

FEEDBACK ON THE DIGITAL SERVICES ACT'S DRAFT DELEGATED ACT

Methodology for calculating the supervisory fee

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to provide feedback to the European Commission on the draft delegated act on the methodology for calculating the supervisory fee for very large online platforms (VLOPs) and very large online search engines (VLOSEs), as foreseen by Article 43 of the Digital Services Act (DSA).¹

Below you will find our recommendations on key elements of the draft delegated act:

1. Clarify the calculation methodology used to establish the fee
2. Make a clear distinction between the designated service and its group
3. Designated services should not bear the residual over-cap amount of other services
4. Provide information on the European Commission's spending
5. Adjust the decision timeline to ensure smooth implementation

1. Clarify the calculation methodology used to establish the fee

- **Recital 6 and Article 4 and Annex II of the draft delegated act**
- **Articles 43 and 24 of the DSA**

The formula for determining the supervisory fee, as set out in the draft delegated act, primarily relies on the number of monthly active recipients for each designated service. This calculation methodology comprises a two-step process: (1) determine a basic amount per designated service, dividing the overall annual costs by all designated services (taking into account the number of days of designation in that year); and (2) adjust that basic amount by a coefficient proportionate to the number of monthly active recipients of the service, increasing the coefficient for every five million additional users.

CCIA Europe is concerned that the calculation of the supervisory fee is directly proportional to the number of reported active recipients of a service. The calculation of monthly active recipients of a service will not be as precise as the draft delegated act suggests, particularly given that the boundaries of intermediary services under the DSA are drawn narrowly and monthly active recipients figures may therefore have some unavoidable overlap, for example, to avoid overcounting logged-out usage. Therefore, the fee could be disproportionately inflated, as online platforms and search engines cannot always accurately count single active recipients. The number of monthly active recipients thus risks being exaggerated due to overcounting.

CCIA Europe considers that the likelihood of imprecise figures and the potential for overcounting recipients will be high. We invite the European Commission to further clarify the calculation method in order to avoid such unintended consequences, while also considering alternative methods. For example, introducing a maximum cap of monthly

¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R2065&qid=1666857517641>

active recipients of the total EU population or total EU population with access to the Internet could help contain overcounting.

2. Make a clear distinction between the designated service and its group

- **Recitals 4 and 7 and Articles 5(1), 5(2), 5(3) and 6(4) of the draft delegated act**
- **Article 43(5) of the DSA**

The draft delegated act states that the supervisory fee should be paid by each provider of a designated service and its amount shall not exceed 0.05% of its worldwide profits in the preceding financial year. The draft delegated act further specifies that, when a service provider has consolidated accounts, its group's worldwide profits should be used to define the maximum fee representing 0.05% because the "financial resources of the group are available to the provider in order to bear the overall amount of the fee."

This is based on an over-simplistic assumption. We are concerned this approach could lead to discrepancies and a disproportionate calculation of the supervisory fee. The supervisory fee would be calculated per designated service whereas the maximum amount of the fee would be calculated based on the group's larger profits. As the profits of a conglomerate are always much larger than those of a single company, it will result in an unfair and disproportionate maximum amount for some designated service providers. Instead, the cap on the supervisory fee should be proportionate to profits generated from the activities supervised, and not profits generated from non-supervised activities.

In addition, the reference to "consolidated worldwide profits" in Article 5 of the draft delegated act is inconsistent with the DSA itself. Article 43(5) of the DSA refers to the maximum overall limit as being "0.05% of [a given VLOP/VLOSE provider's] worldwide annual net income in the preceding financial year". Therefore, Article 5 of the draft delegated act and the associated language in Recital 7 should be amended to fully align it with the DSA. Similarly, it is important to keep coherence between the DSA and the delegated act and refrain from introducing the concept of "systemic impact", which would risk changing the spirit of the act.

The draft also foresees that the supervisory fee determined by the European Commission can be addressed to the legal entity identified as the provider of the designated service, but also to other legal persons. In that case, they "shall be jointly and severally liable for the payment of the supervisory fee in respect of the designated service or services." We are concerned that intricating the roles of the service providers with other companies of the same group when sending the supervisory fee decision could lead to confusion and miscalculation. This could also lead to accounting and tax uncertainty, as well as an administrative burden when the supervisory fee decision is addressed to another company within the same group as the designated service provider.

