



Perspectives on  
cross-border cooperation and regulatory oversight  
in the EU Digital Services Act  
Non-paper

This non-paper summarises how the EU Digital Services Act (DSA) proposal supports the country-of-origin (COO) principle, while including meaningful oversight mechanisms that provide for enhanced cooperation amongst national regulators in their supervision of intermediary service providers and enforcement of the DSA rules.

It also considers specific provisions in the DSA proposal on regulatory oversight against the Commission's objectives of providing legal clarity, respect for fundamental rights, harmonisation across the Single Market and clear responsibilities for different types of intermediaries and authorities. We highlight the provisions that will help achieve these objectives, identify provisions that may fall short of them and, where appropriate, set out suggestions for ways to clarify the proposed rules. Those suggestions include:

- Providing **greater clarity in Article 46 of the DSA on the process for, and procedural safeguards applicable to, joint investigations** by Digital Service Coordinators (DSCs) and on the actions resulting from such investigations, in order to promote certainty for service providers and users.
- Providing for **a harmonised set of objectives and principles** in accordance with which DSCs, other national competent authorities and the Commission should act when exercising oversight functions, and **listing the specific tasks they are empowered to carry out**, in order to promote consistent and coherent regulatory oversight across the EU.
- Providing for **a consistent standard for the exercise of oversight powers** by DSCs, other national competent authorities and the Commission, such that each of these bodies' powers are exercised where *necessary* for the performance of the relevant tasks and objectives.

Our feedback on the DSA proposal is aimed at promoting legal clarity and business certainty for the responsibilities we and others in industry will face, safeguarding data access and ensuring respect for fundamental rights. Even where we suggest certain tweaks, we understand that policymakers are looking for more scrutiny of our systems and processes by regulators across the EU. We support the objective of improving cooperation between authorities, both cross-border and within each Member State.

## **The DSA provides important legal certainty by making DSCs of home states responsible for supervision and enforcement**

The COO principle is one of the cornerstones of the Single Market. In the eCommerce Directive,<sup>1</sup> it applies so that information society services are, in general, subject to the law of the member state in which they are established—the ‘home’ state. On this basis, member states in which the services are received—‘host’ states—cannot restrict the freedom of service providers to provide them, unless they rely on specified public policy exceptions.<sup>2</sup>

In the same spirit, **the DSA generally places supervisory responsibility with the Digital Services Coordinator (DSC) of the home state, which acts as a single point of contact for application of the DSA to providers established in its state.** The DSA requires all DSCs to be independent, transparent and impartial. As the explanatory memorandum to the DSA proposal states, this approach “*ensures the swiftest and most effective enforcement of rules and protects all EU citizens. It aims at providing the simple and clear processes for both citizens and service providers to find relief in their interactions with supervising authorities.*”<sup>3</sup> The Commission is also given a role in supervision and enforcement, particularly in relation to very large online platforms (VLOPs), where systemic risks are suspected of emerging across the EU.

Giving the home state DSC primary oversight responsibilities aligns with the COO principle in the eCommerce Directive. However, **the DSA also establishes enhanced mechanisms for cooperation and coordination between DSCs and other competent authorities across the Member States, that go well beyond the cooperation mechanisms in the eCommerce Directive.**

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>2</sup> In a previous non-paper, we outlined our support for the COO principle in the eCommerce Directive and explained what impact it has for digital services and EU citizens in practice. We addressed three misconceptions around the current operation of the COO principle within the EU regulatory framework, clarifying that: (i) the scope of rules falling under the COO principle in the eCommerce Directive is not all-encompassing; (ii) there is an important role host states may play through procedures for cooperation with the home state; and (iii) Google would still respect national definitions of illegal content.

<sup>3</sup> DSA Proposal, Explanatory Memorandum, page 3, available at:

[https://ec.europa.eu/info/sites/info/files/proposal\\_for\\_a\\_regulation\\_on\\_a\\_single\\_market\\_for\\_digital\\_services.pdf](https://ec.europa.eu/info/sites/info/files/proposal_for_a_regulation_on_a_single_market_for_digital_services.pdf).

