*stand alone*” in nature (i.e. the videos do not merely support economic transactions). This is said to be evident from the content itself on the service and how it is organised through Communities based on subject matter areas and themes. Posts by users can contain videos they upload directly from their devices; which they record directly through functionality provided on Reddit; and which they share from other services.

128. Referring to Reddit’s Response it was noted that it explained how Reddit, Inc. integrates Posts containing videos interchangeably with other kinds of Posts on its feeds as well as in Communities, distributes Posts containing popular videos across the service, and provides tools to allow users to engage with and share them. The Respondent observes that Reddit also provides specific features tailored for audiovisual content such as an autoplay functionality to enhance the service’s audiovisual offering by playing videos automatically when they appear on feeds (this is on by default). It is noted that the Response describes how Reddit incorporates a function where users can filter searches for “media”-only content, which allows users to focus on image and video content. The Response also describes Reddit’s Watch feed which focuses exclusively on video content and how the Reddit video player allows users to watch videos on their feed in full-screen mode.

129. Significantly, the Respondent again observes that certain Communities prominently feature videos, including pornographic videos.

130. It is noted that Reddit, Inc. specifically promotes Reddit as a platform for sharing videos, citing several examples and providing links, specifically Introducing Our Improved Video Ad Offerings - Upvoted ([redditinc.com](https://www.redditinc.com)); Bringing More of Dubsmash to Reddit by Launching New Video Features – Upvoted ([redditinc.com](https://www.redditinc.com)) and New Features Aimed at Making Reddit Easier to Use: An Update on Our Product Priorities Focused on Simplification - Upvoted ([redditinc.com](https://www.redditinc.com)).

131. Addressing its analysis of the data submitted in response to the Information Notice under the heading “*The quantitative and qualitative relevance of the audiovisual content available on the service*” it is next noted that the Respondent is of the view that Reddit’s users make substantial use of videos and that they have a significant reach and relevance to the user experience. This is said to be particularly the case “*in light of the large volume of users Reddit has in the EU; the way it distributes content on feeds and because it promotes Communities where videos are prominent*”. In respect of this view, it is noted that the Respondent had also had regard to the following data furnished by Reddit which was then set out in full including materially: Reddit’s average number of monthly active users in the EU is quantified at no more than 11.3 million; on average, 87,187 native videos were posted on the service within the EU per month during the specified sample period; native video posts make up 2.81% of all monthly posts from the EU; on average, 16.1 unique minutes are spent on Reddit per day per EU account; on average per EU account per day 11.3 videos are watched for at least 2 seconds and during the specified sample period the average number of EU reports of site wide terms or policy violations relating to native video content is 84,327 reports per month and 2,795 reports per day.

132. It is further noted that the Respondent had regard to the additional data points provided by Reddit in its Consultation Response in relation to EU user accounts. This additional data is said not alter the Respondent's view that an essential functionality of the service is devoted to the provision of audiovisual programmes, user-generated videos, or both, to the general public, but rather this view is supported by the quantitative data.

133. Under the heading “*Monetisation or revenue generation from audiovisual content*” it is noted that it appeared to the Respondent from the manner in which audiovisual content on the service is monetised and generates revenues that such content has significant commercial relevance for the service. It is noted that Reddit accepts advertisements are Reddit’s main revenue stream. The Respondent further observes that these advertisements are provided together with audiovisual programmes and user-generated videos. Accordingly, the Respondent considered this to be a form of indirect monetisation of those videos.

134. Reference is also made to Reddit, Inc.’s statement in that “*Video content drives some, but relatively minimal, engagement on the site*” but the Respondent notes that it had observed that video content generally appeared to drive significant engagement on the site across different Communities and this is said to be particularly the case in certain popular communities (e.g. R/videos).

135. Reference is made to the fact that Reddit, Inc. had stated that Reddit does not use metrics related to users’ engagement with audiovisual content for marketing purposes. It is observed, however, that Reddit tracks an individual account’s engagement with any content on Reddit for the purposes of informing future content recommendations. It is noted that the EC Guidelines state: “*The fact that the platform tracks users’ interaction with audiovisual content available on the service for various marketing/commercial purposes, such as targeted behavioural advertising or data-sharing agreements, should also be considered as a means of indirect monetisation*”.

136. The Respondent further observes that Reddit’s business model involves it using the data its users generate concerning videos to improve the service and make it more attractive. It considers that this is an indirect form of monetisation of videos and a commercial purpose which increases the viability and profitability of the service. The Respondent refers to the fact that Reddit, Inc. also describes in the Response how Reddit started a pilot program where eligible users can monetise their contributions (including video content) in certain Subreddits on the platform, subject to Reddit’s Contributor Terms and Contributor Monetisation Policy. It states that users may purchase gold (a virtual item) from Reddit to award contributions, and

eligible users may receive payouts for qualifying contributions depending on the number of karma (general user score) and gold they receive. The Respondent also notes, however, that currently only US users are eligible to participate in the contributor program.

137. Addressing the final heading in the EC Guidelines, “*Availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content*”, the Respondent notes that the provision of specific features and functionalities which it considered to be aimed at enhancing the visibility and attractiveness of videos on the service to users and indicates that such content is not merely ancillary to, or a minor part of the activities of the service. Specific features observed are noted as including that videos are shown by Reddit, Inc. to its users on in its feeds, including Communities, without any specific requests or inputs by users and appear to feature prominently throughout Reddit’s most popular Communities, which Reddit, Inc. actively promotes; the Watch Feed provided on Reddit enables users to access Posts containing video content only; Reddit provides a functionality via the video post option where users can shorten their videos and post only a clip and Reddit video recorder provides various other tools when uploading videos like filters, sound and voiceover.

138. Finally, in addressing the question of jurisdiction, it was stated that the Respondent had formed the view that the provider of Reddit, Reddit, Inc., is under the jurisdiction of the State as it is deemed to be established in Ireland under section 2B of the Act: (a) Reddit, Inc. has a subsidiary undertaking, Reddit Ireland Limited (“Reddit Ireland”), that is established in Ireland; and (b) Reddit Ireland is the subsidiary of Reddit, Inc. that first began its activity in the EU, and it maintains a stable and effective link with the economy of Ireland. This conclusion is recorded as based on information furnished by Reddit and other information obtained by the Respondent from public sources.

139. The Respondent notes that Reddit, Inc. disputes that it is under the jurisdiction of the State. Reddit’s position is set out including that Reddit, Inc. stated that under the Reddit User Agreement the Reddit service is provided by Reddit, Inc. from the United States. Reddit, Inc.’s subsidiary Reddit Ireland Limited is noted as having been incorporated in Ireland in February 2019 and as having a registered address in Dublin. Reddit Ireland Limited’s contention that it

has few employees and all of its activities solely relate to intra-group support services for Reddit, Inc. as the ultimate parent company is noted. It is noted that Reddit, Inc. has subsidiary undertakings subsequently incorporated in other EU Member States (specifically Netherlands, France, Spain, Germany and Portugal). It is noted that these companies similarly provide solely intra-group support services and have few employees. Reddit, Inc. submission to the effect that for it to be within the State's jurisdiction, Reddit Ireland Limited would need to be an "*established service provider*" of an "*information society service*" within the meaning of Article 3(1) of the E-Commerce Directive and its view that Reddit Ireland Limited is not the provider of a relevant online service, nor of any information society service, nor of any other service to any party other than Reddit, Inc. as its parent company is set out.

140. Having noted Reddit's position as summarized above, the Respondent repeats that it disagrees with Reddit's analysis observing that on a correct interpretation of the Act, Reddit Ireland is established in the State and as such Reddit, Inc. is under the jurisdiction of the State. It is stated that a company (in this case, a subsidiary of Reddit, Inc.) is established in the State where it is engaged in the pursuit of an economic activity through a fixed establishment in the State for an indefinite period. The Respondent's position is that it is not necessary for that subsidiary to be providing an information society service. Although the Act provides at section 2B(7) that "*established*" has the same meaning as in Article 3(1) of the E-Commerce Directive, this does not import all of the concepts from the E-Commerce Directive into section 2B. It is noted that "*established*" is not specifically or separately defined in the E-Commerce Directive, but is a concept referenced within Article 3(1) and in the definition of "*established service provider*".

141. The Respondent concludes that a more consistent interpretation of Article 3(1) is that it refers to the concept of "*establishment*" as enumerated in the case law of the European Court of Justice (the "CJEU") on Articles 49 - 55 TFEU. The definition of "*established service provider*" in Article 2(b) of the E-Commerce Directive repeats the definition given in CJEU case law on the concept of "*establishment*", i.e., it involves the pursuit of an economic activity through a fixed establishment for an indefinite period. This is reinforced by recital 19 of the E-Commerce Directive.

142. Therefore, although the concept of establishment is referenced within the definition of “established service provider” in the E-Commerce Directive, the Respondent concludes that it does not follow (as Reddit, Inc. contends) that an undertaking considered for the purposes of section 2B of the 2009 Act must fall within that definition of an established service provider, i.e., be the provider of information society services. It is stated that s. 2B(7) refers to the concept of “established” within the meaning of Article 3(1) of the E-Commerce Directive; it does not explicitly refer to the definition of “established service provider” under Article 2I of the E-Commerce Directive. The Respondent notes that “Service provider” and “established” are concepts that are dissociable from one another. The Respondent further observes that a requirement for subsidiaries and other group entities considered under section 2B(3)-(6) of the Act to be providers of information society services would be inconsistent with the aims of the Revised AVMS Directive and the 2009 Act, and would mean the provisions on deemed jurisdiction were largely devoid of purpose.

143. In its final assessment, therefore, the Respondent concludes that Reddit Ireland Limited is established in the State, i.e., that it is pursuing an economic activity using a fixed establishment in the State for an indefinite period. In further reasoning this conclusion the Respondent notes that Reddit Ireland Limited is an Irish-registered company, bearing CRO number 644242, with separate registered and business addresses in Dublin City Centre. It observes that Reddit Ireland Limited engages in the economic activity of support services to Reddit, Inc., including administrative services, marketing and research and development activities. It states its view that it is not necessary that Reddit Ireland Limited provide “*information society services*” in deciding whether it is established in the State for the purpose of the Revised AVMS Directive. The Respondent specifically refers to Reddit Ireland Limited’s financial statements which indicate that for the year ending the 31st of December, 2021, it had 39 employees (for which it paid tax and social insurance), assets of €1.65 million, and achieved turnover of €7.8 million. The same financial statements are recorded as stating that the company plans to continue its present activities and current trading levels. The Respondent therefore observes that there is no indication from the information provided by Reddit that Reddit Ireland Limited’s activities have ceased and on this basis the Respondent concludes that Reddit Ireland Limited maintains a stable and effective link with the economy of Ireland.

144. Having regard to the dates in which the other European subsidiary companies commenced trade, the Respondent separately notes that Reddit Ireland Limited is the undertaking within the Reddit Inc. corporate group that first began its activity in the EU. This fact coupled with the fact that it maintains a stable and effective link with the economy of Ireland combine to lead the Respondent to its conclusion that Reddit, Inc. is under the jurisdiction of the State as it is deemed to be established in Ireland under section 2B of the 2009 Act (specifically section 2B(4)(b) in accordance with section 2B(5)).

Engagement with Reddit Response

145. In addition to references to the information received from Reddit and its Preliminary Designation Response which appear throughout the Statement of Reasons, and as noted above, a separate Appendix was provided with the Statement of Reasons headed "*Reddit - Commission response to issues raised in Reddit, Inc.'s Consultation*". This is a lengthy document running to some 19 pages. It would not be reasonable to reproduce the full content of this response in this judgment but having read the document with great care I am satisfied that all material objections raised by Reddit in its Preliminary Designation Response are engaged with and are addressed individually in this document.

146. By way of highlight summary only of the detail in this document, I note that in response to procedural concerns raised it is noted that the 2009 Act is prescriptive in respect of the procedure and steps the Respondent must take in designating a named service as a VSPS under section 139E of the Act. It is further pointed out that the procedures the Respondent has followed to make its preliminary determination were stated in the Consultation Letter sent to Reddit Inc. and published in its Designation Decision Framework.

147. Referring to Reddit's position that the Respondent has wrongly interpreted the concepts of "*audiovisual programmes*" and "*user-generated videos*" as defined by the 2009 Act and misapplied the "*essential functionality*" test, the Respondent stands over its interpretation of these with reference to the definitions contained in the Revised AVMS Directive. The

Respondent reiterates that videos on Reddit are user-generated videos where they are a set of moving images with or without sound constituting an individual item created by a user of the service and uploaded by that user or another user. Videos on Reddit are audiovisual programmes where they are a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature-length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama. A video, being either a user-generated video or an audiovisual programme, makes it directly relevant to the Respondent's determination of whether the service is a video-sharing platform service.

148. As for the essential functionality criterion, the Respondent maintains that it interpreted that concept in light of the aims of the 2009 Act and the Revised AVMS Directive. In doing so, it had appropriate regard to the EC Guidelines as it is required to do so by section 139G(4) of the 2009 Act. The Respondent refers to its explanation of its reasons why the service satisfies the essential functionality test under section 3 of the Statement of Reasons, entitled "*Essential Functionality*".

149. In response to Reddit, Inc.'s further submission that the Respondent's assessment failed to consider indicators explicitly outlined in the EC Guidelines or ensure that its assessment met the standards set by the European Commission by failing to follow the requirement in the EC Guidelines that the "*assessment should be based on meaningful and reliable evidence*" and take into account the number or the proportion of videos on the platform as compared to other types of available content, the Respondent observes that it was not required to specifically address the proportion of videos present as opposed to other types of content in its analysis; the EC Guidelines merely indicate assessments of the relevance of videos to services may be framed in this way. The Respondent points out that the factors within the EC Guidelines were not intended by the European Commission to be applied cumulatively, and the absence of one or more of them was not intended to lead to the conclusion that the service is not a VSPS.

150. Addressing Reddit, Inc. submission that the Respondent had not provided it with documentary evidence grounding the assessment carried out by the Respondent preventing it

from properly responding to the Respondent's assessment and the deductions that it has made through its observation and use of Reddit, the Respondent indicates that it considered that an appropriate level of detail was provided in its Statement of Reasons to give Reddit, Inc. the opportunity to respond; that its basis for assessment had been adequately set out; and the matters referred to in the draft Statement of Reasons related to openly observable characteristics of the service. Furthermore, it is noted that the Respondent had where appropriate verified observations from its own observations of the service. It is noted that Reddit, Inc. had responded to descriptions of the functions and characteristics of the service that were drawn from the Respondent's own observation of the service and were included in the draft Statement of Reasons using Reddit, Inc's knowledge and control of the service and these descriptions in response were relied upon by the Respondent in its reasoning. Furthermore, the Respondent points out that it had taken account of clarifications provided by Reddit in finalising its decision.

