



Council of the European Union
General Secretariat

Brussels, 14 July 2021

**Interinstitutional files:
2020/0361 (COD)**

WK 9435/2021 INIT

LIMITE

**COMPET
MI
JAI
TELECOM
CT**

**PI
AUDIO
CONSOM
CODEC
JUSTCIV**

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:	DK Delegation
To:	Delegations

Subject:	Digital Services Act: DK Comments regarding articles 2-9, 39-40 with Recitals
----------	---

WK 9435/2021 INIT

LIMITE

EN

Denmarks written comments – DSA art. 2-9, 39(3)- 40

(6) In practice, certain providers of intermediary services intermediate in relation to services that may or may not be provided by electronic means, such as remote information technology services, transport, accommodation or delivery services. This Regulation should apply only to intermediary services and not affect requirements set out in Union or national law relating to products or services intermediated through intermediary services. **This Regulation should not apply in situations where the intermediation is indispensable to the provision of the intermediated service and the service provider exercises decisive influence over the conditions under which the intermediated service is provided, as specified in the case law of the Court of Justice of the European Union.** ~~including in situations where the intermediary service constitutes an integral part of another service which is not an intermediary service as specified in the case law of the Court of Justice of the European Union.~~

Regarding recital 6, we find it difficult to understand the exact meaning of the wording. Further, in order to provide legal certainty, the case law referred to in recital 6 should be specified in the recitals.

(8) Such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union or, in its absence, on the basis of the existence of a significant number of users in one or more Member States **in relation to their population**, or the targeting of activities towards one or more Member States. The targeting of activities towards one or more Member States can be determined on the basis of all relevant circumstances, including factors such as the use of a language or a currency generally used in that Member State, or the possibility of ordering products or services, or ~~using~~ **the use of a relevant national** top level domain. The targeting of activities towards a Member State could also be derived from the availability of an application in the relevant national application store, from the provision of local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State. A substantial connection should also be assumed where a service provider directs its activities to one or more Member State as set out in Article 17(1)(c) of Regulation (EU) 1215/2012 of the European Parliament and of the Council¹. On the other hand, mere technical accessibility of

¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L351, 20.12.2012, p.1).

a website from the Union cannot, on that ground alone, be considered as establishing a substantial connection to the Union.

In recital 8 we find it unclear when a service provider has a *significant number of users* in one or more Member States in relation to their population. E.g. is it 2 pct.? Or is it 10 pct.? It is also unclear how a “*user*” is defined in this context for instance in relation to online marketplaces. This should be clearly defined.

- (9) **This Regulation fully harmonises the rules applicable to intermediary services in the internal market with the objective to ensure a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected. Accordingly, Member States should not adopt or maintain additional national requirements on those matters falling within the scope of this Regulation, unless explicitly provided for in this Regulation, since this would affect the direct and uniform application of the fully harmonised rules applicable to the providers of intermediary services in accordance with the objectives of this Regulation. This does not preclude the possibility to apply other national legislation applicable to providers of intermediary services in accordance with Union law, including Directive 2000/31/EC, in particular its Article 3, which pursue other legitimate public interest objectives.** ~~This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular Directive 2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended,² and Regulation (EU) .../... of the European Parliament and of the Council³—proposed Terrorist Content Online Regulation. Therefore, this Regulation leaves those other acts, which are to be considered *lex specialis* in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.~~

² ~~Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance), OJ L 95, 15.4.2010, p. 1.~~

³ ~~Regulation (EU) .../... of the European Parliament and of the Council—proposed Terrorist Content Online Regulation.~~

Other Union acts leave the Member States with the possibility of adopting certain measures at national level i.e. the AVMSD and Copyright Directive. It seems unclear whether it will be possible for Member States to maintain such national rules after the DSA has entered into force. Thus, recital 9 should for instance clearly state whether the scope of AVMS art. 7a, Copyright Directive (DSM-directive) art. 12 in connection with art. 15, is in any way covered by the scope of Digital Services Act. We are also still unsure if the recital leads to the conclusion that Member States can in fact uphold national time limits for removal of certain types of illegal content on e.g. Social Media. This should also be clarified in the recital.

- (12) In order to achieve the objective of ensuring a safe, predictable and trusted online environment, for the purpose of this Regulation the concept of “illegal content” should **underpin the general idea that what is illegal offline should also be illegal online. The concept should be defined broadly to cover** ~~be defined broadly and also covers~~ information relating to illegal content, products, services and activities. In particular, that concept should be understood to refer to information, irrespective of its form, that under the applicable law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or that relates to activities that are illegal, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, **the sale of products or the provision of services in infringement of consumer protection law,** the non-authorised use of copyright protected material, **or the illegal offer of accommodation services** ~~or activities involving infringements of consumer protection law~~. In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is consistent with Union law and what the precise nature or subject matter is of the law in question.

Denmark supports that it is now explicitly stressed what is illegal offline should also be illegal online in recital 12.

