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NOTE

From:	DK Delegation
To:	Delegations
Subject:	Digital Services Act: DK Comments on compromise text: articles 8-9, 25, 29, 39(3), 40, 45-46, 50-57 and the corresponding recitals

Denmark's written comment on the Presidency compromise text on the key issues as examined in the meeting on 22 June (article 8-9, 25, 29, 39(3), 40, 45-46, 50-57 and the corresponding recitals).

Article 8, 9 and recitals 29-32 – Orders to act against illegal content and Orders to provide information

The country of origin principle has been a driver for the development of a well-functioning internal market and the possibilities for business to scale up across borders in EU. As we understand article 8 and 9, the provisions will enable authorities to issue orders to service providers in other member states. Denmark is worried that this possibility can challenge the functioning of the internal market, as the businesses will have to familiarize themselves with legislation in all member states. On that background, Denmark finds that the exception to the country of origin principle should only apply to harmonized EU rules. Thus, the possibility to issue orders to providers in other member states should be limited to areas with harmonized rules.

Denmark finds it important to clarify whether providers of intermediary services are not legally obliged to follow orders issued by authorities from other Member States than the one where the provider is established. Article 8 and 9 are not comparable to for instance article 3, 'mere conduct', in the proposed regulation on addressing the dissemination of terrorist content online (TCO), which – as you may know – gives rise to constitutional concerns to Denmark. It is unclear what happens if the provider of intermediary services decides to not follow an order.

Also, we are worried that the use of orders according to article 8 could lead to "overremoval" of content. It seems unlikely, that in practice, the providers of the intermediary services would challenge these orders or would not feel obliged to comply. This could have the unwanted effect that content, which is legal in the Member State where the provider is established, is removed. This is highly problematic, as there are cultural and legal differences in what is considered illegal in different national legislations. We would appreciate the Commissions thought in this regard. Further, we are in doubt how the provision will function in practice, i.e. what safeguards can prevent "overremoval" of content.

We find it unclear how Article 8 (2)(b) should be understood, specifically what "territorial scope of the order" means. The same paragraph refers to "the applicable rules of Union and national law" as well as "general principles of international law". What rules and principles are specifically thought of in this paragraph should be specified.

Article 50 – Enhanced supervision for very large online platforms

We support the amendments in the proposed text to article 50 (1), as "within a reasonable time" was a very unclear timeframe and the recitals did not provide any guidance. We welcome the amendment

saying, that the Digital Services Coordinator shall adopt a decision within *a time period predefined in the recommendation* as this could provide more clarity. What recommendation the paragraph refers to should be specified in the article or recital.

It appears from article 50(1), subparagraph 2, that the Commission, The Board or minimum three Digital Services Coordinators can recommend the Digital Service Coordinator to investigate a suspected infringement. It is unclear what the consequences, if any, are for the Digital Services Coordinator if he/she decides not to investigate the alleged infringement, since the text uses the word "recommend".

According to article 50(3), subparagraph 1, the Board shall communicate its opinion to the Digital Services Coordinator. It is ambiguous why the Commission is not obliged to communicate a decision.

From the Danish side, we attach great priority to the very large online platforms taking upon themselves a much larger responsibility – hence, we are at the outset critical towards the deletion of the possibility for the coordinators to request the relevant VLOP to undergo independent revision.

Article 46 – Joint investigations and requests for Commission intervention

In general, we welcome the compromise text. Regarding article 46, we think that the article could advantageously address which kind of joint investigations could be carried out.

Further, it is unclear if the DSC from the Member State where the intermediary service is established, is required to participate in the joint investigation. That should be clarified as well in order to ensure legal clarity about the roles and the DSC's opportunity to influence the investigations.

Article 51 and recital 96 – Intervention by the Commission and opening of proceedings

We welcome the amendments, but it is unclear how discrepancy is handled in the case, where the Members State has acted, in its own view correctly, but incorrectly in the Commission's view.

Article 52 – Request for information

Regarding article 52, it appears from paragraph 1 that the Commission by simple request or by decision may require to provide such information within *reasonable time*. In addition, the recitals do not provide any guidance in this matter. This is a very unclear timeframe and it should be defined more clearly in order to provide efficiency and legal certainty, as in the amendments in article 50 (1); "within a time period predefines in the recommendation". In this case, it is important to clarify which recommendation would be the appropriate.

Further, the Commission may require information from the VLOP or any other persons acting for purposes related to their trade, business, craft or profession. However, the wording of the recital suggests a broader approach, i.e. for instance information from persons not acting for purposes related to their trade, business, craft or profession (private or natural persons/consumers). The circle of people covered by the provision is unclear and could be defined more precisely.

Article 56 – Commitments

According to the wording of article 56 (2), the Commission may, upon request or on its own initiative, reopen the proceedings; where there has been a material change in any of the facts on which the decision was based; where the very large platform concerns acts contrary to its commitments; or where the decision was based on incomplete, incorrect or misleading information provided by the very large online platform concerned or other person referred to in article 52 (1).

Can the Commission/Presidency elaborate on whether the Commission will actively ensure compliance with such commitments? We are concerned, that the very large online platforms offer commitments that they do not act upon after the Commission has declared that there are no further actions to take.

Article 57 – Monitoring actions

Article 57 sets out, that the Commission may order platforms to provide access to, and explanations relating to, its databases and algorithms. The extensions of the Commission's rights are unclear.

Article 25 and recitals 53-55 – Very large online platforms

From the Danish side, we support the focus on the reach of platforms. However, the regulation seems to lack a definition of *active recipients* and how these are calculated. In order to ensure that this concept is applied and calculated uniformly across Member States, this should be clearly stated in the Regulation.

Article 25 (2) is under scrutiny. We are looking into the introduced possibilities for the Commission to adopt delegated acts, but understand the technical nature of them as highlighted by Commission.

Article 29 and recital 62 – Recommender systems

From the Danish side, we would like to add the following to article 29(1); *Very large online platforms shall also make this information directly and easily accessible from a specific section of the online interface from the page where the information is being prioritized according to the recommender system*. Directive (EU) 2019/2161 ("better enforcement and modernization of Union consumer protection rules") sets similar information requirements for the ranking systems on online marketplaces. However, this Directive requires that the information should be accessible from the online interface.

As very few consumers actively interact with the terms and conditions, a similar requirement should be included in this regulation, for it to have any effect on consumer protection.

We welcome the amendments in article 29(1), that providers of very large online platforms shall also make this information directly and easily accessible on a specific section of the online interface where the information is recommended.