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To Commission's Directorate-General for
Communications Networks, Content and
Technology
Via email

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Comments on the Draft of Commission Delegated Regulation supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council, by laying down rules on the performance of audits for very large online platforms and very large online search engines by Professor Dr. Christian Djeffal, Technical University of Munich

Dear Members of the European Commission,

I am writing in response to your request for comments on the recently proposed legislation, on the Draft of Commission Delegated Regulation supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council, by laying down rules on the performance of audits for very large online platforms and very large online search engines. I appreciate the Commission's initiative in seeking public and stakeholder inputs to inform the decision-making process.

1 Introduction

This intervention will review the Draft Delegated Legislation to strengthen the Digital Services Act (DSA) and to make it more effective, both from the perspective of enforcement authorities and platforms, using participatory elements to effectively involve European citizens and people living in Europe. It is based on the results of the Reinventing Content Moderation (REMODE) project carried out by the Law, Science and Technology Research Group at the Technical University of Munich and funded by TUM Think Tank.¹

The DSA is maybe the most significant project to regulate online platforms and search engines and to mitigate the substantive risks to human rights, democracy and the rule of law that have emerged in recent years. The European Union is adopting a co-regulatory

¹ Information available at <https://www.mcts.tum.de/en/research/remode-a-participatory-certification-mechanism-to-re-innovate-content-moderation/>.

approach that does not itself impose all substantive requirements on how platforms and search engines should operate, but rather procedural and organisational measures that set up checks and balances to mitigate risks. The success of such a co-regulatory approach depends on the ability to improve cooperation between stakeholders so that they actively bring to life the process envisaged by the legislator. At the heart of the regulation of large online platforms are the risk management provisions in Art. 34-37 DSA. Art. 37 DSA contains an innovative and unique clause on independent audits of risk assessments, which will now be further defined by the Draft Delegated Regulation currently under consideration by the Commission.

The primary challenge in risk assessment, particularly in auditing mechanisms, is the need to modify these processes to accommodate technologies that primarily facilitate user actions, specifically user-generated content. The complexity arises from the unpredictable nature of risks and successful mitigation strategies due to the platforms and search engines serving as user infrastructure. Therefore, risk management hinges on both the technologies in use and the users' perceptions and behaviors. Social media presents unique challenges due to the dynamic risks it poses, which differ from the more static threats seen in cybersecurity or industrial product safety. Given this dynamism, risk assessment and mitigation necessitate participatory elements to fully comprehend how such socio-technical systems influence society. Participatory risk assessment holds value beyond the sphere of online platforms. However, the rapidly evolving environment of these platforms due to constant innovations amplifies the importance of these approaches. It's crucial to understand that risks can't be accurately identified by solely examining the technology or analysing social media data in isolation. Understanding the regional and linguistic contexts in which social media operates is critical. A clear example of this is the current issue of image filters' impact on the mental health of young people, particularly girls. Addressing such problems requires more than just studying social media; it calls for active engagement with the affected group to truly understand their needs. This perspective needs to extend to include vulnerable groups protected by European law, such as children and individuals with disabilities. Their unique needs often only surface when given the opportunity to participate. Another rationale for participatory approaches to social media is to counteract potential misuse of direct democratic elements, such as voting on social media, to strategically delegitimize regulation and enforcement under the guise of democracy. Implementing a robust system of participation could facilitate valuable feedback to providers, auditors, and ultimately, authorities.

The DSA actually stresses participatory methods in Recital 90 which reads:

“Providers of very large online platforms and of very large online search engines should ensure that their approach to risk assessment and mitigation is based on the best available information and scientific insights and that they test their assumptions with the groups most impacted by the risks and the measures they take. To this end, they should,

where appropriate, conduct their risk assessments and design their risk mitigation measures with the involvement of representatives of the recipients of the service, representatives of groups potentially impacted by their services, independent experts and civil society organisations. They should seek to embed such consultations into their methodologies for assessing the risks and designing mitigation measures, including, as appropriate, surveys, focus groups, round tables, and other consultation and design methods. In the assessment on whether a measure is reasonable, proportionate and effective, special consideration should be given to the right to freedom of expression.”

