

THE HIGH COURT

[2026] IEHC 666

RECORD NO. 2025 / 1609 JR

BETWEEN

X INTERNET UNLIMITED COMPANY

Applicant

and

COIMISIÚN NA MEÁN

Respondent

Judgment of Mr Justice Cian Ferriter delivered on 8th October 2026

Introduction

1. In these judicial review proceedings, the applicant challenges four decisions of the respondent (“the Commission”) relating to complaints made to the Commission by users of the applicant’s social media platform X.
2. Each of the four decisions in issue were taken by the Commission on 2 October 2025 under section 201(4) of the Broadcasting Act 2009 as amended (“the 2009 Act”). Section 201 of the 2009 Act implements article 53 of the EU Regulation known as the Digital Services Act (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)) (the “DSA” or “Digital Services Regulation”). Section 201 and article 53 relate to complaints made by recipients of services such as the hosting service provided *via* the X platform by the applicant.
3. The four decisions relate to complaints made to the Commission by users of the X service. The complaints variously engaged issues under articles 16, 17 and 20 of the DSA which deal, *inter alia*, with obligations imposed on providers of hosting services

(including online platforms) in relation to illegal content notification systems, provision of statements of reasons for restriction/suspension of user access and the provision to users of an effective complaints handling system respectively.

4. In the case of all four decisions, the Commission decided, on a delegated basis, to pass the complaint information the subject of the decision to its “Supervisory Team” pursuant to Section 201(4)(d) of the 2009 Act (“s.201(4)(d)”) so that the supervisory team could further consider the complaint as part of its overall functions including monitoring compliance with regulatory obligations and taking formal compliance action where warranted.

Issues for determination

5. The applicant’s challenge to each of the four decisions is centred on a contention that the Commission’s decision in each case to refer the individual complaint information to its supervisory team pursuant to s.201(4)(d) was *ultra vires* and unlawful. This head of challenge raises questions as to the proper interpretation of s.201 of the 2009 Act which concerns complaints to the Commission alleging non-compliance by intermediary service providers with their obligations under the DSA (“the s.201 issue”).
6. The applicant further contends that the decisions were vitiated by unlawful delegations of power by the Commission. Resolution of this issue requires consideration of the proper interpretation of the Commission’s power to delegate performance of its functions under s.8 of the 2009 Act and how such delegated powers can properly apply to s.201 decision-making (“the delegation issue”).
7. The applicant advances further discrete grounds of challenge to the lawfulness of one of the four decisions (the MR decision) on fair procedures grounds.
8. The s.201 issue and delegation issue raise questions as to the scope and proper exercise of important aspects of the Commission’s regulatory functions with implications beyond this case. Indeed, this case was chosen to be the lead case in respect of a series of judicial review proceedings between the parties which also raise these issues in virtually identical respects.

The parties

9. The applicant as the provider of the social media platform X is an intermediary service provider (“ISP”) for the purposes of the DSA. The applicant is also a “very large online platform” (“VLOP”) for the purposes of the DSA. The DSA regulates the liability of ISPs for the provision of their services. Additional regulatory obligations are imposed by the DSA on VLOPs.
10. The Commission was established on 15 March 2023 pursuant to the Online Safety and Media Regulation Act 2022 as Ireland's national regulatory authority with responsibility for overseeing the regulation of broadcasters, video-on-demand providers and ISPs.
11. The Commission is Ireland’s Digital Services Coordinator (“DSC”) for the purposes of the DSA and the 2009 Act. As such, it has responsibility for overseeing the State’s regulatory regime for online safety, known as the “Online Safety Framework”, which includes the DSA.
12. The DSA and the 2009 Act confer various powers on the Commission as DSC to enable it regulate, *inter alia*, ISPs including VLOPs.

The legal context

13. In order to set the issues arising in this case in their appropriate legal context, it is necessary to summarise the broad structure of the DSA and the 2009 Act and to set out some of the more relevant provisions of those pieces of legislation.

The DSA

14. I propose to address the structure of the DSA and some of its key provisions in a little detail to give a sense of the breadth and scope of the regulatory architecture established by the Regulation.

15. A number of recitals in the DSA record the objective of achieving a "safe, predictable and trustworthy online environment" (see, e.g., Recitals 3, 9 and 12). This is reflected in article 1 of the DSA, headed "Subject matter" which provides as follows:

“1. The aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.

2. This Regulation lays down harmonised rules on the provision of intermediary services in the internal market. In particular, it establishes:

(a) a framework for the conditional exemption from liability of providers of intermediary services;

(b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services;

(c) rules on the implementation and enforcement of this Regulation, including as regards the cooperation of and coordination between the competent authorities.

16. The applicant's X service is both a "hosting service" (defined as part of the definition of "intermediary service" in article 3(g)(iii) of the DSA) and an "online platform" which is defined in article 3(i) DSA as *“a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public...”*.

17. Chapter II of the DSA is headed “liability of providers of intermediary services” and provides a framework, *inter alia*, for the conditional exemption from liability of intermediary services providers.

18. Chapter III sets out “due diligence obligations for a transparent and safe online environment” and is divided between provisions applicable to all providers of intermediary services (set out in section 1 of chapter 3) and additional provisions applicable to providers of hosting services, including online platforms (in section 2 of chapter 3). Articles 16, 17 and 20 are those articles which, according to the evidence of

the Commission, are most frequently invoked by complainants and were the provisions invoked by a number of the complainants who were the subject of the four decisions impugned by the applicant in these proceedings.

19. Article 16 is headed "Notice and action mechanisms" and provides in article 16(1):

“providers of hosting services shall put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Those mechanisms shall be easy to access and user-friendly, and shall allow for the submission of notices exclusively by electronic means”.

20. Article 16(2) states that the mechanisms referred to in article 16(1) “shall be such as to facilitate the submission of sufficiently precise and adequately substantiated notices” and details the elements which such notices should contain. Notices which comply with the requirements of article 16(2) shall, in accordance with article 16(3) *“be considered to give rise to actual knowledge or awareness for the purposes of Article 6 in respect of the specific item of information concerned where they allow a diligent provider of hosting services to identify the illegality of the relevant activity or information without a detailed legal examination”*. Article 16(5) obliges the provider to notify a decision on a notice under the article and to provide information on the possibilities for redress in respect of the provider’s decision. Article 16(6) requires that decisions on illegal content notifications be taken in a “timely, diligent, non-arbitrary and objective manner”.

21. Article 17 is headed "Statement of reasons". It provides in article 17(1) that *“providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service”* in the event that restrictions are imposed on a service recipient (including suspension or termination of the recipient’s account) on the basis that the information provided by the recipient of the service is illegal content or incompatible with the service provider’s terms and conditions.

22. Article 17(3) sets out a number of requirements in respect of a statement of reasons referred to in article 17(1).

23. Article 20 is found in Section 3 of Chapter III. That section is headed "additional provisions applicable to providers of online platforms". Article 20 is headed "Internal complaint-handling system". It imposes an obligation on providers of online platforms to provide to recipients of the service "an effective internal complaint-handling system" that enables such recipients to lodge complaints against a decision taken by the online platform provider in respect of notices or complaints that a recipient is providing illegal content or content incompatible with the provider's terms and conditions. The types of decisions which a recipient can lodge a complaint about are set out in article 20(1) and include decisions relating to the removal or disablement of access to information and the suspension or termination of the provision of a service to a recipient in whole or in part.
24. Article 20(3) requires online platform providers to ensure "*that their internal complaint-handling systems are easy to access, user-friendly and enable and facilitate the submission of sufficiently precise and adequately substantiated complaints*" and sets out the circumstances in which a provider must reverse the decision complained of. Complaints submitted through internal complaint handling systems are obliged by article 20(4) to be handled in a "timely, non-discriminatory, diligent and non-arbitrary manner". Article 20(5) imposes an obligation on online platform providers to inform complainants of their "reasoned decision" in respect of information to which the complaint relates "without undue delay".
25. Section 5 of chapter III of the DSA is headed "*Additional obligations for providers of very large online platforms and of very large online search engines to manage systemic risks*". The X service is a very large online platform, or VLOP, for this purpose. (Very large online search engines are known by the acronym "VLOSE").
26. The obligations imposed on VLOPs in this section of the DSA include those of assessment of risks (article 34) and mitigation of risks (article 35). Article 34(1) imposes an obligation on VLOPs "*to diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services.*" Article 35 imposes on VLOPs an obligation to put in place "*reasonable, proportionate and*

effective mitigation measures, tailored to the specific systemic risks identified pursuant to Article 34, with particular consideration to the impacts of such measures on fundamental rights” and sets out a range of such potential measures. Article 37 imposes an obligation on, *inter alia*, VLOP providers to have an annual independent audit of their obligations under chapter III of the DSA and any commitment undertaken pursuant to codes of conduct referred to in articles 45 and 46 DSA or in relation to the “crisis protocols” referred to in article 48 DSA.

27. Chapter IV DSA is headed "Implementation, cooperation, penalties and enforcement". Article 49(1) requires Member States to designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and enforcement of the DSA. In addition, Member States are advised to designate one of such competent authorities as their "digital services coordinator" ("DSC"). The Commission is the DSC in the case of Ireland. Article 49(2) provides:

“The Digital Services Coordinator shall be responsible for all matters relating to supervision and enforcement of this Regulation in that Member State, unless the Member State concerned has assigned certain specific tasks or sectors to other competent authorities....

For that purpose, Digital Services Coordinators shall cooperate with each other, other national competent authorities, the Board and the Commission, without prejudice to the possibility for Member States to provide for cooperation mechanisms and regular exchanges of views between the Digital Services Coordinator and other national authorities where relevant for the performance of their respective tasks”.

28. “Digital Services Co-ordinator of establishment” (“DSCofE” or “DSC of Establishment”) is defined in article 3(n) as: *“the Digital Services Coordinator of the Member State where the main establishment of a provider of an intermediary service is located or its legal representative resides or is established”.*

29. Article 50(1) provides that *“Member States shall ensure that their Digital Services Coordinators perform their tasks under this Regulation in an impartial, transparent and timely manner”.* This article also imposes obligations on Member States to ensure that

their digital services coordinators have all necessary resources to carry out their tasks, including sufficient technical, financial and human resources to adequately supervise all providers of intermediary services falling within their competence.

30. Article 51 is headed "Powers of Digital Services Coordinators" and sets out the investigation powers and enforcement powers which DSCs shall have in respect of intermediary services providers falling within the competence of their Member State. Article 51(5) provides that the measures taken by the Digital Services Coordinators in the exercise of their powers listed in that article *"shall be effective, dissuasive and proportionate, having regard, in particular, to the nature, gravity, recurrence and duration of the infringement or suspected infringement to which those measures relate, as well as the economic, technical and operational capacity of the provider of the intermediary services concerned where relevant."* Article 52 concerns penalties and provides that Member States shall lay down rules on penalties applicable to infringements of the DSA. A measure of the extent of the penalties potentially involved is reflected in article 52(3) which provides that *"Member States shall ensure that the maximum amount of fines that may be imposed for a failure to comply with an obligation laid down in this Regulation shall be 6% of the annual worldwide turnover of the provider of intermediary services concerned in the preceding financial year"*.
31. Article 53 is headed "Right to lodge a complaint". Article 53 of the DSA gives users alleging an infringement of the DSA the right to lodge a complaint with their DSC against ISPs and provides that the DSC will assess the complaint. We shall come to the terms of article 53 in more detail later in the judgment when considering the s.201 issue. As we shall see, article 53 is implemented in the State by s.201 of the 2009 Act.
32. Article 54 relates to compensation and confers on recipients of intermediate services the right to seek compensation from intermediary service providers in respect of any damage or loss suffered due to an infringement by those providers of their obligations under the DSA.
33. Article 55 is headed "Activity reports" and imposes an obligation on DSCs to draw up annual reports of their activities under the DSA including the number of complaints received pursuant to article 53 and an overview of their follow-up.

34. Section 2 of Chapter IV is headed "Competences, coordinated investigation and consistency mechanisms". It provides for a division of competencies between the European Commission and Member States. Accordingly, under article 56(2), the European Commission shall have exclusive powers to supervise and enforce section 5 of chapter III which relates to "Additional obligations for providers of VLOPs and VLOSEs to manage systemic risks". Article 56(3) provides that the European Commission shall have powers to supervise and enforce the Regulation, other than those laid down in section 5 chapter III, against providers of VLOPs and VLOSEs. Outside of the obligations in section 5 chapter III, there can be concurrent jurisdiction as between the European Commission and Member States in relation to supervision and enforcement of obligations of VLOPs and VLOSEs (article 56(4)). Article 56(5) provides that "*Member States and the Commission shall supervise and enforce the provisions of this Regulation in close cooperation*".
35. Article 57(1) imposes a mutual assistance obligation on DSCs and the European Commission "in order to apply this Regulation in a consistent and efficient manner".
36. Article 58 provides for cross-border cooperation amongst digital services coordinators and article 60 provides that the DSC of establishment may launch and lead joint investigations with the participation of one or more other DSCs.
37. Section 3 of chapter IV establishes a "European board for digital services" ("the Board") which has a role, *inter alia*, to advise the DSCs and European Commission on contributing to the consistent application of the DSA and effective cooperation of DSCs and the European Commission with regard to matters covered by the DSA.
38. Under section 4 of chapter IV, the Commission is given a range of powers, many in cooperation with DSCs and the Board, in relation to the supervision, investigation, enforcement and monitoring of providers of VLOPs and VLOSEs, including powers as to the imposition of fines (article 74).

