



## Key principles to consider prior to drafting a Code of Conduct under the DSA

### **1. The voluntary nature of Codes of Conduct must be safeguarded.**

- While the Commission recognises in Recital 67 of the DSA that the voluntary nature of any Codes should not be impaired, this position is partially undermined in later parts of the Proposal. Specifically, Recital 68 and Article 35 are potentially problematic as they state that the Commission may invite online platforms to participate in the drawing up of Codes of Conducts, the refusal of which “could be taken into account [...] when determining whether the online platform has infringed the obligations laid down by this Regulation”.

### **2. Codes of Conduct must be coherent with and respect existing legislation.**

- This is essential for legal certainty, a departure from existing law via a Code of Conduct will only undermine the effectiveness of the relevant legislation and the Code itself. In particular, any new Codes should not violate the principles established by the eCommerce Directive, namely the country-of-origin principle, the conditional liability exemptions, or the prohibition of a general monitoring obligation, which have been reaffirmed by the DSA proposal. In keeping with the prohibition of a general monitoring obligation, codes should not mandate stay-down measures.
- Moreover, Codes must be consistent with the policy architecture of the DSA, notably the risk-based approach and the empowerment of stakeholders to take measures that best fit with their operational capacity.

### **3. Codes of Conduct should involve a diverse set of stakeholders, which should include not only a variety of online service providers of different sizes and business models, but stakeholders from different sectors and industries.**

- The need for a diversity of actors in a Code for online advertising is acknowledged in Recital 70 and Article 36(1). However, it must be kept in mind that the effectiveness of any Code of Conduct will be determined by how well it can bring together actors from all different sectors and industries which deal with the issue that is at the core of the Code, as this will be the only way to truly address the bigger picture. For example, whereas the signatories of the existing Code of Practice on Disinformation are exclusively digital service providers, it would be very beneficial to also have representatives of the publishing and media industry at the table in order to better coordinate stakeholders’ efforts across the ecosystem and share best practices.

### **4. The appointed co-regulator for any Code of Conduct must have the necessary expertise to effectively carry out their duties.**

- Within any co-regulatory framework, it is crucial to identify the right entity to take the position of co-regulator from the outset. This is especially true in the digital sector, where issues can be highly technical in nature. The co-regulator must have access to sufficient expertise and resources to appropriately work with signatories. Furthermore, if the scope of a Code of Conduct includes material

which falls under a signatory's trade secrets, it is of the highest importance that trusted expert relationships can be developed between the co-regulator and the relevant stakeholders and that mechanisms for aggregation of data by an independent provider are enabled.

- In its current form, the role of co-regulator in the DSA seems to be shared between the Commission and the newly set up European Board for Digital Services with the Commission being involved in, among others, facilitating the drawing up of Codes, contributing to their content, specifically with regard to KPIs as well as assessing signatories' compliance. The roles of the Commission and the DSCs need to be better defined.

#### **5. The content of a Code of Conduct should be industry-driven, in order to fully utilise this knowledge and expertise with regards to the issue at hand as well as other technicalities.**

- A top-down approach, where much of a Code would be prescribed by an authority of the co-regulator, would undermine democratic legislative processes for adopting laws. It would also reduce a Code's efficiency. While it is encouraging that Article 35(1) specifies that the Commission's role under the DSA will be to encourage and facilitate the drawing up of Codes of Conduct, later in Article 35 is suggested that the Commission could also contribute to the Content of a Code. While guidance from the Commission can be welcomed, clarity will be needed as to the involvement of industry and other stakeholders here, as their involvement seems to be left to the discretion of the Commission in Article 35(2).
- In addition, any commitments and KPIs related to these Codes should at least be co-drafted and approved by the signatories before they come into effect.

#### **6. Codes of Conduct must be flexible and adaptable.**

- A Code which is too rigid with regards to its definitions and required procedures is likely to become outdated quickly and be ineffective in addressing upcoming issues.

#### **7. Codes of Conduct should also be proportionate, taking account of variations between its signatories.**

- While it is necessary for the success of a Code of Conduct to bring together a large variety of signatories, a Code also has to keep in mind the differences between its variety of signatories - in terms of business models, structures, issues, established structures, etc. A Code which is too prescriptive in its requirements for the activity of its signatories would almost certainly restrict their ability to act effectively and in good faith. Furthermore, such a Code of Conduct would be less likely to attract signatories to sign on, as stakeholders could feel like they would be more effective in tackling an issue by themselves. The same applies especially to including blanket KPIs in Codes of Conduct. Whereas the call for having comparable reports between signatories - as seen in Article 35(3) - is understandable, it also has to be taken into account that online service providers have widely differing structures, business models and tools at their disposal. Finding commonly applicable relevant KPIs for

a broad range of actors is nearly impossible especially if these Codes of Conduct are as inclusive as possible.

