Council of the European Union
General Secretariat

Interinstitutional files:
2020/0361 (COD)

Brussels, 25 May 2021

WK 6794/2021 REV 1

LIMITE

COMPET	**CT**
MI	**PI**
JAI	**AUDIO**
TELECOM	**CONSOM**
	CODEC

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

NOTE

From:	Presidency
To:	Delegations
Subject:	Digital Services Act: Replies to MS Questions on Chapters IV and V

Digital Services Act
MS Questions on Chapters 4 and 5

Contents

Belgium

- We consider essential to ensure that this consistency and repartition of tasks are also clearly defined in this text with regard to EU competent authorities.
  In this regard, we would like to ask Commission more **clarity on the relationship between the Digital Services Coordinators Board and other EU competent boards** such as European Data Protection Board and in audio-visual matters.

  The European Board for Digital Services is an advisory group that brings together the national Digital Services Coordinators (DSC) and, where provided for under national law, other competent authorities appointed by Member States for the enforcement and implementation of the DSA. Its competences are limited to matters covered by the DSA (so it is not competent to provide guidance/advice as regards the application of other legislative instruments, such as the GDPR or the AVMSD). However, in order to ensure coordination and cooperation with other regulatory systems also applicable to the same service providers, Article 48(5) envisages the possibility for the Board to cooperate with other EU groups/bodies/agencies. The DSA does not specify how this cooperation should be implemented in practice, hence leaving a wide margin of manoeuvre (inviting representatives to meetings, have common meetings, set up studying groups, etc…).

- With regard to Article 40.3, when several competent authorities exercise their competences with regard to the same provider, **how they should ensure the coordination** in order to avoid any breach of the *ne bis in idem* principle? Is this coordination organised within the DSC Board?
  - Article 40(3) and recital 76 of the proposed Regulation make it clear that where a Member State decides to exercise jurisdiction vis-à-vis intermediary services providers who failed to appoint a legal representative in accordance with Article 11, it must inform all other Member States and ensure that the principle of *ne bis in idem* is respected. This communication is expected to be channeled through the information sharing system set out in Article 67. Hence, all other Member States will be able to consult the information sharing system and take their decisions accordingly. If any other Member State decides to exercise jurisdiction vis-à-vis the same provider, it will have to likewise inform all other Member States and ensure that the principle of ne bis in idem is respected.

- Is there any reason for the **differences between the criterion** provided for in Articles 41.5, 42.2 and 59, namely the measures and fines imposed by the DSC, national judicial authorities and the Commission? Wouldn't consistency between these articles be preferable?

  The Commission notes that the objectives of Articles 41(5) and 59(4) DSA partly overlap. Article 59(4) DSA lays down general requirements for the determination of the amount of the fine imposed by the Commission. Similar requirements are provided in Article 20(3) DMA. The purpose of Article 41(5) DSA is wider insofar as it imposes certain general requirements for the measures (not only fines) taken by the Digital Services Coordinators in the exercise of their powers under Article 41(1)-(3) DSA.

  The purpose of Article 42(2) DSA is different insofar as it establishes obligation for Member States to provide for effective, proportionate and dissuasive penalties applicable to infringements of the DSA. Similar provisions can be found in many EU legislative acts.

- Is there any proceeding **or hierarchy between the measures to be imposed** in accordance with Article 41.2., points b) and c)? Should the DSC notify the infringement prior to impose any measure/fine?

  There is no hierarchy between the possible enforcement measures pursuant to Article 41(2). The choice of measures to be taken in a given case is subject to the requirements set out in Article 41(4). The adoption of some of the measures laid down in Article 41(2) necessarily implies the previous finding of an infringement.

- We understand from the meeting discussions and the slides given by the Commission that the **list of tasks of the Board is not exhaustive**.

  Is this list left open through the words “in particular” in article 49.1 ? (“met name” in the Dutch version). Those words are not reflected in the French version of the text.

  Does it mean that the Board has the possibility to issue opinions at its own initiative and with regard to any topics, in addition to cases mentioned in the articles of this Regulation, dealing with the competences of the Board ?

  The list of tasks in Article 49 is indeed not exhaustive. However, any additional activities the Board might undertake will have to be “necessary to meet the objectives set out in Article 47(2)”, i.e. they will have to entail advising the DSCs and the Commission and have to contribute to the consistent application, cooperation guidance, analysis and assistance with regard to matters covered by the DSA. The Board may therefore issue opinions on its own initiative, but only on issues related to the DSA and with a view to pursue these objectives.

Could the COM explain what is meant exactly by the words "in accordance with this Regulation" (art. 49.1 c)

The task of issuing opinions, recommendations or advice to Digital Services Coordinators is specifically regulated, in terms of timelines and effects for instance, in specific articles of the DSA. This expression makes a general reference to those specific provisions.

Ireland

- A response to the receipt of legal advice on Article 41 (2) (e) from national legal advisors states that the Irish Courts are the final arbiters on matters of administering justice. This means that if the interim measures include imposing a penalty it will be necessary for the DSC to apply to the Courts for an order to that effect. This is not likely to be a speedy process and neither is the outcome assured. In the event that the DSC of the country of establishment is unsuccessful in applying interim measures what is the likely outcome given that the DSA does not prescribe any particular type of interim measures.

  The purpose of the interim measures under Article 41(2)(e) DSA is to avoid the risk of serious harm pending the outcome of the investigation and administrative procedure. Interim measures are, by nature, temporary and may include orders to cease certain activities or to adopt certain measures. While interim measures are not themselves penalties, however, the power to adopt interim measures may imply the power to adopt coercive measures, in order to ensure effective enforcement. In the area of competition law, the powers to grant interim relief are laid down in Article 5 of Regulation 1/2003.

- Can the Commission explain its justification for its own involvement in the regulation of VLOP under Ch. IV S.3 while requiring Member States to establish or designate bodies to act with "complete independence" as DSCs, having regard to the fact that the Commission's separate role in competition enforcement is expressly provided for in the TFEU and therefore may not be wholly analogous, and can the Commission outline what would occur if the implementing acts listed under Article 66 relating to the exercise of its powers under Section 3 are not adopted prior to an intervention by the Commission under that section being initiated?

  DSCs (and other Competent Authorities when empowered to enforce the DSA) are the primary enforcers of the DSA, including for VLOPs (Very Large Online Platforms). In view of their crucial role in ensuring the effectiveness of the rights and obligations laid down in the Regulation, it is considered necessary to ensure complete independence of those authorities from private and public bodies. On the other hand, this does not exclude their supervision according to national constitutional law. See Article 39 DSA.

The involvement of the Commission in the enforcement of DSA obligations is envisaged in view of the particular challenges that may emerge in relation to assessing and ensuring a very large online platform's compliance, for instance relating to the scale or complexity of a suspected infringement or the need for particular expertise or capabilities at Union level. This justifies the possibility for a given Digital Services Coordinator of establishment, to request, on a voluntary basis, the Commission to intervene and exercise its investigatory and enforcement powers. Moreover, given the importance of very large online platforms, in view of their reach and impact, their failure to comply with the DSA obligations may affect a substantial number of recipients of the services across different Member States and may cause large societal harms. Therefore the Commission should have the power to further investigate specific infringements solely applicable to very large platforms and the measures that the platform has subsequently taken to ensure that such infringements are effectively addressed. Similarly, the Commission should also have the possibility to intervene in cross-border situations concerning very large platforms where the Digital Services Coordinator of establishment did not take any measures to address any infringement of the DSA despite the Commission's request.

With regard to the adoption of the implementing acts referred to in Article 66, paragraph 1 clarifies that the Commission "may" adopt implementing acts concerning the practical arrangements listed therein. The adoption of such acts does not appear to be a pre-condition for the exercise of the powers of the Commission.

- Article 74(2) states that the DSA shall apply from 3 months after its entry into force. Yet the DSA leaves the creation of the substantive legal bases for the DSCs, their powers and their relationship with national competent authorities to the Member States. Can the Commission outline their reasoning behind this extremely short implementation period, having regard to the timelines for the implementation of other instruments, the national legislative processes of the Member States and the risk of rushed implementing legislation being subject to successful legal challenge?

  The application deadline laid down in the DSA mirrors the urgency to ensure the objectives of the Regulation. At the same time, it should be considered that the DSA does not necessarily require the set-up of new authorities, as existing authorities can be empowered (at least one and without prejudice of further refinement of competences among different authorities, to be communicated to the Commission and the Board pursuant to Article 38(2)). Moreover, being a Regulation, the DSA does not require transposition of its rules into national law.