151. Reddit, Inc.'s specific complaints that the Respondent had not substantiated the factual basis for material aspects of its draft Statement of Reasons were addressed in turn by the Respondent. The Respondent relied in this regard both on its general observation of the nature and content of the site which it said was fully within Reddit's knowledge and the relevant headings of the EC Guidelines on essential functionality. It was noted that Reddit, Inc had not contested the Respondent's observations that it provides audiovisual programmes, user-generated videos or advertisements through the functions referred in general terms, and in fact refers to instances of same in the Preliminary Designation Response and Consultation Response in general terms.

152. In addressing the narrow interpretation of the definition of "*user-generated video*" under the 2009 Act and the Revised AVMS Directive favoured by Reddit the Respondent pointed out that when users use the functionality Reddit, Inc. provides and has implemented on Reddit to embed videos, they create and upload a set of moving images with or without sound constituting an individual item to the service within the meaning of the 2009 Act and Revised AVMS Directive. The main way Reddit facilitates users accessing, creating, sharing and engaging with user-generated content is through its "Posts" functionality and "Posts" may

include videos. The Respondent points out that embedded videos are provided interchangeably with native videos on Posts on the service and neither the 2009 Act nor the Revised AVMS Directive refer to where a video is technologically hosted as a material factor in making a determination as to whether a video constitutes a user-generated video and/or audiovisual programme. Accordingly, the Respondent did not distinguish same in its Statement of Reasons. The Respondent adds, however, that it did not refer to mere links to videos on Reddit in its analysis of whether the service was a video-sharing platform service but distinguished between text and videos in its description of the service's Post function.

153. The Respondent rejects Reddit's argument that embedded videos fell outside the scope of the concept of programmes and user-generated videos but adds that without prejudice to that position, it had considered whether Reddit would appear to be a VSPS if the assessment was limited in the way proposed by Reddit, Inc i.e. to native video. The Respondent notes that the elements of video functionality described in the Statement of Reasons all apply in the case of native videos, with the specific exception of where functionality is present on the service to limit the sharing of native videos. Further, the Respondent refers to quantitative information about the use of native video stating that it *"supports a finding that native video functionality is not merely ancillary or a minor part of the activities of the service but is an essential functionality of the service based its on reach, rather than its use"*.

154. Accordingly, the Respondent concludes that:

"Reddit would appear to be a VSPS, even if the assessment of Reddit were limited to the service as it pertains to native video only."

155. The Respondent refers to Reddit's contention that if the provision of a service that allows the sharing of video links was to be considered the activity of a VSPS, then any website or app that enables users to share website or app links would be regulated as a VSPS under the 2009 Act and the Revised AVMS Directive. The Respondent expressly disputes Reddit's contention that such an interpretation would result in a vast array of online services and forums being classified and regulated as VSPS e.g. chat rooms, blogs, review websites, or any forum

on the internet where links are shared pointing out that Reddit had not provided any examples of the kinds of services to which it refers. The Respondent maintains that as terms are generally understood, chat rooms, blogs, review websites or forums are typically services that would not satisfy the definition of a VSPS because the videos are not provided to the general public, the provider of the service has editorial control over the videos or video-sharing forms an ancillary part of the service. The Respondent further explains that by contrast, and as explored in the Statement of Reasons, Reddit, Inc. distributes popular Posts containing videos on Reddit as autonomously enjoyable items of video content to the general public and these can be directly enjoyed by users on feeds, like other social media services that use feeds with recommender systems, without recourse to comments / discussions.

156. The Respondent observes that providing posts that contain videos interchangeably with posts containing other forms of content demonstrates that videos are not a merely ancillary part of the activities of the service. It is further pointed out that Reddit also provides the functionality in feeds and in Communities to determine the ranking and sequencing of Posts containing videos. Further, Reddit directly recommends content including the videos it provides in its Communities to users who are not members of those Communities through feeds on its service (as described in the information provided by Reddit in its description of the service's feeds).

157. Reddit, Inc.'s submission, in essence repeated in argument before me, that it was clearly not the intention of the Revised AVMS Directive that a service with embedded videos should be considered a video sharing platform service in its own right as this would lead to a "double" regulation of videos and that it would be impossible or very difficult for the "*sharing*" service (such as Reddit) to implement content moderation as required under Article 28b is considered by the Respondent to be "*not persuasive*". It is pointed out that where video content can be consumed across different services it is appropriate that services should assume responsibility for that content.

158. The Respondent's position is that where content is hosted is not material to the impact that it has when it is viewed when regard is had to the public interest objectives of the Revised

AMVS Directive. Posts containing embedded videos can be consumed as if they are native videos on Reddit. The Respondent rejects Reddit's reliance on the EC Guidelines to distinguish between native video and embedded video pointing out that there is no reference to a distinction in the Act, the Directive or the EC Guidelines between providing videos natively or providing them embedded from other services. The Respondent pointed out that wording in the EC Guidelines focuses on the consumption and exposure of users to videos in a general sense rather than the specific technical means through which they are provided. This is said to reflect the general principle in the introductory remarks of the EC Guidelines which states:

“[S]ervices that rely on audiovisual content as a non-minor or not merely ancillary component of their economic activity tend to expose their users more to such content. Therefore, the Commission considers that, in the application of the essential functionality criterion, Member States, including their national regulatory authorities, should also pay particular attention to the users' perspective and, in particular, to the degree of their exposure to audiovisual content when accessing the relevant services.”

159. It is clearly explained that the Respondent had regard to the other two indicators under this heading being use and reach of videos and that the presence of subreddits where videos are prominent strongly indicates the use, reach and relevance of videos to Reddit in coming to this view. The fact that Reddit has Communities dedicated to providing videos and video-sharing features prominently in Reddit's Communities (and may be disseminated in Reddit's other feeds) is also considered by the Respondent to speak to the fact that video-sharing is neither a minor nor ancillary part of the activities of Reddit. The fact that Reddit also has Communities where pornographic videos are popular and prominent is also referred to as supporting a view that video-sharing is neither a minor nor ancillary part of the activities of Reddit. It is further pointed out that the information notice focused on native video because, following engagement with services, including Reddit, relevant providers stated that providing information on non-native video would not be feasible within the Respondent's timelines or they did not have the information but the Information Notice contained definitions of programmes and user-generated videos in a manner which was not limited to native video.

160. The Respondent notes that Reddit agreed that its main activity is to provide users with access to user-generated content, and that it appeared to agree that the layout of the service prominently uses feeds and communities to distribute Posts made by Reddit users. The Respondent refers in this regard to the EC Guidelines where it is stated:

“Where the platform is geared towards the sharing of content in view of informing, educating or entertaining users rather than, for example, facilitating economic transactions, the audiovisual component is likely not to be considered as merely ancillary to, or a minor part of, the activities of that platform”.

161. Other features highlighted in the engagement with Reddit’s response include the fact that users can enjoy videos on feeds on Reddit autonomously without recourse to any discussions; those feeds themselves being designed to surface autonomously enjoyable popular content to users, including on Communities; Reddit has integrated video sharing functionality into the feeds that comprise its service, including its Communities; Users are exposed to videos frequently across the different elements of the service, Reddit specifically refers to the reference to an *“endless stream of cute animals”*, which indicates that these are autonomously enjoyable items of content; the video-sharing Reddit, Inc. provides on Reddit include its media filter and watch feed; Reddit, Inc. provides live-streaming on Reddit through Twitch and YouTube embeds - these are a form of video provided through the Post function.

162. The Respondent points out that the fact that videos can be manipulated by similar tools as non-video content, or that videos are provided together with other forms of content, does not diminish their relevance as video-sharing functions in an overall determination of whether an essential functionality of a service is devoted to providing videos. Videos are still provided / can still be manipulated through the functions.

Submission to Draft Online Safety Code

163. For completeness it is noted that following the Designation Decision impugned in these

proceedings draft Online Safety Code for Video Sharing Platform Services was launched by the Respondent for public consultation on the 8th of December, 2023 (more fully described in *Tumblr*). In January, 2024, Reddit addressed submissions in writing to the draft Online Safety Code. In those submissions, Reddit focussed on proportionality issues having regard to size and resources, amount and relative significance of video on the platform.

PROCEEDINGS

164. These proceedings were commenced following an *ex parte* application on the 15th of January, 2024 for leave to proceed by way of judicial review to challenge the designation of Reddit as a VSPS which application was adjourned on notice to the Respondent to the 12th day of February, 2024 when leave was granted. In the Order granting leave the Court (Hyland J.) also made directions in relation to the time-frame for delivery of opposition papers and fixed a date for hearing with directions in relation to the exchange of written submissions. No provision was made for the delivery of expert reports in the directions made.

165. The Statement of Grounds identifies distinct grounds of challenge including:

- A.** An error of law in holding that Reddit, Inc is under the jurisdiction of the State;
- B.** An error of law in holding that an essential functionality of Reddit is devoted to providing audiovisual programmes and/or user generated videos by electronic communication networks to the general public in order to inform, entertain or educate specifically insofar as the Respondent wrongly concluded that hyperlinks and/or embedded video links to audiovisual content that are hosted on a third-party service that are contained in the posts to Reddit constitute audiovisual programme and/or user-generated videos within the meaning of s. 2 of the 2009 Act;
- C.** An error of law in its assessment of an essential functionality of Reddit by including embedded video and hyperlinks in its assessment;
- D.** An error of law in the application of the EC Guidelines most notably by including irrelevant matter in the form of embedded video and hyperlinks in its assessment of video content;
- E.** Errors of assessment in the treatment of quantitative and qualitative data, monetisation and revenue generation and tools aimed at enhancing the visibility or

attractiveness of the audiovisual content.

166. A detailed Statement of Opposition was filed on the 27th of February, 2024, in which the Respondent fully stands over the Designation Decision and its jurisdiction to make the decision. Opposition is grounded on a detailed affidavit (sworn on the 26th of February, 2024) of Ms. Niamh Hodnett, the Online Safety Commissioner in which she explains the role of the Respondent, elaborates on the expertise of its members, sets out the process for designation of VSPS, then summarises engagement with Reddit prior to designation and responds to the grounds of challenge identified in some considerable detail including in relation to an error of law as to jurisdiction, an error of law as to essential functionality and error of law and fact in interpreting and applying the EC Guidelines.

167. Leave to amend the Statement of Grounds to include a plea that the Respondent had erred as a matter of law in failing to determine what part of the content of Reddit constituted audio-visual programmes and/or user generated videos on the basis that the said determination was a necessary component of the assessment of whether Reddit constitutes a VSPS was granted on the 2nd of May, 2024 (Hyland J.) just days before the assigned hearing date. An amended Statement of Opposition was duly filed denying any such failure.

168. Despite the fact that no expert third party opinion was sought by the Respondent for the purpose of making the Designation Decision or relied on by Reddit in mounting this challenge, the Respondent took the unusual step of introducing an Affidavit from an expert (Mr. Sykes, a Chartered Electrical Engineer and Chartered IT Professional) in opposition. Although, Reddit 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), issue is taken on behalf of Reddit with the admissibility of *ex post facto* affidavit evidence from experts when no such evidence was available to the Respondent in making the Designation Decision.

ISSUES

169. A primary issue arises in these proceedings as to whether the Respondent erred in determining that the Applicant is “*deemed to be established*” in the State in assuming

jurisdiction to regulate Reddit.

170. Other issues which flow from the case as pleaded are, *inter alia*, whether the Designation Decision is flawed by reason of the failure on the part of the Respondent to properly distinguish between audio-visual and user generated content and whether the Respondent erred by treating “*non-native*” videos (including hyperlinks and embedded links) as audio visual programmes or user generated videos within the meaning of the Revised AVMS Directive in determining that Reddit is required to be regulated as a VSPS.

171. It is also contended that in determining whether the “*essential functionality*” of Reddit is devoted to providing audiovisual programmes and/or user-generated videos, the Respondent failed to properly apply the EC Guidelines on the application of the essential functionality criterion and failed to identify how its application of the indicators identified in the EC Guidelines led it to conclude that Reddit is a VSPS.

172. Separately, an issue which arises from the conduct of the proceedings as opposed to Designation Decision itself is whether the *ex post facto* expert evidence sought to be adduced is properly admissible in these proceedings. I propose to address this issue first, although I do so having considered all of the evidence in the case and addressed my mind to the substantive issues which arise for determination in these proceedings and the significance of the expert evidence sought to be adduced in this regard.

DISCUSSION AND DECISION

Admission of Ex Post Facto Evidence

173. As in *Tumblr*, the Respondent seeks to rely on the affidavit evidence of one Mr. Sykes who purports to offer an opinion supportive of the Designation Decision. Without further addressing the content of his affidavit and report, suffice to say that Mr. Sykes carries out an exercise in examining the video content on the Reddit platform which goes beyond that which the Respondent did in arriving at the Designation Decision.

174. The Respondent seeks to rely on this expert evidence even though it was not before

it when it made its decision because it maintains that these proceedings are comprised of a challenge to the merits and substance of its assessment of essential functionality within the Designation Decision. It is further maintained that the complex nature of the assessment undertaken by it raises 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.

175. Although there are circumstances in which it is appropriate to admit and attach weight to *ex post facto* expert evidence by way of exception, 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 material and reasoning which was not before the decision-maker or contained in 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 as a matter of course.

176. Having considered the record of the decision-making process in relation to the designation of Reddit, I have concluded that there is no necessity for expert evidence to enable me to address the specific issues raised in these proceedings. While there is no doubt that the Respondent is composed of persons with regulatory expertise which equips it to understand and assess the evidence with specialism I do not have, I am satisfied that this judicial review of the application of the essential functionality test under the Revised AVMS Directive with guidance from the EC Guidelines does not necessitate an explanation of technical terms or specialist know-how beyond that which is already apparent in the papers and clearly communicated.

177. In my view the Respondent's factual conclusions and judgment based on the material before it should stand or fall on the material before the Respondent when making the decision

and the reasoning apparent from the Designation Decision. I consider the said Decision to be readily comprehensible without further explanation and I am satisfied that recourse to expert affidavits is not necessary to equip me to identify the legal test applied or to understand and appreciate the significance of the material before the Respondent in making its decision still less the adequacy of the reasoned basis communicated for the Designation Decision, these being the factors which primarily pre-occupy me in circumstances where it is not my role to stand in the shoes of the Respondent and substitute my assessment of the evidence for that of the Respondent on the core question of whether an essential functionality of Reddit is devoted to the sharing of videos.

178. Whilst the content of the expert's affidavit and report could be relevant to a decision to designate and Mr. Syke's opinion would have been supportive of the decision made had it been available to the Respondent before it took its decision, it seems to me that this is really neither here nor there when the information was not, in fact, available to the Respondent when it made its decision. I consider that it would be quite improper and unfair for Reddit'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.