## **8. Codes of Conduct must safeguard fundamental rights and prevent over-removal of lawful content.**

- To respect the DSA's focus on freedom of expression and illegal content, Codes of Conduct should not include measures that create perverse incentives for platforms to over-remove lawful-but-harmful content. While harmful content can be addressed by the Codes, removal measures should only be prescribed through legislative instruments. Principle 9: Codes of Conduct should be targeted, addressing specific issues or types of content or practices, rather than trying to tackle a multitude of concerns at once.
- Experience has taught us that Codes of Conduct work best when they are focused on discrete topics and where the goal to be achieved is specific and measurable (e.g., the Code of Conduct on Illegal Hate Speech and its focus on data gathering). The Codes will be designed to complement the broad structure of the DSA, to address specific concerns as they arise outside of the horizontal framework.

## Annex

### Relevant parts of the DSA:

#### **Memorandum:**

By establishing a clear framework, accompanied by cooperation between and with Member States, as well as by self-regulation, this proposal aims to enhance legal certainty and increase trust levels, while staying relevant and effective in the long term because of the flexibility of the cooperation framework.

In the baseline scenario, the Commission will continue to enforce existing rules, including on sector-specific issues, and will support the self-regulatory efforts in place.

This proposal will be complemented by further actions under the European Democracy Action Plan COM(2020) 790 final, with the objective of empowering citizens and building more resilient democracies across the Union. In particular, the rules on codes of conduct established in this Regulation could serve as a basis and be complemented by a revised and strengthened Code of practice on disinformation, building on the guidance of the Commission.

The proposal is also fully consistent and further supports equality strategies adopted by the Commission in the context of the Union of Equality. The proposal is without prejudice to the Commission's initiative aimed at improving the labour conditions of people working through digital platforms.

Finally, the proposed regulation builds on the Recommendation on illegal content of 2018. It takes account of experiences gained with self-regulatory efforts supported by the Commission, such as the Product Safety Pledge, the Memorandum of Understanding against counterfeit goods, the Code of Conduct against illegal hate speech, and the EU Internet Forum with regard to terrorist content.



**Recitals:**

(58) Very large online platforms should deploy the necessary means to diligently mitigate the systemic risks identified in the risk assessment. Very large online platforms should under such mitigating measures consider, for example, enhancing or otherwise adapting the design and functioning of their content moderation, algorithmic recommender systems and online interfaces, so that they discourage and limit the dissemination of illegal content, adapting their decision-making processes, or adapting their terms and conditions. They may also include corrective measures, such as discontinuing advertising revenue for specific content, or other actions, such as improving the visibility of authoritative information sources. Very large online platforms may reinforce their internal processes or supervision of any of their activities, in particular as regards the detection of systemic risks. They may also initiate or increase cooperation with trusted flaggers, organise training sessions and exchanges with trusted flagger organisations, and cooperate with other service providers, including by initiating or joining **existing codes of conduct or other self-regulatory measures. Any measures adopted should respect the due diligence requirements of this Regulation and be effective and appropriate for mitigating the specific risks identified, in the interest of safeguarding public order, protecting privacy and fighting fraudulent and deceptive commercial practices, and should be proportionate in light of the very large online platform's economic capacity and the need to avoid unnecessary restrictions on the use of their service, taking due account of potential negative effects on the fundamental rights of the recipients of the service.**

(61) The audit report should be substantiated, so as to give a meaningful account of the activities undertaken and the conclusions reached. It should help inform, and where appropriate suggest improvements to the measures taken by the very large online platform to comply with their obligations under this Regulation. The report should be transmitted to the Digital Services Coordinator of establishment and the Board without delay, together with the risk assessment and the mitigation measures, as well as the platform's plans for addressing the audit's recommendations. The report should include an audit opinion based on the conclusions drawn from the audit evidence obtained. A positive opinion should be given where all evidence shows that the very large online platform complies with the obligations laid down by this Regulation or, where applicable, any commitments it has undertaken pursuant to a **code of conduct** or crisis protocol, in particular by identifying, evaluating and mitigating the systemic risks posed by its system and services. A positive opinion should be accompanied by comments where the auditor wishes to include remarks that do not have a substantial effect on the outcome of the audit. A negative opinion should be given where the auditor considers that the very large online platform does not comply with this Regulation or the commitments undertaken.

**(67) The Commission and the Board should encourage the drawing-up of codes of conduct to contribute to the application of this Regulation. While the implementation of codes of conduct should be measurable and subject to public oversight, this should not impair the voluntary nature of such codes and the freedom of interested parties to decide whether to participate. In certain**





circumstances, it is important that very large online platforms cooperate in the drawing-up and adhere to specific codes of conduct. Nothing in this Regulation prevents other service providers from adhering to the same standards of due diligence, adopting best practices and benefitting from the guidance provided by the Commission and the Board, by participating in the same codes of conduct.