Furthermore, we appreciate the additional examples of what is illegal content. This clarifies the concept further also from a consumer protection perspective.

- (13) Considering the particular characteristics of the services concerned and the corresponding need to make the providers thereof subject to certain specific obligations, it is necessary to distinguish, within the broader category of providers of hosting services as defined in this Regulation, the subcategory of online platforms. Online platforms, such as search engines, social networks, or online marketplaces, should be defined as providers of hosting services that not only store information provided by the recipients of the service at their request, but that also disseminate that information to the public, again at their request. However, in order to avoid imposing overly broad obligations, providers of hosting services should not be considered as online platforms where the dissemination to the public is merely a minor and purely ancillary feature that is intrinsically linked to ~~of~~ another service and that feature cannot, for objective technical reasons, be used without that other, principal service, and the integration of that feature is not a means to circumvent the applicability of the rules of this Regulation applicable to online platforms. For example, the hosting of a comments section in an online newspaper could constitute such a feature, where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. In contrast, the hosting of comments in a social network should be considered an online platform service, where it is clear that it is a major feature of the service offered, even if ancillary to the publishing of users' posts.

The DSA should cover all digital services that play an important role in the dissemination of illegal content, and in order to clarify that search engines falls within the scope of hosting services and online platforms it has been explicitly added in the recital.

- (14) The concept of ‘dissemination to the public’, as used in this Regulation, should entail the making available of information to a potentially unlimited number of persons, that is, making the information easily accessible to users in general without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access the information in question. Accordingly, where access to information requires registration or admittance to a group of users, that information should be considered to be disseminated to the public only where users seeking to access the information are automatically registered or admitted without a human decision or selection of whom to grant access. ~~The mere possibility to create groups of users of a given service, including a messagings service, should not, in itself, be understood to mean that the information disseminated in that manner is not disseminated to the public. However, the concept should exclude dissemination of information within closed groups~~
-

consisting of a finite number of pre-determined persons. Interpersonal communication services, as defined in Directive (EU) 2018/1972 of the European Parliament and of the Council,⁴ such as emails or private messaging services, fall outside the scope of the definition on online platforms is Regulation as they are used for interpersonal communication between a finite number of persons which is determined by the sender of the communication. However, the obligations set out in this Regulation for providers of online platforms may apply to services that allow the making available of information to potentially unlimited number of recipients, not determined by the sender of the communication, such as through public groups or open channels. Information should be considered disseminated to the public within the meaning of this Regulation only where that occurs upon the direct request by the recipient of the service that provided the information. Consequently, providers of services, such as cloud infrastructure, which are provided at the request of parties other than the content providers and only indirectly benefit the latter, should not be covered by the definition of online platforms.

We appreciate the amendments in recital 14 to clarify and exemplify how dissemination the public is to be understood.

We agree that private communication is – and should stay – private. It is important to secure the fundamental right to privacy.

As a starting point, we see a well-balanced distinction of open/public and closed groups.

We do have some concerns about very large closed groups. If a group established on a social network has a significant number of users, even though the group is not public but requires the user to enter and someone to admit access – clarity of whether the size could be a factor in determining whether information shared is disseminated to the public would be appreciated.

- (22) In order to benefit from the exemption from liability for hosting services, the provider should, upon obtaining actual knowledge or awareness of illegal content, act expeditiously to remove or to disable access to that content **taking into account the potential harm the illegal content in question may create. In order to ensure a harmonised implementation of illégal content removal throughout the Union, the provider should** acts expeditiously and within 24 hours to remove or to disable access to content which seriously harm public safety

⁴ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, p. 36.

and/or is assessed as manifestly illegal by a layman without further investigation. The provider should act within 24 hours to remove or to disable access to products which are assessed as manifestly illegal by a layman. Where the illegal content does not seriously harm public policy, public security, public health or consumers health or safety, the provider shall remove or disable access to illegal content within 7 days. The deadlines referred to in this Regulation shall be without prejudice to specific deadlines set out in Union law or within administrative or judicial orders. The provider may derogate to the deadlines referred to in this Regulation on the grounds of force majeure or for justifiable technical or operational reasons but it should be required to inform the competent authorities as provided for in this Regulation. The removal or disabling of access should be undertaken in the observance of the principle of the Charter of Fundamental Rights, including a high level of consumer protection and freedom of expression. The provider can obtain such actual knowledge or awareness, inter alia, through, in particular, its own-initiative investigations, or notices submitted to it by individuals or entities in accordance with this Regulation in so far as those notices are sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess and where appropriate act against the allegedly illegal content.