The 2009 Act

39. The 2009 Act, as amended, is a lengthy act, running to over 200 sections and a number of schedules. The consolidated version of the act prepared by the Law Reform Commission runs to some 275 pages.
40. The Commission is established by s.6 of the 2009 Act. The act confers a broad range of functions on the Commission which are not limited to regulatory functions of ISPs under the DSA but include a range of other regulatory functions such as the regulation of broadcasters and media service providers, public service broadcasting, audio visual media content service providers and online safety.
41. Section 8 of the 2009 Act addresses the question of delegation of the Commission's functions. I will set out the full terms of s.8 later in this judgment when addressing the delegation issues raised in these proceedings.
42. Part 8A of the act, relating to "online safety", was inserted by the Online Safety and Media Regulation Act 2022 and involves implementation of the State's obligations under Directive 2010/13/EU as amended by Directive (EU) 2018/1808 relating to audiovisual media services.
43. Part 8B of the act is headed "Investigations and Sanctions". It contains a range of measures relating to the investigation of, *inter alia*, suspected contraventions of the DSA. It also contains various enforcement powers and measures, including financial sanctions, penalties and compliance notices. I will detail some of the specific provisions in Part 8B of relevance to these proceedings (including s.139ZI and s.139ZZGA) later in this judgment when discussing the matters in issue in the proceedings.
44. Part 15 of the 2009 Act is headed "Digital Services". It contains s.201 which is headed "Complaints to Commission concerning Digital Services Regulation". Section 201 represents the State's implementation of article 53 DSA. Section 201 of the 2009 Act gives effect to article 53 by providing for a statutory complaint mechanism. It sets out the manner by which DSA complaints must be processed by the Commission and the options open to the Commission when deciding on a complaint. Section 201 is an important provision of the act in the context of these proceedings, and I will set out its terms in full later when addressing the arguments in relation to its proper interpretation.

45. I will refer to other provisions in 2009 Act as appropriate when addressing the parties' submissions on the issues in the proceedings.

The Commission's role under the DSA in practice

46. The Commission explained in its affidavit evidence that, in its capacity as Ireland's DSC since February 2024, it has a central role in the enforcement of the DSA for users not only in Ireland but across the EU in circumstances where 16 of the 26 very large online platforms (VLOPs) and very large online search engines (VLOSEs) have Ireland as their jurisdiction of main establishment in the EU. As such, the Commission is the Digital Services Coordinator of establishment in respect of those VLOPs and VLOSEs within the meaning of article 3(n) of the DSA. The Commission is also responsible for the supervision and enforcement of the DSA in respect of ISPs that have not been designated as VLOPs and VLOSEs but who are established in Ireland or have nominated a legal representative that is established or resides in Ireland.

47. The Commission says that the fact that it is the DSCoE in respect of so many VLOPs (including the X platform) has significant practical consequences for it since, pursuant to article 53 of the DSA, where an EU-based user of any of these VLOPs make a complaint to a DSC in their home Member State, that complaint will be transmitted to the Commission.

48. The Commission is led by its Chairperson and four other Commissioners with responsibility for online safety, media development, broadcasting and digital services respectively, each of whom has a significant degree of expertise in regulatory decision-making.

49. The Digital Services Commissioner oversees the Platform Supervision and Investigations division within the Commission which has separate and distinct functions in respect of: (i) Regulatory Operations, (ii) User Complaints, (iii) Platform Supervision; and (iv) Investigations. As such, the Platform Supervision and Investigations Division includes the User Complaints Team (the "UCT") and the

platform supervision team, which is relevant to the applicant and the X platform in general (the “Supervisory Team”).

50. The UCT is responsible for receiving, triaging and processing complaints made under article 53 of the DSA. These complaints can originate with recipients of services in Ireland or in other EU Member States. In the latter case, the complaints in question will be transmitted to the Commission by the DSC in the Member State in question.
51. The Commission says that the UCT is dealing with a very significant number of complaints and must do so with necessarily limited resources. By way of example, in 2025 the UCT received approximately 850 complaints, over 90% of which were transmitted from DSCs in other Member States. These complaints were based on 21 different articles of the DSA and related to 42 different ISPs.
52. Bearing in mind that the DSA only came into force on 17 February 2024, the Commission says that it expects that the volume of complaints will increase as the number of users and the volumes of traffic going through the various services increase, as additional DSCs are designated and users become more aware of the DSA and their rights under it. Even over the course of 2025, there was a marked increase in the rate at which complaints were being received by the Commission with approximately 50 complaints received in January 2025 and 40 complaints received in February 2025, rising to approximately 150 complaints being received in January 2026 and 130 complaints in February 2026. Having regard to that trend, the Commission says that the volume of complaints can be expected to increase further in 2026.
53. The Commission says that on assessment by the UCT, it is found that many complaints will be of potential relevance to a discrete number of articles of the DSA. The articles of most frequent relevance in 2025 were articles 16, 17 and 20 of the DSA.
54. The Commission emphasises that, given the volume of complaints being received by it and the potential importance of the issues raised in those complaints, it is vital to the practical and effective functioning of the regulatory regime that the Commission, and its UCT, has flexibility as to how it handles complaints.

The decisions in issue

55. The four decisions in issue in these proceedings (each dated 2 October 2025) address complaints made over the course of 2024 and 2025 to the Commission by recipients of the X service, alleging (variously) breaches of articles 16, 17 and 20 of the DSA (“the impugned decisions”). For ease, I shall refer to those recipient complainants as “MR”, “Hy”, “Hp” and “McW” and the decisions in their cases as the “MR decision”, the “Hy decision”, the “Hp decision” and the “McW decision”.
56. The decision-making process in relation to the complaints in each case followed broadly the same structure, in accordance with the terms of s.201. The Commission carried out an initial assessment to satisfy itself as to its jurisdiction in relation to the complaint and then carried out a further assessment and set out proposed action. The applicant was invited to and did make representations in respect of the proposed action in each case. Following consideration of the representations, the Commission proceeded to a final decision.
57. The final decisions were generally structured in the same way.
58. In relation to the Hy complaint, the final decision of 2 October 2025 set out particulars of the complaint and the final decision. The decision noted that “the Complaint concerns allegations that the Complainant is unable to report alleged illegal content to X”. Under the heading “Article 16”, details of the complaint and the applicant’s representations in response to the complaint were set out. The decision noted that the applicant’s representations did not address the complaint to the effect that it is not possible for a person who does not have an X account to report illegal content (as opposed to reporting the X account) and, further, if an account holder is blocked by another account, they cannot report individual illegal content on that other account. Under the heading “Summary” the decision stated *“having assessed the Complaint information and all Representations, pursuant to section 201(4)(d) of the 2009 Act, An Coimisiún continues to have concerns in relation to X’s compliance with Article 16 of the Digital Services Regulation and its final decision is to pass the Complaint information in relation to article 16 of the Digital Services Regulation to its Supervisory Team, pursuant to section 201(4)(d) of the 2009 Act”*.

59. The same structure was adopted in relation to the Hp. decision of 2 October 2025. This complaint concerned alleged breaches of articles 17 and 20 DSA. Having set out the complaint and the applicant's representations in relation to article 17, the decision letter stated that the Commission "*is concerned that the initial 'Statement of Reason' provided to the Complainant that their account was suspended as "it violated X Rules" is insufficiently clear, lacks the necessary detail, and does not provide the level of detail required under Article 17 of the Digital Services Regulation to allow the Complainant to understand the precise nature of the alleged infringement. It also appears that X did not provide the Complainant with the facts and circumstances of the decision resulting in the suspension and eventual termination of their account*". The decision then stated that the Commission "*considers that the Complaint raises concern in relation to X's compliance with Article 17 [DSA] and considers that the Complaint merits further consideration by its Supervisory Team*". Likewise in respect of the article 20 complaint, the complaint and the applicant's representations in relation to it are summarised and the Commission's view is expressed that the applicant did not provide the complainant with a reasoned decision following the outcome of their appeal and that the approach to location of DSA-related redress mechanisms did not meet the standard of accessibility and transparency required under article 20 of the DSA. The decision concludes that for those reasons the Commission "*considers that the complaint raises concerns in relation to X's compliance with Article 20 [DSA] and considers that the Complaint merits further considerations by its Supervisory Team*".

60. In relation to the MR complaint, the final decision of 2 October 2025 is again structured in the same way. There, the complaint alleged non-compliance with article 16 and article 20 DSA. The decision noted in respect of the article 16 aspect of the complaint that, having considered all information relevant to the complaint including the applicant's representations, the Commission's decision was to take no further action in respect of that aspect of the complaint "*as, in the circumstances, the information available to [the Commission] does not appear to cause concerns in relation to X's compliance with Article 16 [DSA]*". In relation to the article 20 aspect of the complaint, the Commission set out its view that the applicant did not issue a reasoned decision following the appeal outcomes as was required under article 20 and for that reason considered that the complaint raised concerns in relation to the applicant's compliance with article 20 and

considered “that the complaint merited further consideration by its supervisory team.” (This latter conclusion is the subject of a separate fair procedures challenge in these proceedings which will be addressed later in this judgment).

61. The same approach was adopted in the decision of 2 October 2025 in relation to the McW. complaint. Here, complaints were made in relation to alleged non-compliance with both articles 16 and 20. Having considered the representations from the applicant in relation to the article 16 aspect of the complaint, the Commission stated that it did not intend to take any further action in relation to article 16. In relation to the article 20 aspect of the complaint the Commission stated that it continued to have concerns that the applicant may not be in compliance with its obligations under article 20, in circumstances where the applicant did not offer an internal complaints mechanism in response to its rejection of the user’s complaint. It decided therefore that the applicant’s “overall compliance with Article 20 warrants further consideration at this stage”. The decision then stated that the Commission considered that “*by passing the Complaint information to its Supervisory Team, it will assist with and may inform their further consideration of X’s compliance with Article 20 [DSA]*”.

62. In the case of the Hy, Hp and MR decisions the Commission stated in its final decision that it would send the “complaint information” and associated documentation to its supervisory team:

“... so that it may further consider the Complaint as part of its overall functions, which include:

- (a) monitoring compliance with regulatory obligations;*
- (b) resolving issues on a voluntary basis with providers where appropriate;*
- and*
- (c) taking formal compliance action when warranted in accordance with An Coimisiún’s procedures”.*

63. This wording was not included in the McW decision.

64. Each of the final decisions then stated that:

“The objectives of the Supervisory Team in executing its overall functions include gaining a better understanding of the services and operations of the entities that An Coimisiún regulates, analysing areas in which providers potentially may not be in compliance with their obligations under the Digital Services Regulation and implementing new regulatory regimes to better guide and assist providers in effectively addressing harmful and illegal content”.

65. The Hp, MR and McW decisions also stated that:

“Should the Supervisory Team require further information arising from the subject matter of the Complaint, a member of the team will contact X. Should An Coimisiún consider it necessary or appropriate to take further steps in exercise of its powers and functions under the 2009 Act in respect of the subject matter of the Complaint, X will be informed as provided for in the relevant procedures contained in the 2009 Act”.

66. It might be noted that, while the final decisions were each expressed in terms of passing the relevant “complaint information” to the Commission’s supervisory team, a number of the initial letters relating to the Commission’s proposed action following further assessment of the complaints proposed that the “complaint” be passed to the Commission’s supervisory team with no reference to “complaint information”.

67. There was an extensive exchange of correspondence between the applicant and the Commission during the complaints process in each case. I will refer to aspects of that correspondence where relevant when addressing the issues raised in these proceedings.

The McW. complaint and the Article 20 investigation

68. One other aspect of the factual context which I should reference at this point is that the complaint information in relation to one of the complaints, being the McW. complaint, was referred by the Commission's Supervisory Team to an authorised person who assessed and relied on that complaint information (in addition to other material) in deciding to appoint an authorised officer pursuant to s.139ZI(1) of the 2009 Act to commence an investigation into suspected contraventions by the provider of the X

service of article 20 DSA (“the article 20 investigation”). (As it happens, the article 20 investigation is the subject of two separate sets of judicial review proceedings brought by the applicant and related entities against the Commission and recently heard by the High Court).

69. The McW. complaint essentially involved a complaint that another user of the applicant's X service had been impersonating the complainant. Mr McW. in his complaint to the Commission, alleged, *inter alia*, a contravention by the applicant of article 20. In its decision of 2 October 2025 in relation to the McW. complaint, the Commission decided to refer that complaint information to its Supervisory Team pursuant to s.201(4)(d).

70. From the evidence before the court, it is clear that the supervisory team then considered the McW. complaint. A “cover note” was prepared by the supervisory team in respect of the McW. complaint when transferring that complaint to the authorised person who was appointed by the Commission under s.139ZI of the 2009 Act, to decide whether to appoint an authorised officer under s.139ZI to investigate a suspected contravention of article 20 by the applicant. This cover note summarises the McW. complaint and states, *inter alia*, that “*upon receipt of the Complaint, the Supervision Team concluded that the matter described is in scope of [the Article 20 investigation] and appears to be relevant to previous findings and concerns*”. The document goes on to set out the supervision team's position in respect of compliance with the requirements of article 20 of the DSA and expresses a view that the screenshots of the notification received from the provider of X following report under X’s terms and conditions “*...does not contain any mention of the possibility to appeal the decision or access to an appeals mechanism. In its representations, X does not directly reference or address the Article 20 concerns raised by the User Complaints Team in the response dated 9 June 2025. For that reason, the supervision team made the decision to transfer the complaint to the [authorised person].*”

71. The list of materials relied upon by the authorised person in her decision to appoint an authorised officer to commence an investigation under s.139ZI specifically itemises the McW. complaint material as part of the “materials considered by the authorised person” in arriving at a decision as to whether to direct an authorised officer to carry out an

investigation under s.139ZI of the 2009 Act. In the “Analysis and Findings” part of her decision, the authorised person references the McW. complaint (at para 3.2 of that decision document) and states that the applicant's decision in respect of the McW. complaint:- “...*did not provide the Complainant via links or otherwise with access to the appeals mechanism. In these circumstances, the Complainant's ability to access the appeal mechanism, should such an option have been available, was restricted*”.

72. In the authorised officer's “notice of commencement of an investigation” pursuant to s139ZJ and s.139ZI of the 2009 Act, the authorised officer states that she was directed by the authorised person to carry out an investigation of suspected contraventions by the provider of X of article 20, in particular article 20(1) and article 20(3) of the DSA in relation to the online platform X and specifically of the following “*Whether, by reference to the reasons and matters set out [in Section 3 of the Authorised Person's Direction] and/or as may be further defined in the terms of the investigation and/or may be further investigated by the Authorised Officer, there has been a contravention of Article 20 and in particular Article 20(1) of the Digital Services Regulation by the provider of X in relation to the online platform X, and in particular of the requirement that the appeals mechanism provided for under Article 20(1) of the Digital Services Regulation is made available in respect of reports on content that is incompatible with its terms and conditions and any such appeal mechanism is provided in accordance with Article 20(3) of the Digital Services Regulation*”.