179. In view of the conclusions I have reached, it is unnecessary to further recite the contents of Mr. Syke's affidavit or indeed that of Professor Emmerich who was retained on behalf of Reddit to prepare a response in the event that I acceded to the application to adduce expert evidence notwithstanding the objection of Reddit. As I have concluded that the Designation Decision must stand or fall on its own terms, I do not propose to attach any weight to the *ex post facto* expert evidence adduced in this case.

180. By way of aside, it seems to me that it is often possible for a decision maker to carry out further investigations and get better evidence but this causes delay and expense and at some point in every decision making process a judgment call needs to be made in the reasonable exercise of a decision making power as to whether a reasonable and fair opportunity has been afforded to affected parties to make submissions or address concerns and whether the available

evidence is adequate or sufficient to ground the decision in question or further investigations are justified and necessary. It is indeed a truism that perfection is the enemy of the good. An unreasonably delayed decision or protracted decision-making process to allow for helpful but unnecessary further investigations to be conducted is the antithesis of good decision making.

181. It is understandable that when the decision in this case was challenged, the Respondent sought to defend it with better evidence than had been relied upon in making the decision in the first place. While this might suggest an anxiety that the impugned decision was inadequately supported (and in some cases such anxiety may indeed be well-founded), I do not interpret the instinct to present better evidence as necessarily meaning that the evidence relied upon in the first place was inadequate, as has been suggested in argument. Whether it does or not depends on the nature of the evidence and whether it relates to matter that ought to have been considered for a proper decision to be made but was not.

182. It seems to me therefore that the question for me is whether there was a sufficiency of evidence addressed to material considerations, without overlooking or excluding relevant matter(s?) from consideration, available to the decision maker to properly support the particular decision. This is a question I will determine on the evidence before the Respondent when it made its decision having first satisfied myself, as I have, that there is nothing in the new material tendered on either side which could cause me to conclude that essential material or evidence necessary to a lawful exercise of decision-making power in the circumstances of this case has not been considered.

Proper Interpretation and Application of the Essential Functionality Test

183. This case turns in large part on questions of statutory interpretation. It is significant in this regard that these questions of interpretation arise in the context of the State's obligations under EU law. Given the context in which the issues arise, it is appropriate to identify the applicable principles guiding the interpretation and application of a measure of EU law before turning to apply those principles as they arise regarding the Revised AVMS Directive and its transposition into domestic law.

Interpretative Principles

184. 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* at paras. 53 to 55). This principle of interpretation is designed to ensure that national courts can ensure the full effectiveness of EU law when it determines the dispute before it. 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, *Callaghan v. An Bord Pleanála* [2017] IESC 60 and *NAMA v Commissioner for Environmental Information* [2015] 4 IR 626.

Identifying Aims and Objectives

185. Accordingly, my point of departure in addressing whether there has been an error of interpretation or application by the Respondent in arriving at the impugned Designation Decision is to consider the aims and objectives of the Revised AVMS Directive.

186. The aims and objectives of the Revised AVMS Directive are readily discernible and unambiguous. The clear objective of the Revised AVMS Directive is to protect users from certain forms of illegal and harmful audiovisual content online. The Directive was clearly revised to extend its application to newer types of video sharing and to impose certain obligations on video-sharing platform providers as a means of keeping pace with technological developments. The legislative history is further addressed in my judgment in the *Tumblr* proceedings and will not be repeated here save to observe that 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 supported by its legislative history as more fully expanded upon in my judgment in the *Tumblr* proceedings (see, in particular, the 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”).

187. The objective of responding to a rapidly changing environment by providing for broad level of effective protection against harmful online content is also clear from the terms of the Revised AVMS Directive itself. In Recital 1 to the Revised AVMS Directive 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.*”

188. The inclusion of VSPS (as defined in the Revised AVMS Directive) within the scope of regulation is said to be required “*in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism*” (Recital 4). It is therefore clearly intended that the Revised AVMS Directive would be sufficiently broad in scope of application to protect against the consequences of exposure to harmful video content shared on-line.

189. Recital 5 is also informative and helpful in construing the scope of the requirement to regulate under the Revised AVMS Directive. It provides that social media services should be covered if the provision of user-generated videos constitutes an essential functionality of that service. It further states that the provision of user-generated videos could be considered to constitute an essential functionality of the social media service if the audiovisual content is not merely ancillary to, or does not constitute a minor part of, the activities of that social media service. This is the sole use of the language of “*minor*” and “*ancillary*” in the Revised AVMS Directive.

190. Given the jurisdictional issues arising it is significant that Recital 44 refers to the nature of information society services identifying that it is appropriate that the same rules which apply to services established in the territory of the EU would also apply to video-sharing platform providers which are not established in a Member State.

191. The objective or aim identified for applying the same rules regardless of whether established in a Member State or not in Recital 44 is to safeguard the effectiveness of the measures to protect minors and the general public set out in Directive 2010/13/EU and to ensure, as much as possible, a level playing field, in so far as those providers have either a parent undertaking or a subsidiary undertaking which is established in a Member State or where those providers are part of a group and another undertaking of that group is established in a Member State.

192. To achieve this purpose, Recital 44 states that the definitions set out should be principles-based and should ensure that it is not possible for an undertaking to exclude itself from the scope of that Directive by creating a group structure containing multiple layers of undertakings established inside or outside the European Union. Article 28a of the Revised AVMS Directive is clearly designed to give effect to this objective.

193. In Recital 45 the underlying theme of the Revised AVMS Directive in achieving protection for users who consume audiovisual content through platforms which enable video sharing is returned to through a reference to the “*new challenges*”, in particular “*in connection with video-sharing platforms, on which users, particularly minors, increasingly consume audiovisual content*”. It is stated that in this context, “*harmful content and hate speech provided on video-sharing platform services have increasingly given rise to concern.*” Proportionate rules were said to be necessary “*in order to protect minors and the general public from such content.*”

194. 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*”. Recital 47 continues that in view of its determination of the organisation of content, 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.”

195. From the foregoing, it is clear to me that I must approach the interpretation of the Revised AVMS Directive in a manner which seeks to ensure its broad application, in line with its purpose and objective, in a manner which ensures its effectiveness in protecting users and consumers against harmful content as defined. This is the purpose for which the precise rules developed under Articles 1 and 28a of the Revised AVMS Directive were adopted.

Jurisdictional Issue

196. Reddit, Inc’s pleaded case in the Statement of Grounds in relation to jurisdiction was based on two main arguments: that Reddit, Inc. itself, rather than Reddit Ireland Limited, was the provider of the service to EEA users and that Reddit Ireland Limited did not maintain a stable and effective link with the economy of Ireland sufficient to ground jurisdiction in the Respondent as competent authority within the State.

197. In terms of the facts relevant to the question of jurisdiction, there is little dispute. It is accepted that Reddit, Inc. is not incorporated in Ireland but that its subsidiary undertaking, Reddit Ireland Limited, is. It is not disputed that Reddit Ireland Limited is a subsidiary undertaking of Reddit Inc. The Respondent records in its consideration of jurisdiction that Reddit Inc. is the sole shareholder and parent company of Reddit Ireland Limited according to the Reddit Ireland Limited constitution and most recent annual report for the period to the 30th of September, 2022 and these factual matters are not contested.

198. In addition, while Reddit, Inc. has several different subsidiary undertakings in different Member States (and has provided details in this regard to the Respondent), it is not disputed that Reddit Ireland Limited is the subsidiary undertaking through which Reddit, Inc. first began its activity within the European Union. The Respondent had regard to the fact that Reddit Ireland Limited was incorporated in February 2019 whereas Reddit, Inc’s other subsidiary undertakings were *subsequently* incorporated in five other Member States. It was never contended that Reddit, Inc., which is incorporated in the United States, was established within

the EU. On the contrary, Reddit, Inc. emphasised that it was this US-incorporated parent company that provided services to, *inter alia*, EEA users under its user's agreement. Nor was it ever contended that Reddit, Inc was established in another EU Member State through one of its other subsidiary undertakings. It has never been contended nor has evidence been adduced to support a contention, therefore, that Reddit, Inc. is subject to the jurisdiction of another EU Member State instead of Ireland. The logic of the argument made is instead that the Reddit platform should not be subjected to regulation in any EU state.

199. In terms of the stability and effectiveness of its link with the State, the Respondent refers in its consideration to undisputed facts including the fact that Reddit Ireland Limited is an Irish registered company with registered and business addresses in the State and carrying out the economic activity of providing support services to Reddit, Inc. Regard was also had to Reddit Ireland Limited's reported turnover and the number of people it employs in the State, both of which were significant.

200. Furthermore, it is not in dispute in these proceedings that Reddit Ireland Limited is not itself a provider of a relevant online service or the provider of any information society service or other service to end users. Its User Agreement with Reddit, Inc., which is in evidence, confirms that Reddit, Inc. and not Reddit Ireland Limited is the provider of services to users that live in the European Economic Area, the United Kingdom and Switzerland.

201. The undisputed fact that Reddit Ireland Limited is not the provider of services to users and the service provider is Reddit, Inc. does not on the Respondent's case determine the question of whether Reddit, Inc. is a provider of a VSPS under the jurisdiction of the State pursuant to s.2B of the 2009 Act and instead jurisdiction in respect of the services provided by Reddit, Inc. may derive from the establishment of its subsidiary in the State. Reddit, Inc does not agree.

202. The primary ground upon which Reddit, Inc. disputes the Respondent's assertion of jurisdiction over it, as I understand it, is its contention that it is not established in the State in accordance with Article 3(1) of the E-Commerce Directive (having regard to the reference to the E-Commerce Directive at s.2B(7) of the 2009 Act) and the caselaw of the CJEU. As expanded upon through its submissions, this argument is clearly grounded on an assumption

that EU law requires that jurisdiction is predicated on the platform provider who is subjected to regulation being established (as understood on EU law principles) in the State.

203. In passing, I note that much of the correspondence between the parties exhibited by Reddit, Inc. in these proceedings was with its subsidiary undertaking in Ireland, Reddit Ireland Limited. I do not attach any significance to this because ultimately whether jurisdiction vests in the Respondent as the State's Competent Authority is a mixed question of law and fact and engagement in correspondence (whether on a without prejudice basis or not) would not operate to vest substantive jurisdiction in the Respondent if Reddit, Inc. were correct in its primary contention that jurisdiction deriving through a subsidiary is dependent on that subsidiary being engaged in the provision of on-line services to users in the State.

204. It is complained by Reddit that in assuming jurisdiction the Respondent interpreted the concept of establishment under EU law with reference to the subsidiary undertaking alone and that this is incorrect. Reddit, Inc. refers extensively in written submissions to the case-law of the CJEU in cases such as C-194/16 *Bolagsupplysningen OÜ v Svensk Handel AB*; C-222/94 *Commission v United Kingdom*; C-56/96 *VT4 Ltd*, C-161/10 *eDate Advertising*, C-410/21 and C-661/21 *DRV Intertrans BV* and C-376/22 *Google Ireland Ltd v AustriaKomm* where the concept of establishment is addressed.

205. In view of the objectives of the Revised AVMS Directive as referred to above, the stark position is that were Reddit, Inc's position in respect of the applicable test found to be the correct one, then providers of VSPS with very substantial numbers of users and high levels of activity within the EU could avoid effective regulation within the EU. The regime governing VSPS under the Revised AVMS Directive and the application of an Online Safety Code to VSPS would thereby be very significantly undermined. It is clear therefore that the interpretation urged by Reddit is one which is entirely inconsistent with the express purpose of the Revised AVMS Directive. Nonetheless, it is necessary to consider the substance of provision for the exercise of a State's jurisdiction to determine whether the machinery necessary to give effect to the clearly stated purpose and objective of the Revised AVMS Directive has been put in place.

206. In this regard it is crucial that the Revised AVMS Directive did not rely on traditional or conventional rules in relation to determining establishment for the purpose of vesting

jurisdiction but introduced new and special jurisdictional rules. On their face the rules provided under Article 28a were directed to ensuring that EU law regulating video sharing platform providers would be applied in like manner to platform providers established in a Member State and also those not established in a Member State where those providers (not established in the Member State) have either a parent undertaking or a subsidiary undertaking which is established in a Member State or where the provider is part of a group, and another undertaking of that group is established in a Member State.

207. To this end, Article 28a provides in crystal clear terms both for jurisdiction on the part of state authorities where the VSPS is established in a Member State (in accordance with conventional rules) and where it is not but a related company in the form of a parent, subsidiary or member of a group is. In effect, where the VSPS is not established in a Member State of the EU, the Revised AVMS Directive provides for a form of deemed derivative jurisdiction in respect of the non-State established VSPS and sets out the rules which govern which Member State is responsible for exercising this deemed derivative jurisdiction where related qualifying undertakings are established in more than one Member State.

208. As already set out above, Article 28a is implemented in Irish law through the provisions of s. 2B of the 2009 Act. Section 2B(3) of the 2009 Act is expressly addressed to a situation where jurisdiction derives not from the establishment of the VSPS itself in the State but is a deemed jurisdiction deriving from the establishment of related company. Where there is more than one such company within the territory of the EU, s.2B(4) and (5) prescribe the rules by which it may be determined which member state is vested with deemed jurisdiction in a manner which is faithfully aligned with article 28a of the Revised AVMS Directive.

209. In the face of this special regime directed specifically to a situation where the platform provider is not established in a Member State, Reddit's argument that there was an error in determining jurisdiction with reference to the subsidiary undertaking established within the State rather than Reddit is very difficult to understand. After all, the whole point of the special jurisdictional rules established in Article 28a2 to 28a4 and transposed into Irish law by s. 2B(3) to (4) of the 2009 Act was to provide for a jurisdiction in respect of platform providers who were not themselves established within the territory of an EU Member State.

210. To make its argument that jurisdiction has been erroneously assumed over it, Reddit

relies on the reference to Article 3(1) of the E-Commerce Directive in s. 2B(7) of the 2009 Act. It is patent, however, that the reference in s.2B(7) of the 2009 Act was intended to transpose the requirements of Article 28a1 and 28a5 of the Revised AMVS Directive and must be construed in the light of the intention of that Directive where possible and also what was intended by the reference to specific articles of the E-Commerce Directive. For its part, Article 3(1) of the E-Commerce Directive provides that Member State shall ensure that the information society services provided by a service provider established on its territory “...*comply with the national provisions applicable in the Member State in question which fall within the coordinated field*’.

211. Unlike Article 28a, therefore, Article 3(1) of the E-Commerce Directive does not lay down a standalone test of jurisdiction. Instead, it lays down a principle governing the power of Member States to regulate a service provider established on a Member State's territory. Where an information society service provider is established in a particular Member State, it must comply with the laws of that Member State (as opposed to other Member States) in respect of questions falling within “*the coordinated field*’ (as defined in Article 2(h)). Article 3(1) therefore operates to oblige the Member State in which the provider is established to require compliance with the national provisions applicable in the Member State in question which fall within the coordinated field of EU law. Similarly, Articles 12-15 of the E-Commerce Directive, also specifically referred to in Article 28a5 of the Revised AVMS Directive (but not s. 2B of the 2009 Act) are addressed, *inter alia*, to the application of rules in respect of transmission as a “*mere conduit*”, storing, hosting and monitoring of third-party information using an information society service and are not addressed to jurisdiction.

