



## WP COMPCRO (Internal Market) – DSA

### **Explanation of the third compromise text Chapter IV – Enforcement**

Dear Colleagues,

In the CompCro Working Party meeting on 7 October, we examined Chapter IV of the second redraft of the DSA proposal. The provisions in Chapter IV define the implementation, cooperation, sanctions and enforcement of the DSA regulation proposal. With the latest amendments, we have tried to follow the positions of Member States, mainly focusing on the improvement of the efficiency of the enforcement mechanisms. The discussion in the Working Party meeting was lively, pointing to differences between Member States, but at the same time, it has revealed that there is a possibility of reaching a final compromise.

Taken into account the fact that we are in the final phase of negotiations, we kindly ask delegations to send us written comments focused on the newly introduced changes. To be able to prepare the third (final) redraft in line with the schedule for the November COMPET Council, please send us your written comments until Friday, **15 October**.

To help you understand better the amendments and the structure of the renewed enforcement mechanism, we have prepared below additional explanations. In the last point of this flash #10, you can also find slides illustrating how the proposed enforcement mechanism would work in different scenarios.

#### **1. Introduction**

A number of Member States proposed a broader involvement of the countries of destination and of the Commission to avoid potential deadlocks in the enforcement of the Regulation. At the same time, a large number of Member States circulated a common position paper stressing the fundamental importance of maintaining the country of origin principle, enshrined in the initial proposal.

The DSA proposal contains obligations of means requiring intermediaries to set up the systems and structures necessary to adequately process illegal content and risks and to apply their Terms and Conditions in a diligent and non-discriminatory manner. These

systems are necessarily centralised and they need to be supervised at the source. Having a jurisdiction based on the country of each consumer would imply that the same system might be subject to scrutiny by potentially 27 different authorities, which could lead to legal uncertainty, fragmentation and inconsistency of decisions. This is the very same reason why a country of destination principle is not suited as a foundation for regulating the jurisdiction for the public enforcement of this Regulation.

The second compromise text puts forward a coherent public enforcement structure that builds on the primary competence of the country of origin, as in the initial proposal, but also enlarges the range of tools available to ensure cooperation and to foster involvement of other authorities, including in the country of destination and at EU level.

Main characteristics of the initial proposal:

- The DSC-COO is responsible for the enforcement in relation to non-VLOP/SEs
- COM direct intervention only for VLOP/SEs
  - where requested by the DSC-COO or
  - in case the DSC-COO misinterprets the DSA
- Voluntary and informal joint investigations
- In case of “deadlock”, direct enforcement for VLOP/SEs only after a failure or the request of the COO + procedures under Article 258 TFEU
- No specific rules on the exchange of information between the COO and CODs
- Actions vis à vis specific items of illegal content: tool to be used are orders in accordance with Article 8 (directly addressed by the issuing authorities in any concerned Member State to the provider; the issuance of these orders is not regulated by the procedures laid down in Chapter IV)

Objectives of the second compromise text:

- Avoid enforcement deadlocks
  - Expanded toolbox for different scenarios to ensure effective action at EU level
  - Supplementary direct enforcement possibility of COM for VLOP/SEs
- Ensuring effecting supervision on the basis of the country of origin (COO) principle
  - Primary enforcer is the DSC in the COO – must be adequately resourced
  - Cooperation and support of other regulatory actors (competent authorities in the COD and COO, DSC-COD, Board, COM)
- Strengthen single market through consistent enforcement
  - Consistency of enforcement between MS and between VLOP/SEs and non-VLOP/SEs

The following principles, in particular, guided the revision of the text:

- The DSC in the country of origin should remain the point of first contact and of coordination of the enforcement action, but with the active involvement of other authorities and a role of oversight and support at EU level;
- This basic model should be consistent in case of VLOP/SEs and non-VLOP/SEs, as many DSA obligations apply to both, with however the possibility of complementary direct enforcement by COM for VLOP/SEs;
- There should be a range of tools applicable to address various enforcement scenarios, in order to avoid deadlocks but also to allow for involvement of COM when necessary.