Article 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) ‘information society services’ means services within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535;
 - (b) ‘recipient of the service’ means any natural or legal person who **for professional ends or otherwise, uses an intermediary service, in particular for the purposes of seeking information or making it accessible**~~the relevant intermediary service;~~
 - (c) ‘consumer’ means any natural person who is acting for purposes which are outside his or her trade, business, **craft** or profession;
 - (d) ‘to offer services in the Union’ means enabling **natural or** legal ~~or natural~~ persons in one or more Member States to use the services of the provider of ~~information society~~ **intermediary** services which has a substantial connection to the Union;
-

(da) ‘such a substantial connection’ means a connection of an provider of intermediary services with the Union resulting either from its ~~is deemed to exist where the provider has an establishment in the Union~~ **or from**; ~~in the absence of such an establishment, the assessment of a substantial connection is based on specific factual criteria, such as:~~

- a significant number of users in one or more Member States **in relation to their population**; or
- the targeting of activities towards one or more Member States.

(e) ‘trader’ means any natural person, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his or her name or on his or her behalf, for purposes relating to his or her trade, business, craft or profession;

(f) ‘intermediary service’ means one of the following **information society** services:

- a ‘mere conduit’ service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
- a ‘caching’ service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
- a ‘hosting’ service that consists of the storage of information provided by, and at the request of, a recipient of the service;

(g) ‘illegal content’ means any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law;

- (h) 'online platform' means ~~a provider of~~ a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation;
- (i) 'dissemination to the public' means making information available, at the request of the recipient of the service who provided the information, to a potentially unlimited number of third parties;
- (ia) 'online marketplace' means an online platform which allows consumers to conclude distance contracts with other traders or consumers;**
- (j) 'distance contract' means a contract within the meaning of Article 2(7) of Directive 2011/83/EU;
- (k) 'online interface' means any software, including a website or a part thereof, and applications, including mobile applications;
- (l) 'Digital Services Coordinator of establishment' means the Digital Services Coordinator of the Member State where the provider of an intermediary service is established or its legal representative resides or is established;
- (m) 'Digital Services Coordinator of destination' means the Digital Services Coordinator of a Member State where the intermediary service is provided;
- (n) 'advertisement' means information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and ~~displayed~~ **served** by an online platform on its online interface against remuneration specifically for promoting that information;
-

- (o) ‘recommender system’ means a fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed;
- (p) ‘content moderation’ means the activities, **automated or not**, undertaken by providers of intermediary services aimed, **in particular** at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility, and accessibility of that illegal content or that information, such as demotion, **demonetisation**, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account;
- (q) ‘terms and conditions’ means all terms and conditions or ~~specifications~~**clauses**, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the services-;
- (r) ‘turnover’ means the amount derived by an undertaking as defined in Article 5(1) of Regulation (EU) No 139/2004.**

Article 2 (b) – “recipient of the service”:

- Denmark supports the amendment that is in line with the same definition of “recipient of the service” in the e-commerce directive.

Article 2 (da) – “substantial connection” and recital 8:

- Denmark is positive of the presidency proposal regarding a definition of substantial connection in relating to the definition “to offer services in the Union”.
- We agree that a significant number of users in one or more Member States should be determined in relation to their population.
- However, in order to establish legal certainty, we still prefer even more clarity, for example a numeric span, a percentage or other quantitative measures. It could also be exemplified in the recitals.
- Also, it should be clearly described in the recitals how a ‘user’ is defined, i.e. for online marketplaces.

Article 2 (f) – “intermediary service”:

- We find it absolutely necessary that the legal status of digital platforms is clarified by determining what requirements a service must meet in order to be considered an ‘intermediary service provider’ within the remit of the DSA.
 - The collaborative economy has particularly brought about a new range of digital platforms that allow people to connect various goods and services, e.g. with respect to real estate,
-

transport, labor, vacation and money lending. Depending on their particular configuration, some of these services may be considered intermediary services while others may not.

- We understand that the definition needs to be broad and we also advocate for a flexible definition in order to include both services that exist today but also services that will exist in the future and thereby future proof.
- However, we see a grey area already in the e-commerce directive today and therefore, we believe it is important with clarification in the DSA in order to ensure for the supervisory authorities to determine whether a service is included or not by a mere conduit, caching or a hosting service to ensure legal certainty. This is also important in order to ensure uniform interpretation of the rules across the EU.

Article 2 (h) – “online platform” and recital 13:

- We find it very important that the DSA regulates the exact service and not the business at a whole because an online platform, especially a social network, often constitutes of several different business- or service models.
- Therefore, we support the amendment in article 2 (h) and the clarification and example mentioned about social networks in recital 13.

Article 2 (i) – “dissemination to the public” and recital 14:

- We appreciate the amendments in recital 14 to clarify and exemplify how dissemination the public is to be understood.
- We agree that private communication is – and should stay – private. It is important to secure the fundamental right to privacy.
- As a starting point, we see a well-balanced distinction of open/public and closed groups.
- We do have some concerns about very large closed groups. If a group established on a social network has a significant number of users, even though the group is not public but requires the user to enter and someone to admit access – clarity of whether the size could be a factor in determine whether information shared is disseminated to the public would be appreciated.