Greece

Article 41 (rec. 77-79 and 82-83)

- In order to achieve the objectives of the single market and therefore the uniformity on the question of penalties, how is it ensured in practice that for the same infringement the enforcement measures taken by the Digital Service Coordinators referred to in par. 2 will not be different for each MS?

The DSA harmonises the general requirements applicable to the fines imposed by the national authorities, as well as their maximum ceiling. First it sets the general requirement that Member States have to define penalties that are effective, proportionate and dissuasive. Secondly, it sets a maximum ceiling for these fines at 6% of turnover. Provided that these requirements are complied with, the national authorities will have a certain margin of discretion in setting the appropriate level of fines in each individual case, having regard in particular to the factors specified in Article 41(5).

-With regard to remedies (case 2b) and interim measures (case 2e), for which there is no identification, are there any proposals by the Commission for their definition based on good practices?

The remedies and the interim measures depend on the specific individual infringement (and for the interim measures the risk of serious harm at stake), hence they cannot be defined in abstract terms. What is important is that the authority is empowered to impose proportionate remedies which are necessary to bring the individual infringement effectively to an end, as well as to order interim measures so as to avoid the risk of serious harm.

Article 67

-According to paragraph 2, the information exchange system will be used by Digital Service Coordinators, the Commission and the European Board for Digital Services. Since, in accordance with Article 38, MS can designate more than one Authorities as responsible for the enforcement and application of the Regulation, will these authorities can also use the system?

Article 67 refers to the DSCs, as they are the national authority with the overall responsibility for the application and enforcement of the DSA. This responsibility includes contributing to the effective and consistent application and enforcement of the DSA throughout the EU (Article 38(2)), which, in as far as this involves the sharing of information, will occur through the system referred to in Article 67. Although 'active' communication through that system will thus be conducted by the DSCs, the DSA however does not specifically regulate the 'passive' access by other competent authorities to the information shared through that system, in as far as necessary for the performance of their tasks under the DSA. Therefore, such access is not excluded. Specific arrangements

regarding the functioning of the system will be laid down in the implementing acts referred to in Article 67(3).

-Moreover, and since IMI system is already used as a pilot for e-commerce, and given that there have been observations from MS for its functionality in its evaluation in the 20th Ecommerce Expert Group, the relationship between the new system and IMI should be clarified.

Article 67 does not mandate nor exclude the use of IMI or any other existing tool for the information sharing system.

Article 68

-In accordance with Article 68, the recipients of intermediary services shall have the right to mandate a body, an organization or association to exercise the rights referred to in Articles 17 (Internal complaint-handling system), 18 (Out-of-court dispute settlement) and 19 (Trusted flaggers), on behalf of them under certain conditions. The bodies to which this representation will be entrusted, may be the same as those certified by MS for Regulation 2019/1150 of the European Parliament and of the Council *'to promote fair treatment and transparency for business users Mediation services "(Article 14, par. 1)*?

Article 68 lays down the conditions for a body, organisation or association to qualify for collective representation under the DSA:

(a) it has to operate on a not-for-profit basis;

(b) it has to be properly constituted in accordance with the law of a Member State; and

(c) its statutory objectives have to include a legitimate interest in ensuring compliance with the DSA.

In practice, these could be the same bodies, organisations or associations which qualify under Article 14 of the P2B Regulation, provided that they will fulfil the conditions laid down in Article 68 DSA. The requirements of the P2B Regulation are:

(a) they are properly established in accordance with the law of a Member State;

(b) they pursue objectives that are in the collective interest of the group of business users or corporate website users that they represent on a sustained basis;

(c) they are of a non-profit making character;

(d) their decision-making is not unduly influenced by any third party providers of financing, in particular by providers of online intermediation services or of online search engines.

This, however, will have to be assessed for each body, organisation or association on a case-by-case basis. Designation under the P2B Regulation cannot mean an automatic qualification for the purposes of Article 68 because both instruments pursue different objectives.

Estonia

ART 56 [we understand it refers to Article 52(5)]: Can we rightfully assume that the right of the Commission to request information from public authority, body or agency within the Member State applies in accordance with the legislation of the Member State concerned?

Pursuant to Article 52(5), the DSCs and other competent authorities will have an obligation to provide the Commission with all necessary information to carry out the tasks assigned to it under the corresponding Section of the DSA. This provision applies directly and is not dependent on the national legislation. The objective of Article 52(5) DSA is to ensure sincere cooperation between the Commission and the Member States in the context of the implementation and enforcement of the DSA, specifically as regards the Commission's tasks under the DSA. Article 52(5) therefore obliges DSCs and other Member States' competent authorities to provide the necessary information to the Commission, upon the latter's request.

Finally, any exchange of information between the authorities pursuant to Article 52(5) DSA shall take place in line with the obligation of professional secrecy as laid down in Article 63(6) DSA.

ART 68: Does the article presume a contractual relationship between the recipients of services and a body, organisation or association that exercises their rights on their behalf? Do administrative authorities fall under the term 'body'?

Article 68 implies that the recipients of the services give a mandate to the body, organisation or association to carry out the representation.

The DSA does not exclude public bodies from the application of Article 68, provided that they meet the conditions set out therein.

Slovenia

1. Digital Services Coordinators should exercise their power without any external influence and they must not seek or take instructions from any other public authority. Is the European Commission certain that proposed provisions will assure independent law enforcement in an impartial way? Especially in cases where the country of origin's economic interests are very strong.

Article 39 provides that the DSC (and any other competent authority designated by Member States with tasks under the DSA; see Article 38(4)) must remain free from any external influence, whether direct and indirect, and shall not take instructions from public authorities and private parties.

2. In case the provider of intermediary services persistently fails to comply with its obligations in different member states or at the EU level, is there provided any model to coordinate penalties, to be more effective and dissuasive, in view of the public interest pursued. Who will coordinate the total amount of fines imposed? What happens if the maximum amount of fines imposed is reached and new sentences are pending? Is there a solution envisaged for such a scenario?

Penalties (like other measures) must be taken by the DSC in the Member State of establishment, which is the Member State having jurisdiction (Article 40 DSA). When taking these measures, the DSC must take into account, inter alia, the nature, gravity, recurrence and duration of the infringement (Article 41(5); as clarified by recital 80, this includes also the recurrent or systematic nature of the infringement, as well as its territorial scope). These are therefore elements that the DSCs need to take into account when setting the fines in specific cases. On the other hand, the ceilings provided for in Article 42 refer to individual infringements. Therefore, if a service provider is found to have committed several infringements, several fines may be imposed and they do not cumulate for the calculation of the ceiling.

Luxembourg

- Can the Commission explain how a harmonised, or at least, coherent enforcement can be ensured if the tasks and powers of the Digital Services Coordinators, who are the enforcers of the DSA at national level, are not harmonised (i.e. Member States may add other powers to Article 41 given the “at least” in para 1)?

The list of the DSC’s powers provided for in Article 41 are minimum powers which are considered necessary to ensure a harmonized enforcement of the Regulation across the Union, which does not exclude further powers being conferred on the basis of national law. In this manner, a degree of harmonisation is ensured, which is meant to be such as to ensure effective enforcement across the EU.

- Does the Commission agree that there are harmonised provisions in chapter II (for example the “feedback obligation” by intermediaries or the harmonised content of orders to be sent by national authorities under Article 8) for which an enforcement on the basis of the DSA also needs to be foreseen, and that therefore need to be covered by Article 40?

Articles 41 and 42 awards DSCs certain investigatory and enforcement powers and oblige Member States to lay down the rules on penalties for infringements of the DSA by intermediary services

providers "under their jurisdiction". Hence, these articles do not exclude the possibility for the DSC having jurisdiction to impose penalties also for a failure by intermediary service providers to comply with their obligations under Articles 8(1) and 9(1), that is, a failure to provide follow-up information on an order addressed to them.

It is true that Articles 8 and 9 are part of Chapter II of the DSA, whereas Article 40 only regulates jurisdiction for the purposes of Chapters III and IV. Thus, the DSA does not expressly answer the question which DSC has jurisdiction for the purposes of Articles 8 and 9. It may be envisaged to clarify this aspect.

- How does Article 3(4)(b) of the e-Commerce Directive interact with the cooperation mechanism foreseen in Article 41?