Basic pillars of the compromise text:

- “Home state control” principle fully respected: COO is the first port of call for enforcement
  - COO should have sufficient resources, proportionate to the size and number of providers in its MS (Art. 39)
- Expanded cooperation toolbox
  - Mutual assistance (Art. 44a) for COD to allow early oversight of VLOP/SEs in specific circumstances
  - COO to launch mutual assistance mechanism (Art. 44a) or involve COD in joint investigation (Art. 46)
  - Joint investigation at the request of Board or COM (Art. 46 and 46a)
- Reinforced role of COM and prevention of deadlocks:
  - COM to assess legality and effectiveness of the COO decisions (in case of dispute)
  - COM takes over a VLOP/SE case if COO does not follow COM serious doubts in cross-border disputes (Art. 45(7)) or recommendation to investigate Section 4 infringements
  - Specific VLOP/SE joint investigations can be mandated by COM (Art. 46a)
  - COM intervenes directly after a request by the Board in case of serious harm (Art. 46b)

The goal has been to prepare a toolbox with the measures that should work in different kind of enforcement scenarios. The presentation of different scenarios is attached to this document.

We believe that the additional proposed tools to frame the cooperation of public enforcers, coupled with a strengthened possibility for COM's direct enforcement in relation to VLOP/SEs, balance the different positions expressed by delegations.

## 2. Institutional aspects

(Articles 38-44 (excluding 40), 47-49)

Section 1 of Chapter IV refers to both institutional rules applicable to the national authorities that will be empowered to apply the DSA obligations and the tools for cooperation. The first group of provisions includes Articles 38, 39, 41, 42, 43, 44 as regards national institutions, as well as Articles 47 to 49 with regard to the Board, which have not be subject to substantial changes in this third redraft.

With regard to the rules on institutions in charge of public enforcement of DSA obligations, we stress the importance of resources for the good functioning of the enforcement system, in particular in a cross-border context. It is for this reason that additions in Article 39 paragraph 1 aim at ensuring the adequacy of resources in relation to the extent and number of providers under the jurisdiction of the COO. This should be coupled with increased transparency on the budget of the Digital Services Coordinator and, where appropriate, of the other competent authorities.

Another change prompted by comments of delegations concern the range of accountability mechanisms that are not affected by the Regulation, as referred to in Article 39 paragraph 3: the article now does not contain a closed list of accountability tools but rather examples (financial expenditure and reporting to national parliaments). However, it is clarified that such proportionate accountability requirements may concern only the general activities of the authorities involved, as opposed to scrutiny of individual acts, which would affect independence of action of DSC and other competent authorities. The point of independence of DSC and other competent authorities remains of primary importance; in conclusion, any such accountability mechanism should be coherent with the basic independence requirement, also common to many other regulatory frameworks.

As regards questions about the relationship between the DSCs and the other competent authorities, we introduced small clarifications in Article 38 (notably in paragraph 4), to make clear that all the rules contained in Articles 39, 40 and 41 do equally apply to other competent authorities in charge of specific enforcement or application tasks pursuant to the DSA, where applicable. These rules are the independence requirements, the rules on jurisdiction and the need to provide the necessary powers to enforce the Regulation.

. Changes in Article 41 are meant to strengthen the harmonisation of powers of competent authorities, including DSCs, while clarifying that the procedures for the exercise of these powers are left to national law. Changes in Article 42 aim, in line with some observations, at ensuring that the statutory maximum ceiling for fines applicable to an infringement of the Regulation is harmonised at 6% of annual turnover.

With regard to complaints to public enforcement authorities, the changes in Articles 43 and 44 are two-fold. On the one hand, it should be made explicit for the DSC receiving the complaint the possibility to provide its views informing the possible follow up to be taken in the country of origin, without prejudice to a more formal cross-border cooperation request and the specific national rules on good administrative behaviour when processing

complaints. On the other hand, Article 44 provides additional tools to ensure public transparency about the way DSCs process the complaints received.