73. I will return to the article 20 investigation matter when considering the arguments on the section 201 issue later in this judgment.

Grounds of challenge

74. In its re-amended statement of grounds, the applicant raises nine grounds of challenge to the lawfulness of the impugned decisions. Five of the grounds (grounds 3, 3A, 5, 6 and 7) relate to the s.201 issue. One of the grounds (ground 8) relates to the delegation issue. The remaining grounds (grounds 1, 2 and 4) relate to the MR decision and are principally fair procedures grounds related to that decision.

75. I will deal firstly with the s.201 issue, before addressing the delegation issue and will look, finally, at the grounds related to the MR decision.

76. Before addressing the issues, given that the s.201 issue and the delegation issue raise questions of statutory interpretation, it is useful to briefly set out the applicable principles of statutory interpretation.

Applicable principles of statutory interpretation

77. The principles of statutory interpretation have been the subject of detailed consideration by the Supreme Court in recent years including in the cases of *Heather Hill Management Company CLG v An Bord Pleanála* [2024] 2 IR 222 and *A, B and C (minor) v The Minister for Foreign Affairs* [2023] 1 ILRM 335 (“*A, B and C*”).

78. The following useful summary of the applicable principles is set out by Murray J at para. 73 of his judgment in *A, B and C*:

“....the cases – considered most recently in the decision of this court in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43; [2022] 2 I.L.R.M 313 – have put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed as having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words”.

79. Likewise, the principles of interpretation of EU law provisions are well settled. In a judgment of Bradley J. on a recent separate judicial review challenge brought by the applicant against the Commission (*X Internet Unlimited Company v Coimisiún na Meán* [2025] IEHC 442), having quoted passages from the judgment of (Siobhán) Phelan J in *Tumblr Incorporated v Coimisiún na Meán* [2024] IEHC 366 at paras 155 and 156 on the principles of interpretation of EU law, Bradley J. stated (at para 34) that “*It is well-settled, therefore, that the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its legislative context and the provisions of EU law as a whole and the origins of a provision of EU law may also provide information relevant to its interpretation.*”

Section 201 Issue

80. In order to put this issue in context, it is necessary to set out the full terms of article 53 DSA, Recital 118 DSA and s.201 of the 2009 Act.

81. Article 53 provides as follows:

“Recipients of the service and any body, organisation or association mandated to exercise the rights conferred by this Regulation on their behalf shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient of the service is located or established. The Digital Services Coordinator shall assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator of establishment, accompanied, where considered appropriate, by an opinion. Where the complaint falls under the responsibility of another competent authority in its Member State, the Digital Services Coordinator receiving the complaint shall transmit it to that authority. During these proceedings, both parties shall have the right to be heard and receive appropriate information about the status of the complaint, in accordance with national law”.

82. Article 53 gives expression to the objectives set out in Recital 118. Recital 118 provides as follows:

“In order to ensure effective enforcement of the obligations laid down in this Regulation, individuals or representative organisations should be able to lodge any complaint related to compliance with those obligations with the Digital Services Coordinator in the territory where they received the service, without prejudice to this Regulation’s rules on allocation of competences and to the applicable rules on handling of complaints in accordance with national principles of good administration. Complaints could provide a faithful overview of concerns related to a particular intermediary service provider’s compliance and could also inform the Digital Services Coordinator of any more cross-cutting issues. The Digital Services Coordinator should involve other national competent authorities as well as the Digital Services Coordinator of another Member State, and in particular the one of the Member State where the provider of intermediary services concerned is established, if the issue requires cross-border cooperation”.

83. Section 201 of the 2009 Act provides as follows:

Complaints to Commission concerning Digital Services Regulation.

201.— (1) A person (in this section referred to as “a complainant”) may make a complaint to the Commission, in the manner and form specified by the Commission, that there has been a failure by an intermediary service provider to comply with a provision of the Digital Services Regulation.

(2) The Commission shall carry out an initial assessment of the complaint made under subsection (1) and, having done so, may transmit the complaint to—

(a) the Competition and Consumer Protection Commission where the complaint concerns Article 30, 31 or 32,

(b) the Digital Services Coordinator of establishment, where considered appropriate, accompanied by an opinion, or

(c) the European Commission where the complaint concerns Articles 33 to 42.

(3) The Commission shall notify the complainant where the complaint has been transmitted under subsection (2).

(4) The Commission shall, where it does not transmit the complaint under subsection (2), carry out a further assessment of the complaint and may take any of the following actions:

(a) serve an intermediary service provider a compliance notice under section 139ZZGA;

(b) investigate the complaint in accordance with section 139ZI(1);

(c) dismiss the complaint where the Commission finds—

(i) the complaint is frivolous or vexatious or was not made in good faith, or

(ii) the subject matter of the complaint is trivial;

(d) take such other action in respect of the complaint as the Commission considers appropriate.

(5) the Commission shall notify the complainant and the intermediary service provider to which the complaint relates of the complaint made under this section and of any action proposed by the Commission under subsection (4).

(6) A notification under subsection (5) shall—

(a) include particulars of the complaint,

(b) state that the intermediary service provider to which the complaint relates may make representations under subsection (7), and

(c) specify the date by which any representations shall be made under subsection (7).

(7) An intermediary service provider the subject of a complaint made under subsection (1) and notified under subsection (6) may, within the time specified by the Commission in such notification, make representations to the Commission about such complaint.

(8) The Commission shall have regard to any representations made to it under subsection (7) in deciding whether to proceed with any proposed action under subsection (4).

(9) The Commission shall notify the complainant and the intermediary service provider the subject of the complaint made under subsection (1) in writing of its decision under subsection (4)".

84. As can be seen, s.201(2) allows for the Commission to carry out an initial assessment of the complaint made under subsection (1); assuming the Commission does not

transmit the complaint elsewhere, it then carries out a further assessment and may take any of the actions specified in s.201(4)(a) to (d). Section 201(4)(d), which was invoked by the Commission in respect of each of the impugned decisions, permits the Commission “*to take such other action in respect of the complaint as the Commission considers appropriate*”. The Commission must notify the provider (and the complainant) of any action proposed under s.201(4). The ISP can then make representations which the Commission must consider before making its final decision under s.201(4). The s.201(4) decision must then be notified to the complainant and the ISP.

Applicant’s submissions on the s.201 issue

85. The applicant's case on this issue, in short, is that it was *ultra vires* the powers of the Commission to purport, in exercise of its powers under s.201(4)(d), to transfer a complaint or complaint information to its supervisory team for further consideration or review by that team.
86. The applicant's central point in relation to this issue is that a complaint made to the Commission pursuant to s. 201 must ultimately be adjudicated upon and decided by the Commission under s.201 whether by dismissing the complaint, upholding the complaint, or taking other actions specified in s. 201(4) including initiating the process of serving an intermediary service provider a compliance note under s.139ZZGA or initiating a process of investigating the complaint in accordance with s.139ZI(1). The applicant submits that it follows from the terms of article 53 of the DSA and the terms of s.201 properly considered in its statutory context that a complaint must lead to a resolution or outcome of that complaint. This is required both in the interests of the complainant (who is entitled to a decision one way or another on the substance of their complaint) and the intermediary service provider (who equally is entitled to know whether the substance of the complaint is being upheld or rejected or will be the subject of specific compliance notice or investigative steps under the 2009 Act). It cannot be the case that the making of a complaint results in no redress, if the complainant's complaint is well-founded, or no vindication for the service provider, if the complaint is not well-founded.

87. The applicant submits that simply referring complaints onwards to an internal team of the Commission (being the supervisory team) is not an action permitted by s.201 as it improperly avoids a determination of the complaint. It results in the unsatisfactory situation that complaints are not determined as they should be under s.201 but rather are passed on to be, in effect, further assessed on an extra-statutory basis by an internal division of the Commission, without the safeguards set out in s. 201 being provided and without a resolution of the complaint within s.201.
88. The applicant submits that the purpose of s.201 is to provide a reasonably swift and uncomplicated mechanism for the resolution of user complaints. Most complaints, as evidenced by the complaints before the Commission that are the subject of the decision impugned in these proceedings, involve relatively net matters. If there is more complexity involved in respect of a complaint, the investigation option under s.139ZI is open to the Commission. Otherwise, there should be no difficulty following the standard approach to the adjudication of any complaint, namely, consideration of the complaint; identification of a proposed action; consideration of representations by the service provider on that proposed action and a final decision adjudicating on the matter. The applicant says that a sensible interpretation of s.201, in light of the purposes of the DSA and of the 2009 Act, is that a complaint is followed by a proposed action, the receipt of representations and a final decision. It submits that this is the classic structure of an adjudicative administrative process. It is not intended as an informational or administrative mechanism which results in simply transferring the complaint to another team within the Commission to have the complaint considered or assessed by that team. It is a provision designed to produce an outcome. If the facts are complex such that a further investigation is required, then that is provided for within s.201 and not otherwise.
89. The applicant also makes the point in support of this argument that, in circumstances where the Commission is the digital services coordinator of establishment for many of the very large online platform providers in the EU, and it receives referrals of complaints from digital services coordinators from other EU Member States (as happened on the facts here in relation to the Hp. complaint) that those other digital services coordinators would expect to receive an outcome by way of decision on the complaints forwarded on by them.

90. In response to the Commission's reliance on the terms of Recital 118 of the DSA, which refers to the fact that "*complaints could provide a faithful overview of concerns related to a particular intermediary service provider's compliance and could also inform the Digital Service Coordinator of any more cross-cutting issues*", the applicant argues that the Commission is guilty of an unnecessarily binary view of this recital to the effect that complaint information, if it is not transferred to the supervisory team for assessment in a wider supervisory context, is somehow lost and cannot be relied upon. While counsel for the applicant accepted that, at the level of principle, individual complaints could be relied upon by the Commission in discharge of their broader supervisory functions pursuant to the DSA and the 2009 Act, he submitted that the better view of the purpose of article 53 and Recital 118 is that, if a series of decisions under s.201 in relation to individual complaints against an ISP started to reveal a pattern of non-compliance or a "recurrence" of infringements or non-compliance, the complaint information and the outcome of such complaints by way of individual decisions under s. 201 could then be used by the Commission to inform wider supervisory steps (including, presumably, the launch of a wider investigation into suspected contraventions under s.139ZI of the 2009 Act). The fact that individual complaint information may be of use in a wider enforcement context is not a reason not to provide a decision under s.201. Accordingly, the Commission's reliance on Recital 118 to justify the approach it has taken under s.201, of simply referring individual complaints onwards to its supervisory team without deciding those complaints, is misplaced.

91. The applicant further submits that the Commission is bypassing its obligation to direct an investigation into an individual complaint pursuant to s.201(4)(b) where that course of action is warranted, by transferring it to a supervisory team who can "on an extra-statutory basis" achieve the same objective. The applicant lays emphasis in this regard on the example of what happened with the McW. complaint.

92. The applicant submits that the evidence as to how the McW. complaint was relied upon in the lead up to the commencement of the article 20 investigation and is now part of that investigation is an example of "the greater including the lesser", i.e. of the Commission in fact investigating the McW. complaint outside of s.201 when the correct legal course of action was to initiate an investigation pursuant to the Commission's

powers under s. 201(4)(b) in respect of the McW. complaint. The applicant submits that this evidences the Commission “kicking the can down the road” without lawful basis and effectively initiating an investigation into the s.201 complaint by another impermissible route.

93. The applicant submits that, while the Commission is contending, on the one hand, that the s.201 process is at an end when it takes a decision to transfer a complaint to its supervisory team, the experience with the McW complaint demonstrates the reality that the complaint remains live and is, in substance, being handled thereafter by a different division of the Commission on an extra-statutory basis.

94. The applicant submits that this fundamental problem with the Commission's approach to s.201(4) is evident by the fact that the Commission in correspondence with the applicant on one of the complaints in issue effectively reserved to itself the rights to carry out a further assessment and investigation of a s.201 complaint outside the scope of s.201. In a letter to the applicant of 4 April 2025 in relation to the MR complaint, the Commission in explaining its position as regards the proposed action pursuant to s.201(4)(d) of referring the complaint to its supervisory team to enable that team to assess the complaint information as part of its overall functions, the Commission stated that *“For the avoidance of doubt, should the Supervisory Team consider that the Complaint information, of itself or in combination with other information raises concerns about X’s compliance with the DSA, the Supervisory Team may as part of a wider review or otherwise seek to initiate appropriate enforcement proceedings including an investigation under s.139ZI of the 2009 Act. The approach adopted by the Supervisory Team in carrying out its role is a multifaceted one and will depend on many factors. The appropriate process will have to be assessed on a case-by-case basis. While complaint information will inform the supervisory team, it is one of many sources and information available to the Supervisory Team.”* (emphasis added) The applicant submits that this makes clear that the Commission believes it can separately investigate an individual complaint under s.201 outside of the s.201 process and that this view is legally in error.

The Commission’s submissions on the s.201 issue

95. The position of the Commission, in short, is that the decision to refer the complaint information to the Supervisory Team so that that team could consider the complaint as part of its overall functions is within the types of "further action" contemplated by s.201(4)(d) when properly interpreted in light of the objectives of the DSA and of the provisions of the 2009 Act which seek to implement the DSA. It says that this is particularly so in light of the terms of article 53 and Recital 118 DSA which suggest that individual complaints could provide a faithful overview of wider concerns, or more "crosscutting" issues, in relation to a particular ISP's compliance with the DSA. The Commission contends that once the step of referring the complaint information to the Supervisory Team was taken, the complaint process under s.201 was at an end.
96. The Commission submitted that it is important to have regard to the wording and structure of article 53, and the terms of Recital 118, when interpreting s.201. Article 53 makes no provision for the resolution or adjudication of the complaint in the manner contended for by the applicant. It does not require the investigation of a complaint or a substantive investigation into the merits of the complaint. Rather, in keeping with the broad purposes of the DSA as a whole, it is framed in broad and open-ended terms, which the Commission says is designed to give DSCs maximum flexibility in deciding, as they strategically see fit, how best to advance the objectives of the regulation of the online environment set out in the DSA. This is re-enforced by the terms of Recital 118 which clearly envisages DSCs relying on individual complaint information to assess broader, systemic compliance with an ISP's obligations under the DSA.
97. The Commission relied, by way of contrast to the provisions of article 53 and s.201, on s. 10 of the Data Protection Act 1988 (which was the data protection legislation in force prior to the implementation of the GDPR). Section 10 of that Act obliged the Data Protection Commissioner to investigate each complaint received by it and to notify the complainant of his or her decision in relation to it. In contrast, article 57 of the GDPR does not contain such an obligation: it refers to the handling of complaints and investigation of same "to the extent appropriate" and to the requirement to inform the complainant of the outcome of the investigation, including of further investigation if appropriate. Article 77 GDPR entitles a complainant to be notified of the "outcome" of a complaint.

