



Council of the European Union  
General Secretariat

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**NOTE**

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From:	DK Delegation
To:	Delegations

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Subject:	Digital Services Act: DK Comments regarding articles 10-12, 30-38, 41-44, 47-49 with Recitals
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## Denmark's written comments and concrete drafting suggestions

(68) It is appropriate that this Regulation identify certain areas of consideration for such codes of conduct. In particular, risk mitigation measures concerning specific types of illegal content should be explored via self- and co-regulatory agreements. Another area for consideration is the possible negative impacts of systemic risks on society and democracy, such as disinformation or manipulative and abusive activities. This includes coordinated operations aimed at amplifying information, including disinformation, such as the use of bots or fake accounts for the creation of ~~fake~~ inaccurate or misleading information, sometimes with a purpose of obtaining economic gain, which are particularly harmful for vulnerable recipients of the service, such as children. In relation to such areas, adherence to and compliance with a given code of conduct by a very large online platform may be considered as an appropriate risk mitigating measure. ~~The refusal without proper explanations by a provider of an online platform of the Commission's invitation to participate in the application of such a code of conduct could be taken into account, where relevant, when determining whether the online platform has infringed the obligations laid down by this Regulation.~~

As we understand, the participation in codes of conduct is voluntary. Thus, we find that the wording of the last sentence of recital 68 can lead to the conclusion that the participation is in fact binding/mandatory.

If participation is voluntary and the VLOP adheres to all legal requirements in the DSA, then it should be stressed, that the refusal to participate in the code of conduct, should not be taken into account when determining whether the VLOP has infringed the obligations in the DSA.

Therefore, we propose to delete the last sentence of recital 68.

## Article 11

### Legal representatives

1. Providers of intermediary services which do not have an establishment in the Union but which offer services in the Union shall designate, in writing, a legal or natural person as their legal representative in one of the Member States where the provider offers its services.
2. Providers of intermediary services shall mandate their legal representatives to be addressed in addition to or instead of the provider by the Member States' **competent** authorities, the Commission and the Board on all issues necessary for the receipt of, compliance with and enforcement of decisions issued in relation to this Regulation. Providers of intermediary services shall provide their legal representative with the necessary powers and sufficient resources to cooperate with the Member States' authorities, the Commission and the Board and comply with those decisions, and to comply with their obligations when the provider of intermediary services is liable for infringement of the obligations set out in this Regulation.-
3. The designated legal representative can be held liable for non-compliance with obligations under this Regulation, without prejudice to the liability and legal actions that could be initiated against the provider of intermediary services.
4. Providers of intermediary services shall notify the name, address, the electronic mail address and telephone number of their legal representative to the Digital Service Coordinator in the Member State where that legal representative resides or is established. They shall ensure that that information is up to date. Providers of intermediary services shall ensure that their legal representative meet at least the following conditions:
  - a. Is registered in a trade register or similar public register with registration number or equivalent means of identification in that register, where possible in the Member State established;
  - b. has sufficient resources;
  - a-c. is not subject to reconstruction proceedings, bankruptcy, personal or corporate insolvency.

5. The designation of a legal representative within the Union pursuant to paragraph 1 shall not amount to an establishment in the Union.

We are worried that the requirements in article 11(4) could be circumvented by the use of “shell-companies”. In order to prevent this it seems necessary to consider the set up of certain requirements regarding *who* can be notified as legal representative. Especially if the legal responsibility should have any effect in reality.

## Article 31

### Data access and scrutiny

1. **Providers of v**Very large online platforms shall provide the Digital Services Coordinator of establishment or the Commission, upon their reasoned request and within a reasonable period, specified in the request, access to data that are necessary to monitor and assess compliance with this Regulation. That Digital Services Coordinator and the Commission shall only use that data for those purposes.
2. Upon a reasoned request from the Digital Services Coordinator of establishment or the Commission, **providers of** very large online platforms shall, within a reasonable period, as specified in the request, provide access to data to vetted researchers who meet the requirements in paragraphs 4 of this Article, for the sole purpose of conducting research that contributes to the identification and understanding of systemic risks as set out in Article 26(1), taking into account the rights and interests of the providers of very large online platforms and the recipients of the service concerned, including the protection of confidential information, in particular trade secrets, and maintaining the security of their service.-
3. **Providers of v**Very large online platforms shall **facilitate and** provide access to data pursuant to paragraphs 1 and 2 through **appropriate interfaces, including** online databases or application programming interfaces, as **specified in the request** appropriate.
4. In order to be vetted, researchers shall be affiliated with academic institutions, be independent from commercial interests, have proven records of expertise in the fields related to the risks investigated or related research methodologies, and shall commit and be in a capacity to preserve the specific data security and confidentiality requirements corresponding to each request.