## The DSA gives DSCs of host states an expanded role in the oversight of intermediary services across the EU

There are a number of areas where the DSA grants DSCs of host states meaningful oversight powers. Although we believe some provisions may need tweaks or clarifications to support smooth functioning and legal certainty, we consider them to be a key part of the legislation. They provide important opportunities for DSCs of host states to participate in the oversight of the provision of intermediary services in the EU:

- Under Article 35 of the DSA, DSCs are tasked with contributing to and facilitating the drafting of **multi-stakeholder codes of conduct** and monitoring and evaluating the achievement of their objectives, through the European Board for Digital Services (the Board).
- Article 37 of the DSA enables DSCs to recommend through the Board that the Commission **develop crisis protocols** to address extraordinary circumstances affecting public security or public health. Member States' authorities (be them DSCs or other national competent authorities) may also be involved in drawing up, testing and supervising the application of such crisis protocols.
- Article 43 of the DSA gives users the **right to lodge a complaint** against providers of intermediary services alleging an infringement of the DSA **with their national DSC**. National DSCs can transmit the complaints they receive to the DSC of the home state. This provides an important means for users to access redress and for DSCs to have better insights into the impact of intermediary services on users in their jurisdiction.
- Article 45 of the DSA enables DSCs of host states to **request that the DSC of the home state investigate a suspected infringement**. Host state DSCs may also request that the home state DSC investigate suspected infringements of the additional requirements imposed on VLOPs, either through the Board or by acting in concert with two other host state DSCs (Article 50 of the DSA). Where the DSC of a home state fails to respond or the host state DSC considers the response to be unsatisfactory, the host state DSC can refer the matter to the Commission, which can require the home state DSC to reassess the matter and take the necessary investigatory and enforcement steps.
- Article 46 of the DSA provides that DSCs may participate in **joint investigations** concerning providers of intermediary services operating in several Member States.
- **DSCs are involved in oversight activities through the Board**. Article 47 of the DSA establishes the Board as an advisory board, and tasks it with:
  - Contributing to the consistent application of the DSA and effective cooperation

of the DSCs and the Commission;

- Coordinating and contributing to guidance and analysis of the Commission, DSCs, and other competent authorities on emerging issues; and
- Assisting DSCs and the Commission in the supervision of very large online platforms.

In addition, a number of DSA provisions provide DSCs of host states with enhanced visibility on the content moderation practices of intermediary service providers, and the approach of their home state DSC towards them, which can inform use of their oversight powers mentioned above. In particular:

- Under Article 8 of the DSA, DSCs are required to **share with one another orders to remove illegal content** that authorities in their jurisdiction addressed to intermediary service providers across the EU.
- Under Article 9 of the DSA, DSCs are required to **share with one another orders to provide information** that authorities in their jurisdiction addressed to intermediary service providers across the EU.
- Under Article 18 of the DSA, any DSC is **empowered to certify out-of-court dispute settlement bodies in its jurisdiction** to hear disputes between users and intermediary service providers, as regards the latter's content moderation actions.
- Under Article 19 of the DSA, any DSC is **empowered to evaluate and award the status of trusted flaggers to entities in its jurisdiction**, and, where appropriate, investigate and assess whether those entities continue to meet the relevant conditions to be awarded the status of trusted flaggers.
- Under Article 27 of the DSA, DSCs may **cooperate with the Commission to develop and implement guidelines on reasonable, proportionate and effective mitigation measures for specific systemic risks** relating to VLOPs' services.
- Under Article 44, all DSCs are required to **publish annual reports on their activities** under the DSA.

DSCs of host states therefore have a variety of avenues to monitor the activities of intermediary service providers not established in their jurisdiction, and meaningful opportunities to participate in enforcement of the DSA rules.

## **Clarifications that could aid the smooth functioning of the oversight regime**

### *Processes and procedural safeguards for cross-border cooperation among DSCs*

We appreciate the importance of cross-border cooperation to support an effective regulatory framework that protects users across the EU. In pursuing this aim, the DSA must also facilitate greater legal certainty for intermediary services and users, and support consistent and robust enforcement strategies from DSCs and other national competent authorities.