98. The Commission says that it is entirely in keeping with the wording of article 53 DSA that a DSC is permitted to do what the Commission did here, i.e. to refer a complaint to a supervisory team in order to discharge the broader function of supervising the systemic operation of a VLOP's obligations under the DSA and that such a broad power is entirely consistent with the objectives pursued by the DSA.
99. The Commission says that s.201(9) refers to a "decision" being made by the Commission under s.201(4) in relation to the complaint. The Commission therefore agrees that a complaint under s.201 must result in a decision. However, it parts ways with the applicant on the question of the requirement of an adjudication of the complaint in the sense contended for by the applicant. For its part, the Commission submits that a decision on a complaint under s.201 does not have to involve a dismissal or upholding of the merits of the complaint or one of the other options specifically provided for in s.201(4)(a) to (c). Rather, the reference in s.201(4)(d) to the Commission taking "such other action in respect of the complaint as the Commission considers appropriate" is deliberately broad and open-ended. It is not a residual or inferior power. The transfer by the Commission to its Supervisory Team of a complaint for consideration by that team as part of its broader supervisory functions is clearly permitted within both the letter and spirit of s. 201(4)(d). Such an action can assist the Commission in obtaining a "faithful overview of concerns related to a particular intermediary service provider's compliance" as set out in Recital 118. This does not involve any "kicking the can down the road"; rather it involves a legitimate regulatory choice as to how to deal with the complaint where concerns as to compliance have been identified, a regulatory choice anchored in the objectives which the Commission is obliged to pursue pursuant to the terms of the DSA.
100. The Commission submits that the evidence demonstrates the importance of the Commission having flexibility and, in real world terms, being able to achieve the objectives of the DSA. It allows the Commission to have regard to broader strategic considerations in a fast moving environment. The Commission lays particular emphasis in this regard on the realities of the regulatory context as described in the evidence summarised at paras 46 to 54 above.

101. The Commission submits that s.201 does not envisage an adjudicative process in the way contended for by the applicant. The Commission submits that if it was obliged to adjudicate on each individual complaint under s.201 in the sense of upholding or dismissing each complaint, or initiating a compliance notice or formal statutory investigation process, its systems would quickly become unworkable, thereby undermining the objectives of the DSA. While the Commission says that it is properly resourced it explains that its resources are necessarily finite.

102. The Commission submits that there is no bypassing of the statutory process involved in the course of action it took in relation to these decisions. Once a complaint is referred to its Supervisory Team, the individual complaint process is at an end for the purposes of s.201. If any further action is proposed to be taken on foot of the Supervisory Team's consideration of the individual complaint material, all of the safeguards set out in the 2009 Act, such as those safeguards contained in Part 8B, will be afforded as was made clear by the Commission in the course of its exchange of correspondence with the applicant in relation to the complaints in issue in these proceedings.

103. Counsel for the Commission submitted that the fact that the McW. complaint formed part of the materials which were relied upon to commence the article 20 investigation does not demonstrate that the McW. complaint was being investigated in some extra statutory way in frustration of the terms and purposes of s.201. Rather, the McW. complaint information was used as one of a number of sources of information for a discrete and separate statutory investigative process. It is not an investigation of the McW. complaint in any s.201 sense; rather it is an investigation into a suspected contravention, more systemically, by the provider of X of article 20 of which the McW. complaint materials formed but part. It was submitted that there was nothing at all improper in that approach.

Section 201 issue – discussion

104. It can readily be seen from the structure of the DSA that DSCs, and in particular DSCs of establishment, are tasked with the regulation of, *inter alia*, providers of VLOPs who

are providing online services to huge numbers of recipients across the entire EU. As we have seen from the overview of the DSA set out earlier, there is an understandable focus on seeking to regulate systemic risks in respect of such providers. In my view, this is an important context when it comes to the proper interpretation of article 53 (and, by extension, s.201).

105. It is necessary to firstly look at the wording of article 53. The first sentence of the article creates a right in a recipient of the service (and any body, organisation or association mandated to exercise the rights conferred by the DSA on their behalf), to lodge a complaint against an intermediary services provider alleging an infringement of the DSA. The DSC is obliged to “assess” the complaint and, where appropriate, transmit it to the DSC of establishment “accompanied, where considered appropriate, by an opinion” i.e. an opinion on the complaint may be offered when the complaint is transmitted elsewhere but that is not required. The article requires that where the complaint falls under the responsibility of another competent authority in its Member State, the DSC receiving the complaint shall transmit it to that authority. The article contemplates complaint “proceedings”, but simply provides in relation to such proceedings that *“both parties shall have the right to be heard and receive appropriate information about the status of the complaint, in accordance with national law”*. Nowhere in the article is there any reference to the types of outcome which must result from a consideration of the complaint by the DSC if the complaint is not being transmitted elsewhere. Nowhere is it specified that a complaint must be the subject of a form of quasi-judicial adjudication on its individual merits.

106. It is useful then to look at the terms of recital 118, as the recital corresponding to article 53, to see what it articulates in the context of that article. Again, nowhere in Recital 118 does it say or imply that a complainant is entitled to a decision on a complaint in terms of whether that individual complaint should be upheld on its merits (in whole or in part) or dismissed. What is said in Recital 118 is that complaints *“could provide a faithful overview of concerns related to a particular intermediary service provider’s compliance and could also inform the Digital Services Coordinator of any more cross-cutting issues”* which seems to underscore the potential role of the individual complaints assessment process in supporting wider compliance assessment, in keeping with the objectives of the DSA, particularly as regards VLOPs.

107. It can be envisaged how a series of individual complaints against a service provider focusing on alleged non-compliance with a particular article of the DSA might reveal different dimensions to an issue of alleged non-compliance, arising from differing factual scenarios, all of which might be relevant to the broader question of whether that service provider is in compliance with its obligations under that article more generally. In this way, it can be seen how a DSC might want to refer individual complaints and their associated information to a part of the DSC which deals with more general supervisory issues. In this way, individual complaints may legitimately feed into a body of information from which decisions about more systemic enforcement action might be taken, such as the initiation of an investigation into suspected contraventions of overarching obligations on service providers under the DSA. That approach is not on the face of it precluded by the terms of article 53 but rather seems consistent with the deliberately open-ended nature of article 53 read in light of Recital 118 and the regulatory architecture of the DSA as a whole, particularly in relation to VLOPs.

108. Do the terms of s.201 suggest any different approach on the part of the Oireachtas to the question of what might be done following receipt and consideration of a complaint lodged with the Commission as a DSC, or DSC of establishment?

109. Consistent with the first sentence of article 53, which creates the right for service recipients to lodge a complaint against providers of intermediary services alleging an infringement of the DSA, s.201(1) creates a right in a person to make a complaint to the Commission that there has been a failure by an intermediary service provider to comply with a provision of the DSA.

110. In further keeping with the terms of article 53, s.201(2) obliges the Commission to carry out an initial assessment of the complaint and provides for transmission of the complaint to other entities, including a DSC of establishment and, “where considered appropriate, accompanied by an opinion” (thereby reflecting the language of the second sentence of article 53) or to the European Commission where the complaint concerns articles 33 to 42 of the DSA (which, *inter alia*, deals with the obligations on VLOPs), which also reflects the division of competences under the DSA.

111. In accordance with the article 53 entitlement of the parties to be heard and to receive appropriate information about the status of the complaint, s. 201(3) provides that the Commission shall notify the complainant where the complaint has been transmitted following the s.201(2) initial assessment; shall pursuant to s.201(5), notify the complainant and service provider of any action proposed under s.201(4) and allow the service provider make representations (s.201(6) and (7)); and shall have regard to any such representations in deciding whether to proceed with any proposed action under s.201(4) (s.201(8)).

112. Section 201(9) provides that the complainant and the service provider must be notified of the Commission's "decision" under s.201(4). The decision under s.201(4) follows a "further assessment" of the complaint and "may" involve the taking of "any" of the actions set out in s.210(4)(a) to (d).

113. It is necessary to turn then to each of the four potential actions set out in s.201(4)(a) to (d). The first two actions, under (a) and (b), relate to forms of enforcement steps which the Commission can initiate, being service of a compliance notice under s. 139ZZGA or investigation of a complaint in accordance with s.139ZI(1). It will be noted here that s. 201(4) is worded in terms of the Commission taking those actions. As I shall explain when addressing the delegation issue, in my view, the proper interpretation of these provisions is that the Commission shall take the steps of initiating the relevant compliance notice or investigation processes by the appointment of an authorised person for that purpose. These are significant enforcement steps under Part 8B of the 2009 Act and bring with them, if initiated, their own statutory processes and procedural safeguards.

114. Section 201(4)(c) empowers the Commission to dismiss a complaint where the Commission finds the complaint to be frivolous, vexatious, not made in good faith or where the subject matter of the complaint is trivial.

115. Under s.201(4)(d), the Commission can "take such other action in respect of the complaint as the Commission considers appropriate".

116. It will be immediately noted that s.201 does not in its terms anywhere require the Commission to either uphold a complaint, without initiating the service of a compliance

notice under s.139ZZGA or an investigation under s.139ZI(1), or dismiss the complaint in substance although both such options must be contemplated by the phrase “take such other action in respect of the complaint as the Commission considers appropriate” in s.201(4)(d). However, it does not seem to me that, on a proper interpretation of s.201, the Commission is confined under s.201(4)(d) to those further alternative actions. It may take “such other action” as the Commission considers appropriate. On the face of it, that power is very wide in scope.

117. In my view, the scope of the phrase “such other action in respect of the complaint as the Commission deems appropriate” in s.201(4)(d) must be interpreted in light of the terms and purposes of article 53 and the objectives of the DSA as a whole. As already discussed, those objectives include the regulation of systemic risks including “cross-cutting issues”. Where concerns as to potential non-compliance with a service provider’s regulatory obligations have been identified as a result of the Commission’s consideration or assessment of an individual complaint, in my view, it is *intra vires* the Commission’s powers under s.201(4)(d) to pass complaint information together with identified regulatory compliance concerns on to another arm of the Commission which looks at broader compliance issues.

118. In this regard, it is of significance that the Commission in the case of each of the impugned decisions decided to take the action of transferring the complaint information on to its Supervisory Team in circumstances where, having considered the representations of the applicant, it was of the view for reasons set out in each decision that concerns as to compliance with identified articles of the DSA remained i.e. it did not believe that the complaints were either within s.201(4)(c) or otherwise sufficiently without substance/satisfactorily answered by the applicant to dismiss the complaints. As we have seen, in relation to complaints of alleged non-compliance with article 16 DSA in respect of the MR and McW. complaints, the Commission decided to take no further action having considered the applicant’s representations; it did however still have cause for concern as to article 16 compliance on the facts of the Hy. complaint notwithstanding the applicant’s representations in relation to that complaint.

119. Accordingly, the decision in each case to transfer the complaint information for potential use in assessing wider compliance issues was based on an assessment that specific and identified concerns as to compliance arose and the transfer to the

supervisory team was designed to assist overall monitoring of compliance in furtherance of the Commission's regulatory objectives in those circumstances. The basis for the concerns as to non-compliance was clearly set out in each decision. In so far as that complaint information might be used in a separate process under the 2009 Act, the Commission properly emphasises that the applicant will have all appropriate fair procedures entitlements under any such separate process.

120. While it has the power to do so, in my view, the Commission is not *obliged* to issue a final adjudication on the merits of a complaint made pursuant to s.201 in the sense, as contended for by applicant, of formally upholding or dismissing the merits of the complaint. In my view, it is in keeping with the objectives of the DSA, particularly in respect of VLOPS where there is an inherently far-reaching and cross-border dimension to the provision of their services, that individual complaints of non-compliance, rather than being separately adjudicated upon in the sense contended for by the applicant, could be used to assess broader compliance by a provider with its DSA obligations where the individual complaint gives rise to identified concerns on the Commission's part that compliance issues arise; in this way, s.201(4)(d) can provide a bridge between assessment of individual complaints and consideration of issues related to more general DSA compliance by a service provider in a wider supervisory context.

121. It is of note, in my view, that in each case the Commission formed the view that the complaint (or aspects of it) had substance notwithstanding the applicant's representations; this was the trigger in each case for the decision to take the action of passing the complaint information to the supervisory team.

122. I think the legitimacy of this approach in light of the objectives of the DSA can be illustrated in the following way. Supposing the Commission receives a complaint under s.201 in respect of a service provider alleging non-compliance with an aspect of article 20. It then receives a second complaint under s.201 in respect of the same provider alleging non compliance with a different aspect of article 20. It finally receives a third complaint under s.201 in respect of the same provider alleging noncompliance with a different aspect again of article 20. It may be that there is some overlap between the issues arising but the underlying facts are materially different. The Commission may identify a concern arising from these complaints that a more systemic issue of proper compliance with article 20 as a whole arises in respect of this service provider. A

decision to determine the merits of each individual application may run the risk that wider context or overarching relevant background facts are not taken into account in arriving at such an individual complaint determination thereby potentially distorting the value of such a determination. A decision pursuant to section 201(4)(b) to initiate a s.139ZI investigation process in respect of one particular complaint may run the risk that an elaborate process is embarked upon which is necessarily constrained by the particular issue raised on the facts of that particular complaint and therefore the outcome of that process has limited systemic value. Equally, a decision pursuant to section 201(4)(a) to instigate the process of serving the service provider with a compliance notice under section 139ZZGA in respect of one of the other individual complaints may only address the narrow issue arising on that individual complaint at the risk of not addressing wider potential systemic issues.