The two systems operate independently of one another. The cooperation mechanism laid down in Article 45 DSA (which we assume is referred to in the question) applies to investigatory and enforcement measures taken by DSCs under the DSA. Those measures do not fall within the scope of the procedure laid down in Article 3(4) e-Commerce Directive. That is because that procedure, as is evident in particular from Article 3(1) of that directive, Article 3 is concerned with 'national provisions' regulating the provision of information society services (including intermediary services), whilst the DSA is evidently an act of EU law.

Spain

Article 38

To what extent does the DSA improve the current statu quo in order to help cities and local competent authorities to enforce regulations that subject short-term rental accommodation intermediary services to a compulsory registration scheme, in terms of better control of those services and access to their data?

Will local administrations be able to issue orders to act against illegal content – for instance, illegal short-term housing online ads? Will they be able to set up data-sharing obligations on intermediary service providers, to monitor their compliance with EU, national and local laws?

Does the DSA envisage any other way to make sure local laws and the specificities of cities are respected, taking into account the need for coordination due to the applicability of the principle of country of origin?

The orders to which Articles 8 and 9 DSA refer are orders issued by the competent national authorities (administrative or judicial) on the basis of applicable Union or national law. In the absence of relevant EU legislation giving the power to national authorities to order providers of

intermediary services to act against illegal content or to provide information, it will depend on the national law of each Member State whether and if so, to which extent it has provisions in place to this effect. These national laws must be in compliance with EU law.

Recital 33 DSA clarifies that given that the orders in question relate to specific items of illegal content and information, respectively, where they are addressed to providers of intermediary services established in another Member State, they do not in principle restrict those providers' freedom to provide their services across borders. Hence the rules and procedures set out in Article 3 of the e-Commerce Directive (whose compliance with is a condition of enforceability of national measures, in accordance with the case law of the ECJ; see especially case C-390/18) do not apply in respect of those orders.

The DSA's rules on jurisdiction (Article 40) do not reserve the power to issue (or enforce) such orders to the DSC of establishment. That means that, where other acts of EU law or relevant rules of national law so provide, competent authorities of other Member States will be able to issue such orders. Where that is the case, the specific rules regarding such orders set out in Articles 8 and 9 DSC apply to the orders.

Finally, in addition to the provisions of Article 8 and 9, Article 22 of the DSA may also be relevant in ensuring the traceability of traders, including for instance traders providing accommodation services for the purpose of their business, trade or profession. Online platforms allowing consumers to conclude distance contracts with traders are obliged to obtain the registration number of traders when the latter are registered in a trade register or similar public register. They must make reasonable efforts to assess whether such number is reliable (Article 22(2)) and make it available to the recipients of the service in a clear, easily accessible and comprehensible manner (Article 22(6)).

Article 39:

Why is it a requirement for Digital Services Coordinators to neither seek nor receive instructions from the government or any other public authority? Why the requirements for DSCs are not open and flexible enough so that each Member state can organize itself in accordance with its internal structure?

> DSCs (and other Competent Authorities when empowered to enforce the DSA) are the primary enforcers of the DSA, including for VLOPs. In view of their crucial role in ensuring the effectiveness of the rights and obligations laid down in the Regulation, it is considered necessary to ensure complete independence of those authorities from private and public bodies. On the other hand, this does not exclude their supervision according to national constitutional law, see Article 39 DSA. Within these requirements, which are actually also applicable in many

other regulatory areas harmonised by EU law (such as audiovisual, telecommunications, data protection or competition law), the DSA leaves a large institutional discretion in how to arrange the allocation of powers among different national competent authorities.

Poland

Article 40 Jurisdiction

In accordance with Article 40(1) The Member State in which the main establishment of the provider of intermediary services is located shall have jurisdiction for the purposes of Chapters 3 and 4 of the DSA.

- Does this solution guarantee equal rights and that the recipients form country of destination (where the intermediary service is provided, but intermediary is established in another Member State) will not be in a weaker legal position than recipients where intermediary is established (rights of the recipients to effective remedy and the guarantee of a fair trial)?

The DSA rules will be fully harmonized and directly applicable across all Member States. Hence, every recipient in the Union will have the same legal rights vis à vis the intermediary at stake, regardless of the intermediary's place of establishment – or the place of residence of the recipient. On the one hand, the DSA sets up and harmonizes a common enforcement system to ensure that its rules are enforced by authorities complying with specific minimum requirements and powers in every Member State. On the other hand, each DSC has the duty to enforce the DSA where appropriate vis à vis providers established in their territory regardless of the place where the infringement or its effects take place. To support this overarching objective of the enforcement system, and to ensure that the DSC of origin is aware of all elements at stake when enforcing the rules, the DSA provides different tools to ensure cooperation between the DSCs in the country of destination of the service and those in the country of establishment, including the cooperation mechanism (Article 45), the rules on handling of complaints (Article 43), the possibility to set up join investigations (Article 46), as well as additional enforcement and cooperation tools in case of VLOPs (Article 50 and following).

- Will Member States and European Commission be equipped with effective tools to verify that the Digital Services Coordinator of establishment properly fulfil its obligations under the DSA and cooperate with other Member States in case where rights of the recipients of the service where violated?

The DSA provides specific mechanisms to trigger the action of the DSC of establishment where deemed necessary. First, both the Board and the DSC of destination can respectively recommend to or request the DSC of establishment to take measures to ensure compliance with this Regulation.,

and report within predefined timelines. In case of disagreement, moreover, the DSC of establishment and the Board have the possibility to refer the matter to the Commission, which can request that specific investigative or enforcement measures are taken by the DSC of establishment. Finally, where the DSC of establishment has not taken any investigatory or enforcement measures concerning VLOPs pursuant to the request of the Commission, the Commission may take over the enforcement.

Article 43 Right to lodge a complaint

The Digital Services Coordinator of the Member State where the recipient resides or is established may receive complaints from recipients of the service. If an intermediate service provider is outside of jurisdiction of that Digital Services Coordinator then those complaints should be transmitted, to the coordinator in the jurisdiction where the provider is established.

- What are the powers of the Digital Services Coordinator who has received a complaint against an intermediate service provider which is outside of its jurisdiction and has forwarded it to the relevant coordinator? Does Digital Services Coordinator of destination should receive information about how the complaint has been handled and then can disagree with the action taken by the Digital Services Coordinator of establishment?

Under Article 43 DSA, depending on the situation at stake, such as the detail of information provided in the complaint, as assessed by the DSC of destination, that DSC must transmit the complaint to the DSC of establishment, where appropriate. In addition, the DSC of destination may, having regard to the complaint received, trigger a request of cooperation pursuant to Article 45. In this latter case, the cooperation obligations and deadlines provided in that article for are applicable.

- Who is responsible for giving feedback, or any additional information, to the service recipient who made the complaint - is it the Digital Services Coordinator of destination (to which complaint has been lodged against intermediary outside of its jurisdiction) or Digital Services Coordinator of establishment?

Complaints must be assessed initially by the DSC of destination, which has been the one receiving the complaint, and subsequently – that is, after the transmission thereof, where appropriate – by the DSC of establishment. The DSA does not regulate in detail the handling procedures of complaints by the DSCs, which is left for the national law subject to the observance of the general principles of EU law, in particular the principles of equivalence and effectiveness.