With regard to the Board and its institutional features, no change is proposed, apart minor editorials, and this is justified by the overall nature of the Board. In the current architecture, this is an advisory body to the national authorities and the Commission, in order to trigger initiatives or provide feedback of the regulatory community on specific decisions. In view of its nature, it cannot adopt any binding act vis à vis COM, DSCs/competent authorities or third parties, nor it can have an autonomous investigation capacity. It relies on the support of Commission and on requests of its members (to be regulated by the rules of procedures in accordance with the specific requirements of the DSA, e.g. majority voting, following requests from three DSCs in many instances).

### **3. Coordination and cooperation tools**

(Articles 40, 44a-46a)

Some of the most important changes and clarifications provided in the proposed text are focusing on enlarging the cooperation toolbox available to all concerned authorities in DSA enforcement, in order to cope with different possible enforcement scenario. This includes Article 44a, 45, 46, 46a, and it has important links with the role of the Commission. This should facilitate cooperation and involvement of different authorities, in particular in the monitoring and investigation phase, while maintaining intact the one-stop-shop and coordination role of the country of origin, the possibility to recommend action of the Board and the role of Commission as guardian of the system as both dispute settlement and complementary enforcer of rules for VLOP/SEs.

The new Article 44a is meant to provide the general framework for this expanded cooperation toolbox. Based on the common information sharing system, there should be basic day-to-day mutual assistance obligations among all DSA authorities, including but not limited to:

- information about cases opened and forthcoming decisions
- request of COO for cooperation to investigate/provide specific information in other countries within specific time-limits and
- a monitoring cooperation tool, where a COD is able to request from COO, within specific time-limits, existing info on a given VLOP/SE in specific circumstances, such elections, with a view to allow early monitoring and possibly build the case for a formal cross-border cooperation request.

In Article 45, the changes are meant to ensure alignment with the new cooperation tools (mutual assistance and joint investigation) and ensure quick feedback, but above all to expand the grounds for scrutiny by the Commission of the measures proposed by the country of origin. The Commission will not only assess their legal consistency, but also their effectiveness. This should be able to give enough guidance to the COO on the measures to be taken, and a clear criterion for COM to take over direct enforcement if these indications are not followed as regards infringements of VLOP/SE.

Article 46 substantially innovates the Joint investigation tool. From a pure informal and voluntary mechanism, it now becomes a structured cooperation tool, with a specific procedure and effects. Joint investigations may in general be launched at the initiative of the COO (and the COO may be obliged to do this if it does not have enough information to cope with a cross-border cooperation request, according to Article 45(3)) or of the Board, in case of issues with a wider range of effects. During the investigation, all involved authorities (including in the CODs) can exercise their investigatory powers under the coordination of the COO within a predefined time, and the findings should reflect the inputs from all authorities involved. On this basis, the COO shall adopt a preliminary position that, in case of disagreement, can be subject to dispute settlement in front of COM, in accordance with the procedure for cross-border cooperation requests (Article 45(5)), including where the COO refused to launch such a joint investigation where requested by the Board.

We understand the joint investigations as a particularly important tool for complex issues, potentially involving several DSCs/CAs and/or issues requiring expertise available in different Member States.

Article 46a adds an additional possibility, in case of alleged infringements of VLOP/SEs, for the COM to mandate a joint investigation within a predefined timeline, with the possibility for COM to directly issue serious doubts and request to take specific measures pursuant to Article 45(7) where it disagrees with the preliminary position or such position is not adopted within the specified timeframe. Finally, if the COO fails to take into account COM indications, the latter can take over.

The possibility for 3 DSCs to request the Board to take initiatives (in Articles 45, 46 and 46a) is meant to ensure that the Board will decide on issues of interest for several Member States, but does not entail automatically a request from the Board. The Board will have to decide by majority on the request of the 3 DSCs. The Board therefore will act as a filter for these requests.

