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NOTE

From:	DK Delegation
To:	Delegations

Subject:	Digital Services Act: DK Comments regarding articles 47-49, 52-74 with Recitals
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Denmarks written comments to the DSA regarding Article 47-49 and 52-74 with Recitals

- (90) For that purpose, the Board should be able to adopt opinions, requests and recommendations addressed to Digital Services Coordinators or other competent national authorities. While not legally binding, the decision to deviate therefrom should be properly explained and could be taken into account by the Commission in assessing the compliance of the Member State concerned with this Regulation.

According to 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 recital 90, the reason to deviate therefrom can be taken into account in assessing the compliance of the Member State concerned. This seems contradictory and means that the opinions, requests and recommendations will have an indirect binding effect.

(99a) Interim measures can be an important tool to ensure that, while an investigation is ongoing, the infringement being investigated does not lead to serious and irreparable damage for recipients of services of very large online platforms. This tool is important to avoid developments that could be very difficult to reverse by a decision taken by the Commission at the end of the proceedings. The Commission should therefore have the power to impose interim measures by decision in the context of proceedings opened in view of the possible adoption of a decision of non-compliance. This power should apply in cases where the Commission has made a prima facie finding of infringement of obligations concerning very large online platforms and where there is a risk of serious damage for recipients of the service. A decision imposing interim measures should only be valid for a specified period, either until the conclusion of the proceedings by the Commission, or for a fixed time period which can be renewed insofar as it is necessary and appropriate.

We welcome the adjustments made by the Presidency in the new recital 99a.

(100) Compliance with the relevant obligations imposed under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fines and periodic penalty payments should also be laid down for non-compliance with the obligations and breach of the procedural rules, subject to appropriate limitation periods. **The Court of Justice should have unlimited jurisdiction in respect of fines and penalty payments.**

We welcome the adjustments made by the Presidency.

(101b) Without prejudice to the rights of recipients of intermediary services to turn to a representative in accordance with the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC¹, recipients of the services should also have the right to mandate a legal person or a public body to exercise their rights provided for in this Regulation.

We can support the Presidency proposal.

SECTION 3

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

¹ OJ L 409, 4.12.2020, p. 1.

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.

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 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.

We welcome the adjustments made by the Presidency in order to include the competent national authority in the on-site inspections.

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.

We welcome the adjustments made by the Presidency that include external experts and auditors from competent national authorities. However, Article 57(1) 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 59

Fines

1. In the decision pursuant to Article 58, the Commission may impose on the **provider of the** very large online platform concerned fines not exceeding 6% of its total **worldwide** turnover in the preceding financial year where it finds that that ~~platform~~ **provider**, intentionally or negligently:
 - (a) infringes the relevant provisions of this Regulation;
 - (b) fails to comply with a decision ordering interim measures under Article 55; or
 - (c) fails to comply with a voluntary measure made binding by a decision pursuant to Articles 56.

2. The Commission may by decision impose on the **provider of the** very large online platform concerned or other **natural or legal** person referred to in Article 52(1) fines not exceeding 1 % of the total turnover in the preceding financial year, where they intentionally or negligently:
 - (a) **fail to supply or** supply incorrect, incomplete or misleading information in response to a request pursuant to Article 52 or, when the information is requested by decision, fail to reply to the request within the set time period;
 - (b) fail to rectify within the time period set by the Commission, incorrect, incomplete or misleading information given by a member of staff, or fail or refuse to provide complete information;
 - (c) refuse to submit to an on-site inspection pursuant to Article 54.

3. Before adopting the decision pursuant to paragraph 2, the Commission shall communicate its preliminary findings to the **provider of the** very large online platform concerned or other person referred to in Article 52(1).

4. In fixing the amount of the fine, the Commission shall have regard to the nature, gravity, duration and recurrence of the infringement and, for fines imposed pursuant to paragraph 2, the delay caused to the proceedings.

We support the clarification about the worldwide turnover in relation to the amount of the fine. It is important with effective sanctions.

Article 60

Periodic penalty payments

1. The Commission may, by decision, impose on the **provider of the** very large online platform concerned or other person referred to in Article 52(1), as applicable, periodic penalty payments not exceeding 5 % of the average daily **income or worldwide** turnover in the preceding financial year per day, calculated from the date appointed by the decision, in order to compel them to:
 - (a) supply correct and complete information in response to a decision requiring information pursuant to Article 52;
 - (b) submit to an on-site inspection which it has ordered by decision pursuant to Article 54;
 - (c) comply with a decision ordering interim measures pursuant to Article 55(1);
 - (d) comply with commitments made legally binding by a decision pursuant to Article 56(1);
 - (e) comply with a decision pursuant to Article 58(1).
2. Where the **provider of the** very large online platform concerned or other person referred to in Article 52(1) has satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision.

We support the clarification about the worldwide turnover in relation to the amount of the periodic penalty payments.

Article 64a

Review by the Court of Justice of the European Union

In accordance with Article 261 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

We support the Presidency proposal regarding the right to a review by the Court of Justice of the European Union in relation to imposed fines and periodic penalty payment.

Article 66

Implementing acts relating to Commission intervention

1. In relation to the Commission intervention covered by this Section, the Commission may adopt implementing acts concerning the practical arrangements for:
 - (c) the proceedings pursuant to Articles 54 and 57;
 - (a) the hearings provided for in Article 63;
 - (b) the negotiated disclosure of information provided for in Article 63.
2. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 70. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time period set out therein, which shall not be less than one month.

As a general remark, we would like to underline that implementing acts and 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.

SECTION 4
COMMON PROVISIONS ON ENFORCEMENT

Article 67

Information sharing system

1. The Commission shall establish and maintain a reliable and secure information sharing system supporting communications between Digital Services Coordinators, the Commission and the Board.
2. The Digital Services Coordinators, the Commission and the Board shall use the information sharing system for all communications pursuant to this Regulation.
3. The Commission shall adopt implementing acts laying down the practical and operational arrangements for the functioning of the information sharing system and its interoperability with other relevant systems. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 70.

As a general remark, 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 68
Representation

Without prejudice to Directive 2020/XX/EU of the European Parliament and of the Council², recipients of intermediary services shall have the right to mandate a body, organisation or association to exercise the rights **conferred by this Regulation**~~referred to in Articles 17, 18 and 19~~ on their behalf, provided the body, organisation or association meets all of the following conditions:

- (a) it operates on a not-for-profit basis;
- (b) it has been properly constituted in accordance with the law of a Member State;
- (c) its statutory objectives include a legitimate interest in ensuring that this Regulation is complied with.

We can support the Presidency proposal.

SECTION 5
DELEGATED ACTS

Article 69
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Articles 23, 25, and 31 shall be conferred on the Commission for an indeterminate period of time from [date of expected adoption of the Regulation].

²——— [Reference]

3. The delegation of power referred to in Articles 23, 25 and 31 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of power specified in that decision. It shall take effect the day following that of its publication in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Articles 23, 25 and 31 shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

As a general remark, 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.