Article 53 Power to take interviews and statements, Article 54 Power to conduct on-site inspections

- In case of Article 53 will the person interviewed be able to evade questions adversely affecting his/her legal position, as is standard practice in the legal systems of EU Member States? Will the person interrogated be exposed to sanctions if he/she provides false information?
    - Article 47 of the Charter, which enshrines, inter alia, the right to a fair trial will apply to the measures taken under the DSA. The presumption of innocence (Article 48 of the Charter) and right to silence, which is inherent in those fundamental rights, will apply to the extent that the proceedings in question would be considered as proceedings which may lead to the imposition of administrative sanctions of a criminal nature, in the light of the Court's case law. In the context of such proceedings, an undertaking cannot be compelled to provide answers which might involve an admission on its part of the existence of such an infringement (judgment in Orkem v Commission, 374/87, paragraph 35). This guarantee also applies to natural persons who, in an investigation concerning an offence that is punishable by administrative sanctions of a criminal nature, refuse to provide the competent authority with answers which might establish their liability for such an offence, or their criminal liability (judgment in Consob, C- 481/19, paragraph 52).
    - Under the DSA, the possibility to hold a person liable for providing incomplete, incorrect or misleading information during an interview following Article 53 is for the moment not envisaged in Article 59 and 60 DSA (as opposed to a similar framework in relation to DMA, where such a fine is envisaged also in case of providing incomplete, incorrect or misleading information during interview).
- In accordance with Article 54(3) *the Commission and auditors or experts appointed by it may require the very large online platform concerned or other person referred to in Article 52(1) to provide explanations on its organisation, functioning, IT system, algorithms, data-handling and business conducts. The Commission and auditors or experts appointed by it may address questions to key personnel of the very large online platform concerned or other person referred to in Article 52(1).* Will platform employees be able to evade questions affecting their legal situation? Will they face sanctions if they provide false information?
    - Article 47 of the Charter, which enshrines, inter alia, the right to a fair trial will apply to the measures taken under the DSA. The presumption of innocence (Article 48 of the Charter) and right to silence, which is inherent in those fundamental rights, will apply to the extent that the proceedings in question would be considered as proceedings which may lead to the imposition of administrative sanctions of a criminal nature, in the light of the Court's case law. In the context of such

proceedings, an employee of a natural or legal person that has consented to interview cannot be compelled to provide answers which might involve an admission on its part of the existence of such an infringement (judgment in Orkem v Commission, 374/87, paragraph 35). This guarantee also applies to natural persons who, in an investigation concerning an offence that is punishable by administrative sanctions of a criminal nature, refuse to provide the competent authority with answers which might establish their liability for such an offence, or their criminal liability (judgment in Consob, C- 481/19, paragraph 52).

- Under the DSA, the possibility to hold liable a person for providing incomplete, incorrect or misleading information during an interview following Article 53 is for the moment not envisaged in Article 59 and 60 DSA (as opposed to a similar framework in relation to DMA, where such a fine is envisaged also in case of providing incomplete, incorrect or misleading information during interview).

Article 73 Evaluation

Consideration should be given to the possibility that a request to amend the DSA could also be included in the DSA assessment report referred to in Article 73(1). This request could relate to specific areas of the DSA that have been identified in the assessment as not meeting their objectives.

- Why does Article 73(4) indicate that a proposal for amendment of DSA will be limited only to the structure of the European Board for Digital Services? What is the rationale for this limitation?

The DSA provides for a standard review clause for the whole Regulation within 5 years of its entry into force; this should allow the assessment of the effects of the Regulation on the overall ecosystem, and also ensure predictability of the obligations applicable to the providers and recipients concerned. As for any regular evaluation/review, the Commission can propose amendments where this is appropriate.

At the same time, given that the Regulation also envisages a new advisory group with a relevant role in the overall institutional structure, the Board, it has been considered appropriate to carry out an earlier evaluation focused on this specific institutional element, with a view to assess the functioning after the initial start-up phase and the potential need to enhance it. Depending on the outcome of this evaluation, as for any evaluation, the Commission may consider whether proposing amendments specifically concerning the structure of the Board is appropriate.

France

Question 1

Les autorités françaises souhaitent avoir des précisions sur l'intérêt de la surcouche d'un Coordinateur des services numériques (« Digital Services Coordinator – DSC ») alors que sa désignation peut poser des difficultés de mise en œuvre au niveau national et aller à l'encontre de la liberté d'organisation et de l'autonomie procédurale reconnue aux Etats membres ?

Au contraire, ne serait-il pas envisageable que le « Digital Services Act » (DSA) confie aux autorités déjà existantes (régulateurs audiovisuels et autorités de surveillance du marché et les douanes), et à leurs réseaux de coopération au niveau européen, la surveillance de la mise en œuvre des obligations prévues par ce règlement ? En effet, ces régulateurs ont déjà une expérience en matière de régulation et de contenus illicites, y compris à l'égard de plateformes en ligne, sur lesquels il serait utile de s'appuyer et qui permettrait une mise en œuvre rapide du DSA.

The DSA shares the objective to ensure the possibility to build national enforcement systems on the basis of existing structures/authorities and in full respect of institutional autonomy, by allowing a margin in allocating DSA enforcement tasks among national authorities, provided they are equipped with sufficient resources and powers and fulfil the requirements of the DSA, in particular, the independence requirement, the cooperation requirement and the particular tasks reserved for the DSC. At the same time, the DSA provides for horizontal rules applicable across different digital intermediary service providers, sectors, business models and types of illegal content; this reflects the fact that in this domain borders between functionalities of different services can be blurred and a sectoral approach would fail to achieve the objectives of the Regulation, with risks of overlaps, gaps and divergences in the rules applicable to similar problems. This also means that the enforcement of the DSA obligations cross-cuts different sectors and areas,. For this reason, and in line also with the experience in the application of another instrument with a horizontal scope namely the E-Commerce Directive, it is necessary that coordination is ensured among different competent authorities at national level and across Member States with different enforcement systems and that there is a "first door of call" vis-à-vis the competent authorities of other Member States and the Commission for matters related to the application of the DSATherefore, while Member States should be able to entrust more than one competent authority, with specific supervisory or enforcement tasks and competences concerning the application of this Regulation, the Digital Services Coordinator should coordinate and cooperate with those authorities in accordance with the national law setting their respective tasks, and should ensure effective involvement of all relevant authorities in the supervision and enforcement at Union level. .

Question 2

En droit de l'UE, la protection des consommateurs est assurée par les règles de droit international privé – qui prévoient l'application des normes impératives du pays de résidence du consommateur – ainsi que par la directive e-commerce, dont la clause sur le marché intérieur – équivalent du principe du pays d'origine (art 3§1-2) – n'est pas applicable aux « obligations contractuelles concernant les contrats conclus par les consommateurs », ce qui inclut les informations précontractuelles fournies aux consommateurs et nécessaires à une expression éclairée de leur consentement. Pour ces raisons l'article 22 du DSA, qui impose aux plates-formes de « tracer » les vendeurs tiers, ne devrait pas relever du principe du pays d'origine sans provoquer une divergence préjudiciable dans la mise en œuvre des règles de protection des consommateurs. Pourtant, l'article 40 du projet de règlement semble l'appliquer à l'article 22, entraînant ainsi un écart sur lequel s'interrogent les autorités françaises.

Article 22 provides for due diligence obligations applicable to online platforms concerning the identification of the traders active on their platform. It does not regulate the contractual relationship between the trader and the consumer in the context of distance contracts allowed by, for instance, online marketplaces. The centre of gravity of the obligation concerns therefore the internal organisation and controls in the correct identification of the traders active on the platforms rather than the contractual and pre-contractual information obligations of the platform.

The 'home state control' principle of Article 3 of the e-Commerce Directive is not applicable in relation to the exercise of powers under the DSA, since that principle is concerned with the ability to apply and enforce 'national provisions' whilst the DSA is evidently an act of EU law. Whilst Article 40 specifies in a somewhat similar manner that the Member State of establishment has jurisdiction for the purposes of Chapters III and IV of the DSA (i.e. including Article 22), that rule applies independently from the rule laid down in Article 3 e-Commerce Directive.

Question 3

Le DSA donne compétence au régulateur du pays de destination pour solliciter l'intervention de l'autorité de régulation du pays d'établissement auprès d'un fournisseur de service intermédiaire en cas de suspicion d'infraction au DSA (article 45) et lui permet également de participer aux enquêtes menées par le régulateur du pays d'établissement (article 46). À ce sujet, les autorités françaises estiment que le projet de règlement apparaît très insuffisant s'agissant de la coopération entre les Etats membres et fragilise l'efficacité de certains réseaux de coopération administrative existants, tels ceux concernant la protection des consommateurs et la surveillance du marché, ou le réseau des régulateurs audiovisuels. Sans préconiser d'adopter un « principe du pays de destination », qui conduirait à la fragmentation du marché intérieur, les autorités françaises souhaitent interroger la

Commission sur la possibilité d'accroître l'implication des régulateurs de destination pour une meilleure prise en compte des préoccupations des Etats membres dans la mise en œuvre du DSA, et le cas échéant sur les éventuelles pistes qu'elle n'aurait pas retenues à cet égard.

The DSA is without prejudice to the existing cooperation mechanisms, applicable to other sets of EU rules that the DSA does not modify and that prevail as *lex specialis*, in case of conflict. In this sense, the DSA will not undermine the existing powers attributed to other authorities pursuant different Union laws. Furthermore, taking into account the possibility of synergies and of cooperation, existing authorities active in specific sectors can be entrusted with specific enforcement tasks of the DSA, provided the relevant rules of the DSA are complied with. Moreover, regular exchange of views among authorities involved in the enforcement of the DSA and other authorities are possible where relevant for the performance of the tasks of those other authorities under DSA (see Article 38(2) second subpara, as well as Recital 74), as well as among Union bodies, offices, agencies and advisory groups on the one hand, and the Board on the other (Article 48(5) and Recital 91), again in order to ensure cooperation and coordination in the exercise of their respective (but different) competences.

