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COMMISSION IMPLEMENTING REGULATION (EU) .../...

of **XXX**

on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Regulation (EU) 2022/2065 of the European Parliament and of the Council ("Digital Services Act")

This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

COMMISSION IMPLEMENTING REGULATION (EU) .../...

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on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Regulation (EU) 2022/2065 of the European Parliament and of the Council ("Digital Services Act")

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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)¹, and, in particular, Article 83, first paragraph, points (a), (b) and (c) thereof,

After inviting all interested parties to submit their comments,

After consulting the Digital Services Committee,

Whereas:

- (1) Regulation (EU) 2022/2065 empowers the Commission to adopt implementing acts concerning the practical arrangements in respect of certain aspects of proceedings under that Regulation. In compliance with the principle of good administration and the principle of legal certainty, it is necessary to lay down rules concerning the powers of the Commission to conduct inspections pursuant to Article 69 of Regulation (EU) 2022/2065 and to take the necessary monitoring actions pursuant to Article 72 of that Regulation. It is also necessary to lay down rules concerning the exercise of the right to be heard by the addressees of the Commission's preliminary findings and access to the Commission's file provided by Article 79 of Regulation (EU) 2022/2065.
- (2) Article 69(1)(f) of Regulation (EU) 2022/2065 empowers Commission officials and other accompanying persons authorised by the Commission to conduct an inspection to ask any representative or member of staff of the provider of very large online platform or of very large online search engine concerned or, where applicable, of the other persons concerned referred to in Article 67(1) of that Regulation for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers. Pursuant to Article 74(2)(c) of Regulation (EU) 2022/2065 fines may be imposed on such providers or such persons where they fail to rectify within the time period set by the Commission an incorrect, incomplete or misleading answer given by a representative or member of their staff to questions in the course of an inspection. It is therefore necessary to provide such providers and such persons with a record of any explanations given and to establish a procedure enabling them to rectify, amend or supplement explanations given, including by a representative or member of staff who has given such explanations but was not authorised to do so. Explanations given by a representative or a member of staff should remain in the Commission's file as recorded during the inspection.

¹ OJ L, 277, 27.10.2022, p. 1-102.

- (3) Pursuant to Article 72 of Regulation (EU) 2022/2065, the Commission may take the necessary actions to monitor the effective implementation of and compliance with that Regulation. To this end, the Commission should be able to order providers of very large online platforms and of very large online search engines to provide access to and explanations of their databases and algorithms, where this is necessary to ensure effective compliance with Regulation (EU) 2022/2065. Access to such databases may consist of enabling the Commission to search such databases through the use of queries, as needed to monitor the effective implementation and compliance with Regulation (EU) 2022/2065. In this context, the Commission should also be able to require such providers to retain necessary documents, under the terms determined by the Commission. To ensure that the Commission possesses the necessary knowledge and expertise in carrying out its tasks under Regulation (EU) 2022/2065, the Commission should be able to appoint external experts and auditors to assist it in the exercise of its supervisory tasks. Such experts and auditors should be independent from the provider concerned and possess the necessary expertise and knowledge to assist the Commission. To this end, it is necessary to lay down requirements on the independence and expertise of such experts and auditors.
- (4) Article 79(1) of Regulation (EU) 2022/2065 requires the Commission, before adopting a decision pursuant to Articles 73(1), 74 or 76 of that Regulation, to give a provider of very large online platform or of very large online search engine or another person referred to in Article 67(1) of Regulation 2022/2065 to whom it has notified preliminary findings the opportunity of being heard on those findings and on measures that the Commission may intend to take in view of those findings. Such providers and such persons should present their views in writing, within a time period set by the Commission, with a view to reconciling the efficiency and effectiveness of the proceedings, on one hand, and the possibility to exercise the right to be heard, on the other. The addressee of the preliminary findings should have the right to set out succinctly the relevant facts and provide supporting evidence. In order to ensure fair and efficient proceedings, the effective and full enforcement of Regulation (EU) 2022/2065, and legal certainty for all persons concerned, it is necessary to set out rules as regards the format and maximum length of written observations and the use of languages.
- (5) Article 79(4) of Regulation (EU) 2022/2065 requires the Commission to grant access to its file to the parties concerned by its proceedings. While the addressee of the preliminary findings should always obtain from the Commission the non-confidential versions of all documents mentioned in the preliminary findings, the Commission should be able to decide on a case-by-case basis on the appropriate procedure for access to further information in the file. When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The Commission should be able to request persons that submit or have submitted information or documents in the course of proceedings to identify business secrets or other confidential information. The Commission should, before making this information available to the addressee of its preliminary findings, assess for each individual document whether, with view to an effective exercise of the right to be heard, the need to disclose is greater than the harm to the person that submitted the information or documents which might result from disclosure.