Article 2 (ia) – “online marketplace”:

- Denmark is positive about the presidency proposal regarding a new definition of an online marketplace.
- Examples of online marketplaces could with advantage be included in a recital, also with a limitation to make the definition more clear.

Article 2 (r) – “turnover”:

- Denmark can support the new definition with reference to the already existing EC Merger Regulation.

Chapter II – Liability of providers of intermediary services

Article 3

'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the service provider shall not be liable for the information transmitted, on condition that the provider:
 - (a) does not initiate the transmission;
 - (b) does not select the receiver of the transmission; and
 - (c) does not select or modify the information contained in the transmission.
 2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.
 3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.
-

Article 4

'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:
 - (a) the provider does not modify the information;
 - (b) the provider complies with conditions on access to the information;
 - (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
 - (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
 - (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.
2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Denmark supports that a provider should be able to benefit from the exemptions from liability for 'mere conduit' and for 'caching' services when it is in no way involved with the information transmitted.

The articles from the e-commerce directive have proven to be essential for the development of the platform economy and the development of digital services, and therefore we agree that the framework should be preserved.

Article 5

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service the service provider shall not be liable for the information stored at the request of a recipient of the service on condition that the provider:
 - (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
 - (b) upon obtaining such knowledge or awareness, acts expeditiously **and within 24 hours** to remove or to disable access to **content which seriously harm public safety and can be assessed as manifestly illegal by a layman without further investigation**; or
 - (c) upon obtaining such knowledge or awareness, acts expeditiously and **within 24 hours** to remove or to disable access to **products which can be assessed as manifestly illegal by a layman**; or
 - (d) upon obtaining such knowledge or awareness, acts expeditiously and **within 7 days** to remove or to disable access to **content which can be assessed as illegal by a layman after thorough control**; or
 2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.
 3. Paragraph 1 shall not apply with respect to liability under consumer protection law, **including product safety and product liability law** ~~of~~ **where an** online **marketplace** ~~platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform~~ **marketplace** itself or by a recipient of the service who is acting under its authority or control.
 4. **For the assessment of whether the online platform has that control or authority or decisive influence over the trader, relevant criteria shall include:**
 - a) **the online platform operator withholds the identity of the trader or contact details until after the conclusion of the trader-consumer contract;**
 - b) **the online platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the consumer to the trader;**
-

- c) the terms of the trader-consumer contract are essentially determined by the online platform operator;
- d) the price to be paid by the consumer is set by the online platform operator;
- e) the marketing is focused on the online platform and not on traders.

5. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

The DSA should establish a framework for notice and take-down with a clearly defined procedure, safeguards and timeline for acting on notifications on illegal content and ensure uniform procedures in all Member States.

While it is necessary to grant digital platforms time to assess the legality of content, some user-generated content has a very high impact and may pose a greater threat to society or significant damage to the individual.

Thus, it is prudent to have three sets of timelines with a shorter timeframe for such high impact content, and an ambitious timeframe for illegal products corresponding to similar timeframes established elsewhere in the Union product safety legislation.

In order to promote legal clarity we would suggest, that the relevant criteria for the assessment of whether the online marketplace has authority or decisive influence over the trader is pinned out in the legal text.

Article 6

Voluntary own-initiative investigations and legal compliance

Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 solely because they carry out **in good faith and in a diligent manner** voluntary own-initiative investigations or other activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law, including those set out in this Regulation.

Article 7

No general monitoring or active fact-finding obligations

No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.

Article 8

Orders to act against illegal content

1. Providers of intermediary services shall, upon the receipt of an order to act against **one or more** specific items of illegal content, issued by the relevant national judicial or administrative authorities, on the basis of the applicable Union or national law, in conformity with Union law, inform the authority issuing the order of the effect given to the orders, without undue delay, specifying ~~the action taken and~~ the moment when the **order** ~~action was~~ **executed** ~~taken~~.
-

2. Member States shall ensure that the orders referred to in paragraph 1 meet **at least** the following conditions, **when transmitted to the provider**:
- (a) the orders contains the following elements:
 - (i)– a statement of reasons explaining why the information is illegal content, by reference to the specific provision of Union or national law infringed;
 - (ii)– ~~one or more exact uniform resource locators and, where necessary, additional~~ information enabling the **provider of intermediary services to identify and locate** ~~identification of the illegal content concerned,~~ **such as one or more exact uniform resource locators (URL)**;
 - (iii)– information about redress available to the provider of the service and to the recipient of the service who provided the content;
 - (b) the territorial scope of the order, on the basis of the applicable rules of Union and national law, including the Charter, and, where relevant, general principles of international law, does not exceed what is strictly necessary to achieve its objective;
 - (c) the order is ~~drafted~~ **transmitted** in the language declared by the provider **pursuant to Article 10(3) or in another official language of the Union, bilaterally agreed by the authority issuing the order and the provider**, and is sent to the **electronic** point of contact, ~~appointed~~ **established** by the provider, in accordance with Article 10.
3. **After receiving the order from the competent authority, t**The Digital Services Coordinator from the Member State of the judicial or administrative authority issuing the order shall, without undue delay, transmit a copy of the orders referred to in paragraph 1 to all other Digital Services Coordinators through the system established in accordance with Article 67.
-

3a. Without prejudice to national criminal procedural law in conformity with Union law, providers of intermediary services shall inform the recipient of the service who provided the content, at the latest at the time of the removal or disabling of access, of the order received and the effect given to it. Such information to the recipient of the service shall, at least, include the statement of reasons and the redress possibilities, as included in the order pursuant to point a of paragraph 2, and the territorial scope of the order.