212. Under the scheme of Article 28a of the Revised AVMS Directive, jurisdiction over the platform provider who is not established in the State is not determined by reference to the E-Commerce Directive but rather by reference to Article 28a2. Once jurisdiction is established, however, the identified provisions of the E-Commerce Directive apply to that platform provider (otherwise not itself established but now deemed to be established). The intended effect of the reference to the E-Commerce Directive at Article 28a5, in stating that for the purposes of the Revised AMVS Directive Article 3 and Articles 12 to 15 of the E-Commerce Directive shall apply to video-sharing platform providers deemed to be established in a Member State in accordance Article 28a2, is to extend the field of application of the E-Commerce Directive to platforms who are not themselves established within the territory of an EU Member State once

the deemed derivative jurisdiction provided for under Article 28a2 exists. To construe the provisions otherwise completely undermines the special jurisdiction rules created under Article 28a2-28a4.

213. Clearly, the reference to Article 3(1) of the E-Commerce Directive in Articles 28a1 and 28a5 was not to replace the provision for a special jurisdiction provided for under Article 28a2-28a4 of the Revised AVMS Directive. Properly construed Article 28a1 applies to determine jurisdiction where the platform provider is itself established in the Member State and accordingly has no direct relevance in these proceedings. Article 28a5, on the other hand, provides that for the purpose of the Revised AVMS Directive, Article 3 and Articles 12 to 15 of the E-Commerce Directive apply to video-sharing platform providers deemed to be established in a Member State in accordance with Article 28a2.

214. In its analysis of the questions posed C-376/22 *Google Ireland Ltd v AustriaKomm*, the CJEU acknowledged that the concept of establishment as referred to under Article 3(1) of the E-Commerce Directive:

“is to ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State”.

215. This dictum supports my conclusion that the relevance of Article 3(1) in the context of the jurisdictional provisions in respect of VSPS is that, insofar as a VSPS is or is deemed to be under the jurisdiction of the State for the purposes of Article 28a of the Revised AVMS Directive and s.2B of the 2009 Act, then the specific provisions of the E-Commerce Directive also apply to the VSPS. Properly understood, the significance of Article 28a(5) of the Revised AVMS Directive, and s.2B(7) of the 2009 Act, is that they confirm that Article 3 and Articles 12 to 15 of the E-Commerce Directive shall apply not only to VSPS providers established in a Member State but also those *"deemed to be established"* in a Member State under these provisions.

216. Accordingly, by operation of Articles 28a1 and 28a5 of the Revised AVMS Directive, Article 3(1) of the E-Commerce Directive applies where a platform provider is itself established in an EU Member State (for the purpose of Article 28a1) and it also applies to the platform provider pursuant to Article 28a5 where a derived deemed jurisdiction arises on an

application of Article 28a2. In this way the Revised AVMS Directive secures its objective of ensuring a parity of treatment of different providers and a wide and encompassing application of the Directive.

217. The reference to the concept of establishment in Recital 19 of the E-Commerce Directive where it is stated that this should be determined "*in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period*" and *inter alia* that, in the case of a company providing services via an internet website, this is "*the place where it pursues its economic activity*" cannot properly be construed as operating to supplant the special jurisdictional rules provided for under Articles 28a2-28a4. After all, in referring to the E-Commerce Directive, the Revised AVMS Directive is specific in referring to Articles 3(1), 12-15 and not any other part of the E-Commerce Directive. I am quite satisfied that nothing in the reference to the E-Commerce Directive in Articles 28a1 or 28a5 of the Revised AVMS Directive, operates to either displace or dilute the special jurisdictional rules provided for in Article 28a.

218. As the Revised AVMS Directive provides a specific test for establishing jurisdiction in this context, whether directly or on a deemed basis, under the other provisions of Article 28a as given effect in s.2B of the 2009 Act, none of the alternative tests and case-law relied upon by Reddit is applicable to determining whether Reddit, Inc is established in the State. The test is not where the provider has "*its centre of activities*" as suggested in Reddit's written submissions as found in *Commission v. United Kingdom* and *VT4 Limited* (which relate to Directive 89/552). Moreover the passages relied upon from the *Bolagsupplysningen* and *eDate Advertising* judgments are concerned with entirely different legislative regimes (Regulation (EC) No 44/2001 and Regulation No 1215/2012 respectively).

219. Reddit also relies in its submissions on the country-of-origin principle which permits service providers to supply services without being subjected to secondary regulation. Recital 33 of the original AVMS Directive provided that the country-of-origin principle should be regarded as "*the core of this Directive*" because it is essential for the creation of an internal market. It states that the principle must be applied "*to ensure legal certainty for media service providers*" and to ensure "*the free flowing of information and audiovisual programmes*" in the common market.

220. The glaring difficulty with this submission is that the Article 28a of the Revised AVMSD introduced specific rules of jurisdiction. Recital 33 of the original AVMS Directive is not replicated in the Revised AVMS Directive. Instead, the Revised AVMS Directive has a new Recital 44 which states:

“The video-sharing platform providers covered by Directive 2010/13/EU provide information society services within the meaning of Directive 2000/31/EC of the European Parliament and of the Council. Those providers are consequently subject to the provisions on the internal market set out in that Directive, if they are established in a Member State. It is appropriate to ensure that the same rules also apply to video-sharing platform providers which are not established in a Member State with a view to safeguarding the effectiveness of the measures to protect minors and the general public set out in Directive 2010/13/EU and ensuring as much as possible a level playing field, in so far as those providers have either a parent undertaking or a subsidiary undertaking which is established in a Member State or where those providers are part of a group and another undertaking of that group is established in a Member State. Therefore, the definitions set out in Directive 2010/13/EU should be principles-based and should ensure that it is not possible for an undertaking to exclude itself from the scope of that Directive by creating a group structure containing multiple layers of undertakings established inside or outside the Union. The Commission should be informed of the providers under each Member State's jurisdiction pursuant to the rules on establishment set out in Directives 2000/31/EC and 2010/13/EU.”

221. Jurisdiction under the Revised AVMS Directive is therefore clearly not intended to be confined to cases where it is determined that the platform provider's country-of-origin is established in a Member State. Once it is accepted that the platform provider is not established within the territory of a Member State and the question of a deemed derived jurisdiction arises, the provider's centre of activities where those activities take place in two or more Member States does not require to be addressed. The straightforward test of jurisdiction applied under Article 28a4 (transposed by s. 2B of the 2009 Act) is to vest jurisdiction in that Member State where one of the subsidiary undertakings first began its activity, if it maintains a stable and effective link with the economy of that Member State. Insofar as it is contended that the Respondent was required to apply some other legal test for establishing jurisdiction, whether

on the basis of Article 3(1) of the E-Commerce Directive or otherwise, that submission is misconceived.

222. While Reddit, Inc's primary argument is undoubtedly to contend that jurisdiction should only be assumed in respect of its platform services where it is itself established in the State, it also contends in the alternative or by way of secondary argument that Reddit Ireland Limited is not established in the State and does not maintain a stable and effective link with the economy of Ireland for the purpose of establishing a deemed jurisdiction.

223. In advancing this argument Reddit, Inc. points out that neither the Revised AVMS Directive nor the 2009 Act have identified the meaning or extent of the requirement for a subsidiary undertaking to maintain a "*stable and effective link with the economy of the Member State*" for the purposes of establishing jurisdiction. I find this submission to be entirely without merit.

224. As apparent from the Designation Decision itself, the Respondent's reasoning demonstrates consideration, *inter alia*, of the fact that Reddit Ireland Limited is an Irish registered company with registered and business addresses in the State, carrying out the economic activity of providing support services to Reddit and having a reported turnover of in excess of €7.8 million and employing 39 people in the State. The Respondent found, on the basis of facts which were not disputed at the time and remain undisputed, that Reddit Ireland Limited was the first of Reddit, Inc.'s subsidiary undertakings to begin activity in the EU. This was one necessary precondition for establishing deemed jurisdiction under ss.2B(4)(b) and 2B(5) of the 2009 Act. Where it was satisfied, the provider was deemed to be established "*provided that it maintains a stable and effective link with the economy of that Member State*". The Respondent then proceeded, again correctly, to examine this further precondition.

225. On the basis of the detailed factual considerations set out in the Decision, the Respondent next concluded that Reddit Ireland maintains "*a stable and effective link with the economy of Ireland*". As set out in the Designation Decision, the Respondent concluded that Reddit Inc was under the jurisdiction of the State pursuant to s.2B of the 2009 Act because it was "*deemed to be established in the territory of Ireland*". The Respondent set out detailed reasons for this conclusion in the Designation Decision itself (pp.12-15), confirming that Reddit was deemed to be established in Ireland under s.2B(4)(b), in accordance with s.2B(5),

of the Act. The Respondent also responded (at p.35) to Reddit Inc's submissions on jurisdiction in its Consultation Response.

226. While asserting that the Respondent erred in this conclusion, Reddit, Inc. has not identified a single error in any of the considerations relied upon by the Respondent. Instead, Reddit appears to argue that a different legal test should be applied in interpreting the concept of a "*stable and effective link*": that of "*the actual jurisdiction where the service provider has its central administration in the common market*". Without precisely identifying what the applicable test is, it is contended that Reddit Ireland Limited does not meet the required threshold.

227. Reddit appears to base this submission on the judgment of the CJEU in *DRV Intertrans BV*, which, according to it, is authority for the concept of effective and stable establishment referring to the place "*where the essential decisions of the undertaking are adopted or where the functions of its central administration are carried out*". A full reading of the decision in this case does not bear out this contention.

228. In *DRV Intertrans BV*, the CJEU was called on to interpret the meaning of the concept of an "*effective and stable establishment*" in a Member State under Regulation No 1071/2009 (the "2009 Regulation") which laid down common rules for road transport operators. As Article 5 of the 2009 Regulation made clear, that concept had a specific meaning related to the highly specific context being regulated. However, the passage referenced by Reddit, Inc. in its submissions does not relate to the concept of an "*effective and stable establishment*" under the 2009 Regulation at all but instead the different criteria for determining establishment under an entirely separate regime, namely Article 13(1)(b)(i) of Regulation No 883/2004 on the coordination of social security systems which refers to the "*registered office or place of business of the undertaking or employer*". The concept of "*registered office or place of business*" under this separate legal regime was expressly defined as meaning "*the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out*": It clearly follows that this test does not provide guidance on "*effective and stable establishment*" under the 2009 Regulation which in any event also has a very specific meaning in that Regulation, still less on the meaning of the concept of "*stable and effective link*" under the entirely separate and distinct regime created by Article 28a of the Revised AVMS Directive.

229. Moreover, even if there were any legal basis for a test other than the one which it appears to me the Respondent has correctly identified and applied, Reddit, Inc. does not confirm in making a case for a central administration test where it says, as a matter of fact, its central administration is within the EU. Nor has it put any evidence before the Respondent or me that there is another Member State which ought to be deemed to have jurisdiction for the purposes of the Revised AVMS Directive or otherwise. It is reasonable to infer from this that the identification of other tests applied in different contexts is contrived in order to construct an argument to evade regulatory controls within the EU rather than to seriously contend that there has been an error on the part of the Respondent in concluding that the Member State with jurisdiction is Ireland, the very stratagem Article 28a was designed to defeat in a bid to ensure effective and consistent regulation throughout the EU.

230. To recap, in this case, the Respondent determined that Reddit, Inc was "*deemed to be established*" in Ireland on the basis of s.2B(4)(b), read with s.2B(5) of the 2009 Act. This conclusion was based on the following findings:

- i. Reddit did not have a parent undertaking established in a Member State such that s.2B(4)(a) did not apply;
- ii. Reddit had different subsidiary undertakings established in different Member States; and
- iii. Ireland was the Member State where the one of these subsidiary undertakings, Reddit Ireland Limited, first began its activity and the subsidiary maintains a stable and effective link with the economy of that Member State.

231. The Respondent's interpretation and application of the applicable test and the concept of "*stable*" and "*effective*" link with the Irish economy, as apparent from the terms of its' Designation Decision, is consistent not only with the wording of the Revised AVMS Directive but also the objectives pursued, as reflected in Recital 44 of the Revised AVMS Directive.

232. For the reasons set out in its Designation Decision, rehearsed in correspondence in advance of its decision and in the response to Reddit, Inc's submissions, I am satisfied that the Respondent applied the correct legal test to facts established in evidence before it in concluding that Reddit Ireland maintains a stable and effective link with the economy of Ireland and that it was the subsidiary undertaking through which Reddit, Inc. first began its activity within the

European Union, such that the Reddit, Inc. is deemed to be established within the jurisdiction of the State pursuant to section 2B(4)(b) in accordance with section 2B(5) of the 2009 Act. Notably the facts upon which this conclusion is reached are not in dispute albeit it is not accepted that, on the undisputed facts, it can properly be said that Reddit Ireland Limited maintains a stable and effective link with the economy of the State. Specifically, no error has been identified with any of the factual matters relied upon in arriving at the conclusion that Reddit Ireland Limited is established in the State and has a stable and effective link with the economy of Ireland. In my view there was ample evidence to support this conclusion. I see no stateable basis for impeaching the reasoning of the Respondent in arriving its decision in relation to jurisdiction.

Whether there was an error of law or assessment in the designating Reddit as a VSPS without differentiating between content assessed as constituting audiovisual programmes or user generated videos

233. The decision is criticised because of the Respondent’s use of the term “*videos*” instead of the terminology contained in s. 2(2) of the 2009 Act and the use of the phrase “*audiovisual programmes and/or user-generated videos*” without distinguishing between them as though the two separate terms “*audiovisual programmes*” and “*user-generated videos*” captures the same content. This issue was introduced into these proceedings by an amendment to the Statement of Grounds made on the 2nd of May, 2024, approximately a week before the date fixed for hearings. No issue had previously been raised in the pleadings in relation to a failure on the part of the Respondent to clearly set out whether it was relying on audiovisual programmes or user generated video or both in its decision to designate.

234. It is contended on behalf of Reddit with reference to the definition of a VSPS in s. 2(2) of the 2009 Act that before finding a service to constitute a VSPS a determination must be made as to whether an essential functionality of the service provider is providing audiovisual programmes or user-generated videos. It is submitted that as programmes and user generated videos are not synonymous, specific consideration must be given as to whether content that appears on a website falls within the legal scope of the terms “*audiovisual programmes*”/ “*programmes*” and “*user-generated videos*” and this is said to be an important step in framing the reasoning and structure of all other steps that must be followed in reaching a conclusion as

to whether to designate a service as a VSPS. The Respondent is criticised for failing to take this step.