3. Designated services should not bear the residual over-cap amount of other services

→ Recital 8 and Article 5(4) of the draft delegated act

Related to our concerns around the fee cap under point 2 above, CCIA Europe is also deeply concerned that some VLOPs and VLOSEs might face excessive supervisory fees because of the obligation to pay the residual over-cap amounts of other designated service providers. According to the current draft delegated act, any residual supervisory fee amount that is not charged because the maximum limit for a service provider has been met could be charged to another service provider which is still below their cap limit, proportionately to their number of monthly active recipients.

This would result in a provider paying a disproportionate higher fee that is out of sync with its number of average monthly active recipients. As such, this provision is not in line with Article 43(5) of the DSA. Article 43(5) requires that the delegated act adopted respects the overall principle that the annual supervisory fee is proportionate to the number of average monthly active recipients of the service at issue. This is an essential part of the DSA which the delegated act cannot amend.

It would be punitive to require compliant providers to incur costs applicable to other providers. This would also create economic uncertainty for all service providers regarding the supervisory fee methodology and level.

4. Provide information on the European Commission's spending

→ Recitals 2, 3 and 11, Articles 2 and 8, and Annex I of the draft delegated act

The draft delegated act provides that costs related to enforcement and investigations carried out by the European Commission could be recuperated from providers as part of the overall costs incurred by the Commission. This is much broader than the costs envisaged in Article 43(2) of the DSA, which are supervisory in nature. Providers should not be required to foot the Commission's bill related to infringement activities by other providers.

We are also concerned by the lack of any reference to fines imposed by the European Commission being carried forward to reduce subsequent supervisory fees charged to providers.

CCIA Europe recommends that the European Commission reports the breakdown of the overall cost incurred by the Commission for the fulfilment of its supervisory tasks per designated service provider. This reporting would improve transparency, as well as provide useful information to refine the calculation methodology of the supervisory fee. The information would also enlighten the level of risk of each service and allow for adjustment of the supervisory fee accordingly.

In the same vein, the list of operational and administrative expenditures of the European Commission should be further detailed to allow for meaningful cost control and appropriate spending. The list of categories of spending should be tightened to more closely connect costs to the supervisory role, such as regular audits. In particular, this should be sufficiently clear to demonstrate that the supervisory fee for the DSA is not cross-subsidising work on the Digital Markets Act supervision. For example, the costs of any "missions" should relate

to the cost of visiting a designated service – further costs, such as attending conferences or meetings with other governments on the same trip should not fall on the designated services.

5. Adjust the decision timeline to ensure smooth implementation

- **Recitals 9, 10 and 11 and Articles 2(3), 6(1)-6(4), 8(1) and 8(4) of the draft delegated act**
- **Articles 43(2) and (3) of the DSA**

The timeline proposed by the European Commission for communicating the supervisory fee amounts due by each service provider during the calendar year is concerning. The timeline does not take into account companies' financial year-end or other practical aspects:

- By 31 August, designated service providers have to provide their latest financial statements and other supporting documents for the calculation of the maximum amount of the supervisory fee for the next year.
 - This ignores that companies and other jurisdictions have different financial year-ends and would therefore provide information that is more or less accurate depending on whether it ends before 31 August. Some service providers would also need to use anticipated financial data, which is inaccurate by definition.
- By 30 September, the European Commission must provide provisional supervisory fees. Designated service providers only have 10 business days to reply with observations.
 - Beyond the short deadline, this disregards the first fortnight of October which is a public holiday period in many Member States.
- By 30 November, the European Commission will adopt its decision on the amount of the supervisory fee. Designated service providers only have one month, again shortened by a traditional holiday period when financial services close, to arrange the payment of a significant fee.
 - This is particularly worrying given that the heavy penalty for late payment is the ECB interest plus 3.5%.
 - For any business that closes its accounts on 31 December and therefore has financial controls to prevent new purchase orders from being raised in those last weeks of the year, this presents a further risk of administrative error leading to significant penalties.

In order to address these concerns, we ask that the European Commission provides a more flexible timeline for service providers to be able to supply the required information, comment on preliminary findings and, ultimately, pay the supervisory fee.

Conclusion

CCIA Europe has continuously supported the overall objectives of the DSA. CCIA appreciates the European Commission's efforts to consult stakeholders on the calculation methodology of the supervisory fee for VLOPs and VLOSEs. We remain available to further discuss our comments with the European Commission.

About CCIA Europe

- The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and Internet industry firms.
 - As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009.
 - CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.
- For more information, visit: twitter.com/CCIAEurope or www.ccianet.org