4. The conditions and requirements laid down in this article shall be without prejudice to requirements under national criminal procedural law in conformity with Union law.

[We will analyze text the further and get back with our consolidated comments]

Article 9

Orders to provide information

1. Providers of intermediary services shall, upon receipt of an order to provide a specific item of information about one or more specific individual recipients of the service, issued by the relevant national judicial or administrative authorities on the basis of the applicable Union or national law, in conformity with Union law, inform without undue delay the authority of issuing the order of its receipt, ~~and of~~ the effect given to the order **and the moment when the order was executed.**

2. Member States shall ensure that orders referred to in paragraph 1 meet the following conditions, **when transmitted to the provider**:
- (a) the order contains the following elements:
 - (i)**– a statement of reasons explaining the objective for which the information is required and why the requirement to provide the information is necessary and proportionate to determine compliance by the recipients of the intermediary services with applicable Union or national rules, unless such a statement cannot be provided for reasons related to the prevention, investigation, detection and prosecution of criminal offences;
 - (ii)**– information about redress available to the provider and to the recipients of the service concerned;
 - (b) the order only requires the provider to provide information already collected for the purposes of providing the service and which lies within its control;
 - (c) the order is ~~drafted~~ **transmitted** in the language declared by the provider **pursuant to Article 10(3) or in another official language of the Union, bilaterally agreed by the authority issuing the order and the provider**, and is sent to the **electronic** point of contact **established**~~appointed~~ by that provider, in accordance with Article 10;
3. **After receiving the order from the competent authority, t**The Digital Services Coordinator from the Member State of the national judicial or administrative authority issuing the order shall, without undue delay, transmit a copy of the order referred to in paragraph 1 to all Digital Services Coordinators through the system established in accordance with Article 67.
-

3a. Without prejudice to national criminal procedural law in conformity with Union law, providers of intermediary services shall inform the recipient of the service concerned, at the latest at the time when the order is executed, of the order received and the effect given to it. Such information to the recipient of the service shall, at least, include the statement of reasons and the redress possibilities included in the order.

4. The conditions and requirements laid down in this article shall be without prejudice to requirements under national criminal procedural law in conformity with Union law.

[We will analyze text the further and get back with our consolidated comments]

Article 39

Requirements for Digital Services Coordinators

1. Member States shall ensure that their Digital Services Coordinators perform their tasks under this Regulation in an impartial, transparent and timely manner. Member States shall ensure that their Digital Services Coordinators have adequate technical, financial and human resources to carry out their tasks.
2. When carrying out their tasks and exercising their powers in accordance with this Regulation, the Digital Services Coordinators shall act with complete independence. They shall remain free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.
3. Paragraph 2 is without prejudice to the tasks of Digital Services Coordinators within the system of supervision and enforcement provided for in this Regulation and the cooperation with other competent authorities in accordance with Article 38(2). Paragraph 2 shall not prevent **the exercise of judicial review and shall be without prejudice to proportionate accountability requirements regarding financial expenditure or reporting to national parliaments, without endangering the achievement of the objectives of this Regulation.** ~~supervision of the authorities concerned in accordance with national constitutional law~~

Article 40

Jurisdiction

1. The Member State in which the main establishment of the provider of intermediary services is located shall have jurisdiction for the purposes of **application and enforcement of the obligations placed on intermediaries by this Regulation by the national**
-

competent authorities in accordance with this Chapter~~Chapters III and IV of this Regulation.~~

2. A provider of intermediary services which does not have an establishment in the Union but which offers services in the Union shall, for the purposes of **this Article**~~Chapters III and IV~~, be deemed to be under the jurisdiction of the Member State where its legal representative resides or is established.
3. Where a provider of intermediary services fails to appoint a legal representative in accordance with Article 11, all Member States shall have jurisdiction for the purposes of ~~Chapters III and IV~~ **this Article**. Where a Member State decides to exercise jurisdiction under this paragraph, it shall inform all other Member States and ensure that **the applicable safeguards afforded by the Charter are respected**~~the principle of ne bis in idem is respected~~.
4. Paragraphs 1, 2 and 3 are without prejudice to the second subparagraph of Article 50(4) and the second subparagraph of Article 51(2) and the tasks and powers of the Commission under Section 3.