235. It is pointed out on behalf of Reddit that in expressing its conclusion in the Designation Decision that “*Reddit provides audiovisual programmes and/ or user generated videos*”, the Respondent stated only that “*Reddit confirmed in the Response that it provides access to audiovisual content on Reddit from its users.*” It rejected the request by the Applicant that it identify specific examples of “*audiovisual content*” that it considered appeared on the Reddit website by stating “*As provider of the service, Reddit, Inc., has full knowledge of the fact that Reddit comprises a number of feeds including Communities, how they are provided, and what they contain.*”

236. Reddit contends that this was not a sufficient answer and it is submitted that while it is undoubtedly familiar with the technical details of its own service, it is maintained that it was entitled to, and the Respondent was obliged to provide, a clear determination of what part of the content on the Reddit website it considered constituted “*audiovisual programmes*” and/ or “*user-generated videos*” and were thus within the scope of being designated a “*video-sharing platform service*”. The Respondent is, in effect, accused of conflating the terms and referring to “*audiovisual content*” in the Information Notice as “*a collective term for both user-generated videos and audiovisual programmes*” thereby failing to properly identify the content upon which the designation decision is based.

237. In responding to these arguments, the Respondent relies on the terms of its Designation Decision from which it says it is clear that, in line with ss.2(2) to (3) of the 2009 Act and Article 1(1)(aa) the Revised AVMS Directive, its determination related to the content provided by Reddit in the form of audiovisual programmes and/or user-generated videos. It is said that this is apparent from the Respondent's formal statement of view, its detailed statement of reasons which references this position repeatedly, its detailed response to the issues raised by Reddit in consultation which engaged specifically on these issues, as well as the letter under cover of which the Decision was furnished to the Reddit.

238. I find the complaint introduced by Reddit by way of late amendment to the proceedings to be a curious one in circumstances where Reddit itself sought to coin new phrases such as “*relevant video content*” and “*native video*” in its engagement with the Respondent, even

though these terms are not used in the Revised AVMS Directive or the transposing legislation at all. Reddit's purpose in so doing was self-evidently not to clarify whether the content relevant to the Respondent's consideration was "*audio visual programmes*" or "*user generated videos*" and to clarify to which the information request was directed as a result of any confusion in relation to these terms. Instead, these terms were introduced in a blatantly obvious attempt to narrow the scope of application of the Revised AVMS Directive by excluding video content (be it audio visual programmes or user generated video) which Reddit sought to characterize as irrelevant on the basis that it had not been uploaded directly to the site by a creator or user and was accessible through a link on the site.

239. In the light of the contention now made, it is surprising that Reddit never asked the Respondent to distinguish between "*audio visual programmes*" or "*user generated videos*" notwithstanding the detail of the Preliminary Designation Decision which would have clearly alerted them to the global and encompassing manner in which the Respondent was using this language. It is noteworthy in light of the late introduction of this complaint that although the Information Notice contained detailed requests for information in relation to "*audiovisual content*" and "*video content*", Reddit never suggested that they could not respond without a distinction being drawn first between "*audio visual programmes*" and "*user generated videos*". Nor did they seek to classify their responses on the basis of the content being either "*audio-visual programmes*" and/or "*user generated videos*". All engagement around content by Reddit focussed on an attempt to confine consideration to "*native video*" defined and understood by all as a sub-class of "*user generated video*" adopting the definition included in the Information Notice. Crucially, in the engagement around this issue, it was never once suggested by Reddit that audio visual programmes and/or user generated videos were not provided on the platform or that one was but not the other.

240. I am satisfied based on the content of the material generated in the decision-making process and the terms of the Respondent's Designation Decision that Reddit cannot have been under any real doubt as to the content on its service to which the Designation Decision related. In this regard, it is important to note that while Reddit disputed the extent to which it provided audiovisual programmes and/or user generated videos and the classification of certain types of content, there was no real dispute that Reddit provided audiovisual programmes and/or user generated videos.

241. Although Reddit suggests that the Respondent ought to have identified specific examples and greater detail on the content in question, no legal basis or authority is identified in support of this argument. It seems to me that on the facts and circumstances of this case, there was no necessity to provide specific examples to justify the Respondent's conclusion as the material in question was sufficiently clear from the terms of the very detailed and considered Designation Decision. This is not a tenable proposition in circumstances where there was no less than an average of 89,000 individual items of native user generated video posted on line monthly, based on the Respondent's own information.

242. It must be recalled that while the Respondent relies on its own observation and examination of the platform as outlined in the Designation Decision, it is clear that it also relied very heavily on data which the Respondent had itself submitted. In submitting this data, as collated by Reddit itself, not only was it not disputed that Reddit provided audiovisual programmes and/or user-generated videos but Reddit made a proper attempt to quantify amounts of "native video" as a category of "user-generated video," the relevance of which it did not dispute. As apparent from the papers, the figures furnished in respect of "native video" demonstrated that there was a significant amount of native user-generated video available on the platform.

243. I am satisfied that on any view, the Respondent gave detailed reasons for its Designation Decision, amply discharging its duty to give reasons as identified in *Connelly v. An Bord Pleanála* [2021] 2 IR 752. As noted by the Respondent in its written submissions, where the terms 'videos' and 'audiovisual content' are used at certain points in the Designation Decision, it is clear that they are used by way of shorthand and they are not used in isolation but in the context of the Respondent's clear determination that Reddit provides audiovisual programmes and/or user-generated videos. These terms had also been used interchangeably in the Information Notice without protest from Reddit. Reddit had engaged with the Respondent in providing data in relation to video and/or audio-visual content, whilst also outlining the content in respect of which data was not available. Reddit further engaged in responding to the Preliminary Designation without then contending that it needed clarity in relation to Respondent's reliance on audiovisual programmes or user-generated videos as identified in the terms of the Designation Decision.

244. In all the circumstances, on a reasonable, fair and objective reading of the Designation Decision in the context of the decision-making process as a whole, the use of such terms could not be regarded as giving rise to uncertainty as to the content which led the determination that Reddit constituted a VSPS. Ample reasons were provided in the Designation Decision.

Whether the Respondent erred by treating “Non-Native” videos (including hyperlinks and embedded links) as audio visual programmes or user generated videos within the meaning of the Revised AVMS Directive in determining that Reddit is required to be regulated as a VSPS

245. It is common case that video is accessible through Reddit in various ways. It is accessible as “*native video*”, through an embedded link or through a hyperlink uploaded in posts to Reddit. The issue raised turns on what constitutes a “*user generated video*” within the scope of the Revised AMVS Directive and our implementing legislation and whether the Respondent has erred in law by designating Reddit as a VSPS by reference to video content which is not hosted on Reddit but made available through a link uploaded on Reddit. It is Reddit’s case that only so called “*native video*” is properly within the scope of the Revised AMVS Directive and the Respondent’s decision is vitiated because it had regard to other video content.

246. It is explained in these proceedings that “*native video*” is video that is generated by a user and is uploaded to a website, e.g. Reddit, and thereafter is stored on and hosted by that website’s servers. An embedded link, on the other hand, is a piece of HTML code that is written on the web-page and connects the user of the web-page to content which is hosted on a third-party website but which streams directly through the web-page to which the link has been uploaded. In contrast and as I understand it, a hyperlink is written as a piece of HTML code which, when clicked on, connects the user to content on a third-party website. It does not cause any copy of the third-party page to come into existence on the linking website’s server. When a user clicks on a hyperlink, the user’s browser establishes a connection directly to the third-party website and fetches the target video from that third-party website. Reddit suggests that this process is the same as if the user had typed the URL in the user’s browser to go to that site.

247. In summary and in layman’s terms, therefore, a video is made accessible through Reddit either as a “*native video*” when has it been uploaded directly onto the platform and is hosted on the platform, through an embedded video which streams directly through the platform upon pressing a link which has been uploaded onto the site but without the video itself being hosted on Reddit or through a hyperlink which has been uploaded and when clicked brings the user directly to another site where the video is hosted.

248. Although the issue of the scope of what is captured as “*user generated video*” for the purpose of designation as a VSPS is central to the case made on behalf of Reddit and was fully engaged with by the Respondent insofar as embedded video is concerned, it is not clear to me that Reddit’s complaint that the decision is vitiated by error of law turns on the answer to this question in circumstances where the Respondent states in the terms of the impugned Designation Decision that even excluding embedded video, which it considers falls within the scope of the Directive and the 2009 Act, and basing its assessment only on so-called “*native user generated video*”, it is satisfied that an essential functionality of Reddit is devoted to the provision of videos.

249. In this regard, the approach adopted by the Respondent is important and warrants highlighting. It is stated in the Designation Decision:

“The Commission has carefully considered Reddit Inc’s view that the Commission’s assessment of whether a service appears to be a VSPS should be limited to assessing the functionality and characteristics of a service as it pertains to native video only. The Commission does not agree with this. Without prejudice to that position, the Commission has considered whether Reddit would appear to be a VSPS if the assessment was limited in the way proposed by Reddit Inc.”

250. The Respondent continued:

“The Commission notes that the elements of video functionality described in the Statement of Reasons all apply in the case of native videos, with the specific exception of where functionality is present on the service to limit the sharing of native videos.... Further, the Commission finds that quantitative information about the use of native video supports a finding that native video functionality is not merely ancillary or a

minor part of the activities of the service but is an essential functionality of the service based on its reach, rather than its use. For these reasons, the Commission concludes that Reddit would appear to be a VSPS, even if the assessment of Reddit were limited to the service as it pertains to native video only”.

251. Given that the decision to designate was expressly found to be adequately supported by the presence of “*native user generated video*” on the platform and the functionality relating to same without any reference to other video content, it is clear that the decision would be the same even if Reddit were correct in its contention that embedded and/or hyperlinked video should not be considered as “*user-generated video*” within the meaning of the Revised AVMS Directive (as transposed). Reddit does not accept that this is so and maintains that there is a contradiction or confusion in the Respondent’s decision by reason of its assertion that embedded video constitutes “*user generated video*” whilst still maintaining that it would designate Reddit on the basis of native user generated video alone.

252. I find Reddit’s case regarding an alleged contradiction or confusion, whilst forcefully argued, to be torturous and less than compelling. The contradiction or confusion alleged is two-fold. It is alleged that there is a contradiction in circumstances where regard is had to embedded video but no clear position is taken regarding hyperlinked video which Reddit says ought to be treated the same, namely as outside the scope of the Revised AVMS Directive. It is also alleged that there is contradiction or confusion where the presence of embedded video on the platform is considered in the terms of the decision, albeit that it is then said that it is not necessary to rely on this video content in deciding to designate. In essence, Reddit considers that the fact that it was referred to at all makes it unclear whether embedded video was assessed or not in the decision to designate.

253. I reject Reddit’s arguments in this regard because it seems to me to be entirely clear that the Respondent considers embedded video to be captured within the scope of the Revised AVMS Directive and to maintain the position that as such it strengthens the decision to designate as a VSPS. Notwithstanding this position, the Respondent explains that it was not necessary for it to rely on embedded video content in making a decision to designate because in its view sufficient basis for designation exists on the basis of native video alone. In this way the Respondent explains to Reddit that even if it were in error, as contended by Reddit, in

concluding that embedded video falls within the scope of “*user generated video*”, this would not affect their decision. This is because the decision to designate is adequately supported by the presence of native video and related functionality on the platform, as the Respondent has concluded.

254. Put otherwise, reliance on embedded video or hyperlinked video was superfluous and unnecessary to ground the Designation Decision. As it was superfluous to the decision and the decision to designate was warranted on the native user video content alone, it follows that even if the Respondent were wrong in its view that embedded videos could be regarded as constituting user-generated video under the Revised AVMS Directive and the 2009 Act, the Respondent would still consider Reddit a VSPS. The Respondent made it very clear (p. 20) that, if its assessment of Reddit were limited to the service as it pertains to native video only, then on this more limited basis it considered that Reddit would still be a VSPS.

255. While it further appears from the Designation Decision that the Respondent may not yet have decided whether hyperlinked material hosted on another site which is not streamed through Reddit to be within scope of the Revised AVMS Directive and the 2009 Act, this does not result in any frailty in the decision. This is because it has been clearly stated that the decision to designate is not based on this material. I see no infirmity in the decision arising from a failure on the part of the Respondent to take a clear position on whether hyperlinked content is within the scope of “*user-generated video*” under the Revised AVMS Directive or not when it has not been necessary for it to base its decision on this material. Nor is there anything improper in the Respondent restraining from deciding an issue when unnecessary to do so for the purpose of its decision.

256. I note in this regard that Reddit further contend that embedded links are the same as hyperlinks in technical respects. In contending that neither embedded nor hyperlinked video are properly within the scope of regulation pursuant to the Revised AVMS Directive and that there is no basis for distinguishing between the two types of non-native video, Reddit relies on the fact that in both the embedded video and the hyperlinked video the content always remains hosted on the third-party website and is never transmitted to any server operated by Reddit as it is transmitted directly from the third-party site, albeit through a frame provided in the

platform where the link exists. When the user clicks play on an embedded video, the video is served to the user's device by the third-party website and plays surrounded by the material on the linking site from where the user posted the link. In contrast, in the case of hyperlinked video, the user navigates to the third-party website and the video is viewed on that website.

257. I do not accept Reddit's characterisation of embedded video and hyperlinked video as being the same. There is an acknowledged difference. The acknowledged difference is that instead of the user navigating to the third-party website, which is what occurs in a hyperlink situation, in the case of embedded video the HTML code on the linking website connects to the third-party website, creates a frame in the linking website and, displays in that frame on the user's device, the content that is being hosted on the third-party website. While both embedded and hyperlinked video are made accessible through posts appearing on Reddit, the evidence establishes that there is indeed a difference between the two. It is common case that one is displayed directly through the Reddit platform by clicking on a link uploaded in a post whilst the other requires the user to travel to another platform, albeit this is also achieved by clicking on a link which has been uploaded in the post. It is clear therefore that they are not identical.

258. I am satisfied that access to both embedded and hyperlinked user generated video sharing is facilitated by the content of posts uploaded to Reddit but there is a difference in how the video is displayed. In the case of embedded video, it is displayed through the Reddit platform, whereas in the case of the hyperlinked video it is not. Where the videos are displayed differently a distinction arises between the two types of videos which may have implications for whether hyperlinked videos are within the scope of the Revised AVMS Directive or not, a decision which the Respondent has not, yet, taken.

259. There is nothing contradictory in the Respondent acknowledging in its decision that different considerations may apply in relation to hyperlinked material. Nor is there any ambiguity in the basis for the Respondent's decision in this regard. A different approach is signalled by the Respondent to embedded videos which they maintain are within the scope of the Revised AVMS Directive but were not necessary for their decision (because there was so much native user generated video available to support the decision) and hyperlinked video which they say they did not treat as being within scope when considering whether sufficient

indicators of an essential functionality were present to warrant designation (and in respect of which proper quantitative data has not in any event been provided).