- As regards **requests to the DSC of a home state to investigate a suspected infringement** (Article 45 of the DSA), we would welcome clarification on the threshold for triggering this mechanism (e.g. “reasonable grounds” to suspect that the service provider has diverged from the compliance baseline) to ensure that it is used proportionately and meaningfully. We also recommend linking this threshold to a definition of systematic failure. The current reference to “an infringement” of the DSA Regulation is too vague and too broad, and does not serve legal certainty or the DSA’s focus on oversight of systems. For example, would one user alleging to its national DSC that a service provider failed to provide it with a statement of reasons when removing its content from the service (under Article 15 of the DSA) trigger this mechanism? Such an approach could result in an overwhelming number of requests being made to home state DSCs, which would adversely impact the efficiency of their investigations and impede their ability to address requests to investigate systemic failures.

In Article 45(4), we would also recommend allowing for flexibility in the time period in which the DSC of the home state must reply to provide its assessment of a request to investigate a suspected infringement. Depending on the alleged infringement, a time period of two months may prove to be too short in practice, and not allow for meaningful investigation and enforcement measures to be taken by the DSC of the home state. For example, as part of its assessment, the DSC of the home state will likely need to make information requests to the service provider. The time period should take this into account, and be of sufficient duration to allow service providers to seek clarifications if needed, carry out their own investigation and respond appropriately and within the procedural safeguards applicable under national law.

- On **joint investigations** (Article 46), we would suggest clarifications on the processes and procedural safeguards applicable to such investigations, and, given the oversight responsibility of the DSC of the home state, also on the expected nature of actions resulting from any joint investigations. For example, it would be helpful to provide further clarity in Article 46 on:
  - The process for initiating a joint investigation, e.g. by specifying that such an investigation may be commenced once a request has been made by the home state DSC to other relevant DSCs to participate in the investigation; and
  - The circumstances under which a joint investigation can be conducted, e.g. only where the service provider subject to investigation has establishments in the

Member States of the jointly acting DSCs.

### *Tasks and objectives of competent authorities, DSCs and the Commission*

Specifying the tasks of regulatory bodies and a harmonised set of objectives and principles to underpin their work can support consistent application and coherence in regulatory strategy, whether within Member States or across the EU. It can also support the proportionate and robust exercise of investigation and enforcement powers, as we explain in the section that follows. For example, the European Electronic Communications Code achieves this in Articles 3 and 4 on objectives, and Article 5 includes a list of specific tasks for the national regulatory and other competent authorities. Indeed, the benefit of specifying tasks in this way may be seen in Article 49, in which the DSA identifies the tasks of the Board.

We welcome the inclusion of the general overriding objectives of the DSA in Article 1(2) and Recital 4, namely to contribute to the proper functioning of the internal market for intermediary services, ensure legal certainty, promote a “*safe, predictable and trusted*” online environment and protect fundamental rights enshrined in the EU Charter of Fundamental Rights.

**We would recommend that the DSA specify further tasks and objectives, which the DSCs or other competent authorities and the Commission should take into account when performing oversight activities.**

Given the aims of the DSA as set out in the recitals and the approach of the DSA more generally, the statutory objectives of DSCs, other competent authorities and the Commission could include:

- **supporting the exercise of EU fundamental rights and freedoms;**
- **contributing to the proper functioning of the internal market** by supporting the consistent application of the DSA throughout the EU, as well as by enabling trust and growth in the provision of intermediary services;
- **promoting innovation in systems to reduce the presence and dissemination of illegal content on intermediary services**, including by adopting risk-based approaches to oversight and focusing on systematic infringements of the DSA; and
- **promoting the interests of the citizens of the EU**, by ensuring compliance with the DSA and by promoting public awareness and understanding of the risks, rules, safeguards and rights in relation both to the provision and receipt of digital services provided by intermediary services.

As regards tasks of DSCs and other competent authorities, we recommend that they are clearly identified in a new Article of the DSA, along the lines of the list in Annex I to this

non-paper.