This recital states that participatory methods are to be used whenever they are suitable and appropriate for risk assessment of very large online platforms and very large search engines (VLOPES). It sets out the objective that the risk assessment should also be informed by input from different stakeholders, including open participation. The approach of requiring appropriate participatory elements in risk assessment obligations is not new. Art. 35 (7) of the General Data Protection Directive already contains such an obligation. However, recital 90 is much more explicit on how the participatory elements should be implemented. Another important aspect of this obligation is that it applies not only to the process of risk assessment, but also to risk mitigation. In many cases, risk mitigation involves trade-offs or introduces new risks. It is therefore appropriate that the Draft Commission Delegated Regulation also contains participatory elements. Art. 13 (1) (a) (v) provides, for example, that the compliance of audit providers with Art. 34 DSA should include "whether and how the audited provider has tested risk assumptions with groups most affected by the specific risks". However, for the reasons outlined above, it is important to strategically review the Draft Commission Delegated Regulation from a participatory audit perspective.

2 General approach

One function of the Commission Delegated Legislation is to further define the broad terms used in the DSA. This includes the term "most vulnerable groups". One aspect to be clarified here is that the impact on groups also depends on their exposure to risk, but also on their vulnerability, especially in the case of children and persons with disabilities.

As recital 90 of the DSA incorporates risk management obligations into the risk assessment, the audit must also address these elements as part of the overall process. As risk mitigation is explicitly mentioned in Recital 90 DSA, it should also be included in Art. 14 of the Commission Delegated Regulation. Furthermore, participation must be applied to the different levels of the audit process. According to the methodology of the draft, this has the following levels:

- a. The goal auditing processes should contain a reference to participatory measures.
- b. The elements to be analysed should include appropriate participatory measures by VLOPES.
- c. The information analysed by the auditing organisation to support the assessment carried out under this article should include reports on participatory measures. As all relevant obligations are listed in a non-exhaustive manner, it is not necessary to add anything to the text as it stands.

3 Specific suggestions

3.1 Definition of groups most impacted

<p>Current Version:</p>	<p>Suggestion: Art. 2 (19) “groups most impacted” means collection of individuals that shares specific distinctive features and is in relation to these features either exposed to risks or vulnerable to risks because of their constitution like in the case of children or persons with disabilities.</p>
<p>Explanatory note: This further definition is necessary in order to clarify that there are groups with special needs that are in many cases also afforded special protection by European law.</p>	

3.2 The goal of audits

<p>Current Version: Art. 14 (1) (a) how the audited provider identified risk mitigation measures for each of the systemic risks referred to in Article 34(1) of Regulation (EU) 2022/2065, and whether the identification of such risk mitigation measures was carried out in a diligent manner; (b) how the audited provider assessed whether the risk mitigation measures in Article 35(1) points (a) to (k) were applicable to the audited service and whether the conclusion of that assessment was appropriate, including as regards those measures which were not applied by the audited provider;</p>	<p>Suggestion: Art. 14 (1) (a) how the audited provider identified risk mitigation measures for each of the systemic risks referred to in Article 34(1) of Regulation (EU) 2022/2065, and whether the identification of such risk mitigation measures was carried out in a diligent manner, in particular considering the views of groups most impacted by risk and mitigation measure; (b) how the audited provider assessed whether the risk mitigation measures in Article 35(1) points (a) to (k) were applicable to the audited service and whether the conclusion of that assessment was appropriate, including as regards those measures which were not applied by the audited provider taking into account the views of groups most impacted by risk and mitigation measure;</p>
<p>Explanatory note: As mentioned above, Recital 90 DSA also contains participatory measures regarding mitigation. Therefore, it should also be included in the auditing of risk mitigation.</p>	