260. I understand that Reddit considers that even if only native video were relied upon in the decision to designate as the Respondent states, the decision-making process is invalidated if the Respondent has not decided whether hyperlinked video is in scope and has proceeded on the basis of native video alone, even though considering embedded video to be within scope. The point Reddit makes in this regard is that the Respondent is required to assess the service as a whole which it can only do if it fully charts the parameters of what is and is not within scope. Whether this submission is correct as a matter of law depends on the question which a decision maker is required to determine. I cannot agree with Reddit's argument in this regard on the facts and circumstances of this case having regard to the core question which the Respondent was obliged to determine in deciding whether to designate or not.

261. The question of substance which the Respondent was obliged to determine was whether an essential functionality of the service provider (not "*the*" essential functionality but "*an*") was devoted to providing programmes or user generated videos or both to the general public, without editorial responsibility, in order to inform, entertain or educate by means of electronic communications network as defined and the organisation of which is determined by the service provider including by automatic means or algorithms in particular by displaying, tagging and sequencing. The Respondent says that based on the native user generated video on the platform and the video functionality of Reddit, it is properly designated as a VSPS. If embedded video and hyperlinked video are within scope, then this additional video content serves to increase the amount of reckonable video content on site reinforcing the Respondent's decision to designate. It is material which supports rather than undermines a decision which is already adequately supported by native user generated video.

262. It seems to me therefore that the presence of such additional video-content and related functionality cannot on any reckoning assist Reddit. Even where Reddit's functionality or ability to organise this video is less than in the case of native video, which it may be, Reddit's functionality regarding the organisation of posts (which would include posts containing video links) generally continues to apply such that, if it is within scope, this content strengthens the case for designation by showing a greater presence of user generated video on site or available

through the site. If it is not within scope, it does not affect the decision where there was sufficient indication of an essential functionality without this material, as the Respondent has unambiguously and clearly stated.

263. On the authority of cases such as *Irish Life and Permanent v. FSO* [2012] IEHC 367, *Westwood v. Information Commissioner* [2015] 1 IR 489 and *Danske Bank v. FSPO* [2021] IEHC 116, even if I were to find that embedded videos fell outside the scope of “user generated video” as urged by Reddit, this finding would not invalidate the Designation Decision as the Respondent’s determination did not depend on whether or not embedded videos could be regarded as user-generated videos. In *Irish Life and Permanent v. FSO* [2012] IEHC 367 Hogan J. refused to overturn a decision despite finding an aspect thereof to be in error, stating (para. 64):

“... these observations are not central to the conclusions ...”

264. In *Westwood v Information Commissioner* [2015] 1 I.R. 489, Cross J. similarly found that a mistake or error of law in the decision will not itself result in that decision being quashed unless the mistake is material to the decision made. Even if Reddit were correct in its criticisms of the approach taken in treating embedded video as within scope, that part of the Designation Decision is not material to the core finding in a manner which would warrant a quashing of the Designation Decision as the essence of the Designation Decision is that based on native video content alone and without counting embedded video, designation was warranted.

265. I am satisfied that it is entirely acceptable for the Respondent to consider that the presence of native video alone together with related features in terms of quantitative and qualitative data including data regarding platform functionality and information regarding monetisation would be sufficient indication on its own, without regard to other video content present on the site or made accessible through the site, that an essential functionality of the site is devoted to providing videos within the scope of the regulatory provisions. This decision is not undermined by the fact that there was other user-generated video made accessible through the site which it was not necessary to rely upon in arriving at the decision. The question of whether this other material is subject to regulatory control through measures to be adopted by the Respondent including an Online Safety Code is not an issue which arises for determination on these proceedings. Such questions will fall to be determined on a case-by-case basis and

in view of the terms of any measures yet to be adopted or applied.

266. In circumstances where it is contended on behalf of Reddit that the decision is separately flawed because in having regard to the presence of embedded links to video content the Respondent took into account irrelevant considerations and/or failed to properly apply the EC Guidelines, I have concluded that it is necessary for me to address the question of whether such content is properly within the scope of the Revised AVMS Directive despite my conclusion that essential functionality may be assessed as demonstrated on the basis of native user video alone together with video functionality on the platform. This means I must consider whether, properly construed, the Revised AMVS Directive embraces so called “*embedded video*” within the definition of “*user generated video*”.

267. Having regard to the requirements of judicial restraint, however, I do not propose to address the question of whether hyperlinks are also within scope as it is crystal clear that the Respondent did not refer to hyperlinked video in its decision and has not found it necessary to adopt a position on the question of whether it is within scope for the purpose of these proceedings whereas it has engaged fully with Reddit in relation to the question of embedded videos. The necessity to further determine the question of whether hyperlinked video is within scope and for the Respondent to assess it in the decision-making process arises only where a decision to designate on the basis of an essential functionality is not considered to be properly grounded on the basis of native video alone having regard to the service as a whole and this was not the case here.

268. When considering the scope of the Revised AMVS Directive in the light of the case made on behalf of Reddit, it is important to stress that neither the Revised AMVS Directive nor the 2009 Act use the words “*native video*”, “*embedded video*” or “*hyperlinked video*” when referring to “*user generated videos*” provided on a VSPS or otherwise. Instead, the concept of “*native video*” appears to have been introduced by social media platforms (including Reddit) in response to correspondence in August, 2023 from the Respondent in which it invited consultation on information, specifically quantitative data, it might request from service providers 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 correspondence the Respondent offered platforms, including Reddit, an opportunity to

comment on quantitative data requests which it indicated had been identified as potentially helpful to it in the exercise of its regulatory functions. It was stated that it was important to the Respondent that information when requested, in particular data and metrics, was useful, would be readily available and not unduly burdensome or duplicative and could be provided within the requested timeframe then contemplated as being a four-week timeframe from receipt of an Information Notice.

269. The quantitative data identified in an appendix to the letter of the 14th of August, 2023 and upon which comment was invited is set out above but included average number of users who post content of any kind and then content including videos and/or programmes in any given month. No distinction was made by the Respondent between different types of video content. The words native, embedded or hyperlink were not used. Instead, the terms “*audiovisual content*” (appearing to embrace both videos and/or programmes) and “*user generated videos*” were used.

270. In its consultation response in early September, 2023, Reddit replied requesting some clarification, identifying information it could provide and information not readily available and pointing out that while it is generally able to provide the average number of users who post “*native video*” to the site in any given month, it also allows users to post text, images, videos and links to third party sites and does not have readily available data regarding the nature of content available via the link on the third party site. Accordingly, the first reference to “*native video*” in this case appears to have come from Reddit in commenting on the type of information it was able to provide readily in response to a contemplated formal Information Notice concerning videos, programmes and audio-visual content posted on its platform.

271. Reddit’s consultation response acknowledged that in addition to videos uploaded directly by users to Reddit (native video), videos are also made available on the Reddit platform via a link to third party sites posted on the Reddit platform. The distinction between the categories of video content was identified as relevant to Reddit’s ability to provide quantitative data in respect of all video content made available through the Reddit platform. It was not then contended, however, that video made available on Reddit via links to other sites did not constitute “*user generated video*” or video content otherwise assessable in determining whether a provider comes within the scope of regulation

required under the Revised AVMS Directive, as transposed.

272. When the Information Notice was subsequently served by the Respondent it included in it the definition of terms appearing in that Notice. Terms defined in the Information Notice included “*audiovisual content*” (as referred to above) being a term which was said to be used as “*a collective term for both user-generated videos and audiovisual programmes*”. It was stated that collectively programmes and user-generated videos encompass a wide range and diversity of audiovisual content of any length and with or without sound including content created by and uploaded by individuals, professional grade video/programmes produced by companies/organisations including broadcast programmes, pre-recorded and livestreamed video, videos that include static imagery.

273. The word “*post(s)*” was defined as referring to any content published and shared by a user on the Service or Section e.g. status updates, message, photo, native video or other media content. While there is a reference to native data here, more relevant is the fact that the word “*post*” captures any content. The word “*recipient(s)*” is defined as meaning recipients of the service, anyone accessing, viewing, or engaging with content on a service, including registered / account users and/or members of the general public and a similar meaning was given to “*user(s)*” as embracing users of the service, anyone accessing, viewing or engaging with content on a service, including registered / account users and/or members of the general public.

274. Importantly a “*user-generated video*” was defined as meaning 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. This is the definition of “*user generated video*” which appears in the Revised AMVS Directive. It differs slightly from the definition in s. 2(1) of the 2009 Act insofar as that definition refers to a “*user generated video*” as one which is created by a user and is uploaded to “*the*” service as opposed to “*a*” service. The Information Notice then goes on to define “*video*” or “*native video*” as meaning user-generated video directly posted to the service or dissociable section of a service.

275. In relation to questions posed in section 3C of the Information Notice containing the questions directed to eliciting information concerning “*essential functionality*”,

reference was made to these definitions, but it was further stated:

“The term “video” refers to all forms of audiovisual content.”

276. Accordingly, it was clear that requests for information relating to video extended beyond “*native video*”.

277. In this way, the Information Notice distinguishes between “*native video*” and a broader category of user-generated video and to acknowledge that they are two different concepts. Undoubtedly, however, the concept in the Revised AVMS Directive is that of “*user-generated video*” as defined in the Directive. The subsequent definition of “*native video*” as a sub-category of “*user generated video*” cannot alter the broader scope of the Revised AVMS Directive. Clearly, “*user generated video*” does not become synonymous with “*native video*” unless “*user generated video*” was always so confined under the Revised AVMS Directive. I acknowledge as true that within the sub-set of questions asked in the Information Notice there were questions seeking data pertaining to native video specifically and without further seeking data in relation to posts containing links to user generated video or programmes leading Reddit to suggest that this conveyed an understanding on the part of the Respondent which Reddit shared that only native video was relevant.

278. I do not accept this suggestion as well-founded. It flies in the face of the Information Notice as a whole where a wide range of definitions are provided in a manner which clearly demonstrates that native video is only a subcategory of user generated video. In my view this narrowing of the request for data relating to native video must be seen in the context of Reddit’s Consultation Response from which it was clear that whilst Reddit could provide data in relation to native video, it did not have data in relation to other video content available through posts on the site linking to other sites. There was therefore little point in the Respondent seeking other data, as the answer would have been that it was not available.

279. It seems to me that on any fair and reasonable reading of the terms as defined in the Information Notice, Reddit ought not to have considered that only native video was being treated by the Respondent as coming within the scope of the Revised AVMS Directive. It had to be aware that this term, introduced by it in its Consultation Response, was used to refer to a category only of user generated videos but that the definition of user generated video in the

Revised AVMS Directive itself had not been supplanted, nor could it lawfully be. Seen in wider context, it is not reasonable for Reddit to infer from the terms of the Information Notice any suggestion that only “*native video*” was considered to constitute video content coming within the scope of the Revised AVMS Directive or that the scope of “*user generated video*” within the meaning of the Directive properly interpreted was limited to “*native video*”.

280. In deciding whether an embedded link to a user generated video uploaded on Reddit and made accessible through the Reddit platform by clicking on the link constitutes a “*user generated video*” within the meaning of the Revised AVMS Directive properly construed, the terms of Information Notice are of little value in any event as the Information Notice does not bear on the meaning of the Revised AVMS Directive itself. It is settled law that, in interpreting a provision of EU law, it is necessary to consider not only the wording of the provision in question but also the context in which it occurs and the objectives pursued by the rules of which it is part (see Case C-376/22 *Google Ireland* (at para. 26)). It is also settled law that, insofar as there is any inconsistency between a provision of EU law and provisions of national law, national law must be interpreted, so far as possible, in a manner that gives full effect to EU law as established in cases such as Case 14/83, *Von Colson*, para. 26, C-105/21 *Spetsializirana prokuratura* (see para. 83) and C-573/17 *Popławski* where the principle of conforming interpretation is referred to as requiring that the whole body of domestic law be taken into consideration and that the interpretative methods recognised by domestic law be applied with a view to ensuring that the measure of EU law concerned is fully effective and to achieving an outcome consistent with the objective pursued by it.

281. It is manifestly the case that the provisions of the Revised AVMS Directive relating to VSPS were drafted to ensure that VSPS took appropriate measures to protect minors and the general public from harm caused by certain kinds of videos in a manner which was intended to expand the reach of the Directive to ensure effective protection against harmful content being provided to users where a user is understood as anyone accessing, viewing or engaging with content on a service. The objective is to provide protection from offending video content available to view on a platform and not on where that video content is hosted. The broad reach of the Directive is clear from the fact that it provides separately for platforms that are designed almost exclusively to allow and encourage users to record, upload, share and interact with native videos which are intended to be covered by “*the principal purpose*” test and otherwise

for video sharing functionality which activity is captured by an essential functionality criterion. The broad reach is also demonstrated by the essence of the activity captured by the intended scope of the Revised AVMS Directive with its emphasis not only on making videos available for consumption by a platform but also the fact of consumption by consumers. Videos are accessible for consumption through Reddit in like manner insofar as the consumer is concerned whether they are native video or embedded video.

282. For the Revised AVMS Directive to properly bear the narrow interpretation urged on behalf of Reddit, it would have to be construed as powerless in the face of the reposting of harmful video. In my view such a construction is not compatible with both the purpose of the Directive and its' language. Instead, the Revised AVMS Directive uses broad and encompassing language to capture harmful video content which comes within remit. Although Reddit relies heavily on where video is hosted, the language of the Revised AVMS Directive uses language which is not consistent with where the content is hosted being determinative. The Revised AVMS Directive refers to content which is "*created and uploaded*" "*to a video sharing platform by that user or any other user*" (Article 1(ba) of the Directive). It refers not to hosting content but to providing it. Examples of this are seen in the use of the word "*provide*" (see Recital 4 of the Directive) or "*provision*" (Recital 5 of the Directive) or "*provided*" (Recital 47).

283. It is further noted that in Article 28b(c) the term "*dissemination*" is used in relation to the sharing of unlawful content, reinforcing that it is the making available of the offending content which falls to be regulated.

284. I find it telling that the word "*embedded*" appears in Recital 6 in relation to "*video clips embedded in editorial content of the electronic versions of newspapers and magazines*" to indicate that they are not covered but the converse would seem to be that other embedded video clips are covered.

285. Reddit attaches significance to the word "*upload*" and seeks to equate that word with the word "*host*". I am satisfied, however, that this is not the natural or plain meaning of the word "*upload*". The word "*upload*" more properly conveys the transfer or transmission of

data over a network via the internet or making content available over the internet. Nowhere in the Revised AVMS Directive is the word “*host*” used to limit the regulatory remit of the Directive to host platforms as opposed to platforms which stream video content through links posted on the platform.