123. I give these potential examples not as reflecting the facts of the cases before me but to test the question of the proper interpretation of the power given to the Commission in s.201(4)(d) *“to take such other action in respect of the complaint as the Commission considers appropriate.”*

124. For the reasons outlined above, one can see how the principal regulatory objectives of the DSA might be better served if, following assessment of the question of potential non-compliance in respect of each individual complaint and identification of potential concerns about non-compliance notwithstanding the representations received from the service provider, the Commission’s decision-makers took the view in individual cases that the individual complaint information and related representations would be passed to a different internal team within the Commission with responsibility for more overarching monitoring of regulatory compliance by service providers. One could further see how the absence of a power to take such an action could serve to frustrate attainment of the objectives of the DSA. There is also, given the breadth of the services being regulated by the Commission further to the DSA and the huge number of service recipients involved, a legitimate question as to the appropriate use by the Commission of its necessarily finite resources, although this factor of itself could obviously only influence decisions as between equally legitimate and *intra vires* courses of actions whether under s.201 or otherwise under the statutory scheme.

125. Accordingly, in my view, the Commission is correct in its interpretation of s.201(4)(d), in light of the terms of article 53 and Recital 118 of the DSA, and the objectives of the regulatory architecture of the DSA as a whole, that the Commission is entitled to take the action under s.201(4)(d) by way of a decision on an individual complaint lodged under s.201, of passing on the complaint information (including the complaint, the service providers representations and the decision-maker's concerns as to potential non-compliance resulting from an assessment of the complaint and the representations received in relation to that complaint) where concerns as to non-compliance with DSA obligations have been identified by the Commission.

126. It follows, in my view, that the Commission acted lawfully and within the powers conferred by it on a proper interpretation of s.201(4)(d) in making a decision in the case of each of the four complaints the subject matter of these proceedings, having being satisfied that concerns as to compliance were raised by the complaints, notwithstanding the applicant's representations, to send the complaint information and related documentation to its supervisory team so that that team might further consider that material as part of its overall regulatory functions. I note in this regard that the functions and objectives of the Supervisory Team as explained in each of the decision letters (quoted at paras 62 and 64 of this judgment) are fully consistent with the objectives of the DSA in relation to monitoring compliance with the obligations on service providers including VLOPs under the DSA.

127. Turning to address some of the other submissions made by the applicant, in my view, the fact that the authorised officer appointed pursuant to s.139ZI of the 2009 Act to conduct the article 20 investigation had regard to the McW. complaint information referred to the supervisory team pursuant to s.201(4), did not mean that the Commission was acting on an extra-statutory basis or otherwise bypassing s.201(4)(b) to achieve the result of investigating the McW. complaint through the back door as it were. In my view, an investigation pursuant to s.139ZI into an individual complaint, which is triggered by the Commission pursuant to s.201(4)(b), is a legally separate action to that of investigation pursuant to s.139I into a broader suspected article 20 contravention investigation. It seems to me to be fully consistent with the scheme of the DSA and the 2009 Act that an authorised office could look at individual complaint information as part of a wider body of information in assessing whether the service provider has

contravened or is in compliance with article 20 (or any other relevant DSA article) more generally. An investigation initiated in respect an individual complaint pursuant to s.139ZI on foot of a decision on a s.201 complaint to take action under s. 201(4)(b), is necessarily confined to the circumstances of that complaint. An investigation into the wider question of article 20 compliance (or compliance with some other relevant DSA article) by a service provider or VLOP has a necessarily broader and more systemic reach. The outcome of the latter type of s.139ZI investigation will not be a determination on whether or not an individual complaint is well-founded (although it may perhaps by implication encompass such view, depending on the terms of the determination); it will rather necessarily be a determination on the wider question of compliance with or contravention by the service provider, of the relevant DSA article.

128. Accordingly, I see nothing inconsistent with the statutory scheme, or legally impermissible, in a broader article 20 suspected contravention investigation being initiated by an authorised officer pursuant to the terms of s.139ZI in reliance, along with other information, on individual s.201 complaint information referred on by the Commission's supervisory team or on such information being relied upon together with other information in the s.139ZI investigation itself.

129. The applicant raised other grounds in relation to s.201 in its further amended statement of grounds including ground 5, being a breach of legitimate expectation, ground 6, being that the stated reason did not justify the action, and ground 7, being that there was an *ultra vires* delegation of powers to the supervisory team which is not permitted by *inter alia* s.201(4). The legitimate expectation point is a further iteration of the core argument in relation to the proper interpretation s. 201(4), namely that, on its interpretation of s.201(4), the applicant had a legitimate expectation to a final decision in respect of the complaint made pursuant to that provision. Ground 6, that the stated reason in the decisions did not justify the action in respect of three of the four decisions, is again linked to the central contention that a decision under s. 201(4) on a complaint made to the Commission should involve a determination of that complaint and ground 7 also converged to the question of the proper interpretation of s.201.

130. For the reasons set out above, I reject the applicant’s case in relation to the s.201 issue and am satisfied that the Commission acted lawfully in taking the decisions it did pursuant to s.201(4)(d) of the 2009 Act.

Delegation Issue

131. Each of the four impugned decisions were taken, in a delegated capacity, by the Commission's Digital Services Commissioner, pursuant to powers vested in the Commissioner by an instrument of delegation made pursuant to s. 8(1) of the 2009 Act. The proposed action letters sent as part of the decision-making process in each case resulted from the exercise of functions in a delegated capacity by the “Director of User Complaints”, pursuant to powers vested in that delegate by a separate instrument of delegation also made pursuant to s. 8(1) of the 2009 Act. As we shall come to, the relevant delegation instruments delegated the performance of the Commission's powers and functions pursuant to s. 201(4)(c) and (d) of the 2009 Act but not s. 201(4)(a) or (b) of the 2009 Act.

132. Section 8 of the 2009 Act (“Section 8”) is headed “Delegation of functions” and provides as follows:

“(1) Subject to subsection (3), the Commission may delegate the performance of any of its functions to a Commissioner, or to a member of the staff of the Commission, on such terms and conditions as it may determine, and the Commissioner or member of the staff of the Commission shall be accountable to the Commission for the performance of that function.

(2) Without prejudice to the generality of subsection (1), a function may be delegated under that subsection so as to be capable of being performed by any Online Safety Commissioner for the time being.

(3) The Commission may not delegate the performance of its functions under—

(a) section 17, 24, 29, or 31,

(b) subsection (3), (4) or (5) of section 48,

(c) section 50 or 51,

- (d) Part 6 or 8,*
- (e) subsection (6) or (8) of section 139ZE,*
- (f) Part 8B, or*
- (g) Part 3A of the Competition Act 2002.*

(4) A function delegated by the Commission under subsection (1) continues to be vested in the Commission and is capable of being performed concurrently by either the Commission or the delegate”.

133. The applicant contends, in essence, that the Commission improperly and unlawfully fettered the delegated decision-makers’ powers in that the decision-makers were constrained by the terms of the delegation instruments into arriving at only two of the four possible actions set out in s.201(4) (being s.201(4)(c) and (d)) and were precluded from considering or deciding upon the other two statutory actions otherwise available to the Commission (being s.201(4)(a) and (b)).

134. The Commission for its part took the view that it could not lawfully delegate the taking of actions under s.201(4)(a) or (b) as these provisions entail the taking of actions under Part 8B of the 2009 Act and the terms of s.8(3)(f) of the 2009 Act (as set out above) preclude such delegation. The Commission’s position is that it retained the power to take any of the actions in s.201(4) on foot of a s.201 complaint (as is clear from s.8(4) of the 2009 Act) and that delegates were free to return a complaint matter to it if they did not believe it appropriate to act on foot of a recommendation to take an action on a complaint under s.201(4)(c) or (d).

135. In order to put the applicant’s challenge in context, it is necessary to set out in some detail the evidence relating to the Commission’s exercise of its delegation powers in relation to the impugned decisions, the applicant’s amended case in light of that evidence and further evidence adduced by the Commission in response to the applicant’s amended case, including additional evidence furnished arising out of submissions made at the hearing before me.

Initial evidence as to delegation

136. The affidavit grounding the Commission’s statement of opposition was sworn by Judy O’Connell who is legal director with the Commission (" Ms O’Connell’s first affidavit"). In her affidavit, Ms O’Connell quite properly disclosed two instances of delegation pursuant to s.8(1) of the 2009 Act which arose during the handling of the complaints which resulted in the impugned decisions. She referenced the fact that the Commission’s letters of proposed action sent in January 2025 in respect of the complaints ("the proposed action letters") in which the Commission notified the applicant in each of the four cases of the proposed action of passing the complaint information to the Supervisory Team, involved an exercise of delegation by the Commission to the "Director of Complaints and Dispute Resolution". Ms O’Connell exhibited a delegation instrument of 27 June 2024 which addressed a delegation of powers to that delegate (the "June 2024 delegation instrument"). Ms O’Connell averred that the authority to issue the final decision letters was delegated by the Commission to the Digital Services Commissioner and the relevant certificate of delegation, dated 9 September 2025, was exhibited in relation to that delegation ("the September 2025 delegation instrument").

137. Each of these delegation instruments was in materially identical form. The June 2024 delegation instrument stated that the Commission, by virtue of the powers invested in it under s. 8(1) of the 2009 Act, *“hereby delegate to the Director of Complaints and Dispute Resolution (the ‘Delegate’) (and, in the event of the Director of Complaints and Dispute Resolution's absence from An Coimisiún for any period, the Director of User Experience shall act as the Delegate during that period)”* and specified statutory powers and functions of the Commission under s.201 of the 2009 Act, namely:

- “(i) The performance of An Coimisiún’s powers and functions pursuant to section 201(4)(c) of the 2009 Act;*
- (ii) The performance of An Coimisiún’s powers and functions pursuant to section 201(4)(d) of the 2009 Act; and*
- (iii) The performance of An Coimisiún’s powers and functions pursuant to section 201(2) of the 2009 Act”.*

138. The June 2024 delegation instrument went on to state that *“For the avoidance of doubt, pursuant to section 8(4) of the 2009 Act, the above delegated functions continue*

to be vested in An Coimisiún and are capable of being performed concurrently by An Coimisiún and the delegate”.

139. The September 2025 delegation instrument was in materially identical terms save that it recited a delegation by the Commission, by virtue of the powers invested in it under s. 8(1) of the 2009 Act, to "the Digital Services Commissioner". The same statutory powers under ss. 201(4)(c), 201(4)(d) and 201(2) of the 2009 Act were recited with the same reservation pursuant to s. 8(4) of the 2009 Act.

Applicant's amended case contending delegation was unlawful

140. On foot of the disclosure of these delegation instruments, the applicant successfully applied to further amend its statement of grounds to make a case that there had been an unlawful, partial and undisclosed delegation of the Commission's functions under s. 201 that led to an unlawful fettering of the Commission's powers and functions under s. 201 in relation to the handling of the impugned complaints.

141. In summary, the applicant pleaded that, as the delegation instruments only purported to delegate the performance of the Commission's powers and functions under ss.201(2), 201(4)(c) and 201(4)(d) of the 2009 Act, and not the powers and functions under s.201(4)(a) (i.e. the power to issue compliance notices under s.139ZZGA) or s.201(4)(b) (i.e. the power to investigate in accordance with s.139ZI(1)), the Commission improperly and unlawfully fettered the delegated decision-makers' powers in that the decision-maker was constrained to reach only two of the four outcomes set out in s. 201(4) and was precluded from considering, proposing or deciding upon the other two statutory outcomes. The applicant also pleaded that the non-disclosure of the delegation was contrary to the requirements of transparency, fair procedures and good administration.

142. The applicant also pleaded that, as a further illegality, the relevant decision-making was taken by the Director of User Complaints and not the Director of Complaints and Dispute Resolution. The applicant also makes a case that the delegations explain, in whole or in material part, the consistent pattern of the Commission's decisions to refer complaints made under s.201 to its Supervisory Team as part of the other action which

the Commission says it can take under s.201(4)(d) of the 2009 Act which amounted to an undisclosed policy of arriving at such decisions in all cases.

143. The applicant says that its legal case in this regard is supported by the further evidence which the Commission put before the court by way of a further affidavit of Ms O'Connell sworn in response to the further amended statement of grounds dealing with the delegation issue.

Commission's further evidence re delegation issue

144. In her further affidavit (sworn 13 May 2026), Ms O'Connell ("Ms O'Connell's second affidavit") in addressing the delegation issue, explained the Commission's internal administrative arrangements for handling complaints concerning the DSA. She averred how, within the Commission, the User Complaints Team (UCT), acting under the oversight of the Director of User Complaints and Dispute Resolution, has responsibility for handling complaints. She stated as follows:-

"To this end, it carries out an initial assessment of the complaint pursuant to section 201(2), notifies (pursuant to section 201(3)) the complainant where the complaint is transmitted under section 201(2), carries out a further assessment under section 201(4) where appropriate, and notifies the complainant and the intermediary service provider of proposed and final actions under section 201(4) in accordance with section 201(5) and 201(9) respectively. All of these procedural steps are operational in nature, are acts of An Coimisiún as a whole, and do not require any express delegation. An Coimisiún could not effectively discharge its complaint handling functions if these procedural and operational steps were not carried out by the UC [User Complaints] team".

145. Ms O'Connell averred how, in the case of s. 201(2), the User Complaints Team (UCT) member with responsibility for the complaint will conduct an initial assessment. Where that team member is of the view that the complaint falls within the competence of another competent authority, the member will propose transmission by the relevant decision-maker to that competent authority under s. 201(2). This decision-maker will assess the relevant material prior to deciding whether or not to take the delegated decision or transmitting the complaint to another authority.

146. Ms O'Connell further averred how, in the case of s. 201(4), *"the UCT member with responsibility for the complaint will conduct the further assessment and consider the appropriate action. They will then propose this action to the relevant decision-maker for their consideration and, as appropriate, confirmation. The full range of actions under s. 201(4)(a)-(d) are available in this context"*.

147. Ms O'Connell in her second affidavit explained that the Director of Complaints and Dispute Resolution (the subject of the June 2024 delegation instrument) is the same position as the "Director of User Complaints" (who was involved in deciding on the proposed action letters) with the title "Director of Complaints and Dispute Resolution" simply reflecting the contractual job title associated with the Director of User Complaints position and that it was only the user complaints function that was relevant for the purposes of these proceedings.