Article 45

Cross-border cooperation among Digital Services Coordinators

1. Where a Digital Services Coordinator **of destination** has reasons to suspect that a provider of an intermediary service, ~~not under the jurisdiction of the Member State concerned,~~ infringed this Regulation, it **may** ~~shall~~ request the Digital Services Coordinator of establishment to assess the matter and take the necessary investigatory and enforcement measures to ensure compliance with this Regulation.

Where the Board has reasons to suspect that a provider of intermediary services infringed this Regulation in a manner involving at least three Member States, it may recommend the Digital Services Coordinator of establishment to assess the matter and take the necessary investigatory and enforcement measures to ensure compliance with this Regulation.
 2. A request or recommendation pursuant to paragraph 1 shall at least indicate:
 - (a) the **electronic** point of contact of the provider of the intermediary services concerned as provided for in Article 10;
 - (b) a description of the relevant facts, the provisions of this Regulation concerned and the reasons why the Digital Services Coordinator that sent the request, or the Board, suspects that the provider infringed this Regulation;
-

- (c) any other information that the Digital Services Coordinator that sent the request, or the Board, considers relevant, including, where appropriate, information gathered on its own initiative or suggestions for specific investigatory or enforcement measures to be taken, including interim measures.
 - 3. The Digital Services Coordinator of establishment shall take into utmost account the request or recommendation pursuant to paragraph 1. Where it considers that it has insufficient information to act upon the request or recommendation and has reasons to consider that the Digital Services Coordinator that sent the request, or the Board, could provide additional information, it may request such information. The time period laid down in paragraph 4 shall be suspended until that additional information is provided.
 - 4. The Digital Services Coordinator of establishment shall, without undue delay and in any event not later than two months following receipt of the request or recommendation, communicate to the Digital Services Coordinator that sent the request, or the Board, its assessment of the suspected infringement, or that of any other competent authority pursuant to national law where relevant, and an explanation of any investigatory or enforcement measures taken or envisaged in relation thereto to ensure compliance with this Regulation.
 - 5. Where the Digital Services Coordinator that sent the request, or, where appropriate, the Board, did not receive a reply within the time period laid down in paragraph 4 or where it does not agree with the assessment of the Digital Services Coordinator of establishment, it may refer the matter to the Commission, providing all relevant information. That information shall include at least the request or recommendation sent to the Digital Services Coordinator of establishment, any additional information provided pursuant to paragraph 3 and the communication referred to in paragraph 4.
 - 6. The Commission shall assess the matter within three months following the referral of the matter pursuant to paragraph 5, after having consulted the Digital Services Coordinator of establishment and, unless it referred the matter itself, the Board.
-

7. Where, pursuant to paragraph 6, the Commission concludes that the assessment or the investigatory or enforcement measures taken or envisaged pursuant to paragraph 4 are incompatible with this Regulation, it shall request the Digital Service Coordinator of establishment to further assess the matter and take the necessary investigatory or enforcement measures to ensure compliance with this Regulation, and to inform it about those measures taken within two months from that request.

Article 46

Joint investigations and requests for Commission intervention

1. **Any** Digital Services Coordinators may participate in joint investigations, which may be coordinated with the support of the Board, with regard to matters covered by this Regulation, concerning providers of intermediary services operating in several Member States. **The competent national authority of the Member State in whose territory the intermediary service is established shall be given the opportunity to participate in such investigations at all times.**

Such joint investigations are without prejudice to the tasks and powers of the participating Digital Coordinators and the requirements applicable to the performance of those tasks and exercise of those powers provided in this Regulation. The participating Digital Services Coordinators shall make the results of the joint investigations available to other Digital Services Coordinators, the Commission and the Board through the system provided for in Article 67 for the fulfilment of their respective tasks under this Regulation.

2. Where a Digital Services Coordinator of establishment has reasons to suspect that a very large online platform infringed this Regulation, it may request the Commission to take the necessary investigatory and enforcement measures to ensure compliance with this Regulation in accordance with Section 3. Such a request shall contain all information listed in Article 45(2) and set out the reasons for requesting the Commission to intervene. **If the Commission intends to initiate proceedings pursuant to Article 51, it shall communicate it to the Digital Services Coordinator of establishment within three months upon the receipt of the request.**

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.

SECTION 3

SUPERVISION, INVESTIGATION, ENFORCEMENT AND MONITORING IN RESPECT OF VERY LARGE ONLINE PLATFORMS

Article 50

Enhanced supervision for very large online platforms

1. Where the Digital Services Coordinator of establishment adopts a decision finding that a **provider of** very large online platform has infringed any of the provisions of Section 4 of Chapter III, it shall make use of the enhanced supervision system laid down in this Article. It shall take utmost account of any opinion and recommendation of the Commission and the Board pursuant to this Article.