HAS ADOPTED THIS REGULATION:

Chapter I

Scope

Article 1

Subject matter and scope

- (1) This Regulation lays down rules concerning practical arrangements for:
 - (a) inspections conducted pursuant to Article 69 Regulation (EU) 2022/2065 and monitoring actions adopted pursuant to Article 72 of that Regulation;
 - (b) the exercise of the right to be heard and the terms of disclosure provided for in Article 79 of Regulation (EU) 2022/2065;

Chapter II

Inspections and monitoring actions by the Commission

Article 2

Explanations provided during inspections

- (1) Explanations requested by the Commission or accompanying persons pursuant to Article 69(2), point (f), of Regulation (EU) 2022/2065 shall be given only by authorised representatives or members of staff of a provider of very large online platform, provider of very large online search engine, or, where applicable, of other persons referred to in Article 67(1) of that Regulation. The explanations given may be recorded by Commission's officials or accompanying persons in any form.
- (2) After the inspection, a copy of any recording made pursuant to paragraph 1 shall be made available to the provider of very large online platform, the provider of very large online search engine or to other person referred to in Article 67(1) of Regulation (EU) 2022/2065 concerned by that inspection.
- (3) In cases where a representative or a member of staff referred to in paragraph 1 has been asked for and given explanations, but that representative or that member of staff was not authorised to provide explanations on behalf of the provider or of the person concerned, the Commission shall set a time limit within which the provider or person concerned may communicate to the Commission any rectification, amendment or supplement to the explanations given by that representative or that member of staff. The rectification, amendment or supplement shall be added to the explanations recorded pursuant to paragraph 1 of this Article.
- (4) The acceptance by the Commission of rectifications, amendments or supplementary information to explanations given pursuant to paragraph 3 shall be without prejudice to the power of the Commission to impose fines and periodic penalty payments in accordance with Articles 74 and 76 of Regulation (EU) 2022/2065 respectively.

Article 3

Monitoring actions

- (1) The Commission may order providers of very large online platforms or of very large online search engine to provide it with access to and explanations of that provider's databases and algorithms.
- (2) Access provided pursuant to paragraph 1 shall be ensured in a timely and effective manner, enabling the Commission to access all information in the databases concerned and all information in relation to the algorithm concerned which are necessary for the assessment of the implementation of and compliance with Regulation (EU) 2022/2065.
- (3) Access provided pursuant to paragraph 1 shall comply with the requirements laid down in Article 4(2) to (7) of this Regulation.
- (4) The Commission may impose on the provider of very large online platform or of very large online search engine an obligation to retain all documents necessary to assess the implementation of and compliance with Regulation (EU) 2022/2065.
- (5) When imposing a retention obligation pursuant to paragraph 4, the Commission shall define the terms of retention, including the period and scope of documents to be retained for which the obligation shall apply. That period may be prolonged, where necessary to assess the implementation of and compliance with Regulation (EU) 2022/2065.
- (6) The Commission may appoint external experts and auditors to assist it in monitoring the effective implementation of and compliance with Regulation (EU) 2022/2065 by providers of very large online platforms and of very large online search engines. Those experts and auditors shall be independent from the provider concerned and shall have proven expertise and knowledge in the matter on which they assist the Commission.
- (7) To ensure independence in accordance with paragraph 6, the Commission, when appointing experts or auditors pursuant to that paragraph, shall take into account the existence of shared ownership, governance, management, personnel, or resources of the external experts or auditors concerned and the existence of contractual relationships with the provider of very large online platform or of very large online search engine concerned over the 24 months prior to procedure carried out by the Commission. The appointed expert or auditor shall remain independent throughout the period of appointment.
- (8) To ensure the experts and auditors possess the necessary expertise and knowledge in accordance with paragraph 6, the Commission, when appointing experts or auditors pursuant to that paragraph, shall take into account the expert's proven expertise in the matter on which they assist the Commission and proven technical competence to perform audits on the matter on which they assist the Commission.