Within this enhanced cooperation framework, the basic thrust of the original proposal, i.e. the country of origin principle for the public enforcement of the provision, is therefore maintained. Changes in Article 40 are therefore minimal, mostly aiming at clarifying the consequences of opening proceedings vis à vis a provider not established in EU and without a legal representative therein. The recitals include important clarifications that address some concerns of delegations:

- As regards consumers' issues, it should be clear that Article 40 does not change in any way the private international law rules on jurisdiction and conflict of laws. Therefore, this article does not regulate private enforcement of the DSA rules, which will follow the normal rules on jurisdiction, including the country of residence of the consumer targeted by the services. Similarly, Article 40 does not regulate at all the jurisdiction applicable to public and private enforcement concerning issues regarding the illegality of individual items of content, which remain regulated by the applicable provisions (Union law or national law in conformity with Union law), such as jurisdiction regarding defective goods, application of consumer protection legislation or defamation.

- As regards the different criteria of the AVMSD and DSA for third country platforms, additions to recital 37 have also been added to encourage providers to appoint subsidiaries or parent companies, where they are established in the Union, in order to avoid mere letterbox legal representative and to facilitate alignment of jurisdictional rules in the AVMSD.

The proposal contains a series of tools, which are flexible enough to cover different situations, taking into account the possible complexity of issues at stake. It is worth noted, that the deadlines for actions by different actors are only maximum deadlines, which should take into account the different circumstances of the cases, in accordance with the general duty to cooperate. E.g., the COM should decide whether to take over according to Article 46b taking into account the seriousness of the issue at stake. In any event, we considered necessary that the deadlines should be short enough to ensure prompt and timely response of the authorities.

#### **4. Triggers for Commission direct intervention and enhanced supervision**

(Articles 46b-51)

The proposed compromise text maintains the structure of the original proposal, which is also its distinctive feature compared to other systems such as GDPR and in line, for example, with the approach in the banking Union: the possibility for direct enforcement at European level vis à vis providers. This possibility is envisaged in particular in Articles 46b, 50 and 51, but it is also linked to the possibility for COM to issue serious doubts in the context of cooperation.

Taking into account that the DSA applies to all intermediary service providers in the Union, however, we considered necessary to ensure that this possibility is limited to VLOP/SEs and as a complementary tool compared to the normal enforcement coordinated by the COO. The first intervention of the COO, eventually supported by CODs through mutual assistance and joint investigations should remain the rule, also to ensure consistency in the application of rules to VLOP/SEs and non-VLOP/SEs, but we considered necessary to strengthen the possibility for direct intervention of the Commission to cope with specific issues and avoid deadlocks.

First, in Article 46b we included a major change to the “normal” procedure to request COM intervention, with the possibility for a quicker direct intervention of COM upon request of the Board in case of infringements that raise a risk of serious harm, where direct intervention is necessary to avoid that possible different views or delays may be irremediable. This possibility can be activated without any prior action of COO and can therefore be used to address urgent issues.

The additional possibility of COM intervention laid down in Article 50 paragraph 1 is meant to ensure that specific infringements of VLOP/SEs with particularly relevant systemic features (e.g. insufficient risk assessment or risk mitigation measures adopted by the VLOP/VOSE) are tackled also upon own initiative of the COM and within a predefined timeline (for instance immediately after a negative audit). In case of inertia of the COO in

investigating such infringements, COM should be able to take over, sanction them and in addition trigger the enhanced supervision in order to ensure that the platform remedies it for the future.

The enhanced supervision should be seen as an additional supervisory procedure applicable to a VLOPSEs that has infringed one of the specific VLOP/SE's obligations and therefore may not only be sanctioned for the past, but in addition should also be put under specific control for it to remedy effectively. Within this context, we took note of comments from several delegations that regretted the deletion of audits as an element of the enhanced supervision. We have therefore reintroduced this, but with a slightly different function. While in the original COM text the audit was an element for the DSC to accept or refuse a given action plan (hence becoming a procedural requirement), in the new system the audit is one necessary element of the action plan. It should be coupled with the other measures proposed by the platform (including Code of conducts, which are not mandatory, but shall be taken into account if proposed), and it should provide an independent assessment of how the action plan has been implemented and produced effects. This will be an input for the final decision of the DSCs on whether the infringement has been fully terminated or remedied.