The Commission acting on its own initiative, or the Board acting on its own initiative or upon request of at least three Digital Services Coordinators of destination, may, where it has reasons to suspect that a **provider of** very large online platform infringed any of those provisions, recommend the Digital Services Coordinator of establishment to investigate the suspected infringement with a view to that Digital Services Coordinator adopting such a decision ~~within a reasonable time period~~ **within a time period predefined in the recommendation.**

Where other competent authorities in that Member State are empowered to establish the existence of an infringement and to ensure the enhanced supervision in respect of a given provider of a very large online platform, the Digital Services Coordinator of establishment shall involve them in accordance with the applicable national law.

2. When communicating the decision referred to in the first subparagraph of paragraph 1 to the **provider of the** very large online platform concerned, the Digital Services Coordinator of establishment shall request it to draw up and communicate to the Digital Services Coordinator of establishment, the Commission and the Board, within one month from that decision, an action plan, specifying how that platform intends to terminate or remedy the infringement. The measures set out in the action plan may include, where appropriate, participation in a code of conduct as provided for in Article 35.
3. Within one month following receipt of the action plan, the Board shall communicate its opinion on the action plan to the Digital Services Coordinator of establishment. Within one month following receipt of that opinion, that Digital Services Coordinator shall decide whether the action plan is appropriate to terminate or remedy the infringement.

~~Where the Digital Services Coordinator of establishment has concerns on the ability of the measures to terminate or remedy the infringement, it may request the very large online platform concerned to subject itself to an additional, independent audit to assess the effectiveness of those measures in terminating or remedying the infringement. In that case, that platform shall send the audit report to that Digital Services Coordinator, the Commission and the Board within four months from the decision referred to in the first subparagraph. When requesting such an additional audit, the Digital Services Coordinator may specify a particular audit organisation that is to carry out the audit, at the expense of the platform concerned, selected on the basis of criteria set out in Article 28(2).~~

4. The Digital Services Coordinator of establishment shall communicate to the Commission, the Board and the **provider of the** very large online platform concerned its views as to whether the **provider of** very large online platform has terminated or remedied the infringement and the reasons thereof. It shall do so within the following time periods, as applicable:

~~-(a) — within one month from the receipt of the audit report referred to in the second subparagraph of paragraph 3, where such an audit was performed;~~

(a) at the same time as the decision adopted pursuant to paragraph 3, where it does not consider the action plan appropriate to terminate or remedy the infringement;

(b) within three months from the decision on the action plan referred to in the first subparagraph of paragraph 3, **where the action plan was considered appropriate to terminate or remedy the infringement**, ~~where no such audit was performed;~~

- (c) immediately upon the expiry of the time period set out in paragraph 2, where that platform failed to communicate the action plan within that time period.

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. Thus, 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. However, from our side it is important, that the Member States will be given an opportunity to influence the content of the recommendation.

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 unclear why the Commission is not obliged to communicate a decision.

From the Danish side it is a priority that the very large online platforms take 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.

~~Pursuant to that communication, the Digital Services Coordinator of establishment shall no longer be entitled to take any investigatory or enforcement measures in respect of the relevant conduct by the very large online platform concerned, without prejudice to Article 66 or any other measures that it may take at the request of the Commission.~~

Article 51

Intervention by the Commission and opening of proceedings

1. The Commission, acting either upon the Board's recommendation or on its own initiative after consulting the Board, may initiate proceedings in view of the possible adoption of decisions pursuant to Articles 58 and 59 in respect of the relevant conduct by the **provider of the** very large online platform that:
 - (a) is suspected of having infringed any of the provisions of this Regulation and the Digital Services Coordinator of establishment did not take **the necessary** any investigatory or enforcement measures, pursuant to the request of the Commission referred to in Article 45(7), upon the expiry of the time period set in that request;
 - (b) is suspected of having infringed any of the provisions of this Regulation and the Digital Services Coordinator of establishment requested the Commission to intervene in accordance with Article 46(2), upon the reception of that request;
 - (c) has been found to have infringed any of the provisions of Section 4 of Chapter III, upon the expiry of the relevant time periods⁵ for the communication referred to in Article 50(4).
 2. Where the Commission decides to initiate proceedings pursuant to paragraph 1, it shall notify all Digital Services Coordinators, the Board and the **provider of the** very large online platform concerned.
-

~~As regards points (a) and (b) of paragraph 1, p~~Pursuant to that notification, the Digital Services Coordinator of establishment concerned shall no longer be entitled to take any investigatory or enforcement measures in respect of the relevant conduct by **the provider of the very large online platform concerned**, without prejudice to Article 66 or any other measures that it₁ may take at the request of the Commission. **The Commission shall inform the Digital Services Coordinator of establishment of its preliminary findings pursuant to Article 63(1).**

3. The Digital Services Coordinator referred to in Articles 45(7), 46(2) and 50(1), as applicable, shall, without undue delay upon being informed, transmit to the Commission:
 - (a) any information that that Digital Services Coordinator exchanged relating to the infringement or the suspected infringement, as applicable, with the Board and with the **provider of the** very large online platform concerned;
 - (b) the case file of that Digital Services Coordinator relating to the infringement or the suspected infringement, as applicable;
 - (c) any other information in the possession of that Digital Services Coordinator that may be relevant to the proceedings initiated by the Commission.
4. The Board, and the Digital Services Coordinators making the request referred to in Article 45(1), shall, without undue delay upon being informed, transmit to the Commission any information in their possession that may be relevant to the proceedings initiated by the Commission.