Chapter III

Right to be heard and access to the file

Article 4

Written observations on preliminary findings

- (1) The addressee of preliminary findings communicated pursuant to Articles 73(2), 74(3) and 76 of Regulation (EU) 2022/2065 may, within a time limit set by the Commission, succinctly inform the Commission in writing of its views on those findings and on measures the Commission may intend to take in view of those findings and submit evidence in support of those views. The Commission is not obliged to take account of written observations received after the expiry of that time limit.
- (2) Information submitted to the Commission pursuant to paragraph 1 shall be correct, complete and not misleading. It shall be presented in a clear, well-structured and intelligible manner.
- (3) The written observations referred to in paragraph 1 shall be in one of the official languages of the Union. Supporting documents shall be submitted in their original language and, where their original language is not one of the official languages of the Union, they shall be accompanied by a faithful translation into an official language of the Union.
- (4) The written observations referred to in paragraph 1 shall comply with the format and page limits set out in the Annex to this Regulation. The Commission may, upon reasoned request, authorise an addressee of preliminary findings to exceed those page limits where and to the extent that addressee substantiates that it is objectively impossible to deal with particularly complex legal or factual issues within the maximum page limits set out in the Annex.
- (5) Documents, databases or any other information shall be submitted to the Commission in accordance with Article 7 of this Regulation.
- (6) Information submitted to the Commission pursuant to paragraph 1 shall be accompanied by written proof that the persons submitting that information are authorised to act on behalf of the addressee of the preliminary findings concerned.
- (7) The Commission shall acknowledge, without delay and in writing, receipt of information submitted pursuant to paragraph 1 to the addressee of the preliminary findings concerned or to its representatives.

Article 5

Access to the file

- (1) Upon request, the Commission shall grant access to the file to the addressee of the preliminary findings communicated pursuant to Articles 73(2), 74(3) or 76 of Regulation (EU) 2022/2065 (“the addressee”) to the extent that such access is

necessary to enable that addressee to exercise its right to be heard. Access to the file shall not be granted before the notification of the preliminary findings.

- (2) When providing access to file, the Commission shall provide the addressee with all documents mentioned in the preliminary findings, subject to redactions to protect business secrets or other confidential information that have been made by information providers pursuant to Article 6.
- (3) Subject to paragraph 4 of this Article, the Commission will additionally provide access to all documents on its file submitted by information providers, without any redactions, under terms set out in a Commission decision that will appropriately protect business secrets and other confidential information. Specifically:
 - (a) Access to documents under this paragraph shall only be granted to a limited number of specified legal and economic counsel and technical experts engaged by the addressee of preliminary findings and whose names shall be communicated to the Commission in advance.
 - (b) Specified legal and economic counsel and technical experts must be undertakings, employees of undertakings or in a situation comparable to that of employees of undertakings. All of them shall be bound by the terms of disclosure.
 - (c) Persons listed as specified legal and economic counsel and technical experts may not, throughout the duration of the investigation and for three years after the end of the Commission's investigation be in an employment relationship with the addressee or in a situation comparable to that of an employee of the addressee of the preliminary findings.
 - (d) Specified legal and economic counsel and technical experts shall not disclose any of the documents provided or their content to any natural or legal person that is not a signatory to the terms of disclosure and shall not use any of the documents provided other than for the purpose of representing the addressee before the Commission or the Court of Justice of the European Union in the context of the specific proceedings.
 - (e) The Commission will specify, in the terms of disclosure, the technical means of the disclosure and its duration. Disclosure may be made by electronic means or (for some or all documents) at the Commission's premises.
- (4) Pursuant to Article 79(4) of Regulation (EU) 2022/2065, the right of access to the file of the Commission shall not extend to internal documents of the Commission or the competent authorities of the Member States. Correspondence between the Commission and other public authorities, including other institutions of the EU or of non-member countries, and other types of sensitive documents may also be subject to similar protections.
- (5) In exceptional circumstances, the Commission may decide not to disclose certain documents or to disclose partly redacted documents under the terms of disclosure set out in paragraph (3) of this Article if, taking into account the harm that the information provider would likely suffer from disclosure under the terms of

disclosure, the Commission determines that on balance, this harm outweighs the importance of the disclosure for the exercise of the rights of defence.