With regard to the involvement of the Member State of destination, the DSA provides for several tools to ensure that the issues identified by the DSC and possible other competent authorities of that Member State are assessed by the DSC and possible other competent authorities in the Member State of establishment, within pre-defined timelines and with mechanisms in case of disagreement, in order to ensure an high degree of cooperation and coordination (see in particular Articles 43, 45 and 46).

Question 4

Pourquoi l'article 45 traite-t-il uniquement de l'ouverture d'une instruction par le Coordinateur des services numériques du pays d'établissement et n'aborde pas le sujet de l'adoption des mesures correctrices permettant de faire respecter le règlement ? Quel recours serait possible pour un Coordinateur des services numériques saisissant en cas de carence (non action) du Coordinateur du pays d'établissement, après relance de la Commission (article 45.7), dans le cas d'un fournisseur de services intermédiaires (qui ne serait pas une très grande plateforme)? Pourquoi aucune procédure d'arbitrage n'est proposée à l'article 45 en cas de désaccord persistant entre coordinateurs, à l'instar de ce que permet l'EDPB ?

The DSA empowers the DSC or the Board to refer a specific cross-border cooperation case to the Commission in the event of disagreement with the assessment of the DSC of establishment and/or in case of inertia within the predefined timeline. In addition to the request of the Commission to take the necessary measures pursuant to Article 45 and the specific power to take over the

investigation in case of very large online platform, moreover, the Commission has also the general duty to oversee the application of, and where necessary enforce, Union law under the control of the Court of Justice of the European Union in accordance with the Treaties.

Question 5

La Commission européenne peut-elle expliquer les raisons qui ont prévalu à l'adoption d'un schéma de régulation différent s'agissant des obligations spécifiques aux très grandes plateformes (section 4 du chapitre III) ? Par ailleurs, concernant l'intervention de la Commission européenne, qu'est-ce qui justifie cette procédure complexe et longue (articles 50 et 51) ?

Les très grandes plateformes étant actives dans la majeure partie de l'Europe, appliquer d'emblée une supervision centralisée au niveau de l'Union européenne ne serait-elle pas plus adaptée pour superviser les très grandes plateformes (notamment au regard du rallongement des procédures qu'induirait la supervision par l'autorité du pays d'établissement dans la plupart des cas) ?

Given the importance of very large online platforms, in view of their reach and impact, their failure to comply with the specific obligations applicable to them may affect a substantial number of recipients of the services across different Member States and may cause large societal harms. Moeover, infringements of Section 4 of Chapter III DSA involve situations where the identification of the infringement, but also and in particular the remedies to it, may be particularly complex and may affect, for instance, the core features of the platform content moderation systems. For this reason, in respect of such infringements, VLOPs are subject to an enhanced supervision of its activities by the competent authority (DSC of establishment and, where relevant, the Commission), with a view to ensure that the infringement is remedied.

Moreover, within this context and after the conclusion of the enhanced supervision activities, where the infringement of the provision that solely applies to very large online platforms is not effectively addressed by that platform, only the Commission, on its own initiative or upon the Board's recommendation may, on its own initiative or upon advice of the Board, decide to further investigate the infringement concerned and the measures that the platform has subsequently taken.

Question 6

Pourquoi, dans le cas où l'infraction par une très grande plateforme est constatée par décision du coordinateur des services numériques du pays d'établissement (article 50.1), aucune sanction n'est appliquée à cette plateforme ? En effet, il faut attendre la fin de l'instruction par la Commission (article 51) pour que cette dernière applique une éventuelle sanction. Quel recours est possible si le régulateur du pays d'établissement ne suit pas la recommandation de la Commission ou du Board

(article 50.1§2) ? Ne faut-il pas prévoir de raccourcir les délais de l'article 50 pour assurer une bonne réactivité en cas d'infraction constatée d'une très grande plateforme ?

Pursuant to Article 50(1) DSA, the DSC of establishment may adopt a decision finding that a VLOP infringed one of the provision of Section 4 of Chapter III of the DSA. Such a decision triggers the enhanced supervision mechanism in respect of the relevant conduct by the VLOP at issue. When ascertaining whether the infringement has been terminated or remedied during the subsequent step of the procedure pursuant to Article 50, the VLOP is still under the jurisdiction of the DSC of establishment. Only after the communication pursuant to Article 50(4) (or in case of lack of it at the expiry of the relevant time period for doing so), the Commission is entitled to intervene by initiating proceedings (Article 51(1)(c) DSA). As specified in Article 50(4), pursuant to that communication, the DSC of establishment is no longer entitled to take any investigatory or enforcement measures.

Germany

1. Re. Art. 39

Art. 39(2) states that the Digital Services Coordinator "shall act with **complete independence**" when performing its tasks and exercising its powers and that he "shall neither seek nor take instructions from any other public authority or any private party". According to Art. 38(4), this also applies "**to all other competent authorities**". The following questions arise in this regard:

- In reason of constitutional requirements deriving from the principle of democratic legitimation as enshrined in Art. 20 of the German Constitution ("Grundgesetz"), in principle, any authority in DE needs to be integrated into the structures and chains of control of the executive and, thus, needs to be subject to technical and legal supervision (in the end) by the competent ministry which in turn is (being part of the Government) directly responsible to the German Parliament. Is the provision in para. 3 second sentence ("Paragraph 2 shall not prevent supervision of the authorities concerned in accordance with national constitutional law.") intended to cover also such types of **supervision as required by national constitutional law**? Rec. 74 seems not to be sufficiently clear in this regard as it only refers to the possibility of "national control or monitoring mechanisms regarding financial expenditure or judicial review" and might need some **clarification** in this respect.

The requirement of complete independence is a common requirement for a wide range of authorities entrusted with regulatory tasks under EU law, such as the authorities in charge of telecom regulation, of media regulation and of data protection. As specified in Article 39(3) DSA, and as further explained in Recital 74, the independence requirements of the DSA do not prevent supervision of the authorities concerned in accordance with national constitutional law. Therefore,

such supervision remains possible in principle, without such supervision necessarily remaining limited to the specific issues highlighted in the recital (financial expenditure, judicial review). However, the recital also stresses that any such supervision may not endanger the achievement of the objectives of the DSA.
Furthermore, it can be noted that the Court of Justice has clarified that the democratic principle is not in contrast with the requirement of complete independence and the existence of authorities outside the hierarchical order of the administration, as this does not preclude its accountability to the parliament. However, the complete independence requirement does exclude the possibility of scrutiny of their acts by the government (see case C-518/07).

- With regard to the regulation of media content (in particular broadcasting and the press), the independence and freedom from state control / state interference of the regulatory authorities and voluntary self-regulatory bodies must be maintained. However, given that the vast majority of intermediary services provide technical services or operate trading platforms, is it really necessary for the Digital Services Coordinator to be **completely independent**? Especially in comparison to the **COM**, which assumes its own enforcement powers in the DSA and which is not subject to the requirement of complete independence.

The DSCs are the necessary enforcers of the DSA obligations in all Member States, in the sense that they will enforce the DSA in areas where the MS has not appointed other, specific competent authorities. Pursuant to Article 39, read together with Article 38(4), both the DSC and any such possible other competent authorities need to operate with complete independence when performing their tasks under the DSA, as they play a crucial role in ensuring the effectiveness of the rights and obligations laid down in this Regulation and the achievement of its objectives.
As regards the comparison to the independence requirements of the Commission, it should be considered that pursuant to Article 17(3) TUE "[i]n carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks".

2. <u>Re. Art. 40</u>

According to Art. 40, the **country of origin principle** is maintained. In our view, this implies the risk that the authorities of a single country of origin are **overwhelmed with effectively monitoring providers of intermediary services** for the entire internal market, i.e. for all other MS, and for the protection of all EU citizens. Should there not be a **possibility for other MS States to step in**, as in the case of a provider without a legal representative (see para. 3)? From our point of view, at least the **lengthy procedure for the COM** to get involved according to Art. 45 and Art. 50 must be

shortened and the **COM´s enforcement powers must be extended** to cover not only infringements by VLOPs but also by other providers.

