DIGITAL SERVICES ACT (DSA)

Feedback on the DSA's Draft Implementing Regulation

March 2023

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to provide feedback to the European Commission on the Draft Implementing Regulation (DIR)[1] on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Digital Services Act (DSA).[2] These proceedings pertain to Articles 62-72 and 79 of the DSA, relative to the inspections, interim measures, commitments and monitoring actions, as well as to the right to be heard and access to the file of very large online platforms (VLOPs) and very large online search engines (VLOSEs).

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

1. Inspections and monitoring actions by the Commission
2. Right to be heard and access to the file
3. General comments on the proceedings

I. Inspections and monitoring actions by the Commission

1. Improve the recordings during inspections (Article 2)

Article 2 of the DIR outlines how to collect the explanations provided during inspections of VLOPs/VLOSEs' premises. Two improvements related to such recordings would help to ensure these proceedings do not conflict with other rights.

First of all, Article 2(1) states that Commission officials or accompanying persons may record in any form the explanations given by authorised representatives or members of staff of VLOPs/VLOSEs. While this approach allows the Commission more flexibility, it should not compromise the right to privacy of the representatives/staff of VLOPs/VLOSEs. For example, an employee's right to privacy should be respected if they do not wish to be recorded on video.

Secondly, Article 2(2) foresees that any recording made during the inspections can be provided to providers of VLOPs/VLOSEs, but also to third parties and auditors concerned by the inspection. Giving third parties and auditors access to those recordings is disproportionate and risks disclosing confidential information, including business secrets. Indeed, VLOPs/VLOSEs should have the right to object to such access.

[1] European Commission, Have your say, Published initiative, Digital Services Act – implementing regulation, consulted on 2 March 2023, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13565-Digital-Services-Act-implementing-regulation_en

[2] 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

Finally, Article 2 only refers to Article 69(2)(f) of the DSA on explanations given during inspections. We believe that Article 2 should also be extended to Article 69(2)(g) on answers to ensure the same protections apply in both cases.

2. Ensure proportionate monitoring actions (Article 3)

Article 3(5) of the DIR enables the European Commission to "define the terms of retention, including the period and scope of documents to be retained for which the obligation shall apply" – this period can be prolonged if necessary, according to the DIR. While this provision is justified in order to avoid document destruction, the Commission's power should remain proportionate. To that end, the paragraph concerned should mention that the retention obligation shall not go beyond what is strictly necessary and ought to be revisited after a certain time to make sure it is not kept in place indefinitely.

Article 3(6) of the DIR allows the European Commission to appoint external experts and auditors to assist it in the monitoring of VLOPs/VLOSEs' effective implementation and compliance with the DSA. Article 3(7) and (8) set out two criteria for appointing these external experts and auditors: they should be independent of the provider in question, and have relevant proven expertise and technical competence to perform audits.

However, in order to guarantee the independence of these experts and auditors, more safeguards need to be put in place. For example, a mechanism should be introduced to ensure the absence of any conflict of interest throughout their appointment. Appointed experts and auditors should also be subject to strict confidentiality and non-compete obligations to avoid conflicts of interest in the future (e.g. an expert/auditor could go work for a competitor of the provider they helped the Commission to monitor). Finally, VLOPs/VLOSEs should have an opportunity to object to the appointment of an expert or auditor on the ground of existing conflicts of interest, or if they consider that the expert or auditor does not possess the required expertise or technical competence. A public register of appointed experts and auditors would be a useful tool to ensure transparency and support the identification of conflicts of interest.

II. Right to be heard and access to the file

3. Enhance written observations as an effective exercise of the right to be heard (Article 4)

In order to align it with Article 79(2) of the DSA, Article 4(1) of the DIR should mention that the addressee of preliminary findings has at least 14 days to respond with written observations to the European Commission. This time period should only start to run after full access to the file has been granted to the addressee in order to ensure that the response is informed, also when access is requested under Article 5(6) of the DIR.

Article 4(4) and the Annex of the DIR set a limit of 50 pages to the response of the addressee of preliminary findings. This limit undermines the provider's right of defence by hindering its ability to provide explanations, thus also increasing the risk of being fined up to 6% of its annual worldwide turnover. Therefore, the 50-page limit might very well disproportionately limit fundamental safeguards of EU law. The Commission's ability to increase the page limit is based on the provider substantiating "that it is objectively impossible to deal with particularly complex legal or factual issues within the maximum

page limits". In other words, this would require a company to prove that something is impossible, which is an arbitrarily high bar for page limits that impact fundamental rights of defence.