- (6) The specified legal and economic counsel and technical experts referred to in paragraph 3 may make a reasoned request to the Commission for access to a non-confidential version of any document on the Commission's file not already provided to the addressee under paragraph 2, in order that such non-confidential version may be made available to the addressee, or for an extension of the terms of disclosure to additional specified individuals representing the addressee or another undertaking advising the addressee as an expert within [one week] of receiving access under the terms of disclosure. Such additional access may only be granted exceptionally and provided that it is indispensable for the proper exercise of the addressee's right to be heard.
- (7) In the application of paragraphs (5) or (6), the Commission may require the information provider to provide a non-confidential version of the document(s), pursuant to Article 6.
- (8) A request made under paragraph 6 may be made in respect of a document that has already been disclosed in a non-confidential version to the addressee, where the request duly justifies why certain redactions made in that non-confidential version should be lifted. Where the Commission considers that disclosure is to be provided without certain redactions in order to ensure that the addressee is in a position to exercise its right to be heard effectively, the Commission shall request the information provider to agree to extend the terms of disclosure to specified individual(s) or undertakings for the documents in question only.
- (9) In the event that the information provider does not agree to the extension of the terms of disclosure, the Commission shall adopt a decision setting out the terms of disclosure.
- (10) Documents obtained through access to the file provided pursuant to this Article shall only be used for the purposes of the relevant proceedings within which access to those documents was given or of judicial or administrative proceedings related to those proceedings.
- (11) At any time during the procedure, the Commission may instead of or in combination with the method of granting access to file pursuant to paragraph 3 above, give access to some or all documents redacted pursuant to Article 6 in order to avoid a disproportionate delay or administrative burden.

Chapter IV

General and final provisions

Article 6

Identification and protection of confidential information

- (1) The Commission may require providers of very large online platforms or of very large online search engines concerned or, where applicable, other natural or legal person concerned referred to in Article 67(1) of Regulation (EU) 2022/2065 to identify the information, submitted to the Commission pursuant to Articles 2, 3 and 4 of this Regulation which they consider to contain business secrets or to be otherwise confidential and to identify the natural and legal persons in relation to whom that information, is considered to be confidential. The Commission may require such providers concerned or such persons concerned to identify any part of its preliminary findings which, in their view, contains business secrets or other confidential information.
- (2) The Commission may set a time limit for the provider of very large online platforms and of very large online search engines concerned or, where applicable, for the natural or legal person concerned referred to in Article 67(1) of Regulation (EU) 2022/2065, to:
 - (a) substantiate their claims for business secrets and other confidential information for each individual document and database or part of document and database;
 - (b) provide the Commission with a non-confidential version of the documents and database in which the business secrets and other confidential information are redacted;
 - (c) provide a concise, non-confidential, description of each piece of redacted information.
- (3) Where providers of very large online platforms or of very large online search engines or, where applicable, natural or legal person concerned referred to in Article 67(1) of Regulation (EU) 2022/2065, fail to comply with paragraphs 2 and 3, the Commission may assume that the information concerned do not contain business secrets or other confidential information.

Article 7

Transmission of documents

- (1) Transmission of documents, databases or any other information to and from the Commission pursuant to Articles 2, 3 and 4 of this Regulation shall take place by digital means. Technical specifications regarding the means of transmission and signature may be published and regularly updated by the Commission.

- (2) Documents transmitted by digital means shall be signed using at least one qualified electronic signature complying with the requirements set out in Regulation (EU) No 910/2014 of the European Parliament and of the Council².
- (3) Documents transmitted to the Commission by digital means shall be deemed to have been received by the Commission on the day when an acknowledgement of receipt has been sent.
- (4) For real-time or near-real-time information shared for example through application programming interfaces or any other equivalent means the Commission shall define the method and the duration of such sharing of information.
- (5) Documents, databases and any other information transmitted to the Commission by digital means, shall be deemed not to have been received if one of the following circumstances occurs:
 - (a) the document or parts thereof is inoperable or unusable;
 - (b) the document contains viruses, malware or other threats;
 - (c) the document contains an electronic signature the validity of which cannot be verified by the Commission.
- (6) The Commission shall inform the sender without delay if one of the circumstances referred to in paragraph 5 occurs and shall give it the possibility to express its views within a reasonable time limit.
- (7) By way of derogation from paragraph 1, documents may be transmitted to the Commission by registered mail or by hand where exceptional circumstances arise which make transmission by digital means impossible or extremely difficult. Those documents shall be deemed to have been received by the Commission on the day of their delivery at the address of the responsible Commission service as published by the Commission on its website. The delivery shall be confirmed in an acknowledgement of receipt by the Commission.

Article 8

Entry into force

- (8) This Regulation shall enter into force 20 days following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

² Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

Done at Brussels,

For the Commission
The President
[\[...\]](#)

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