The DSA provides for a range of mechanisms to ensure that the views of the DSC of destination and/or the effects in the Member State of destination are duly taken into account by the DSC of establishment, including in the context of the right to lodge a complaint (Article 43), the possibility to set up joint investigations (Article 46) and a specific cross-border cooperation mechanism based on strict deadlines for replies and involvement of the Commission in case of disagreement (Article 45).

The involvement of the Commission as direct enforcer of the DSA is foreseen in specific cases where, given the importance of very large online platforms, in view of their reach and impact, their failure to comply with the specific obligations applicable to them may affect a substantial number of recipients of the services across different Member States and may cause large societal harms, while such failures may also be particularly complex to identify and address.. This is first of all the case when the compliance of VLOPs with the obligations specifically addressed to them (Section 4 of Chapter III DSA) are at stake, in view inter alia of their typically multinational or even pan-EU dimension, the potential systemic risks that they might pose and the likely complexity of the infringements (see Article 51(1)(c)). In addition, also in some other instances the DSA envisages the intervention of the Commission, again particularly in relation to VLOPs (but then in respect of other obligations than those of Section 4 of Chapter II DSA), in accordance with Article 51(1)(a) and (b)

In relation to para. 3, from our point of view, the fundamental question arises as to the extent to which **sanctions against third-country providers without legal representatives** are permissible under international law within the EU. How is this assessed by the COM?

The territorial scope of the DSA includes intermediary services providers that are established in a third country and offer services in the Union. These providers will have an obligation to appoint a legal representative in the EU (Article 11) and particular rules of jurisdiction apply (Article 40(2) and (3)).. As regards the exercise of enforcement powers, according to Chapter IV DSA, including the imposition of sanctions, the provisions of the DSA do not distinguish between providers which are established in the EU and those which are not. These measures are necessary to ensure the effectiveness of the rules of the DSA and to ensure that all intermediary service providers active on the internal market are treated equally.

The same rationale underlies other acts of EU law, such as the GDPR, the Platform-to-Business Regulation and the Terrorist Content Online Regulation. The possibility to effectively enforce the provisions of the DSA against non-EU providers which offer services in the EU but which have not

appointed a legal representative will depend on various factors, such as the existence of international agreements with the non-EU countries concerned or the presence of assets of the provider in the EU.

The Commission sees no reason to consider these measures not permissible under international law.

We also wonder: How can the MS, which exercises jurisdiction towards a third-country provider without a legal representative, **ensure** that the principle "**ne bis in idem**" is adhered to? From our point of view, the MS concerned can only inform all other MS immediately. This should be clarified in para. 3.

Please see earlier reply to a question asked by Belgium.

Art. 40 makes no reference to the **Digital Services Coordinator**.

- To what extent should the "requirements" mentioned there also apply to "any other competent authorities" in accordance with Art. 38(4)? What are the requirements?
- From our point of view, this stipulation can at most refer to the **notification of all other MS** according to para. 3, sentence 2. Is this assumption correct?

Article 40 is about the general jurisdiction of a Member State for the purposes of enforcing the rules laid down in Chapters III and IV of the DSA. This is the reason why it does not specifically refer to the DSC, but it rather refers to the Member State (where indeed different competent authorities may be empowered to enforce the DSA). Accordingly, depending on the solution chosen by a given Member State, other competent authorities (in addition to the DSC) may have jurisdiction for the enforcement of the DSA in accordance with the rules on jurisdiction laid down in Article 40.

3. <u>Re. Art. 45</u>

Do the **requests by the Digital Services Coordinator** of another MS according to para. 1 sub-para. 1 and the **recommendations by the Board** according to para. 1 sub-para. 2 in conjunction with Art. 49(1) lit. c have a **different legal quality**?
If so, what are the **consequences** for the Digital Services Coordinator of establishment?

The request of the DSC or the recommendation of the Board have the minimum content and bear the same legal consequences within the context of the mechanism of Article 45, i.e. the DSC of establishment will have to assess the issue, taking into utmost account the request or recommendation, and will have to communicate its assessment and eventually the measures undertaken within 2 months from the receipt of the request or recommendation. The only difference is that a DSC of destination is obliged ("shall") to send such request when has reasons to suspect, while the Board can ("may") send a recommendation, if the behaviour affects more than 3 Member States. Moreover, in accordance with Article 49(2), the DSCs or any other national competent

authority shall provide the reasons for not following the Board's recommendations when reporting its actions or when adopting the relevant decision.

According to para. 4, the coordinator of establishment has two months to assess the request / recommendation from another MS or the Board. According to para. 6, the COM has three months to assess the matter after it has been referred to.

- Do these **deadlines not seem too long**?
- In the context of the three-month time line for the COM according to para. 6, the **effective enforcement of the DSA** is delayed considerably.

Article 45(4) DSA provides for the obligation to act without undue delay and, in any case, within the maximum time limit of two months. The maximum time limit of 2 months for the DSC appears adequate given that the circumstances of the case may call for an in-depth assessment and that the right to be heard of the concerned party (in case enforcement measures are considered appropriate) may need to be ensured. Within 2 months, the DSC of establishment not only needs to provide the assessment, but also communicate the measures taken or that it envisages taking. This does not exclude the adoption of interim measures, which can also be suggested by the Board/DSC of destination.
In the context of referral to the Commission, the time limit of three months is considered justified given that the Commission has to analyse the circumstances of the case and take a decision, after having consulted the DSC of establishment and, if the request for assessment does not comes directly from it, the Board.
Why is the COM's right to exercise its own enforcement powers in this case limited to **VLOPs**? There is an increasing number of niche platforms which, despite their small size, could be of great importance for specific areas.

The involvement of the Commission as direct enforcer of the DSA is foreseen in specific cases where, given the importance of very large online platforms, in view of their reach and impact, their failure to comply with the specific obligations applicable to them may affect a substantial number of recipients of the services across different Member States and may cause large societal harms, while such failures may also be particularly complex to identify and address.

4. <u>Re. Art. 55</u>

What **interim measures against the VLOP** in question are conceivable in the event of urgency due to the risk of serious damage for the recipients of the service under para. 1? Unfortunately, the recitals do not contain any further explanations. In addition, there are no explanations as to when the conditions are met, e.g. how many recipients must be affected and at what threshold the risk of serious damage within the meaning of Art. 55(1) is to be assumed.

The interim measures depend on the specific individual infringement and the risk of serious harm at stake, hence they cannot be defined in abstract terms. The Commission is empowered to impose proportionate interim measures so as to avoid the risk of serious harm.

For example, if the risk assessment under Article 26 DSA identifies serious and systematic risks of recipients of the VLOPs service being exposed to consequences of the intentional manipulation of their services on a regular basis and the concerned VLOP fails to take necessary mitigating measures (under Article 27 DSA), the Commission may need to adopt interim measures to avoid the risk of serious harm pending the outcome of further administrative procedures.

The risk of serious harm will have to be assessed on a case by case basis, as is the case for interim relief in general. Similar approach underlies the interim measures under Regulation 1/2003 and the DMA proposal.

5. Re Art. 56

How does the COM ensure that the **DSA deters and properly penalizes misconduct** by VLOPs and that measures are taken in a transparent way and reported on? Art. 56(1) provides that the COM declare that there are no further grounds for action. However, in many cases it does not seem to be sufficient for the VLOP to only end the misconduct in order to deter future infractions but an **additional penalty** rather seems to be warranted. Also, should the COM not also give reasons in its decision under Art. 56(1) why it considers the commitments to be sufficient?

In case of a commitments decision, no fine or periodic penalty payment is envisaged, since such a decision does not conclude on the existence of the infringement, but rather makes legally binding commitments that are considered effective and sufficient in addressing the non-compliance concerns raised. The system proposed is similar to the one used under Regulation 1/2003 as well as the DMA proposal.

Any decision by the Commission has to contain an adequate statement of reasons, including a commitments decision under Article 56 DSA.

6. Re. Art. 58

Could you please give examples of what **measures** other than fines or periodic penalties are envisaged in the context of VLOPs?

As provided in Article 58(3), in the context of the non-compliance decision under Article 58 DSA the Commission must order the VLOP to take the necessary measures to ensure compliance with the decision within a reasonable time period and to provide information on the intended measures.

The content of such "necessary measures" is not prescribed, as it would depend on the circumstances of the individual case.