Article 4 of the DIR and the DSA do not refer to the organisation of an oral hearing, as part of the right to be heard of VLOPs/VLOSEs. CCIA Europe considers that the DIR should include this step as part of the proceedings of Article 79 of the DSA, because an oral hearing is important for the effective exercise of the right to be heard. This stems from the fact that companies face high fines for DSA infringements, as previously mentioned, but also because the decision can be based on information provided by third parties. It would also be in line with merger control and antitrust proceedings, which provide a right to request an oral hearing. Moreover, guaranteeing the independence of an appointed 'hearing officer' would ensure that VLOPs/VLOSEs' rights of defence are respected.

4. Make the right to access the file workable (Article 5)

Article 5 of the DIR introduces a two-tier regime to access the file once it has notified its preliminary findings on non-compliance decisions, fines, or periodic penalty payments (respectively Articles 73, 74 and 76 of the DSA). While the addressee receives only the documents mentioned in the preliminary findings (potentially redacted), legal and economic counsel and technical experts can access the full file, under terms of disclosure determined by the Commission. Several improvements are necessary to ensure the effective protection of providers' rights of defence in this respect.

Article 5(1) of the DIR establishes that the European Commission must grant access to the file to the VLOP/VLOSE concerned "to the extent such access is necessary to enable the addressee to exercise its right to be heard". Accessing the file will almost systematically be instrumental for companies in exercising their right to be heard. So instead, granting access to the file to the VLOP/VLOSE should be a general principle. Not being able to access the full file could prevent the addressee from consulting documents which contradict the Commission's findings, and therefore are crucial to exercising the right of defence.

Article 5(3)(c) prevents legal and economic counsel and technical experts from working for the company they represent during the investigation, and for three years afterwards. This restriction is disproportionate, especially given the safeguards provided by Article 5(3)(d) which requires them to not misuse or disclose the information they received as part of the investigation.

Article 5(4) excludes internal documents and correspondence of the European Commission with national authorities from the right to access the file. A reference is also made to "other types of sensitive documents". As this reference is not specific and could open the way for discretionary decisions, it should be removed from the DIR.

Article 5(6) sets a period of time of only one week for legal and economic counsel and technical experts to request further access to the file for the addressee. This period of time should be increased to at least three weeks as there simply is no justification to impose such a strict deadline.

Finally, we believe that a clarification of what exactly will be included in the file is much needed. The European Commission should indicate whether the 'file' will include documents collected before the initiation of proceedings under Article 66 of the DSA.

III. General comments on the proceedings

5. Give more certainty on time limits throughout proceedings

Several provisions of the DIR – e.g. Article 2(3), Article 6(2), Article 7(6) – enable the European Commission to set time limits for different steps of the proceedings. This discretionary decision-making around timelines creates uncertainty and potential tight deadlines, limiting the ability of providers to exercise their rights. For example, Article 79(2) of the DSA sets a minimum time limit of 14 days. The draft should provide minimal time limits for other steps of the proceedings as well. These time limits should be reasonable and give enough time for providers to respond.

6. Ensure workable transmission of documents (Article 7)

In the same vein, as an acknowledgement of receipt of documents will trigger time limits, they should not leave room for uncertainty. Article 7(3) of the DIR states that documents transmitted to the "Commission by digital means will be deemed to have been received by the Commission on the day when an acknowledgement of receipt has been sent". Providing an automated date of receipt upon submission of such documents would instead provide more certainty to VLOPs/VLOSEs.

Additionally, the technical specifications regarding the means of transmission and signature of documents to the European Commission (Article 7(1) of the DIR) should be published as soon as the designation of VLOPs/VLOSEs starts. Indeed, the protection of confidential documents transmitted by providers cannot wait till this implementing regulation has been adopted.

Conclusion

CCIA Europe appreciates the European Commission's efforts to consult stakeholders on the detailed arrangements for the conduct of certain proceedings impacting VLOPs and VLOSEs. We hope that our suggestions will be useful in the ongoing process of ensuring that the proceedings between the Commission and companies are satisfactory. 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

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