In the text of Article 51 we added two new options for direct intervention of COM (Articles 46b and 50(1)) to the existing ones, in line with changes in the text of these Articles. Moreover, changes in other articles (such as Article 45(7) and 46a) extended the conditions to trigger COM direct intervention according to the existing "routes", with the possibility for COM to review COO action on the merits and in case of disagreement with the results of Joint Investigation mandated by COM.

Finally, we want to remind on the action against individual items of content, for which orders in accordance with Article 8 are available directly, and without any procedure. The COM is supposed to intervene in exceptional circumstances, to address specific enforcement scenarios where pan-EU intervention is needed either in view of inertia of national regulators, disagreement or seriousness of the problem. This role of "enforcer of last resort" should also provide incentives for the system to work, with the cooperation of the national authorities.

## **5. Commission's investigatory and enforcement powers**

(Article 52-65)

As discussed previously, the provisions concerning investigatory and enforcement powers by the Commission laid down in Articles 52 to 65 of the DSA are largely the same as similar provisions in the DMA. These powers and competences are conversely similar to the powers that the Commission and in some cases competent national authorities have under Regulation 1/2003. In this context, it is important to maintain consistency between the two texts, as they both regulate the direct enforcement powers of the Commission.

We have provided further clarifications in recital 99 as regards the possible addresses of the specific investigatory tools, such as requests for information or interviews.



In Article 53(2) we have introduced an obligation on the COM to inform the DSCs of the interview that will be conducted with an undertaking on its territory. Conversely, such DSC can request to accompany the COM when conducting such on-site interview.

In Article 54(1) we primarily aimed at aligning the language of the provision on inspections with the similar provisions in the DMA, where request has been made that powers of the COM should be clearly spelled out. The aim of the changes in Article 54 is twofold. First, to identify specific powers and tasks that could be undertaken are based on similar framework laid down in Regulation 1/2003. Second, to provide for a framework of cooperation between the COM and DSC of the country where the inspection is to be conducted, which includes getting views before inspection decision is adopted, possible assistance during the inspection as well as further assistance by the law enforcement authorities where the undertaking concerns refuses to submit to an inspection.

In Article 57(1) we have clarified, again aligning it with a similar provision under the DMA, that VLOP/SE may be requested to retain certain documents that may be necessary for the exercise of the investigatory and enforcement tasks by the COM. The main purpose of this change is to ensure that the relevant document is preserved by the VLOP/SE.

In Article 58 on fines, we have added, as also requested by some Member States, two additional instances of possible non-compliance, notably when VLOP/SE fails to retain and safeguard documents relevant for the regulatory oversight and in case of failure to comply with the conditions of access to file under Article 63(4).

In Article 63 we clarified that in case of a negotiated disclosure of information relevant in the context of access to file, the COM may take a decision on conditions of such access, to avoid any procedural deadlock in case agreement cannot be reached.

To safeguard proportionality and protection of rights and interests of affected parties any legally binding investigative step will be done by a Decision, which is legally challengeable. Proportionality and protection of parties is ensured by the fact that the Commission takes such decision and has to substantiate it. COM can only conduct an interview if there is a consent by the person, which is to be interviewed. If the interviewee refuses to be interviewed the Commission cannot conduct such an interview. In addition, the subject matter of the interview and the scope of issues that could be covered needs to be related to investigation. On-site inspections by the Commission should not take place at the premises of natural persons as this was never the intention and that is why the language used by the proposal is referring to the "premises of the provider".

Finally, the rules on professional secrecy originally laid down in Article 63 have been extrapolated and included in a new separate article 66a. In this way, the rule (the same as in Regulation 1/2003) is not limited to the powers exercised in the context of Commission direct intervention under section 3, but it applies also to the activities carried out by Commission, DSCs, competent authorities and the Board in the remaining sections (such as in the context of mutual assistance, cross-border cooperation, joint investigations). This extension reflects the expanded range of situations where potentially confidential information is shared among the authorities, with the necessity to prevent undue disclosure, as in the context of Regulation 1/2003.