### *Powers of DSCs and the Commission*

In line with good regulatory practices and fundamental principles of EU law, the exercise of any oversight powers (in particular those outlined in Articles 41 and 50 to 54 of the DSA) should be clear in scope, transparent and proportionate to the objectives of the DSA. We have **four recommendations in this regard:**

- First, as noted above, we recommend an approach similar to that of the European Electronic Communications Code, whereby **the DSCs, other national competent authorities and the Commission may exercise their oversight powers to pursue a clear and harmonised set of objectives and tasks.**
- Second, we recommend **aligning the standards for the exercise of oversight powers by DSCs, other national competent authorities and the Commission to that of “necessity” for the performance of relevant tasks and objectives.** The DSA proposal currently includes different standards for the exercise of oversight powers between DSCs, other national competent authorities and the Commission. We are particularly concerned by the standard proposed in Articles 52 to 54 of the DSA for the exercise of the Commission's powers, which is at a lower threshold (“[i]n order to carry out the tasks assigned to it under this Section”). We recommend changing this to “where necessary to carry out its tasks and achieve the objectives of the DSA”.
- Third, given the scale of content moderation and the DSA’s focus on the management of systemic risks (under Article 26), we recommend that **oversight powers of DSCs, other national competent authorities and the Commission be exercised to address systematic failures by an intermediary service provider** – and not in relation to individual content moderation outcomes.
- Fourth, we recommend provisions in the DSA to support a risk-based approach to enforcement by DSCs, other national competent authorities and the Commission, **as well as a more harmonised approach to appropriate penalties.** To this end, we would welcome (i) clarification that Digital Services Coordinators and the Commission may only apply penalties for systematic violations of due diligence obligations, (ii) clarification that any fines for procedural violations may only be applied where the service provider engaged in the violation in bad faith, as well as (ii) clear guidance by the Commission on what methodology should be used to calculate fines.

## Annex

We recommend that the DSA add a new article to explicitly specify the tasks that DSCs or other competent authorities are empowered to carry out under the DSA in order to promote consistent and coherent regulatory oversight across the EU.

### Proposed tasks of DSCs in addition to the ones already included in the DSA

- Monitor the application of and assess compliance with the DSA in accordance with the relevant jurisdictional provisions and cooperation mechanisms.
- Monitor relevant developments and emerging issues on the impact of illegal content on intermediary services, in particular the development of and innovation in content moderation and recommender technologies and practices, and, in respect of very large online platforms, on the mitigation measures in relation to systemic risks.
- Promote public awareness and understanding of the risks, rules, safeguards and rights in relation both to the provision and receipt of digital services provided by intermediary services.

### Existing tasks of DSCs already included in the DSA

- Transmit copies of orders to act against illegal content and orders to provide information to all other DSCs in accordance with Articles 8 and 9 of the DSA Regulation, respectively.
- Establish and maintain a list of notifications in relation to the requirements in Article 11 of the DSA for providers of intermediary services which do not have an establishment in the Union.
- Conduct certification processes for out-of-court dispute settlement bodies in accordance with Article 18 of the DSA.
- Evaluate and award the status of trusted flaggers, and, where appropriate, investigate and assess whether entities awarded the status of trusted flaggers continue to meet the relevant conditions, in accordance with Article 19 of the DSA.
- Conduct verification processes, where appropriate, for the designation of online platforms as very large online platforms in accordance with Article 25 of the DSA.
- Cooperate with the Commission to develop and implement guidelines on reasonable, proportionate and effective mitigation measures for specific systemic risks in accordance with Article 27 of the DSA.

- Monitor reports from Code of Conduct participants in accordance with Article 35 of the DSA.
- Handle complaints lodged by recipients of a service in accordance with Article 43 of the DSA.
- Publish annual reports on their activities under the DSA and on orders issued to act against illegal content or to provide information in accordance with Article 44 of the DSA.
- Handle requests lodged by DSCs in other Member States or recommendations by the Board in accordance with Article 45 of the DSA, and assess the matter and take the necessary investigatory and enforcement measures to promote compliance with the DSA.
- Cooperate with, including sharing information and providing mutual assistance to, other DSCs or competent authorities with a view to ensuring the consistency of application and enforcement of the DSA, including participating in joint operations in accordance with Article 46 of the DSA.
- Conduct investigations on the application of the DSA, including on the basis of information received from a DSC in another Member State.
- Contribute to the activities of the Board.