148. Ms O'Connell explained the Commission's view that the functions under s.201(4)(a) and 201(4)(b) were not delegated because those functions engage powers under Part 8B of the 2009 Act, namely the service of a compliance notice under s.139ZZGA and the commencement of an investigation in accordance with s.139ZI(1) and that, pursuant to s. 8(3)(f) of the 2009 Act functions under Part 8B could not be delegated. She says that, in order to ensure the independence of the Commission in the context of Part 8B, any decisions taken under ss.201(4)(a) and (b) are limited to the authorisation of an authorised person pursuant to s.139ZZGA or s.139ZI(1); any decision to serve a compliance notice or to commence an investigation are ultimately decisions of the appointed authorised officer, independent of the Commission.

149. While noting it was a matter for legal submission, Ms O'Connell pointed out at para 50 of her second affidavit that, pursuant to Section 8(4) of the 2009 Act, a function delegated by the Commission pursuant to Section 8(1) continued to be vested in the Commission and was capable of being performed concurrently by either the Commission or the delegate. Accordingly, she said, if in respect of a given complaint the circumstances were such that it was appropriate for the Commission to exercise its powers under s.201(4)(a) or (b) it would be entirely capable of doing so.

150. Ms O’Connell averred (at paras 51 and 52 of her second affidavit) that where the UCT member has carried out a further assessment under s.201(4) *“and considered the appropriate action thereunder, the team member proposes this action to the relevant decision-maker for their consideration and, as appropriate, confirmation. In any given case, the full range of actions under s. 201(4) are available to An Coimisiún”*. (emphasis added).

151. At para 53 of that affidavit, Ms O’Connell averred that *“As actions under section 201(4)(c) and (d) have been delegated, in the case of those powers and functions, the team member would propose the action to a delegated decision-maker. The decision as to whether or not to take a proposed action under section 201(4)(c) and (d) rests with the delegated decision-maker”*. (emphasis added).

152. During the course of his oral submissions on the delegation issue, counsel for the Commission submitted, on the basis of Ms O’Connell’s affidavit evidence at para 53 of her second affidavit (i.e. that “the decision whether or not to take a proposed action under section 201(4)(c) and (d) rests with the delegated decision-maker”) that:-

“If the delegated decision-maker had a concern that in fact it wasn't appropriate to do so and in fact the appropriate course of action was to trigger an investigation under section 201(4)(b) or to trigger the process for serving a compliance notice under section 201(4)(a) that can be sent to the relevant decision-maker. Because at all times, having regard to section 8(4) of the 2009 Act and the express terms of the instrument of delegation itself, An Coimisiún is empowered to exercise those functions”. (Transcript, Day 2, pp. 83 and 84).

153. I then raised a number of questions with counsel for the Commission including where the delegate got the power to refer the matter back to the Commission and whether that was addressed in the evidence, and how the delegate could consider matters under s.201(4)(a) or (b).

154. In answer to those questions, counsel for the Commission referenced Ms O'Connell's second affidavit at paras 50 and 51 which, as we have seen, stated that in respect of any given complaint the Commission would be capable of exercising its powers under

section 201(4)(a) and (b) if it considered it appropriate to do so. He also referenced Ms O’Connell’s evidence (at para 51 of her second affidavit) that the User Complaints Team member carries out the further assessment under s.201(4) and proposes an appropriate action to the relevant decision-maker “for further consideration and as appropriate confirmation” (emphasis added). He also referenced Ms O’Connell’s evidence at para. 53 of that affidavit that “the decision as to whether or not to take a proposed action under section 201(4)(c) and (d) rests with the delegated decision-maker” (emphasis added).

155. In further exchanges with the court, counsel for the Commission reiterated that the delegated decision-maker does not have to make a decision on the UCT member’s recommendation, can refuse to follow their recommendation and, if so, *"as a matter of practicality it goes back to UCT and it falls for further consideration... and the appropriate channel... would be then for it to go to An Coimisiún itself"* (transcript day 2 page 87). He accepted that the “practical modalities” of that process of a matter being sent back by the delegate to the Commission were not specifically addressed on affidavit (transcript day 2 page 84).

156. At the conclusion of the arguments from both sides on the delegation issue, I raised a concern that there was an absence of express evidence in relation to counsel for the Commission's statement that a delegate would in practice send a matter back to the User Complaints Team if the delegate was not satisfied to follow the recommendation of the UCT in respect of the appropriate course of action under s.201(4). Following discussion with counsel, I gave the opportunity to the Commission to put in supplemental evidence on this point (subject to any objections which the applicant might wish to raise to that course of action).

157. Ms O'Connell then swore a further affidavit (her third affidavit) on 17 July 2026. It is necessary to set out the evidence from this affidavit in some detail:

“5. As addressed at paragraphs 51 and 53 of my Second Affidavit, where the UCT, having undertaken a further assessment of a complaint on behalf An Coimisiún, considers that a decision pursuant to section 201(4)(c) or (d) is appropriate in respect of a given complaint, and the powers under section

201(4)(c) or (d) have been delegated, the UCT sends a draft decision document to the delegated decision-maker (the “Delegate”), setting out its recommendation. This is what occurred in respect of each of the Complaints relevant to the Proceedings and, in each case, the recommendation was to take action pursuant to section 201(4)(d) to pass the complaint information to An Coimisiún’s Supervisory Team.

6. I wish to emphasise that a recommendation from the UCT in this regard is no more than a recommendation. The UCT is not a decision-maker; only An Coimisiún or a Delegate can make a decision under section 201. An Coimisiún or a Delegate considers the recommendation and raises queries as appropriate. As addressed at paragraph 53 of my Second Affidavit, where a recommendation is sent to the Delegate, the decision “whether or not” to take a proposed action under section 201(4)(c) or (d) rests with the Delegate. Accordingly, the Delegate is entirely free to decline to follow the recommendation. This may occur where, for example, the Delegate is not satisfied on the basis of the material before them that the proposed decision is appropriate (which has occurred on at least one occasion), or where the Delegate considers that some action-including action under section 201(4)(a) or (b) – is appropriate, or for other reasons specific to the particular complaint. As I observed at paragraph 54 of my Second Affidavit, the fact that An Coimisiún did not take action under section 201(4)(a) and (b) in respect of the Complaints at issue in the Proceedings had nothing to do with the nature and scope of the delegations but was a reflection of the serious and significant nature of those powers which would only properly be exercised in appropriate circumstances.

7. Where the Delegate declines to make a decision in line with the UCT’s recommendation, the matter returns to the UCT, with comments, for further consideration. Having considered the matter further, it is open to the UCT to make a fresh draft decision, with a new recommendation, complying with section 201(5) of the Broadcasting Act as necessary. If the recommendation is to take action pursuant to section 201(4)(c) or (d), the UCT would send the draft decision either to the Delegate or to An Coimisiún. If the recommendation is to

take action pursuant to section 201(4)(a) or (b), the UCT would send the draft decision to An Coimisiún, as only An Coimisiún can take such a decision.

8. It should be borne in mind that the Delegate relevant to the Complaints were the Director of User Complaints and An Coimisiún and An Coimisiún's Digital Services Commissioner. The Director of User Complaints oversees the UCT's operations as a whole on a day-to-day basis. The Digital Services Commissioner is a member of An Coimisiún and has overall responsibility for enforcement in respect of digital services. Accordingly, both Delegates are well placed to determine whether or not to follow a recommendation to the UCT in respect of a particular complaint. As addressed at paragraphs 55 and 56 of my Second Affidavit, the delegation of the functions under section 201(4)(c) and (d) in this context takes place for administrative and operational reasons and gives An Coimisiún an important degree of flexibility in handling complaints and decision-making under section 201. This is particularly important having regard to the volume of complaints received by An Coimisiún (a point addressed at paragraphs 19 and 20 of my First Affidavit) ”.

158. The applicant ultimately, and reasonably, did not object to this further affidavit being tendered in respect of the matter. However, the applicant filed a replying affidavit of Mr Janusz Baszynski, the applicant's finance director. In this affidavit, Mr Baszynski raised a number of objections to the evidence tendered by Ms O'Connell in her third affidavit. He made the point that Ms O'Connell was not a member of the UCT and was not a delegate in respect of any of the complaints at issue in these proceedings. He complained that she did not explain how she had knowledge of what the UCT or delegates in fact considered or did in the cases in issue in the proceedings. He pointed out that the language in Ms O'Connell's third affidavit was conditional and hypothetical, describing what might happen, not what did happen or even "(with one possible exception)" what has happened. He noted that no email, procedure document or contemporaneous record was exhibited or referred to in support of the "iterative process" described in Ms O'Connell's third affidavit.

159. Mr Baszynski in his affidavit exhibited various documents which the applicant had obtained from the Commission pursuant to a freedom of information request. These

documents included the "record of proposed and final decision" in respect of the complaints which led to the impugned decisions, in addition to such records for decisions not challenged in these proceedings ("the decision records"). He characterised the decision records as the Commission's own decision-making template being "a formal working document that records each step in the assessment and determination of a complaint as it occurs". Mr Baszynski stated: "*The Decision Records in defined stages, populating it as the complaint is assessed. It proceeds through five formal stages: Stage 1 (Validity Assessment); Stage 2 (Jurisdictional Assessment); Stage 3 (Further Assessment); Stage 4 (Proposed Decision on Complaint pursuant to Section 201(4)) and Stage 5 (Decision under Section 201(4))*". He expressed the view that "each stage is completed sequentially before the next is commenced" and that the decision record in each case records "the matters considered, the analysis undertaken and the conclusions reached at each stage". He expressed the view that the decision record ought to be a complete and self-contained account of the process from start to finish "not a partial or selective record". He makes the point that the decision records contains no trace of the "elaborate process" now described in Ms O'Connell's third affidavit, there being:

"no stage for the UCT to consider whether to refer to the Commission for action under (a) or (b), no record of the delegate considering whether to accept or decline the recommendation, no step for referring a matter back to the UCT. I say and believe that the fact that it does not do so is significant and suggests strongly that the process now described in the Third Affidavit was not in fact in place at the relevant time".

160. Mr Baszynski also exhibited decision records for decisions in three other cases, not the subject of these proceedings, which all follow the same five-stage structure. He expressed the view that "*The explanations in the Third Affidavit appear to be ex post facto legal explanations constructed to address the difficulties identified in the Amended Statement of Grounds. None of what is put forward is based in fact verified by any contemporaneous document or record*".

161. In responding to other aspects of Ms O'Connell's third affidavit, Mr Baszynski stated that:

“Paragraph 7 [of Ms O’Connell’s third affidavit, set out above] describes a decision-loop whereby the delegate declines, the matter ‘returns to the UCT, with comments’, the UCT makes ‘a fresh draft decision with a new recommendation’ and if the recommendations for action under (a) or (b), the UCT sends it to the Commission. However there is no evidence that any of this has ever actually happened and as noted above the Applicant has not seen any contemporaneous (or even later) policy or procedure documents attesting to the existence of such a procedure”.

162. Mr Baszynski concludes his affidavit by stating that the applicant *“does not accept that there was, at the relevant time, a procedure in place such as that now described by Ms O’Connell”*.

163. The applicant effectively invites me to disregard Ms O’Connell’s evidence and the submissions made by counsel for the Commission which were posited on the position described in that evidence (presumably at that point given by way of instructions) on the basis that the facts deposed to by Ms O’Connell are not true. The applicant’s position is tantamount to the serious allegation that Ms O’Connell and the Commission have invented a process as an *ex post facto* rationalisation of their legal case. This is contended for on the essential basis that such a process (i.e. of delegates refusing to follow a recommendation and referring the matter back to the Commission) has not been borne out in any document or record put before the court by the Commission and that the Commission’s standard form decision records do not build in or make room for such a process.

164. I am not persuaded that I should disregard Ms O’Connell’s evidence in the manner contended for by the applicant. I do not accept that Ms O’Connell was not in a position to validly give evidence on these matters. She had given the Commission’s earlier affidavit evidence on this issue and her third affidavit sought to elaborate upon, and put in context, that earlier evidence. I prefer to focus instead on the terms of evidence. Her evidence is not conditional or hypothetical. At para 53 of her second affidavit, she stated that the decision as to “whether or not” to take a proposed action under s. 201(4)(c) or (d) rests with the delegate and in her third affidavit she says that “An Coimisiún or a

Delegate considers the recommendation [of the UCT] and raises queries as appropriate”. She avers that as a matter of fact on at least one occasion it has occurred that the delegate was not satisfied on the basis of the material before them that the proposed decision of the UCT was appropriate (third affidavit, para 6). She avers, as a fact, that “*where the delegate declines to make a decision in line with the UCT's recommendation, the matter returns to the UCT, with comments, for further consideration*”. She also avers that the relevant delegates, being the Director of User Complaints and the Digital Services Commissioner are both well placed to determine whether or not to follow a recommendation of the UCT in respect of a particular complaint given their roles and experience; the Director of User Complaints oversees the UCT's operations as a whole on a day-to-day basis and the Digital Services Commissioner is a member of An Coimisiún who has overall responsibility for enforcement in respect of digital services.

165. While it may have been useful for the Commission to have placed some documentary evidence before the court of the occasion where a delegate did not follow a recommendation and sent the matter back to the UCT, I do not accept that the absence of such material renders inaccurate, still less inadmissible, Ms O'Connell's sworn evidence that as a matter of fact this has happened. As regards the applicant's complaint that the decision records do not make space for or otherwise make provision for a delegate refusing to follow a recommendation, I do not see this point as fatally undermining Ms O'Connell's evidence. If that course of action occurred, that fact is clearly capable of being recorded on the template (e.g. at stage 5 of the process) along with the ultimate decision made under s. 201(4) thereafter.

166. Accordingly, I proceed on the basis as averred by Ms O'Connell that a recommendation to a delegate for a course of action under s. 201(4)(c) or (d) is simply that, a recommendation; that the delegate has the power to consider the complaint with the recommendation and arrive at his or her own view as to whether the recommendation should be followed and if the delegate believes it not appropriate to follow the recommendation, that the delegate can send the recommendation back to the UCT with comments as appropriate and that the Commission can thereafter exercise any of its functions under s. 201(4) including, if it considered appropriate, deciding to take action under s. 201(4)(a) or (b) in respect of that complaint.