3.3 Elements of the audit

<p>Current Version: Art. 10 ... 5. Audit procedures shall include at least: ... (c) the performance of tests, including with respect to algorithmic systems, concerning the audited obligations and commitments in relation to which the auditing organisation has reasonable doubts, as referred to in paragraph 4, and concerning audited obligations and commitments where the auditing organisation deems necessary to perform tests in its choice of methodology pursuant to paragraph 1.</p>	<p>Suggestion: Art. 10 ... 5. Audit procedures shall include at least: ... (c) the performance of tests, including with respect to algorithmic systems and views of groups most impacted, concerning the audited obligations and commitments in relation to which the auditing organisation has reasonable doubts, as referred to in paragraph 4, and concerning audited obligations and commitments where the auditing organisation deems necessary to perform tests in its choice of methodology pursuant to paragraph 1.</p>
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Explanatory note: It is clear that the methodologies described in this provision only apply if they are appropriate in the light of the specific doubts of the audit organisation. For the specific example given, it is important to add a participatory element, as the assumptions necessarily made should be tested in the same way as the service provider has to test them. While the approach of social auditing signifies the possibility to include participation as a substantive analytical procedure,² such an approach might be disproportionate in this case. Instead, participatory exercises are limited to instances in which the auditing organisation has reasonable doubts.

Current Version: Art. 13

...

(b) the actions, means and processes put in place by the audited provider to ensure compliance with Article 34 of Regulation (EU) 2022/2065 and the results thereof; such assessment shall be based on:

- (i) substantive analytical procedures;
- (ii) tests, including of algorithmic systems, where the auditing organisation has reasonable doubts, following the results of the substantive analytical procedures and the assessment of internal controls, or where the auditing organisation deems necessary to perform tests in its choice of methodology pursuant to Article 10(1).

Suggestion: Art 13

...

(b) the actions, means and processes put in place by the audited provider to ensure compliance with Article 34 of Regulation (EU) 2022/2065 and the results thereof; such assessment shall be based on:

- (i) substantive analytical procedures;
- (ii) tests, including of algorithmic systems **and views of groups most impacted**, where the auditing organisation has reasonable doubts, following the results of the substantive analytical procedures and the assessment of internal controls, or where the auditing organisation deems necessary to perform tests in its choice of methodology pursuant to Article 10(1).

Explanatory note: It is clear that the methodologies described in this provision only apply if they are appropriate in the light of the specific doubts of the audit organisation. For the specific example given, it is important to add a participatory element, as the assumptions necessarily made should be tested in the same way as the service provider has to test them.

² Archie B. Carroll & George W. Beiler, *Landmarks in the Evolution of the Social Audit* 18, ACADEMY OF MANAGEMENT JOURNAL 589–99 (1975)

Current Version: Art. 14	Suggestion: Art. 14
<p>...</p> <p>(b) mitigation measures put in place by audited providers; such assessment shall be based on:</p> <p>(i) substantive analytical procedures;</p> <p>(ii) tests, including of algorithmic systems, where the auditing organisation has reasonable doubts, following the results of the substantive analytical procedures and the assessment of internal controls, or where the auditing organisation deems necessary to perform tests in its choice of methodology pursuant to article 10(1).</p>	<p>...</p> <p>(b) mitigation measures put in place by audited providers; such assessment shall be based on:</p> <p>(i) substantive analytical procedures;</p> <p>(ii) tests, including of algorithmic systems and views of groups most impacted, where the auditing organisation has reasonable doubts, following the results of the substantive analytical procedures and the assessment of internal controls, or where the auditing organisation deems necessary to perform tests in its choice of methodology pursuant to article 10(1).</p>
<p>Explanatory note: It is clear that the methodologies described in this provision only apply if they are appropriate in the light of the specific doubts of the audit organisation. For the specific example given, it is important to add a participatory element, as the assumptions necessarily made should be tested in the same way as the service provider has to test them.</p>	

Thank you for considering these perspectives. I trust that these comments will contribute to an informed and balanced discussion of the proposed legislation. I would be glad to provide further information or clarification on any of the points raised, should that be helpful.

Yours sincerely,

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