## 6. Implementation mechanism in different scenarios

### Scenario 1: Time sensitive/serious EU-wide infringements – Examples of direct COM powers

- Lack of a functional N&A system of VLOPs in processing notices related to serious illegal content across EU



- Board, upon request of 3 MS, can ask COM to take over (Art. 46b) and enforce directly

NB: direct action against individual items of illegal content through orders (art 8)

- Negative audit on risk mitigation measures by VLOP



- COM, on its own initiative or request of Board, asks COO to assess infringement within predefined timeline
- No assessment: COM can take over (Art. 50)

### Scenario 2: Examples of issues with country-specific features

- Risk of proliferation of fake news in VLOP social media in view of electoral period



- COD to ask COO existing information about content moderation system of the social media to allow early monitoring (Art. 44b)
- COD to request COO to investigate (Art.45) within 1 month
- COO to request COD to provide specific information (Art. 44b) or make a joint investigation (Art. 46), with COD able to request info/inspect information

- Platform (non-VLOPs) refuses to submit to COO dispute resolution in a given Member State



- DSC-COD to receive complaints from consumers
- DSC-COD to
  - Transmit complaints...
  - ...and may also request COO to investigate (Art. 45)

## Scenario 3: Example of regional issue

3rd country platform targeting MS A, B, C and violating Art. 12 on T&C



- Legal Representative in EU (Country X) not in the MS A, B, C area
- 3 MS A, B, C, ask Board to launch Joint Investigation (Art. 46)
- Board asks DSC-Country X to launch joint investigation with A, B, C, recommending screening of 3rd country language content by A, B, C authorities
  - A should be able to seize content stored by platform in A servers or ask information directly to the platform
- Country X to propose measures on the basis of common findings (3+1 months)
- No action by Country X or Board disagrees → Board can refer issue to COM for dispute settlement (Art. 45(5))

## Scenario 4: Example of a disagreement or inaction

MS A marketplace did not verify VAT number of MS B traders in spite of public register accessible



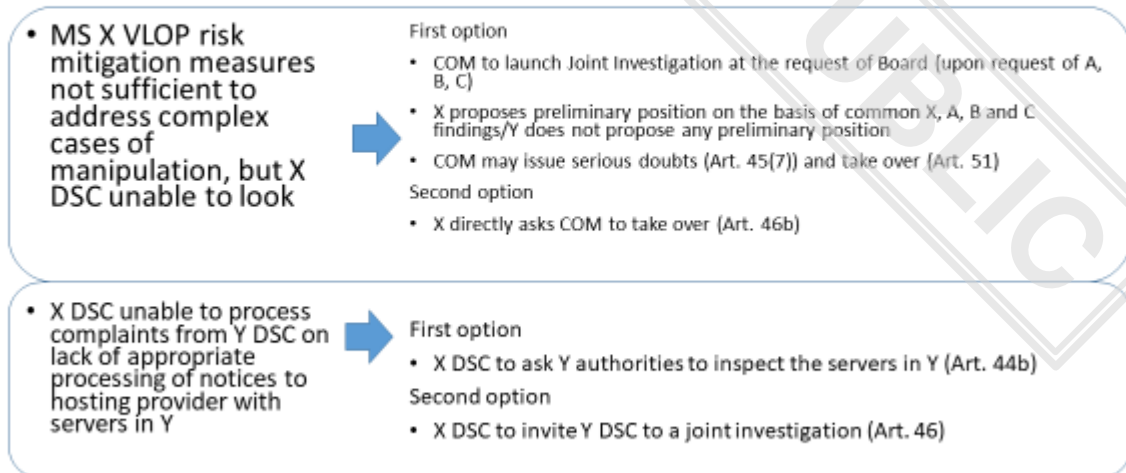
- B DSC to request COO to investigate (Art. 45) within 1 month
- MS A COO considered justified the lack of verification/did not take action
- MS B DSC may refer the matter to COM (assessment 2 months)
- COM expresses serious doubts and asks to reassess the alleged infringement taking into account the large number of MS B consumers affected by several rogue traders (Art. 45(7))