(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 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 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.**

(69) The rules on codes of conduct under this Regulation could serve as a basis for already established self-regulatory efforts at Union level, including the Product Safety Pledge, the Memorandum of Understanding against counterfeit goods, the Code of Conduct against illegal hate speech as well as the Code of practice on disinformation. In particular for the latter, the Commission will issue guidance for strengthening the Code of practice on disinformation as announced in the European Democracy Action Plan.

(70) The provision of online advertising generally involves several actors, including intermediary services that connect publishers of advertising with advertisers. **Codes of conducts** should support and complement the transparency obligations relating to advertisement for online platforms and very large online platforms set out in this Regulation in order to provide for flexible and effective mechanisms to facilitate and enhance the compliance with those obligations, notably as concerns the modalities of the transmission of the relevant information. **The involvement of a wide range of stakeholders should ensure that those codes of conduct are widely supported, technically sound, effective and offer the highest levels of user-friendliness to ensure that the transparency obligations achieve their objectives.**

(89) The Board should contribute to achieving a common Union perspective on the consistent application of this Regulation and to cooperation among competent authorities, including by advising the Commission and the Digital Services Coordinators about appropriate investigation and enforcement measures, in particular vis à vis very large online platforms. **The Board should also**



**contribute to the drafting of relevant templates and codes of conduct and analyse emerging general trends in the development of digital services in the Union.**

**Articles:**

**Article 28 - Independent audit**

1. Very large online platforms shall be subject, at their own expense and at least once a year, to audits to assess compliance with the following:

- (a) the obligations set out in Chapter III;
- (b) any commitments undertaken pursuant to the **codes of conduct** referred to in Articles 35 and 36 and the crisis protocols referred to in Article 37.

2. Audits performed pursuant to paragraph 1 shall be performed by organisations which:

- (a) are independent from the very large online platform concerned;
- (b) have proven expertise in the area of risk management, technical competence and capabilities;
- (c) have proven objectivity and professional ethics, based in particular on adherence to **codes of practice** or appropriate standards.

**Article 35 - Codes of conduct**

1. The Commission and the Board shall encourage and facilitate the drawing up of codes of conduct at Union level to contribute to the proper application of this Regulation, taking into account in particular the specific challenges of tackling different types of illegal content and systemic risks, in accordance with Union law, in particular on competition and the protection of personal data.

2. Where significant systemic risk within the meaning of Article 26(1) emerge and concern several very large online platforms, **the Commission may invite the very large online platforms concerned, other very large online platforms, other online platforms and other providers of intermediary services, as appropriate, as well as civil society organisations and other interested parties, to participate in the drawing up of codes of conduct, including by setting out commitments to take specific risk mitigation measures, as well as a regular reporting framework on any measures taken and their outcomes.**

3. When giving effect to paragraphs 1 and 2, the Commission and the Board shall aim to ensure that the codes of conduct clearly set out their objectives, contain key performance indicators to measure the achievement of those objectives and take due account of the needs and interests of all interested parties, including citizens, at Union level. The Commission and the Board shall also aim to ensure that participants report regularly to the Commission and their respective Digital Service Coordinators of establishment on any measures taken and their outcomes, as measured against the key performance indicators that they contain.

4. The Commission and the Board shall assess whether the codes of conduct meet the aims specified in paragraphs 1 and 3, and shall regularly monitor and evaluate the achievement of their objectives. They shall publish their conclusions.





5. The Board shall regularly monitor and evaluate the achievement of the objectives of the codes of conduct, having regard to the key performance indicators that they may contain.

#### Article 36 - Codes of conduct for online advertising

1. The Commission shall encourage and facilitate the drawing up of codes of conduct at Union level between, online platforms and other relevant service providers, such as providers of online advertising intermediary services or organisations representing recipients of the service and civil society organisations or relevant authorities to contribute to further transparency in online advertising beyond the requirements of Articles 24 and 30.

2. The Commission shall aim to ensure that the codes of conduct pursue an effective transmission of information, in full respect for the rights and interests of all parties involved, and a competitive, transparent and fair environment in online advertising, in accordance with Union and national law, in particular on competition and the protection of personal data. The Commission shall aim to ensure that the codes of conduct address at least:

- (a) the transmission of information held by providers of online advertising intermediaries to recipients of the service with regard to requirements set in points (b) and (c) of Article 24;
- (b) the transmission of information held by providers of online advertising intermediaries to the repositories pursuant to Article 30.

3. The Commission shall encourage the development of the codes of conduct within one year following the date of application of this Regulation and their application no later than six months after that date.

#### 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 50 - Enhanced supervision for very large online platforms

1. Where the Digital Services Coordinator of establishment adopts a decision finding that a 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 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.

2. When communicating the decision referred to in the first subparagraph of paragraph 1 to 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.