Applicant's submissions on the delegation issue

167. The applicant's case is a straightforward one: it submits that this evidence demonstrates that once a User Complaints Team member proposes a course of action under s. 201(4)(c) or (d) to the delegated decision-maker, that decision-maker does not lawfully have power to make any decision under s.201(4)(a) or (b). In this way, the decision-maker is fettered in his or her decision-maker and it is inevitably channelled into making a decision under (c) or (d). Unless the complaint is a frivolous or vexatious one or was not made in good faith, or the subject matter of the complaint is trivial, this necessarily compels the decision-maker to exercise only option (d).

168. The applicant submits that, outside of s.8, there is no equivalent provision in the 2009 Act for the Commission to perform its functions through duly authorised staff members. Accordingly, the general principle of "*delegatus non potest delegare*" applies. This is the general principle, as described in Hogan, Morgan and Daly: *Administrative Law in Ireland* (5th Ed., 2019), at para. 11-73, that "A power must be exercised by the authority (*delegatus*) in which it has been vested by the legislature. It cannot be transferred (*delegare*) to any other person or body". Hogan, Morgan and Daly cite as a "straightforward example" that of *Lawlor v Flood* [1999] 3 IR 107 where the chair of a tribunal of inquiry had ordered the applicant to answer in private session questions posed by counsel for the tribunal but where it was held that the governing legislation only provided for the examination of witnesses by the tribunal itself and therefore the power could not be delegated to counsel for the tribunal. As Hogan, Morgan and Daly point out, the maxim is merely a rule of statutory construction rather than a constitutional rule and they quote a statement from Craig: *Administrative Law* (8th Ed., 2016), at p. 528, that:-

"Whether a person other than that named in the empowering statute is allowed to act or not will be dependent on the statutory context. The nature of the subject-matter, the degree of control retained by the person delegating, the type of person or body to whom the power is delegated, will all be taken into account".

169. The applicant submitted that there was no substance to the contention that the delegate's powers only took effect at the time of the decision; a single unitary function was involved, namely the further assessment of the complaint followed by one of the actions specified in the four subsections of s.201(4); there was no basis upon which this single unitary function could be subdivided as the Commission sought to do. To do so was in substance to contend that the delegate merely acts as a rubberstamp with no function other than to follow through on the recommendation from the User Complaints Team. It submitted that this was not legally permissible on a proper interpretation of s. 201(4), as such assessment must be made by the decision-maker with all the options available. Ms O'Connell's evidence, it was submitted, demonstrated that the Commission simply had an erroneous view of the law as to the scope of its powers of delegation in respect of s.201.

170. The applicant submits that the Commission's position reveals a further material error of law in its understanding of s.201 and its powers of delegation under s. 8 of the 2009 Act. In particular, it contends that the Commission's apparent view, as disclosed by Ms O'Connell's affidavit, that it could not delegate powers under s.201(4)(a) or (b) because those powers on the Commission's view engage matters within Part 8B of the 2009 Act is simply wrong as a matter of law.

171. The applicant says that this follows for a number of reasons.

172. Firstly, s.8(3) of the 2009 Act sets out a series of functions the performance of which may not be delegated. This subsection sets out an exhaustive list of non-delegable functions. Section 201 is not listed in s. 8(3). Therefore, on the face of it, the performance of the functions set out s. 201 are capable of being delegated in full by the Commission.

173. Secondly, the applicant points out that in a number of the matters listed in s.8(3) themselves involve subsections of particular sections (being subs. (3), (4) or (5) of s. 48 and subs.(6) or (8) of s.139ZE) such that if the Oireachtas wanted to confine the subsections of functions under s.201 which could not be delegated, it could have done so but did not do so.

174. Thirdly, and more fundamentally, the applicant submits that the proper reading of s.201(4) shows that, once the Commission does not transmit the complaint elsewhere under subsection (2), a single function is involved namely a further assessment of the complaint leading to the taking of one of a range of actions. It submits that the Commission simply erred in law in treating the range of actions set out in s.201(4)(a) to (d) as themselves being individually separate functions. The correct interpretation of the provision is, rather, that there was only one function to delegate being that of a further assessment leading to the taking of one of the specified actions.

175. The applicant submits that the taking of action under s.201(4)(a) and (b) do not involve the performance of functions under Part 8B; the proper interpretation of those provisions is that the Commission may set in train steps which will lead, further to s.201(4)(a) and (b), to steps being taken under Part 8B such as the appointment of an authorised person to consider the question of a compliance notice under s.139ZZGA or the question of whether to appoint an authorised officer to invest a complaint in accordance with s.139ZI(1). This is clear from the fact that s.201(4) refers to "the Commission" taking the specified actions in circumstances where, on the clear terms of ss. 139ZZGA and 139ZI(1), it is an authorised person and not the Commission which takes the actions under those provisions. The applicant points out in this regard that there will be nothing to stop the Commission delegating powers under s.201(4) to a person who would become an authorised person under s.139ZI or s.139ZZGA.

176. The applicant submits that this fundamental error on the part of the Commission in relation to its delegated powers thereafter explains the consistent and invariable pattern (outside of cases where there is demonstrably no basis to the complaint) of transferring complaints on to the Supervisory Team under s.201(4)(d). All of this has been shaped by an erroneous understanding on the Commission's part of the limits of the power of its delegation powers. The applicant relies in this regard on the fact that there is no evidence of any person involved in the decisions in issue having in fact considered the compliance notice or investigation options in respect of the complaints in issue. There is no evidence from any User Complaints Team member nor from the decision-makers that the full range of options under s.201(4) was in fact considered.

177. The applicant relied on the principle established in cases such as *Mishra v Minister for Justice* [1996] 1 IR 189 that a discretionary power, including one conferred by its statute, cannot be applied or operated in a way which fetters the discretion conferred by the Act. In *Mishra*, Kelly J stated that “*care must be taken to ensure that the application of [the] policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the Act*” (recently cited with approval by Sara Phelan J in *Masood v Minister for Justice* [2025] IEHC 485 at para 53 and also cited by Edwards J in the Court of Appeal in the case of *Robinson v The Minister for Defence* [2023] IECA 88, at para 77).

Commission’s submissions on delegation issue

178. The Commission, for its part, contends that it was perfectly entitled to delegate the function of taking a decision to adopt an action under s.201(4)(c) and (d) to a delegate as is clear from the broad terms of s. 8(1) of the 2009 Act which it says permits delegation of any of its functions which must include its power to take actions under s.201(4)(c) and (d). It could not, as a matter of law, delegate the taking of the actions set out in s. 201(a) or (b) because the actions set out in those subsections clearly involve the exercise of functions in Part 8B of the 2009 Act (namely the Commission's functions in appointing an authorised person to consider appointment of an authorised officer to commence an investigation under s.139ZI(1) or serve a compliance notice under s.139ZZGA), and s.8(3) is clear in precluding the delegation of such functions by the Commission.

179. The Commission's core point is that the evidence makes clear that there is simply no fettering of the delegate’s decision-making discretion as contended for by the applicant; a delegate is free to decide to take the action recommended by the UCT, if the delegate considers that that course of action is appropriate. If the delegate does not so consider, the delegate can refuse to follow the recommendation and refer the matter back to the UCT, at which point the Commission (which at all times retains the power to exercise the full range of functions under s. 201(4)) can address the matter as it sees fit. It effectively contends that the applicant is seeking to drive a wedge into the internal

decision-making of the Commission, where there is no legal or factual basis for any concern.

Delegation issue - discussion

180. The delegation issues that arise in these proceedings flow from the Commission's view, as explained on affidavit by its legal director, Judy O'Connell, that the functions pursuant to s.201(4)(a) and s. 201(4)(b) were not capable of delegation because those functions "engage powers" under Part 8B of the 2009 Act, namely the service of a compliance notice under s.139ZZGA and the commencement of an investigation in accordance with s.139ZI(1) and that pursuant to s.8(3)(f) of the 2009 Act such functions under Part 8(b) cannot be delegated.

181. In my view that interpretation is correct for the following reasons.

182. It is necessary firstly to look at the proper interpretation of s.201(4)(a) and (b). As I indicated earlier, in my view, the proper interpretation of s.201(4)(a) and (b) is that the Commission shall take the steps of initiating the relevant compliance notice or investigation processes by the appointment of an authorised person for that purpose. I say so for the following reasons.

183. Section 201(4)(a) refers to the Commission taking the action of "serv[ing] an intermediary service provider a compliance notice under section 139ZZGA". However, under the terms of s.139ZZGA, the Commission cannot itself serve an ISP with a compliance notice under s.139ZZGA. In fact, s.139ZZGA(1) refers to "a person authorised by the Commission under subs.(2)" being of the opinion that a relevant intermediary service provider has infringed a provision of the DSA to which that section applies (the relevant articles of the DSA to which the section is applicable being set out in s. 139ZZGA(14)) and empowers that authorised person (and not the Commission itself) to direct an authorised officer to serve a compliance notice on the provider. The Commission's role under s. 139ZZGA is confined to s.139ZZGA(2) which provides that "The Commission may authorise any Commissioner or member of its staff for the purposes of subsection (1)" i.e. the Commission can authorise a person who can in turn direct an authorised officer to serve a compliance notice on the provider. Accordingly,

where s. 201(4)(a) provides that the Commission may serve an ISP with the compliance noted under s.139ZZGA, in my view, that has to be read, in light of the terms of the 2009 Act as a whole and s.139ZZGA in particular, as meaning that the Commission may appoint an authorised person under s.139ZZGA(2) who may then form an opinion as to infringement of the DSA and direct an authorised officer to serve a compliance notice on the provider.

184. Similarly, in relation to the power conferred by s. 201(4)(b) on the Commission to “investigate a complaint in accordance with s.139ZI(1)”, s.139ZI is structured in a similar manner to s. 139ZZGA. S139ZI(1) provides that “*if a person authorised by the Commission under subsection (2) believes there is a reason to suspect that there has been a contravention, the person may direct an authorised officer to carry out an investigation of the suspected contravention*”, and s.139ZI(2) provides “*the Commission may authorise any Commissioner or member of its staff for the purposes of subsection (1)*”. It follows that, as s.201(4)(b) cannot be complied with in literal terms, given that the Commission has no power under s.139ZI(1) to investigate a complaint (or “suspected contravention”, using the wording of s.139ZI(1)), s.201(4)(b) must be interpreted reading the 2009 Act as a whole and in particular reading s.201 in light of s.139ZI, as meaning that the Commission may take the step under s.139ZI(2) of authorising any Commissioner or member of staff as an authorised person who may then direct an authorised officer to carry out an investigation of the suspected contravention reflected in the complaint.

185. Accordingly, in my view, the proper interpretation of s.201(4)(a) and (b) is that the Commission shall take the appropriate initiating steps under ss.139ZZGA or s.139ZI(1) by the appointment of an authorised person as the first step in the procedures set out in those provisions which can then lead to the service of a compliance notice by an authorised officer or the commencement of an investigation.

186. The applicant contends that the decision to take an action under s.201(4)(a) or (b) involves the exercise of a function under s.201, and not under Part 8B, such that s.8(3)(f) does not apply and the Commission could lawfully have delegated the exercise of such functions (along with the powers to take action under s.201(4)(c) or (d)) to a delegate

thereby making a lawful delegation of all available powers under s.201(4) such as to avoid the fettering of discretion resulting from delegating only some of those powers.

187. While it is correct to say that a decision to take an action under s.201(4) is a decision within s.201, in my view, the actions as specified in s.201(4)(a) or (b) clearly involve the exercise of functions under the identified separate sections of the 2009 Act, being s.139ZZGA and s.139ZI. Those sections are in Part 8B. While they may be said to be reasonably limited and discrete functions under Part 8B, they are nonetheless clearly functions within Part 8B and as such are not delegable by virtue of s.8(3)(f) of the 2009 Act. If the Commission decides, at the further assessment stage of a complaint made under s.201, to take the action pursuant to s.201(4)(a) of triggering the service of a compliance notice under s.139ZZGA by the appointment of an authorised person with power to direct an authorised officer to do so, or pursuant to s.201(4)(b), to appoint an authorised person with power to direct an authorised officer to investigate the complaint in accordance with s.139ZI(1), those actions involve the performance of functions under Part 8B.

188. I do not believe that I can qualify the scope of the non-delegation prohibition in s.8(3)(f) by reading in, after the words “Part 8B”, the words “*save for the exercise of powers under s.139ZZGA or s.139ZI*” or “*save for the exercise of powers under s.139ZZGA or s.139ZI where those powers are exercised on foot of a complaint pursuant to s.201*”. There is a clear rationale to the Commission alone being allowed under the statutory scheme to exercise the serious powers of initiating the process leading to the issuing of a compliance notice or the commencement of a formal investigation. In my view the words of s.8(3), including s.8(3)(f), read in light of the relevant parts of the 2009 Act, should be interpreted in accordance with their actual terms namely that the Commission cannot delegate the performance of its functions under Part 8B. That includes its functions under s.139ZI and s.139ZZGA. Accordingly, in my view, the Commission was correct to take the view that it could not delegate those functions to a delegate in the context of the s.201 decision-making process.

189. The position is clearly different in respect of the actions set out in s.201(4)(c) or (d); the delegation of the functions involved in the performance of those actions is not prohibited from delegation by the terms of s.8(3).

190. The next step in the analysis is to consider whether the delegation engaged in here involved a fettering of the powers of the delegate (or, indeed, the Commission) in terms of the range of actions open to it under s.201(4). In short, did the fact that the delegates were only empowered to exercise the performance of powers and functions under s.201(4)(c) and (d) mean that the delegate (and the Commission by extension) was improperly fettered to only arriving at decisions under those subsections?