FI VLOP marketplace disregards OOC dispute settlement in several MS



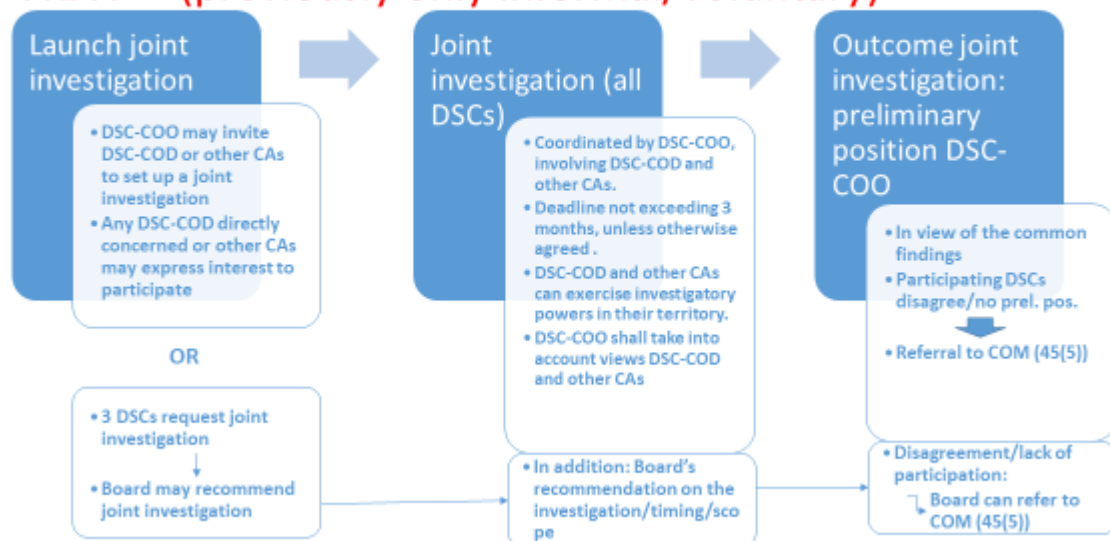
- MS A, B and C asks Board to recommend COM to launch JI. COM mandates it. Either:
- X proposes preliminary position on the basis of common A, B, C and D findings, concluding breach of DSA requirements → enforces against VLOP
  - Or X does not propose any preliminary position or X does not participate in the Joint Investigation or COM disagrees with X preliminary position
    - COM expresses its serious doubts and recommends measures to be taken (2 months) (Art. 45(7))
    - If X does not agree and/or does not take measures COM can take over and fine the VLOP (Art. 51)