5. The Commission shall, after consulting the Board, adopt delegated acts laying down the technical conditions under which **providers of** very large online platforms are to share data pursuant to paragraphs 1 and 2 and the purposes for which the data may be used. Those delegated acts shall lay down the specific conditions **and procedures** under which such sharing of data with vetted researchers can take place in compliance with Regulation (EU) 2016/679, taking into account the rights and interests of the **providers of** very large online platforms and the recipients of the service concerned, including the protection of confidential information, in particular trade secrets, and maintaining the security of their service.
6. Within 15 days following receipt of a request as referred to in paragraph 1 and 2, **providers of** a very large online platforms may request the Digital Services Coordinator of establishment or the Commission, as applicable, to amend the request, where it considers that it is unable to give access to the data requested because one of following two reasons:
- (a) it does not have access to the data;
  - (b) giving access to the data will lead to significant vulnerabilities for the security of its service or the protection of confidential information, in particular trade secrets.
7. Requests for amendment pursuant to point (b) of paragraph 6 shall contain proposals for one or more alternative means through which access may be provided to the requested data or other data which are appropriate and sufficient for the purpose of the request.

The Digital Services Coordinator of establishment or the Commission shall decide upon the request for amendment within 15 days and communicate to the **provider of** very large online platforms its decision and, where relevant, the amended request and the new time period to comply with the request.

It is important for Denmark to provide better frameworks for researcher's access to data, while taking into account the protection of business secrets and information that may compromise the security of services.

As a general remark regarding paragraph 5, we would like to underline that delegated acts should be reduced to a minimum and *only* be of *technical* character. Further, Member States should be closely involved in the formulation thereof.

*Article 41*

*Powers of Digital Services Coordinators*

1. Where needed for carrying out their tasks, Digital Services Coordinators shall have at least the following powers of investigation, in respect of conduct by providers of intermediary services under the jurisdiction of their Member State:
  - (a) the power to require those providers, as well as any other persons acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to a suspected infringement of this Regulation, including, organisations performing the audits referred to in Articles 28 and 50(3), to provide such information within a reasonable time period;
  - (b) the power to carry out, **or request a judicial authority to order,** on-site inspections of any premises that those providers or those persons use for purposes related to their trade, business, craft or profession, or to request other public authorities to do so, in order to examine, seize, take or obtain copies of information relating to a suspected infringement in any form, irrespective of the storage medium;
  - (c) the power to ask any member of staff or representative of those providers or those persons to give explanations in respect of any information relating to a suspected infringement and to record the answers.

2. Where needed for carrying out their tasks, Digital Services Coordinators shall have at least the following enforcement powers, in respect of providers of intermediary services under the jurisdiction of their Member State:
- (a) the power to accept the commitments offered by those providers in relation to their compliance with this Regulation and to make those commitments binding;
  - (b) the power to order the cessation of infringements and, where appropriate, to impose remedies proportionate to the infringement and necessary to bring the infringement effectively to an end;
  - (c) the power to impose fines, **or request a judicial authority to do so,** in accordance with Article 42 for failure to comply with this Regulation, including with any of the **investigatory** orders issued pursuant to paragraph 1;
  - (d) the power to impose a periodic penalty payment, **or request a judicial authority to do so,** in accordance with Article 42 to ensure that an infringement is terminated in compliance with an order issued pursuant to point (b) of this paragraph or for failure to comply with any of the **investigatory** orders issued pursuant to paragraph 1;
  - (e) the power to adopt interim measures to avoid the risk of serious harm.