For example, if the VLOP concerned fails to conduct a risk assessment under Article 26 DSA, the Commission will normally not only adopt a non-compliance decision (under Article 58 DSA) and impose fines (under Article 59 DSA), but will also order the VLOP to carry out such risk assessment within a specific period of time.

7. Re. Art. 59

What is the **precise purpose** of the requirement contained in para. 3 that, before adopting the decision, the COM shall communicate its preliminary findings "**to any other person**" referred to in Art. 52(1)?

Since the addressee of the request for information may not only be VLOP, but also any other persons acting for purposes related to their trade, business, craft or profession that may be reasonably be aware of information relating to the suspected infringement or the infringements, including organisations performing the audits referred to in Articles 28 and 50(3), these persons can be subject also to a Commission decision under Article 59(2) imposing a fine, in case of provision of incorrect or misleading information or failure to provide such information.

Article 59(3) ensures respect of the rights of defence of those persons, by informing the persons concerned of the intention to adopt a decision and providing them with an opportunity to submit their views on the preliminary findings.

Slovak Republic

1.) (Art. 38-68): The powers of the DSC and the EC in CH IV constitute a wide range of investigative powers outside the scope of injunctions or competition investigations. In what way will they be subject to a full judicial review, if so? Given the sanction regimes under the DSA, how to possibly avoid a potential distortion of competition, e.g. with offline competitors that are not subject to such regulation?

Article 41(6) requires that any exercise of the powers laid down in Article 41 is subject to adequate safeguards laid down in the applicable national law (in conformity with the Charter and with the general principles of Union law). In particular, the right of effective judicial remedy of all affected parties should be ensured.

Similarly, with regard to powers exercised by the Commission, these are subject to the review of the Court of Justice of the European Union pursuant to Article 263 TFEU.

The DSA addresses the specific issues related to the provision of digital services in the single market, which are not relevant for offline providers.

2. Art. 55: Concerning the interim measures what would be a process of assessing such serious measures and based on what (in practice)?

[see also Q. 4 posed by Germany] The interim measures depend on the specific individual infringement and the risk of serious harm at stake, hence they cannot be defined in abstract terms. The Commission is empowered to impose proportionate interim measures so as to avoid the risk of serious harm. It shall adopt these by decision, which shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

In view of the urgency and given that the measure is only temporary and valid during the proceedings, the right to be heard shall not be granted before the issuance of such a decision pursuant to Article 63(1). Such a decision shall be published pursuant to Article 64 and, as it has legal effects vis à vis the addressee, it may be subject to judicial review pursuant to Article 263 TFEU, as this is already the case also under Regulation 1/2003.

For example, if the risk assessment under Article 26 DSA identifies serious and systematic risks of recipients of the VLOPs service being exposed to consequences of the intentional manipulation of their services on a regular basis and the concerned VLOP fails to take necessary mitigating measures (under Article 27 DSA), the Commission may need to adopt interim measures to avoid the risk of serious harm pending the outcome of further administrative procedures.

The risk of serious harm will have to be assessed on a case by case basis, as is the case for interim relief in general. Similar approach underlies the interim measures under Regulation 1/2003 and the DMA proposal.

3. Art. 57: At what stage can art. 57 be applied, while being a general monitoring clause?

Article 57 can be exercised only “for the purposes of carrying out the tasks assigned to the Commission” under Section 3 of Chapter IV. It shall therefore apply only in the context of the enforcement of the DSA obligations to a specific concerned provider, and not as a general power to monitor and have access to information beyond the specific tasks described in that Section.

4. Art. 39 and CH IV, section 3: What are the reasons for a strong request for the complete independence of Digital Service Coordinators if their competence is limited to obligations in DSA and do not decide about the online content? Is that sufficiently reflected in VLOPs supervision?

DSCs (and other Competent Authorities when empowered to enforce the DSA) are the primary enforcers of the DSA, including for VLOPs. In view of their crucial role in ensuring the effectiveness of the rights and obligations laid down in the Regulation and in achieving its objectives, it is considered necessary to ensure complete independence of those authorities from private and public bodies, including when enforcing these rules vis à vis VLOPs.

5. Art. 74: How does Art. 74(2) reflect the fact of the need of changes in national legislation of all/many Member States due to DSA?

The application deadline laid down in the DSA mirrors the urgency to ensure the objectives of the Regulation. At the same time, it should be considered that the DSA does not necessarily require the set-up of new authorities, as existing authorities can be empowered (at least one and without prejudice of further refinement of competences among different authorities, to be communicated to the Commission and the Board pursuant to Article 38(2)). Moreover, being a Regulation, the DSA does not require transposition of its rules into national law.

Hungary

Chapter IV: Article 40 (Jurisdiction) and Article 41 (Powers of Digital Services Coordinators)

Providers of intermediary services usually operate data centers and network facilities in each targeted EU member state in order to speed up and optimize their services. In Art. 40, however, the jurisdiction is limited to one specific Member State of the main establishment, and the Digital Services Coordinators of the jurisdiction Member State is not authorized to carry out on-site inspections in different Member States, according to Art. 41. This may lead to the situation, where substantial segments of the intermediary service providers' infrastructure will be lacking the possibility of on-site inspection. On what legal grounds do you think it is possible to carry out on-site inspections in such cases in non-jurisdiction Member States? How do you think the integrity of the intermediary services providers' infrastructure can be verified without on-site inspection capabilities of possible eavesdropping or data interference?

Article 41 attributes the powers listed therein to DSC (or, where relevant, other competent authorities – see above) in relation to providers under their jurisdiction (Article 40). Therefore, this coversalso the inspection and information gathering powers mentioned in Article 41(1)). It follows from Article 40 on jurisdiction that only the Member State of establishment of the provider has those powers. DSCs should however be able to search for and obtain information which is located in its territory, including in the context of joint investigations, with due regard to the fact that oversight and enforcement measures concerning a provider under the jurisdiction of another

Member State should be adopted by the DSC of establishment, where relevant in accordance with the procedures relating to cross-border cooperation (see recital 77).

Chapter IV: Article 41 para 3 point b of first subparagraph + second subparagraph

Under what technical solutions is it feasible to temporary restrict of access of recipients of the service concerned?

How can the efficiency of this instrument be ensured if in line with the second subparagraph the interested parties are invited to submit written observations within a time period that shall not be less than two weeks?

The DSA does not specify the technical solutions to implement the temporary restriction of access pursuant to Article 41(3), as a measure that needs to be proportionate to certain particularly serious and persistent infringements (recital 82). This restriction is an "ultima ratio" measure for infringements that entail a serious criminal offence involving a threat to the life or safety of persons, and it can only apply where all other powers pursuant to Article 41 have been exhausted and the infringement persists and causes serious harm which cannot be avoided through the exercise of other powers, and the management body of the provider has been required to terminate the infringement and this is unsuccessful. Only under those consecutive conditions, the DSC can require a judicial authority to order the temporary restriction of access to the service concerned by the infringement. Where this is not technically feasible, the temporary restriction would apply to the whole online interface of the provider.

As this measure can affect the rights and interest of third parties, it is appropriate to require that the measures be ordered by a competent judicial authority and subject to additional safeguards. In particular, third parties potentially affected by such measures should be afforded the opportunity to be heard (Recital 82). The right to be heard would be compromised if the third parties potentially affected were not given sufficient time to exercise such right. .

Chapter IV: Article 54 (Power to conduct on-site inspections)

On-site inspections to intermediary services providers' facilities may result in encountering highly sensitive data, from law enforcement or national security point of view. How would the acquired information be secured when the on-site inspection is performed by auditors and experts appointed by the Commission, according to (2)? Would a security clearance be mandatory to these appointed auditors and experts?

The auditors and experts appointed by the Commission are acting on behalf of the Commission and are subject to the same confidentiality requirements applicable to the Commission (Article 65(6)).

Czech Republic

General question on chapters IV and V: Since DSCs are supposed to be independent, why isn't the EU-level structure independent as well? There is little distinction between the practical independence of such an office on the MS and on the EU level.

The Board is an independent advisory group (Article 47(1)), composed of DSCs, which have to be independent. With regard to the Commission it should be considered that pursuant to Article 17(3) TUE "[i]n carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks".

Article 40: Following-up to the discussions so far, why isn't Chapter II included in the scope of this article as well? Is this covered elsewhere in the DSA? Art. 41 seems to apply to the whole of the DSA. At the WP on April 27th, the Cion explained (in simple words) that the provisions of art. 40 may lead to the use of articles 8 and 9. The question therefore also is whether it is necessary or not to make this clearly stated in the text?