## Scenario 5: Overwhelmed COO

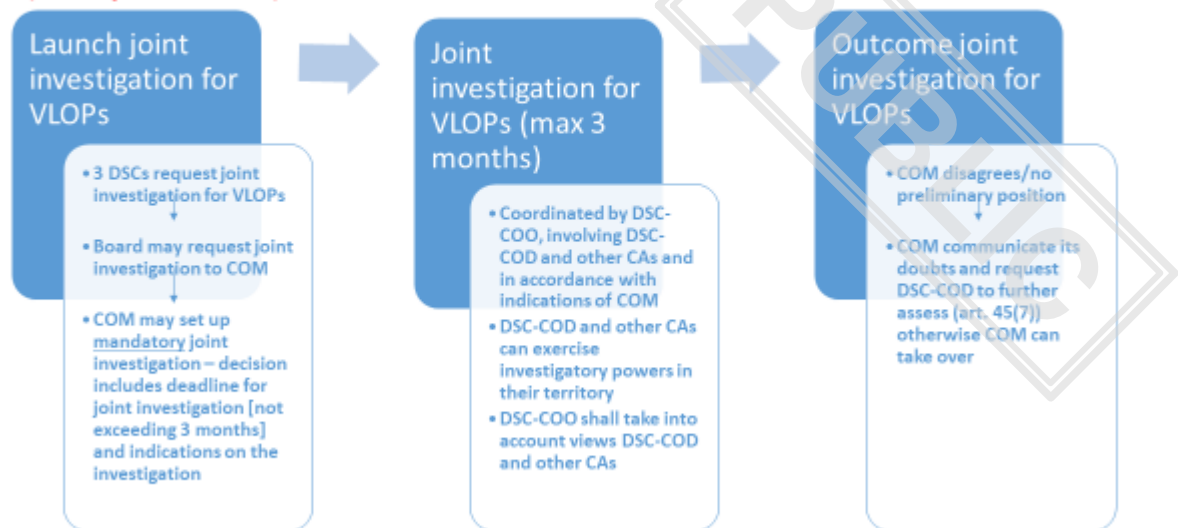


## Article 46 – Joint investigations (all providers)

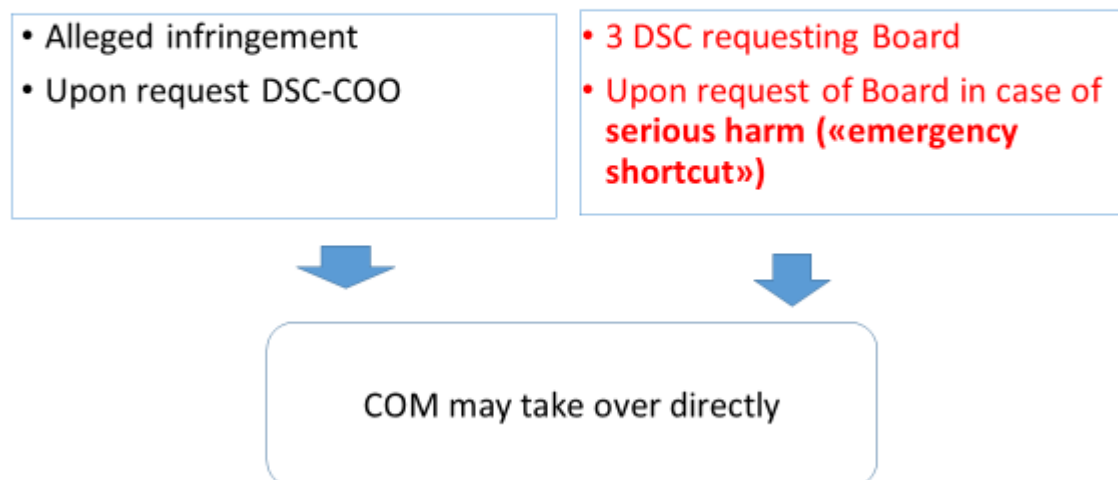
**NEW – (previously only informal/voluntary)**



## Article 46a – Mandatory joint investigations (only VLOPs) NEW



## Article 46b – Request for direct COM intervention (only VLOPs)



## Article 50 – Section 4 infringements (VLOPs only obligations)

COM proposal	Compromise text
<ul style="list-style-type: none"> <li>• COM or Board recommends</li> <li>• DSC-COO to assess infringement               <ul style="list-style-type: none"> <li>• If infringement: decision (poss. fines) plus action plan</li> <li>• <i>[risk of deadlock, if COO does not find any infringement]</i></li> </ul> </li> <li>• DSC-COO assesses action plan and compliance (audit pre-requisite)</li> <li>• COM takes over in view of COO assessment</li> </ul>	<ul style="list-style-type: none"> <li>• COM recommends investigation within predefined timeline</li> <li>• DSC-COO assesses infringement               <ul style="list-style-type: none"> <li>• If infringement: decision (poss. fines) plus action plan (including audit)</li> <li>• No assessment: COM takes over</li> </ul> </li> <li>• DSC-COO assesses action plan (code of conducts to be taken into account) and compliance (input of audit)</li> <li>• COM takes over in view of COO assessment</li> </ul>



Council of the European Union  
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**Interinstitutional files:  
2020/0361 (COD)**

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**Brussels, 11 October 2021**

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