As regards points (c) and (d) of the first subparagraph, Digital Services Coordinators shall also have the enforcement powers set out in those points in respect of the other persons referred to in paragraph 1 for failure to comply with any of the orders issued to them pursuant to that paragraph. They shall only exercise those enforcement powers after having provided those other persons in good time with all relevant information relating to such orders, including the applicable time period, the fines or periodic payments that may be imposed for failure to comply and redress possibilities.



3. Where needed for carrying out their tasks, Digital Services Coordinators shall also have, in respect of providers of intermediary services under the jurisdiction of their Member State, where all other powers pursuant to this Article to bring about the cessation of an infringement have been exhausted, the infringement persists and causes serious harm which cannot be avoided through the exercise of other powers available under Union or national law, the power to take the following measures:
- (a) require the management body of the providers, within a reasonable time period, to examine the situation, adopt and submit an action plan setting out the necessary measures to terminate the infringement, ensure that the provider takes those measures, and report on the measures taken;
  - (b) where the Digital Services Coordinator considers that the provider has not sufficiently complied with the requirements of the first indent, that the infringement persists and causes serious harm, and that the infringement entails a serious criminal offence involving a threat to the life or safety of persons, request the competent judicial authority of that Member State to order the temporary restriction of access of recipients of the service concerned by the infringement or, only where that is not technically feasible, to the online interface of the provider of intermediary services on which the infringement takes place.

The Digital Services Coordinator shall, except where it acts upon the Commission's request referred to in Article 65, prior to submitting the request referred to in point (b) of the first subparagraph, invite interested parties to submit written observations within a time period that shall not be less than two weeks, describing the measures that it intends to request and identifying the intended addressee or addressees thereof. The provider, the intended addressee or addressees and any other third party demonstrating a legitimate interest shall be entitled to participate in the proceedings before the competent judicial authority. Any measure ordered shall be proportionate to the nature, gravity, recurrence and duration of the infringement, without unduly restricting access to lawful information by recipients of the service concerned.

The restriction shall be for a period of four weeks, subject to the possibility for the competent judicial authority, in its order, to allow the Digital Services Coordinator to extend that period for further periods of the same lengths, subject to a maximum number of extensions set by that judicial authority. The Digital Services Coordinator shall only extend the period where it considers, having regard to the rights and interests of all parties affected by the restriction and all relevant circumstances, including any information that the provider, the addressee or addressees and any other third party that demonstrated a legitimate interest may provide to it, that both of the following conditions have been met:

- (a) the provider has failed to take the necessary measures to terminate the infringement;
- (b) the temporary restriction does not unduly restrict access to lawful information by recipients of the service, having regard to the number of recipients affected and whether any adequate and readily accessible alternatives exist.

Where the Digital Services Coordinator considers that those two conditions have been met but it cannot further extend the period pursuant to the third subparagraph, it shall submit a new request to the competent judicial authority, as referred to in point (b) of the first subparagraph.

4. The powers listed in paragraphs 1, 2 and 3 are without prejudice to Section 3.
5. The measures taken by the Digital Services Coordinators in the exercise of their powers listed in paragraphs 1, 2 and 3 shall be effective, dissuasive and proportionate, having regard, in particular, to the nature, gravity, recurrence and duration of the infringement or suspected infringement to which those measures relate, as well as the economic, technical and operational capacity of the provider of the intermediary services concerned where relevant.

6. Member States shall ensure that any exercise of the powers pursuant to paragraphs 1, 2 and 3 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, those measures shall only be taken in accordance with the right to respect for private life and the rights of defence, including the rights to be heard and of access to the file, and subject to the right to an effective judicial remedy of all affected parties.

It is important for Denmark, that the Member States have the authority to decide what bodies can impose fines. As we understand the current proposal, this has been taken onboard.

As the largest digital platforms are cross-border in nature, Denmark emphasizes that the Commission should play an active role in investigating the offenses of the largest digital platforms, as it can be challenging for national enforcement authorities to ensure effective enforcement of consumer protection rules for especially the largest online platforms.