See second question by Luxembourg

Article 41: Why is "at least" mentioned in para 1? Since the DSA is a regulation, it should be directly applicable. "At least" may incite divergent national rules which is against the spirit of this regulation.

The list of the DSC's powers provided for in Article 41 are minimum harmonized powers which are considered necessary to ensure a harmonized enforcement of the Regulation across the Union, which does not exclude further powers being conferred on the basis of national law.

Article 50: If the DSC is recommended to investigate the suspected infringement and they decide not to do so, do they have to justify their negative decision? What procedure and under what jurisdiction would be used in case the DSC does not initiate an investigation on the basis of a recommendation from the Commission or the Board pursuant to Article 50 (1)?

The DSC shall take utmost account of any recommendation issued by the Commission or the Board pursuant to Article 50(2). Moreover, pursuant to Article 49(2), the DSCs shall provide the reasons for not following the Board's recommendations when reporting its actions or when adopting the relevant decision.

Articles 52 – 60: As stated in the WP, we believe there is misbalance between the internal and external powers of the DSC (towards the intermediaries and towards the Commission). Therefore, we would like to ask also in written why there is no role for the DSC in these articles (and if there is a bigger role for the DSC envisaged, why it is not stated in the text)? In our opinion, it is a missed opportunity for cooperation and it is also not supported by the legal basis.

Once the Commission has initiated the proceedings pursuant to Article 51, the DSC should be precluded from exercising their investigatory and enforcement powers in respect of the service concerned, so as to avoid duplication, inconsistencies and risks from the viewpoint of the principle of *ne bis in idem*. However, those DSCs are not precluded from exercising their powers to assist the Commission, at its request (Article 51(2) and Recital 97). .

Austria

- Art. 40 (Jurisdiction):

„…*jurisdiction for the purposes of Chapters III and IV of this Regulation*" is a very broad expression. As regards the concrete enforcement mechanisms provided in the DSA, we suppose that contrary to this very broad expression the jurisdiction addressed in Art. 40 covers only administrative and public enforcement.

Q: Is this suggestion correct?

If yes, we propose again to mention the Brussel Ia-Regulation in Art. 1 para 5 to ensure legal certainty as regards a clear dissociation from civil law.

- Art. 41 para 3:

Following Recital 76, the purpose of this article is "to ensure clarity under which Member State's jurisdiction those providers fall for the purposes of enforcing the rules laid down […] by the national competent authorities".

The Regulation does not modify the specific rules regulating the international private law aspects, including Brussels I Regulation.

Q: Is „competent judicial authority" equal to "court", does it have to be a "tribunal" in the sense of Art. 6 EHRC?

In the heading of Art. 65, those "judicial authorities" are called "courts".

The Regulation does not define the characteristics of "judicial authorities". However, as the decision concerning access will adjudicate civil rights of third parties (see recital 82), the judicial

authority shall comply with the applicable requirements for bodies entitled to adjudicate these issues.

Q: Is the order to restrict access of recipients of the service addressed to the infringing intermediary or to other intermediaries that grant that access, e.g. ISPs?

The order pursuant to Article 41(3) may be addressed in principle to a provider of intermediary services, such as the relevant hosting service provider, internet service provider or domain registry or registrar, , which is in a reasonable position to achieve that objective without unduly restricting access to lawful information (Recital 83).

- Art. 57 para 1 (Monitoring actions):

Q: What are the "necessary actions" the Commission can take to monitor the effective implementation and compliance with the DSA? Is the possibility to "order that platforms provide access to, and explanations relating to, its databases and algorithms" mentioned in the second sentence one of those actions that can only be taken to monitor the effective implementation and compliance with the DSA? What other actions can fall under this provision?

As stated in Q3of Slovak Republic, Article 57 can be exercised only "for the purposes of carrying out the tasks assigned to the Commission" under Section 3 of Chapter IV. It shall therefore apply only in the context of the enforcement of the DSA obligations to a specific concerned provider, and not as a general power to monitor and have access to information beyond the specific tasks described in that Section. On the other hand, the Article does not pre-define which monitoring actions can be ordered by the Commission, as this would depend from the specific facts and circumstances of a given case, in full respect of the principle of proportionality and the rights and interests of the affected parties (recital 98). For instance, the Commission could undertake actions to verify compliance with commitments within the meaning of this Regulation (e.g. "mystery shopping" exercises).

- Art. 58 (Non-compliance) and Art. 59 (Fines):

Q: What is meant by „the relevant provisions of this Regulation"?

This expression seems to be very vague and unspecific. This is problematic in particular against the background that Art. 59 imposes significant sanctions. For the sake of legal certainty and to be in line with fundamental rights, it is necessary that it is clear for everyone which conduct is sanctioned and which is legal - a general reference to the whole Regulation does not fulfil these requirements. Comparable legal instruments (Regulation 1/2003, DMA) provide a clear and explicit catalogue of conduct that leads to sanctions.

The DSA clearly spells out the specific directly applicable obligations applicable to very large online platforms at stake in its substantive provisions. Only the violation of these obligations under the DSA shall be subject to these enforcement measures.

- Art. 68 (Representation):

Under Austrian law, the main activity of associations has to be non-profit (§ 1 Abs. 2 Vereinsgesetz: "Ein Verein darf nicht auf Gewinn berechnet sein.") However, associations have a sideline privilege. Therefore, they can generate certain income without losing their status as "non-profit".

Q: Is this compatible with the wording under lit. a?

The operation on a not-for-profit basis does not exclude that the association may recover its costs.

Croatia

1. Art 38 (2) – Can 'competent authority' act as a DSC, i.e. if the 'competent authority' is designated public body, can the Unit/Department, perform the tasks and responsibilities of the DSC within the same public body e.g. Ministry?

The DSC is one competent authority in accordance with Article 38(1). It is not necessary, but it is possible, to appoint more than one authority for the enforcement, provided that one of such authority is designated as DSC. However, both DSC and other competent authorities pursuant to Article 38 need to act with complete independence, in accordance with Article 39.

2. Art 39 (2) - Clarification on the 'complete independence' when DSC act in carrying their tasks and exercising their powers?

See Q1 (first subquestion) of Germany

3. Art 51 (1, a) - Further clarification on consequences if MS DSC has infringed or did not take any adequate investigatory or enforcement measures should be provided.

According to Article 51(1)(a), where the DSC of establishment did not take any investigatory or enforcement measure concerning a specific VLOP in accordance with the request (and the timeline) of the Commission, the Commission can take direct enforcement action vis à vis such provider. Recital 85, moreover, clarifies that the DSA is also without prejudice to the Commission's general duty to […] enforce Union law under the control of the Court of Justice of the European Union in accordance with the Treaties.

4. As far as we understood, Art. 65 (1) of the DSA tends for the DSC to take necessary measures after EC used all legal remedies and exercised all powers available in the

Regulation listed through articles 51 to 64. We would like the clarification on the possible involvement of the MS DSC as an active participant in the process and not just as local support.

Following Article 65(1), the Commission may request the DSC of establishment to act pursuant to Article 41(3), hence in accordance with the requirements set therein. The powers and requirements of the DSC in the context of Article 65 are therefore the same as in Article 41.

5. Paragraph (6) of Article 63 basically states that confidential information should not be disclosed. Clarification is needed for this requirement laid down in the paragraph which obligates public sector bodies to note disclose any of the information which are covered with professional secrecy. What kind of rules, as per Art 63 (6) should competent authority introduce in order to safeguard the potential lose or any unlawful situation regarding the information?

The Regulation requires Member States, the Board and the Commission to ensure the respect of confidentiality and professional and business secrecy. As a matter of principle, such rules on ensuring confidentiality of professional secrecy are general safeguards in the context of the enforcement of substantive rules (e.g. Regulation 1/2003; Regulation 139/2004).

6. Considering the challenges of technical functioning and interoperability of the systems, referring to the Art 67 (3) will there be any technical preconditions for the DSCs to put in place such as dedicated servers, closed systems or certificates in order to enable proper functioning of the ‘Information sharing system’. If yes they should be published shared with the DCS in order for them to be timely prepared and equipped.

Pursuant to Article 67 the information sharing system referred to in is to be established and maintained by the Commission. The Legislative Financial Fiche provides the necessary resources for the establishment and maintenance of such a system at Union level. An implementing act will lay down the practical and operational arrangements for its functioning and interoperability.