286. Were the Revised AVMS Directive to have the narrower scope contended for by Reddit one would expect to see the word “*host*” used in conjunction with “*uploading*” with regard to VSPS. However, it seems to me that the word “*upload*” is used in the sense that it applies where a video containing content is uploaded to a site thereby making that video available or providing it or transmitting or transferring it for viewing on that site without the necessity for the video to be hosted there.

287. Nor do I find the word “*host*” together with “*upload*” used in the 2009 Act to exclude from the ambit of regulation video sharing platforms which stream video content where that content is hosted elsewhere. Indeed, in the transposing provisions of the 2009 Act, s. 139R provides for the making of a complaint to the Respondent on the grounds that harmful online content “*is available on a designated online service*” and s. 139T(d) provides for the dismissal of a complaint where the Respondent concludes that the content “*is no longer available on the designated online service*” reinforcing my view that it is the availability of the content to view on the platform which is captured by regulation under the Revised AVMS Directive as transposed, not whether it is hosted there.

288. Instead of limiting jurisdiction by reference to where the harmful content is hosted, the focus of the Revised AVMS Directive in terms of identifying its remit is referable to the content which it is sought to regulate, such content being content which “*may impair*” minors (Article 28b(1)(a)) or content “*containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter*” (Article 28b(1)(b)), videos “*containing content the dissemination of which constitutes an activity which is a criminal offence under Union law*” (Article 28b(1)(c)). The measures prescribed are “*aimed at effectively reducing the exposure of children*” (Article 28b(2)) and appropriate measures are determined in light of the “*nature of the content in question, the harm it may cause, the characteristics of the category of person 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” (Article 28b(3)). Accordingly, the purpose of the Revised AVMS Directive could not be clearer and its purpose is not limited to platforms which host content but rather to platforms which make available or provide or disseminate harmful content.

289. Recalling that the 2009 Act must be construed in a manner which gives effect to the Directive and in the case any inconsistency between a provision of EU law and provisions of national law, then national law must be interpreted, so far as possible, in a manner that gives full effect to EU law, then it seems to me that a broader interpretation than that urged by Reddit (in part in reliance on the use of the word “*the*” in the 2009 Act) is called for. Uploading a user created video to “*a*” service in the language of the Revised AMVS Directive rather than “*the*” service, in the language of the 2009 Act, clearly captures re-posts and is in my view capable of embracing a link to a video uploaded to Reddit where the video has been created by a user (not necessarily the same user as the one uploading the link to Reddit) and uploaded to a different platform.

290. I am satisfied that the definition of “*user generated video*” is properly construed by the Respondent as capturing a situation where an embedded link is uploaded in a post on Reddit in a manner which permits the video to be played on the Reddit platform. The fact that the video is played on Reddit means that it is accessed by the user on Reddit. The user engages with and views the content on Reddit. This is enough to bring such content within the regulatory scope of the Revised AVMS Directive and our transposing legislation as the component elements of the test for user generated video are met – the video is created by a user and uploaded to a video sharing platform by that user or another user. This being the case, the mere fact that Reddit does not itself either “*host*” the video or provide live-streaming services and that the nature of the content referenced by an embedded video link (including the extent to which it is live or recorded) is determined by the service hosting the content does not invalidate the Respondent's finding that videos including live-streaming may be provided on the Applicant's service through embedded links whilst “*hosted*” elsewhere.

291. Contrary to what is suggested on behalf of Reddit, subjecting a second platform to regulation under the Revised AVMS Directive does not give rise to unnecessary double regulation but is instead an acknowledgement of what is required to provide effective

regulation responsive to modern technologies and an ever-evolving online world.

292. It is true that the concepts of hyperlinking and embedded links have been addressed in a number of cases but in different contexts to that in issue in these proceedings. These authorities were fairly and properly accepted on behalf of Reddit as not being directly on point as they concern defamation and copyright infringement proceedings.

293. In C-466/12, *Svensson* the ECJ stated that the provision of links affords users of the linking website “*direct access*” to other material which was not altered even where the user is given “*the impression that it is appearing on the site on which the link is found, whereas in fact that work comes from another site.*” The importance of this decision was signalled as being that the CJEU accepts that in the context of copyright infringement that the posting of a link on the internet to an item of media is not considered a new communication of that item of media.

294. Similarly, in Case C-160/15 *GS Media BV v. Sanoma Media Netherlands BV, Playboy Entreprises International Inc., Britt Geertruida Dekker* the CJEU considered whether, and in what circumstances, posting on a website a hyperlink to protected works, which were freely available on another website without the consent of the copyright holder, constituted a “*communication to the public*” within the meaning of Article 3 (1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society requiring consent of the copyright holder. The Court found that where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even in the absence of that intervention such that no separate breach of copyright occurred by making available the hyperlink presuming no actual knowledge of a breach of copyright having occurred.

295. I further note Reddit’s reliance in contending for an error of law on the part of the Respondent on the fact that the concept of hyperlinks was addressed by the European Court of Human Rights in *Magyar Jeti ZRT v Hungary* (Application no. 11257/16) where, in the context of defamation proceedings, it was stated that hyperlinks “*do not present the linked statements to the audience or communicate its content, but only serve to call readers’ attention to the*

existence of material on another website.” The Applicant in the complaint to the European Court of Human Rights was an online news portal in Hungary which averaged approximately 250,000 unique users per day. It was noted by the European Court of Human Rights that the linking website exercised no control over the linked content which could be changed after the creation of the link. In its decision, the European Court of Human Rights criticized the Hungarian courts for applying strict liability for the defamatory content on the journalist who posted the hyperlink without comment or endorsement because it failed to sufficiently balance the right to freedom of expression with the right to reputation and unduly burdened the free flow of information on the Internet.

296. It seems to me that the *dicta* in the cases from the Luxembourg and Strasbourg courts relied upon by Reddit is of only marginal relevance to the issues which arise here because the considerations which arise in a defamation or breach of copyright case where different legal tests apply are not the same as those arising in the context of regulation for online safety at issue in this case. The concept of publication or communication to the public inherent in both defamation law and copyright law considered in the case-law referred to is not the same as “*uploading*” or “*providing*” or “*disseminating*” video content as sought to be captured within the meaning of the Revised AVMS Directive.

297. These decisions cannot be interpreted in this very different legal context to support the exclusion of hyperlinked (whether including or excluding embedded) audio-visual or video material as being beyond the scope of all regulation pursuant to the provisions of the Revised AVMS Directive. The regulation of a video sharing platform in a manner which requires measures to be taken to protect against the dissemination of harmful content is quite a different legal issue to the legal issues at the heart of these proceedings. The remit of the Revised AVMS Directive would be radically curtailed and undermined were it not to be applied to the wider dissemination of harmful content simply because a harmful video had already been posted elsewhere and is hosted on a third-party website.

298. It must be acknowledged that the question of control is a factor in determining whether audiovisual content is within the scope of regulation under the Revised AVMS Directive but this [that?] lack of full control is acknowledged as a feature of a VSPS by the very terms of the Revised AVMS Directive. It is noted in Recital 48 of the Directive that in light of the

nature of the provider's involvement with the content provided on a VSPS, the appropriate measures to protect minors and the general public should be related to the organisation of the content and not to the content as such. Insofar as Reddit has organisational input into all posts uploaded, whether they include video or not, it must follow that even those posts including links to embedded video are subject to organisational measures put in place by Reddit.

299. It seems to me that the existence of organisational measures in relation to posts generally, as opposed to video posts specifically, can be considered when posts containing embedded video links are in contemplation as all posts, regardless of their content, are subject to organisational processing controlled by Reddit sufficient to bring those posts containing video links within the regulatory scope of the Revised AVMS Directive.

300. It also bears emphasis in [] light of Reddit's complaints as to its ability to operate protective measures in respect of material hosted on third party sites but available through a link embedded in a post uploaded on its platform that the effect of the Designation Decision in this case is to subject Reddit to a regulatory code which has yet to be adopted. It is unclear to what extent and in what way the new online safety code will be applied to embedded and hyperlinked videos (if at all in the case of hyperlinked videos) and concerns in this regard are hypothetical and speculative at this juncture.

301. Such measures as may be prescribed will, however, require to be identified and tailored in a manner which permits due regard to be had to relevant factors including the level of control over offending content and the extent to which the material is organised by the provider. Both the code to be adopted and its application will, in themselves, be subject to the requirements of proportionality. In this regard, Article 28b of the Revised AVMS Directive mandates the taking of appropriate measures to protect minors and the general public from harmful content.

302. The question of appropriateness is fact and circumstance dependent. Article 28b(2) provides that appropriate measures are designed "*taking into account the limited control exercised*" by VSPS. Accordingly, the concept of limited control is recognised but in a manner which does not remove all obligation to comply with regulatory controls or immunise a service from regulation.

303. It is clear from Article 28b(3) that measures to be adopted are required to be “*practicable and proportionate*” and are framed having regard to the size of the platform and the characteristics of the persons to be protected as well as the rights and interests at stake. Appropriate measures under Article 28b are directed to users who have created or uploaded (disjunctively) video content making it clear that a video may be created and uploaded by one user and then further disseminated or provided or made available by either the same or a different user uploading a link.

304. In terms of the types of measures identified under Article 28b(3), the requirements anticipated are linked to actual knowledge or what can be reasonably expected (see Article 28b(3)(c)) and whilst Reddit protests that the measures which might be introduced would be unduly onerous and outside the capacity of a website which shares videos without hosting them, this argument breaks down when one examines the types of measures identified in Article 28b(3) of the Revised AVMS Directive and the absence of evidence that measures of this type simply could not be operated in respect of video content transmitted through the platform but hosted elsewhere.

305. In my view the uploading of a link which allows video content to be transmitted on or through the platform is clearly within scope of the Revised AVMS Directive where in consequence of the presence of the uploaded link on the platform, the video is made available or provided or disseminated through the platform on which the link has been uploaded. I am satisfied that the Respondent properly concluded that embedded video links to audiovisual programmes and/or user generated videos that are available on the Applicant's service as well as native video posts constitute audiovisual programmes and/or user-generated videos within the meaning of s. 2 of the 2009 Act. Such links are capable of being captured by the definition of user generated video and/or audio visual programming under the Revised AVMS Directive because they allow for video sharing activity of the type which it is sought to control under the Directive, providing for the sharing of potentially harmful video content by making it available to consumers for consumption on the platform using video functionality and tools, including organisational tools like a recommender system, in a manner which monetises video and in circumstances where a sufficiency of indicators identified in the EC Guidelines are met. In this way the video is “*made available*” or “*provided*” to the consumer or the consumer is “*exposed*” to harmful content in the manner contemplated under the Revised AVMS Directive.

Whether an Error of Law and/or Fact in Interpreting the EC Guidelines

306. It is common case that videos being merely present on a platform is not the test for designation as a VSPS under the 2009 Act, the Revised AVMS Directive or the EC Guidelines. Instead, an essential functionality of the platform must be devoted to providing video content (be it audiovisual programmes or user generated videos or both) via an electronic communication network to the general public for information, entertainment or educational purposes where the platform provider does not have effective control over their selection but determines the organisation of the video content. The concept of “*essential functionality*” reproduced in the 2009 Act is an autonomous concept of EU law that derives from the Revised AVMS Directive and must be interpreted to give effect to the Directive’s aims.

307. Reddit argues that in concluding that the audiovisual content on the platform is not merely ancillary to or a minor part of its activities, the Respondent made errors of assessment originating from errors of law in its interpretation of the EC Guidelines. It also argues that it had a legitimate expectation that the EC Guidelines would be applied and identifies a number of complaints in respect of each of the four categories of indicators of essential functionality identified in the EC Guidelines which it contends were not properly applied.

308. Before addressing the Applicant's specific complaints, it is appropriate to recall that under s. 139G(4) of the 2009 Act, the Respondent was obliged to have regard to the EC Guidelines in making a decision on the designation of a named service as a VSPS the provider of which is under the jurisdiction of the State. As is clear from the Decision, and in compliance with its obligation under section 139G(4), the Respondent did indeed have careful regard to the EC Guidelines, addressing the categories of indicators under the EC Guidelines in detail in both the Statement of Reasons and the Response to the Issues Raised in Consultation within the Decision. Indeed, as the PA Report and the Decision Framework make clear, the EC Guidelines informed the Respondent's approach to designation of named services at all stages of the process. Accordingly, there is no question of the Respondent failing to have regard to the EC Guidelines and/or failing to have regard to the indicators thereunder.

309. In this regard, it is important to underline that while the Respondent is obliged to have regard to the indicators identified in the EC Guidelines, the said Guidelines are intended to provide guidance on the practical application of the essential functionality criterion. They are not binding and they do not supplant or override the legal test under the Directive but seek to ensure consistency in the application of that test through the provision of Guidance on how to approach the application of the test.

310. Although the EC Guidelines set out four categories of indicators to assist in carrying out this assessment, it is expressly stated that the decision as to whether or not a service has the provision of audiovisual content as an essential functionality is a matter for the relevant national authority, which should carry out such an assessment on a case-by-case basis, taking into account the specificities of the relevant service.

311. The key question for the relevant national authority is whether, 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. Accordingly, it is for the Respondent to carry out an overall assessment of the service in reaching its decision. The fact that Reddit may disagree with the Respondent's approach to the assessment of, or weight afforded to, any one or more indicators in the EC Guidelines is not in itself a ground for judicial review. Indeed, when it comes to a review of a decision of the Respondent in relation to the assessment it carried out, the Court's role is limited. My function on an application of this nature is to guarantee legality in the exercise of its functions by the Respondent as a community authority.

312. As a community authority engaged in making complex assessments, the Respondent enjoys a wide measure of discretion, the exercise of which is subject to judicial review which is not the same as an appeal and in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Therefore, whereas I have jurisdiction to intervene in judicial review proceedings where irrationality or manifest error is established either by reason of an error of law in the interpretation and application of the essential functionality test, a failure to

properly reason the decision or to have regard to all relevant considerations or where the decision is tainted by irrelevant considerations, for an error of assessment of the kind complained of by Reddit in this part of its challenge to ground intervention, such error would require to be clearly established (see *SIAC Construction Ltd. v. Mayo County Council* [2002] 3 IR 148).

313. It is clear that in these proceedings it is 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 the Respondent and to verifying, in particular, that the action taken by the Respondent 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 the field of EU law such as this one, in satisfying myself as to the findings of fact in a claim of manifest error, it is also established 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.