191. As we have seen from the evidence on this issue discussed earlier, it is not the case in fact that the delegates were constrained to reach a decision under only either s.201(4)(c) or (d). If the delegate having considered the complaint and related representations was of the view that the action recommended by the UCT (e.g. in relation to an action under s.201(4)(d) alone) was not the appropriate action, the delegate can refuse (and has in fact in the past refused) to follow that recommendation and send the matter back to the UCT. This means that the Commission is then free in such a case to take any of the actions under s.201(4)(a) to (d) as it considers appropriate. It is important to have regard to the relevant test set out in *Mishra v Minister for Justice* namely whether the Commission disabled itself from exercising its discretion in individual cases because of the approach taken by it in relation to the question of delegation. The evidence before me is that the Commission did not disable its discretion and did not operate in practice to improperly bind the decision-maker. The key point is that it was open to the delegate to decide not to exercise the recommended delegated power in which case the matter would come back to the Commission to determine which action under s.201(4)(a) to (d) it considered appropriate to take. It is clear by virtue of the terms of s. 8(4) that the Commission, notwithstanding the delegation of powers at all times retains the power to make any decision in respect of any of the four permitted actions under s. 201(4)(a) to (d).

192. In the circumstances, I do not believe it can be said that the Commission improperly disabled itself from exercising its statutory discretion by reference to any of the matters available to it under s. 201(4). There is no improper fettering of discretion involved in this system. It might be a somewhat inelegant system but that is a product of the structure of the relevant provisions of the 2009 Act, and not of any legally impermissible steps on the part of the Commission or its delegates.

193. It is necessary to deal with one further related issue, namely the applicant's complaint that the further assessment of the complaint under s.201(4) and the action decided to be taken on foot of that assessment is a unitary function, and the process as described in Ms O'Connell's evidence seeks to impermissibly split that unitary function. I do not agree. In my view, the correct position is that the function ultimately exercised by the Commission or its delegate under s. 201(4) is the taking of one of the actions set out in (a) to (d). In order to arrive at a decision on an action, the decision-maker (whether the delegate or the Commission itself) must obviously assess the complaint in the sense of considering the complaint and the representations received in response to it, and evaluate what the appropriate course of action is, within the limits of the delegation, if such a delegation is involved. On the evidence before me, it is clear that the UCT, in conducting what Ms O'Connell has described as a "further assessment" is effectively conducting its assessment of the complaint as part of the process of recommending a course of action on foot of that assessment. The making of a recommendation remains just that however: a recommendation. Such a recommendation does not (and could not) preclude the decision-maker (whether the delegate or Commission) from then assessing or considering the material related to the complaint when arriving at a decision as to what action is to be taken on foot of the complaint under s.201(4). As the evidence demonstrates, the decision-maker is not funnelled into a pre-ordained outcome or constrained in its own assessment of the complaint and the action which may (or may not) be appropriate as a result of such assessment.

194. Put another way, inherent in a decision by a delegate as to whether or not to take a decision under s.201(4) (c) or (d) is an assessment by the delegate of the complaint. The delegate looks at the complaint, and the representations related to it, makes his or her own assessment of it and decides if he or she agrees with the proposed action. If not, the delegate sends the matter back with comments as appropriate to the UCT and the Commission can look at the matter afresh. The key point is that at no time is the delegate or Commission forced into taking a course of action which would amount to a fettering of either the delegate's delegated powers or functions or the Commission's overall powers and functions under s. 201. If the matter is referred back by a delegate to the Commission, an operative decision as to the step to be taken under s.201(4)(a) to (d) in respect of the complaint remains to be taken.

195. In the circumstances, I do not believe that the applicant's case on the delegation issue is well-founded.

196. For completeness, I will address some residual arguments on the delegation issue advanced by the applicant.

197. It was pleaded that, as a further illegality, the relevant decision-making was taken by the Director of User Complaints and not the Director of Complaints and Dispute Resolution. I am satisfied on the evidence that there is no substance to this point in circumstances; the Director of User Complaints and the Director of Complaints and Dispute Resolution are one and the same person and the proposed action decisions were in fact accordingly taken by the office holder who was the relevant delegate under the June 2024 delegation instrument.

198. The applicant also advanced a case that the delegations explain, in whole or in material part, the consistent pattern of the Commission's decisions to refer complaints made under s.201 to its Supervisory Team as part of the other action which the Commission says it can take under s.201(4)(d) of the 2009 Act which amounted to an illegitimate and undisclosed policy of deciding in advance to adopt that outcome in relation to all complaints relating to the applicant. The Commission emphatically denied the existence of any such policy and I do not believe that the applicant has satisfied the burden of proof of demonstrating that such a policy is, or was at the relevant times, in place. The fact that there was a similar outcome to a series of complaints does not without more substantiate the serious allegation that there was an unlawful, secret policy of requiring such an outcome in all cases.

199. As regards the pleaded case that there was a non-disclosure by the Commission of the system of delegation in operation here that was contrary to the requirements of transparency, fair procedures and good administration, in my view there is no basis to that allegation. Each of the proposed action letters and the final decision letters made clear in terms that the powers being performed relevant to those letters/decisions were being performed by delegates. The proposed action letters stated that “*the functions of An Coimisiún for the purpose of the actions outlined in this letter are being exercised,*

in a delegated capacity, by the Director of User Complaints pursuant to Section 8(1) of the 2009 Act". The final decision letters stated that "*the functions of An Coimisiún for the purpose of the actions outlined in this correspondence are being exercised by the Commissioner for Digital Services pursuant to Section 8(1) of the 2009 Act*". The Commission was transparent about that fact that its functions were being exercised in a delegated capacity and identified the relevant delegates. The applicant could have pursued further information as to the relevant delegations of power following receipt of those letters and decisions if it saw fit.

Conclusion on delegation issue

200. For the reasons set out above, I am satisfied that the impugned decisions were not vitiated by an unlawful delegation of powers on the part of the Commission.

Discrete grounds of challenge to MR Decision

201. A complainant, MR, lodged two complaints in relation to the applicant with the Commission, the first on 30 July 2024, and the second on 1 August 2024. These complaints were wide-ranging in nature and not always easy to follow. However, in essence, they complained that the applicant had breached articles 16 and 20 DSA in the handling of complaints made by MR to the applicant. The first complaint appeared to focus on article 20 and alleged that it was not possible to submit "precise and adequately substantiated complaints" on the applicant's system. MR also complained that he was entitled to "receive a legally reasoned decision not the same automated short notification from a bot". The essence of his complaint appeared to be that the applicant's complaint handling system was deficient in not providing reasoned decisions by humans but rather in providing automated decisions.

202. MR's second complaint, lodged on 1 August 2024, alleged that a decision of the applicant on a report of illegal content pursuant to article 16 DSA was deficient in not providing any reasons and was improperly fully automated.

203. These two complaints appear to have been assigned the same complaint reference by the applicant and treated in effect as one complaint. On 6 January 2025, the

Commission wrote to the applicant in relation to MR's combined complaint under the heading "Particulars of the complaint". This letter stated that the complaint contained allegations *“relating, but not limited to X's reporting mechanisms under the Digital Services Regulation [i.e. article 16 DSA] and X's complaint handling system under the Digital Services Regulation [i.e. article 20 DSA]”*.

204. A copy of the complaints was included with the letter. The letter indicated that the Commission proposed to take the action of passing the complaint to the Commission's supervisory team for further consideration pursuant to s. 201(4)(d) of the 2009 Act.

205. The letter summarised the complaint under article 16 as an allegation that the applicant's DSA reporting mechanism does not allow the provision of legal context due to a 250-character limit.

206. In relation to the article 20 aspect of the complaint, after referencing some of the requirements of article 20 (although curiously not referencing the requirement in article 20 that a provider give a “reasoned decision” in respect of the complaint, the letter then stated:-

“The Complainant alleges that their appeals to X's decisions on their reports were ignored. They allege that they were not given an opportunity to provide sufficient legal context and rebuttals in their appeals to the decisions made by X. Therefore, An Coimisiún considers that X's overall compliance with Article 20 warrants further consideration at this stage”.

207. Under the heading "Summary", the letter stated that the Commission “has outlined above the basis for its concerns that X may not be in compliance with Article 16 and 20” DSA. On the basis of those concerns, the letter stated that the Commission proposed to send the complaints to its Supervisory Team so that the complaint might be further considered by that team as part of its overall functions.

208. In my view, it is of significance from the perspective of fair procedures that the Commission in this letter identified what it regarded as its concerns about Article 20 compliance arising out of MR's complaints and invited the applicant to make

representations about the complaint in that context. In my view, a reasonable reading of that letter conveyed to the applicant the basis upon which the Commission believed that Article 20 may not have been complied with. The Commission did not in this letter identify the failure to provide a reasoned decision as a concern arising from the complaint as regards Article 20.

209. Further correspondence was exchanged between the parties on other aspects of the overall process under s. 201.

210. In a letter of 16 June 2025, the applicant made substantive representations pursuant to s. 201(7) on MR's complaint. I think a fair reading of this letter is that it addressed the substance of the concerns as identified by the Commission in its letter of 6 January 2025 including the concern/complaint that the applicant used automatic responses and did not have human oversight in its appeal process. This letter did not address any concern relating to an alleged absence of a reasoned decision in respect of the applicant's decisions on MR's complaints.

211. In the final decision letter of 2 October 2025, in summarising MR's complaints, the Commission stated that:-

“The Complainant alleged in their email submission to An Coimisiún of 30 July 2024 that “X Corps’ complaint handling system doesn’t allow to provide legal context. Besides selecting a Legal reason there is a small text area that has a character limit! The form has a 250 character limit, which is not enough even to quote a single article!”

The complainant also alleged “as a user, I should be able to submit sufficient, precise, adequately substantiated complaints that contain sufficient grounds for the legal action. However, it is not possible. As a user, I shall receive a legally reasoned decision, not the same automated short notification from a bot”.

The complaint further alleged – “X Corps’ complaint handling system automatically resolves a legal request within five minutes. No matter how many

times you ‘appeal’, you are dealt with the same automated reply that does not provide any legal references nor arguments!”

212. The decision letter then notes the applicant's representations to the effect that its legal content report form permitted users to make submissions of up to 1,000 characters, allowing ample scope to provide the necessary details.

213. The decision letter then stated:-

“Having considered all information relevant to the Complainant, including the Representations from X, An Coimisiún’s decision is to take no further action in respect of this aspect of the Complaint as it relates to Article 16 [DSA] as, in the circumstances, the information available to An Coimisiún does not appear to cause concerns in relation to X’s compliance with Article 16 [DSA]”.

214. The applicant takes no issue with that conclusion.

215. The decision then goes on to state:-

"However, An Coimisiún remains concerned that X may not be in compliance with Article 20 of the DSA. An Coimisiún has outlined below the reasons for passing the Complaint information to its Supervisory Team as it relates to Article 20 [DSA].

In having regard to X’s Representations, in which X submits that no further action should be taken in relation to this Complaint, and that the Complaint should be dismissed, An Coimisiún remains of the view that it is appropriate to proceed with its Proposed Action, notified to X on 6 January 2025... and therefore its final decision is to pass the Complaint information to its Supervisory Team pursuant to section 201(4)(d) of the 2009 Act, for the reasons set out below”.

216. The decision letter then notes the provisions of Article 20 DSA including that *“providers of online platforms must inform complainants without undue delay of their*

reasoned decision in respect of the complaint and inform the complainant of the possibility for redress". The decision letter makes reference to the obligation in Article 20 imposed on providers of online platforms to ensure that decisions "*are taken under the supervision of appropriately qualified staff, and not solely on the basis of automated means*". The letter then notes the applicant's assertions and the representations that all reports appeals by the complainant were individually reviewed and closed by human moderators and were not the product of automation.

217. The decision letters goes on to note that the Commission:-

"has considered X's Representations regarding the Complainant's appeals. However, notwithstanding the matters put forward by X, it appears that X did not issue a reasoned decision following the appeal outcomes as is required under Article 20. Therefore, An Coimisiún considers that the Complaint raises concerns in relation to X's compliance with Article 20 of the DSA and considers that the Complaint merits further consideration by its Supervisory Team". (emphasis added)

218. The applicant's essential complaint is that the Commission had not identified in its letter of proposed action of 6 January 2025 that it had a concern as to potential non-compliance by the applicant with the requirements of Article 20 in respect of the MR complaints in not issuing a reasoned decision in respect of the appeal outcomes on his complaints and that the subsequent final decision relying on an absence of reasoned decisions in the appeal decisions was accordingly arrived at in breach of fair procedures.

219. While it might be said in broad terms that the MR complaints to the Commission about the applicant's alleged non-compliance with Article 20 made reference to the lack of a reasoned decision, the real thrust of the complaints was that the process was an entirely automated one, which did not in fact involve human moderation and decision-making. This certainly appears to be the view that the Commission took in relation to the substance of the complaint when it identified its concerns as to potential non-compliance with Article 16 and 20 in its proposed action letter of 6 January 2025. While that letter sent to the applicant a copy of the complaint, it did not identify that the

Commission had a concern about an alleged absence of reasoned decisions in respect of appeal outcomes in potential non-compliance with Article 20.

220. In my view, on the very particular facts, the Commission acted in breach of fair procedures by identifying concerns in relation to article 20 non-compliance which it believed warranted the proposed action of referring the complaint to its Supervisory Team, inviting representations on the complaint in that context, and then making a final decision based on concerns as to non-compliance with a wholly different aspect of article 20, namely, that the applicant had not issued reasoned decisions, and referring the complaint to its Supervisory Team on that basis. The final decision was the first time in the process that the Commission identified a concern with the requirement to issue a reasoned decision under article 20. It was the sole basis of the proposed regulatory action, a regulatory action of some potential moment to the applicant, which was arrived at on a basis quite different to that identified in the proposed action letter inviting representations. On the facts, the applicant was not given an opportunity to address that concern. In my view, that amounted to a breach of fair procedures.

221. I reach that conclusion on balance where it can be reasonably said that the applicant was furnished with and therefore on notice of MR's entire complaint and was invited to make representations on that complaint and did seek to make representations on that complaint. However, it seems to me that where the Commission takes it upon itself to identify the particular aspects of the complaint with which it has concerns and which form the basis of its proposed action, that it is substantively and procedurally unfair to then turn around, when those concerns have been addressed to its apparent satisfaction, and rely instead on another deemed area of non-compliance.

222. For those reasons, in my view, the final decision in respect of the MR complaints should be quashed.

Conclusion

223. For the reasons set out in this judgment, save for an order of *certiorari* on fair procedures grounds in respect of the final decision in the MR case, I refuse the relief sought by the applicant.