#### *Article 42*

##### *Penalties*

1. Member States shall lay down the rules on penalties applicable to infringements of this Regulation by providers of intermediary services under their jurisdiction and shall take all the necessary measures to ensure that they are implemented in accordance with Article 41.
2. Penalties shall be effective, proportionate and dissuasive. Member States shall notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendments affecting them.
3. Member States shall ensure that the maximum amount of penalties imposed for a failure to comply with the obligations laid down in this Regulation shall not exceed 6 % of the annual income or turnover of the provider of intermediary services concerned **in the preceding financial year**. Penalties for the supply of incorrect, incomplete or misleading information, failure to reply or rectify incorrect, incomplete or misleading information and to submit to an on-site inspection shall not exceed 1% of the annual income or turnover of the provider **or person** concerned **in the preceding financial year**.
4. Member States shall ensure that the maximum amount of a periodic penalty payment shall not exceed 5 % of the average daily turnover **or income** of the provider of intermediary

services concerned in the preceding financial year per day, calculated from the date specified in the decision concerned.

It is important for Denmark, that the Member States have the authority to decide what bodies can impose fines.

As the largest digital platforms are cross-border in nature, Denmark emphasizes that the Commission should play an active role in investigating the offenses of the largest digital platforms, as it can be challenging for national enforcement authorities to ensure effective enforcement of consumer protection rules for especially the largest online platforms.

## *Article 43*

### *Right to lodge a complaint*

**Both recipients of the service and their representative organisations** shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient resides or is established. The Digital Services Coordinator shall assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator of establishment. Where the complaint falls under the responsibility of another competent authority in its Member State, the Digital Service Coordinator receiving the complaint shall transmit it to that authority.

Article 17 gives the recipients of the service access to an effective internal complaint-handling system, against the decision taken by the provider of the online platform, e.g. whether or not to remove or disable access information. According to Article 18, recipients of the service, addressed by the decisions referred to in Article 17(1), shall be entitled to select any out-of-court dispute settlement body.

Article 43 states that recipients shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient resides or is established.

We find it difficult to understand whether the recipient after Article 43 have the right to lodge an individual complaint to the DSC regarding a decision made by the provider of the online platform to remove specific information and if the DSC then should make a new decision of whether certain content is illegal or not. Or if the right to lodge a complaint in Article 43 only relates to infringement of this Regulation (for instance the requirements in chapter 3), and therefore give no individuals the right to lodge a complaint regarding individual decisions made by the provider of the online platform.

We find that it should be clarified in Article 43 what kind of complaints the recipient has the right to lodge – whether they are limited to the DSA requirements mentioned in chapter 3 and 5, or does it include the right for individuals to lodge a complaint to the DSC regarding decisions as mentioned in Article 17. The coherence between the Articles could advantageously be described in a recital.

## *Article 49*

### *Tasks of the Board*

1. Where necessary to meet the objectives set out in Article 47(2), the Board shall in particular:
  - (a) support the coordination of joint investigations;
  - (b) support the competent authorities in the analysis of reports and results of audits of very large online platforms to be transmitted pursuant to this Regulation;
  - (c) issue opinions, recommendations or advice to Digital Services Coordinators in accordance with this Regulation;
  - (d) advise the Commission to take the measures referred to in Article 51 and, ~~where requested by the Commission,~~ adopt opinions on draft Commission measures concerning very large online platforms in accordance with this Regulation;
  - (e) support and promote the development and implementation of European standards, guidelines, reports, templates and code of conducts as provided for in this Regulation, as well as the identification of emerging issues, with regard to matters covered by this Regulation.
2. Digital Services Coordinators and other national competent authorities that do not follow the opinions, requests or recommendations addressed to them adopted by the Board shall provide the reasons for this choice when reporting pursuant to this Regulation or when adopting their relevant decisions, as appropriate.

Article 49(1)(c): The Board can issue advice, opinions and recommendations to the Digital Services Coordinators. Digital Services Coordinators and other national competent authorities that do not follow these opinions, requests or recommendations addressed to them adopted by the board shall provide the reasons for this choice. Although such advice, opinions and recommendations are not binding according to the recitals, it also appears from recital 90, that the reason to deviate therefrom can be taken into account in assessing the compliance of the Member State concerned. This seems contradictory.