314. Notwithstanding the strictures on the Court in a review where complaint is made relating to the assessment carried out, most of the specific complaints raised by Reddit with reference to the EC Guidelines appear to be based on its disagreement with the merits of the Respondent's assessment. Thus, in respect of the first category of indicators which are addressed at paragraph 6.6 of Section E of the Statement of Grounds, Reddit alleges that the Respondent failed to have regard to the factor that the Applicant is a discussion-based online forum which provides users with access to user-generated content and failed to consider the information provided to the Respondent that substantiated Reddit's position that audiovisual content plays an insignificant role in the overall economy of the service. It is clear from the terms of the Designation Decision, however, that the Respondent expressly had regard to these matters. Reddit's real objection, therefore, is that the Respondent did not attach the weight to this factor which is urged on behalf of Reddit. No basis for interfering with the Designation Decision is demonstrated referable to the weight attached by the Respondent to the evidence before it regarding the extent to which audio-visual content plays a role in the overall economy of the service.

315. Furthermore, insofar as it is objected that regard was had to the presence of embedded videos on the platform, it seems to me for the reasons addressed above that the Respondent did not err in law or in its application of the EC Guidelines in considering that this was a relevant matter to which the Respondent was entitled to have regard in its Designation Decision. I have already concluded that embedded video links, as understood in these proceedings, are properly within the scope of regulation under the Revised AVMS Directive. The existence of such video content was therefore a relevant consideration, even if reliance on this content was not ultimately decided to be necessary to support the Designation Decision made in the light of the available and better empirical information submitted in relation to native video which was considered sufficient on its own to constitute sufficient indication that an essential functionality of the service was devoted to video sharing within the meaning of the Revised AVMS Directive. In this regard, I am satisfied that the Respondent properly had regard to the fact that videos - whether directly uploaded or recorded by users or shared from other services - are integrated with other kinds of posts on the feeds and within the communities on Reddit's service. This was not an irrelevant consideration and is consistent with due regard to the EC Guidelines by the Respondent.

316. Contrary to what is alleged at paragraph 6.6.4 of the Statement of Grounds, I am satisfied that the Respondent did not err in fact in observing, in the Response to the Issues Raised in the Consultation, that Reddit provides livestreaming through embedded video links. In so observing, the Respondent did not find that Reddit itself provided live-streaming services. However, even if there was an error of fact in the Respondent's analysis in this regard, this was a small factor in the overall consideration such that I could not conclude that it was capable of materially affecting the Respondent's assessment in respect of the fourth category of indicators where it appears in the Statement of Reasons document, still less the overall assessment of essential functionality carried out in the Decision. It is again recalled that ultimately the Respondent unequivocally confirmed that Reddit required to be designated on the basis of native video content alone making any question of live streaming through embedded video content wholly immaterial to the Designation Decision.

317. In respect of the second category of indicators which are addressed at paragraph 6.7 of Section E of the Statement of Grounds, contrary to what is alleged at paragraphs 6.7.3 and 6.7.4, and as is again apparent from the Designation Decision itself, the Respondent expressly had regard to the percentage of audiovisual programmes and/or user generated videos on Reddit, including the proportion of such programmes and/or videos excluding hyperlinks and embedded video links, as well as to other relevant data furnished to it by Reddit. However, for the reasons set out in the Designation Decision, the Respondent disagreed with Reddit's submission that the percentage of audiovisual programmes and/or user-generated videos meant that such audiovisual content was merely ancillary to, or a minor part of, the Reddit's service.

318. It seems to me that the Respondent made this decision on the basis of the evidence and it was a decision which was clearly open on the evidence recalling that for the period of 1st of January 2023 to 30th of June 2023, on average, 87,187 native videos were posted on the service within the EU per month. Over the course of a year this amounts to over 1 million native user generated videos. Furthermore, the posting of the video does not reflect the number of times it is watched. The data demonstrated that on average, 16.1 unique minutes are spent on Reddit per day per EU account. The average number of native videos watched per user for 2 seconds, for 5 seconds, for 10 seconds and to completion for the period 1st of January 2023 to 30th of June 2023 were available to the Respondent. On average per EU account per day during this period, 11.3 videos were watched for at least 2 seconds. Bearing in mind that there are some 11.3 million monthly active recipients of the service in the European Union, the extensive potential reach of native user generated video content alone is clear when 1 million native user generated videos are uploaded annually and, from millions of account holders, the average account holder views more than 11 videos a day.

319. In its assessment of whether videos are available to the general public, the Respondent had regard to, and it seems to me quite properly had regard to, the potential reach of the videos provided on Reddit's service. In view of the express reference in the EC Guidelines relating to the second category of indicators to the "*reach of the audiovisual content*", which refers *inter alia* to the fact that popular videos, even if limited in number, "*may reach large numbers of users, especially via sharing and recommendations*", it is clear that this was a factor to which the Respondent was entitled to have regard as part of its consideration of the second category

of indicators and/or its overall assessment. Having regard to the data provided by Reddit, as well as the objectives pursued by the underlying legislation, the potential reach of the audiovisual content on the service was a relevant factor for the Respondent to take into account in its Designation Decision and it properly did so.

320. In respect of the third category of indicators which are addressed at paragraph 6.8 of Section E of the Statement of Grounds and contrary to what is alleged at paragraph 6.8.1, and as is once again apparent from the Designation Decision, the Respondent had proper regard to Reddit's submissions in respect of monetisation or revenue generation from audiovisual content. For the reasons set out in the Designation Decision, the Respondent concluded that audiovisual content had significant commercial relevance for Reddit's service *inter alia* based on the indirect monetisation of videos by reason of advertisements being provided together with such content.

321. Bearing in mind the express reference in the EC Guidelines relating to the tracking of "*users' platform activities*", I am satisfied that the Respondent was entitled to have, and properly had, regard to the Reddit's tracking of users' engagement with the content for the purpose of future content recommendation in its Designation Decision, particularly bearing in mind the link between the level of user engagement and Reddit's advertising-based business model.

322. In respect of the fourth category of indicators which are addressed at paragraph 6.9 of Section E of the Statement of Grounds, in its Designation Decision, the Respondent did not assert that Reddit favours or disfavors a post solely based on its status as a video as contended by Reddit in these proceedings. Instead, the Respondent referred to the provision of specific features and functionalities aimed at enhancing the visibility and attractiveness of videos on the service, including the fact videos are shown to users on Reddit's feeds, including through communities, without any specific requests or inputs by users and that videos appear to feature prominently through Reddit's most popular communities which it actively promotes. I am satisfied that the Respondent's consideration of these factors was entirely consistent with the Guidelines and the fourth category of indicators thereunder specifically and were matters which

it was proper for the Respondent to consider in applying the essential functionality test.

323. In respect of the *"Watch Feed"*, video recording functionality and the functionality Reddit provides to restrict the posting of native videos in Communities, I am satisfied that the Respondent was entitled to have regard to these matters in carrying out its assessment and properly did so. In doing so, it considered, but did not accept, the submissions made by Reddit.

324. While Reddit asserts that there were errors of assessment originating in errors of law in the Respondent's interpretation of the EC Guidelines, Reddit's case under this heading is in large part a challenge to the merits of the Respondent's assessment and the weight afforded to different factors in carrying out that assessment. Under the EC Guidelines, the Respondent's function is to determine whether, on the basis of an overall assessment, a sufficient number of indicators analysed support the conclusion that the audiovisual programmes and/or user generated videos provided by a service is not merely ancillary to, or a minor part of, the activities of the service. It seems to me that this is precisely what the Respondent did in this case.

325. For the detailed reasons set out in the Designation Decision, I am further satisfied that the Respondent was entitled to conclude that a sufficient number of indicators under the EC Guidelines supported the conclusion that audiovisual programmes and/or user generated video was an essential functionality of Reddit's service. As the terms of the Decision make clear, this was an evidence-based assessment which took account of the specificities of Reddit's service. In my view, none of the arguments raised by Reddit call into question the correctness and/or validity of the Respondent's assessment.

326. Based on its overall assessment the Respondent determined that an essential functionality of Reddit was devoted to providing videos for the reasons stated. The fact that video-sharing functionality was found to be neither a minor nor ancillary aspect of the activities of services was instructive in the Respondent making its determination and the indicators in the Guidelines clearly informed its decision. The evidence relied upon in arriving at this

decision is clearly set out and is factually accurate, reliable and consistent and is capable of substantiating it. It has not been established that any evidence was presented which ought to have been considered but was not.

Whether errors of assessment in the treatment of quantitative and qualitative data, monetisation and revenue generation and tools aimed at enhancing the visibility or attractiveness of the audiovisual content

327. Reddit appears to have assumed that if the relative number of videos compared to other forms of content on the service is small, this means the service is not a video-sharing platform service. This is not supported by the 2009 Act nor the Revised AVMS Directive nor EC Guidelines. In its decision, the Respondent referred specifically to the wording under the “*Reach of the Audiovisual Content*” indicator in the Guidelines stating:

“Popular videos, even if limited in number, may reach large numbers of users, especially via sharing and recommendations. The presence in the platform of popular video content aiming to inform, educate or entertain users is an indication of the non-ancillary or non-minor character of such content. In these cases, the audiovisual functionality is not likely to be considered merely ancillary to, or a minor part of, the activities of the service. Consistent with Recital 5 and the need to give due regard to the general public interest to be achieved by the new rules, particular attention could be given, in this context, to the target audience of the platform and, in particular, to whether the platform is targeting minors or, even if it is not explicitly targeting minors, is regularly used by minors and takes no measures to discourage such use. In particular, in these cases, an important number of (vulnerable) users can be exposed to the audiovisual content available on the platform, even if the relative amount of such content on the platform is limited. Therefore, the assessment should take into account the degree of risk of exposure of minors to audiovisual content on the service.”

328. While Reddit submits that the audiovisual programmes and/or user-generated videos on Reddit constitutes a very small or incidental percentage of the overall content that is available on Reddit, particularly where the audiovisual programmes and/or user generated

videos exclude hyperlinks and embedded video links, the figures speak for themselves. It bears repetition in the face of Reddit's protest against regulation on the basis that video sharing within the meaning of the Directive on its platform is small and incidental that over 1 million native user generated videos are posted on Reddit within the EU annually on its own figures. The posting of the video does not reflect the number of times it is watched and Reddit's own data demonstrated that there are over 11 million EU Reddit users and on average a user watches more than 11 videos a day. It has not been denied that some of these videos contain pornographic content.

329. The EC Guidelines state that where a platform includes a significant amount of videos, the audiovisual functionality of the service is not likely to be merely ancillary to or a minor part of the service. The EC Guidelines further state that the fact that users make substantial use of videos available on that platform is an indication that audiovisual content is of particular relevance to the site. No matter how Reddit characterizes its native video content in relative terms to other content on its platform, the figures speak for themselves in terms of significance and relevance and the Respondent was entitled to attach weight to these figures in arriving at its decision to designate. It may also readily be extrapolated from these figures that the reach of any harmful video content shared on the platform is potentially enormous, even though video sharing is not the principal function of the platform and is incidental to its primary function.

330. Video content can be incidental in relative terms and nonetheless essential to a functionality of the platform. Where the objective of the Revised AVMS Directive is the provision of effective protection against harmful content, I am satisfied that the Respondent's conclusion that Reddit requires to be regulated as a VSPS under the Revised AVMS Directive on the basis of the information available to it is fully sustainable on a proper application of the legal test to the facts as established on the evidence before the Respondent.

CONCLUSION

331. I do not consider it necessary to refer any question concerning the interpretation of EU law pursuant to Article 267 of TFEU to the CJEU in order to determine the issues arising in these proceedings.

332. Reddit's arguments in relation to jurisdiction are based on a fundamental misunderstanding of the legal framework governing the determination of jurisdiction under the legislation. Section 2B of the 2009 Act, which transposes Article 28a of the Revised AVMS Directive into Irish law, sets out the specific rules determining jurisdiction that apply in the case of VSPPS and provides for a derived deemed jurisdiction in prescribed circumstances irrespective of the country of origin or place of establishment of the service provider. The intention in referring to identified provisions of the E-Commerce Directive was to make clear that once jurisdiction was properly deemed to exist in accordance with Article 28a of the Revised AVMS Directive, then national provisions would apply as if the platform was itself established within the territory of the Member State.

333. In contending otherwise, Reddit ignores the specific rules of jurisdiction set out in Article 2B of the Act which gives effect to Article 28a Revised AVMS Directive. These rules address the situation where a VSPPS is not established in a Member State at all but acts through subsidiary undertakings in the Union. Article 28a of the Revised AVMS Directive, as reflected in s.2B of the Act, gives effect to the EU legislature's intention in this regard by providing a specific definition of jurisdiction for the purposes of VSPPS which applies either if the provider is "*established*" in the territory of a Member State (Article 28a(1) ; s.2B(2)) or, where the VSPPS provider is not so established, it is "*deemed to be established*" because a related undertaking is established in a Member State (Article 28a(2)-(4) ; s.2B(3)-(5)). Detailed provision is made to identify when such a VSPPS provider is "*deemed to be established*" in a Member State.

334. Where an embedded video is present as a link in a file uploaded by a user onto a platform and is available to stream on that platform by clicking on the link, it is capable of constituting a "*user generated video*" shared on that platform within the meaning of the Revised AVMS Directive even where a user does not upload the video directly onto the said platform and the video is not hosted there. As "*user-generated video*" within the meaning of the Revised AVMS Directive extends to and embraces embedded video, I am satisfied that it was proper for the Respondent to have regard to the fact that this content existed.

335. Having identified the existence of relevant video content, it was not necessary for the Respondent to further assess it where it was concluded on the basis of quantitative and qualitative data available in respect of native user generated video that the native video alone present on the site justified a decision that an essential functionality of the platform was video sharing within the meaning of the Revised AVMS Directive.

336. Further, I am satisfied that there is a difference between embedded video and hyperlinked videos as these terms are utilised in these proceedings because in the case of embedded video, it is viewed by the user or consumer on the Reddit platform, without leaving the Reddit platform and without signing into another platform, in contrast with the position regarding hyperlinked evidence. There is therefore no ambiguity or contradiction arising from the Respondent's differing treatment of each type of video in arriving at the Designation Decision.

337. Great care was taken by the Respondent in arriving at the Designation Decision. The decision was taken in a fully open and transparent process whereby the Respondent's decision making process was clearly set out and its preliminary views were made known to Reddit before the Designation Decision was taken thereby affording Reddit an opportunity to address the Respondent on relevant matter before a final decision was taken. Reddit's response was fully considered and addressed in some specific detail by the Respondent in proceeding to designate. In arriving at the Designation Decision the Respondent had careful regard to the EC Guidelines and based its decision on relevant considerations in line with the EC Guidelines. There was an ample sufficiency of material available to the Respondent to support the Designation Decision.

338. As Reddit has failed to demonstrate an error in the interpretation and application of the essential functionality test as properly guided by the EC Guidelines and on the basis of relevant considerations which were properly grounded in the evidence as further expanded on above, I refuse the relief sought and dismiss these proceedings. Unless it is indicated that the terms of final orders can be agreed, I will list this matter to deal with any consequential matters.