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

Requests for information

1. In order to carry out the tasks assigned to it under this Section, the Commission may by simple request or by decision require the **provider of the** very large online platforms concerned, as well as any other **natural or legal** 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 infringement, as applicable, including organisations performing the audits referred to in Articles 28 and 50(3), to provide such information within a reasonable time period.
 2. When sending a simple request for information to the **provider of the** very large online platform concerned or other person referred to in **paragraph Article 52(1 of this Article)**, the Commission shall state the legal basis and the purpose of the request, specify what information is required and set the time period within which the information is to be provided, and the penalties provided for in Article 59 for supplying incorrect or misleading information.
 3. Where the Commission requires the **provider of the** very large online platform concerned or other person referred to in **paragraph Article 52(1 of this Article)** to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and set the time period within which it is to be provided. It shall also indicate the penalties provided for in Article 59 and indicate or impose the periodic penalty payments provided for in Article 60. It shall further indicate the right to have the decision reviewed by the Court of Justice of the European Union.
 4. The owners of the very large online platform concerned or other person referred to in ~~Article 52~~**(paragraph 1)** or their representatives and, in the case of legal persons, companies or firms, or where they have no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the **provider of the** very large online platform concerned or other person referred to in ~~Article 52~~**(paragraph 1)**. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
 5. At the request of the Commission, the Digital Services Coordinators and other competent authorities shall provide the Commission with all necessary information to carry out the tasks assigned to it under this Section.
-

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 predefined 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 53

Power to take interviews and statements

In order to carry out the tasks assigned to it under this Section, the Commission may interview any natural or legal person which consents to being interviewed for the purpose of collecting information, relating to the subject-matter of an investigation, in relation to the suspected infringement or infringement, as applicable.

Article 54

Power to conduct on-site inspections

1. In order to carry out the tasks assigned to it under this Section, the Commission may conduct on-site inspections at the premises of the **provider of the** very large online platform concerned or other person referred to in Article 52(1).
 2. On-site inspections may also be carried out with the assistance of auditors or experts appointed by the Commission pursuant to Article 57(2), **as well as with the competent national authority of the Member State in whose territory the inspection is to be conducted.**
 - 3. During on-site inspections the Commission, ~~and~~ auditors ~~and~~ experts appointed by ~~the Commission~~, **as well as the competent national authority of the Member State in whose territory the inspection is to be conducted** may require the **provider of 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 **provider of the** very large online platform concerned or other person referred to in Article 52(1).
-

4. The **provider of the** very large online platform concerned or other **natural or legal** person referred to in Article 52(1) is required to submit to an on-site inspection ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the visit, set the date on which it is to begin and indicate the penalties provided for in Articles 59 and 60 and the right to have the decision reviewed by the Court of Justice of the European Union.

Article 55

Interim measures

1. In the context of proceedings which may lead to the adoption of a decision of non-compliance pursuant to Article 58(1), where there is an urgency due to the risk of serious damage for the recipients of the service, the Commission may, by decision, order interim measures against the **provider of the** very large online platform concerned on the basis of a prima facie finding of an infringement.
2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 56

Commitments

1. If, during proceedings under this Section, the **provider of the** very large online platform concerned offers commitments to ensure compliance with the relevant provisions of this Regulation, the Commission may by decision make those commitments binding on the **provider of the** very large online platform concerned and declare that there are no further grounds for action.
-

2. The Commission may, upon request or on its own initiative, reopen the proceedings:
 - (a) where there has been a material change in any of the facts on which the decision was based;
 - (b) where the **provider of the** very large online platform concerned acts contrary to its commitments; or
 - (c) where the decision was based on incomplete, incorrect or misleading information provided by the **provider of the** very large online platform concerned or other person referred to in Article 52(1).
3. Where the Commission considers that the commitments offered by the **provider of the** very large online platform concerned are unable to ensure effective compliance with the relevant provisions of this Regulation, it shall reject those commitments in a reasoned decision when concluding the proceedings.

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

1. For the purposes of carrying out the tasks assigned to it under this Section, the Commission may take the necessary actions to monitor the effective implementation and compliance with this Regulation by the **provider of the** very large online platform concerned. The Commission may also order that ~~platform~~ **provider** to provide access to, and explanations relating to, its databases and algorithms.
 2. The actions pursuant to paragraph 1 may include the appointment of independent external experts and auditors, **including from competent national authorities**, to assist the
-

Commission in monitoring compliance with the relevant provisions of this Regulation and to provide specific expertise or knowledge to the Commission.

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.
