

COMMISSION IMPLEMENTING REGULATION (EU) 2023/1201**of 21 June 2023****on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to 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) In the context of inspections, Article 69(2)(f) and (g) 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. In the same context of inspections, Article 69(2)(g) of Regulation (EU) 2022/2065 empowers Commission officials and other accompanying persons authorised by the Commission to address questions to any such representative or member of staff 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.
- (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. For the purposes of this regulation, the term database should be interpreted as referring to any relevant data assets available to the provider of very large online platform or of very large online search engine concerned, regardless of whether these are accessible in a single database. When ordering such access for purposes of monitoring, the Commission should also be able to specify technical interfaces that can facilitate

⁽¹⁾ OJ L 277, 27.10.2022, p. 1.

access to databases and algorithms, such as Application Programmable Interfaces (APIs) or other means of technical access, including real time access and/or means of accessing high volumes of data. 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 a very large online search engine or another person referred to in Article 67(1) of Regulation (EU) 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 who submitted the information or documents which might result from disclosure,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Subject matter and scope

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), points (f) and (g), 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 possibility for the provider of very large online platform, provider of very large online search engine, or, where applicable, or other persons referred to in Article 67(1) of Regulation (EU) 2022/2065 to communicate to the Commission 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. Where the Commission orders a provider of very large online platforms or of very large online search engine to grant it access to that provider's databases or algorithmic systems pursuant to Article 72(1) of Regulation (EU) 2022/2065, the Commission may specify the technical means or the interfaces through which providers of very large online platforms or of very large online search engines shall provide such access.
2. Providers of very large online platforms or of very large online search engine ordered to provide access pursuant to Article 72(1) of Regulation (EU) 2022/2065 shall do so 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 by the provider concerned with Regulation (EU) 2022/2065.
3. Providers of very large online platforms or of very large online search engine ordered to provide access pursuant to Article 72(1) of Regulation (EU) 2022/2065 shall comply with the requirements laid down in Article 7 of this Regulation.
4. Where the Commission imposes an obligation on a provider of very large online platforms or of very large online search engine to retain all documents necessary to assess the implementation of and compliance with Regulation (EU) 2022/2065 pursuant to Article 72(1) of that regulation, the Commission shall define the terms of retention, including the period and scope of documents to be retained for which the obligation applies. That period may be prolonged, where necessary, to assess the implementation of and compliance with Regulation (EU) 2022/2065.

5. Where the Commission appoints external experts or 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 pursuant to Article 72(2) of that regulation, the Commission shall ensure that those experts and auditors are independent from the provider concerned and that they have proven expertise and knowledge in the matter on which they assist the Commission.

6. To ensure independence in accordance with paragraph 5, 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.

7. To ensure that the experts and auditors possess the necessary expertise and knowledge in accordance with paragraph 5, the Commission, when appointing an expert or an auditor pursuant to that paragraph, shall take into account the expert's proven expertise in the matter on which they assist the Commission or the auditor's 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 and in accordance with the format and length requirements for documents set out in the Annex to this Regulation, inform the Commission of its views in writing on those findings and on measures the Commission may intend to take in view of those findings and submit evidence in support thereof. The Commission shall not be 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 or exceedingly difficult to deal with particularly complex legal or factual issues within the maximum page limits.

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, to the addressee of the preliminary findings concerned or to its representatives receipt of information submitted pursuant to paragraph 1.

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'). 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 that have been made by pursuant to Article 6 to protect business secrets or other confidential information.

3. Without prejudice to paragraph 4, the Commission shall also provide access to all documents on its file, without any redactions, under terms of disclosure to be set out in a Commission decision. The terms of disclosure shall be determined in accordance with the following:

- (a) Access to documents shall only be granted to a limited number of specified external legal and economic counsel and external technical experts engaged by the addressee and whose names shall be communicated to the Commission in advance.
- (b) The specified external legal and economic counsel and external 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 external legal and economic counsel and technical experts shall not, at the date of the Commission decision setting out the terms of disclosure, be in an employment relationship with the addressee or in a situation comparable to that of an employee of the addressee. Should the specified external legal or economic counsel or external technical experts subsequently enter into such a relationship with the addressee or with other undertakings active on the same markets as the addressee during the investigation or during the three years following the end of the Commission's investigation, the specified external legal or economic counsel or external technical expert and the addressee shall promptly inform the Commission about the terms of such relationship. The specified external legal or economic counsel or external technical expert in question shall also provide the Commission with an assurance that they no longer have access to the information or documents on the file to which they were given access according to point (a) and which were not made available to the addressee by the Commission. They shall also provide assurances to the Commission that they will continue to comply with the requirements referred to in point (d) of this paragraph.
- (d) Specified external legal and economic counsel and external 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 or their content other than for the purposes referred to in Article 5(9) below.
- (e) The Commission shall 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. In exceptional circumstances, the Commission may decide not grant access to certain documents or to grant access to partly redacted documents under the terms of disclosure referred to in paragraph 3 if it determines that the harm that the party that submitted the documents in question would likely suffer from disclosure under those terms would, on balance, outweigh the importance of the disclosure of the full document for the exercise of the right to be heard.

5. 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.

6. The specified external legal and economic counsel and external technical experts referred to in paragraph 3 may, within one week of receiving access under the terms of disclosure, 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, with a view to making such non-confidential version available to the addressee, or for an extension of the terms of disclosure to additional specified external legal and economic counsel or external technical experts. 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. For the purpose of applying paragraphs 4 to 6, the Commission may require the party that submitted the documents in question to provide a non-confidential version thereof, pursuant to Article 6.
8. Where the Commission considers a request under paragraph 6 to be well-founded in view of ensuring that the addressee is in a position to exercise its right to be heard effectively, the Commission shall request the party that submitted the documents in question either to agree to making a non-confidential version available to the addressee or to agree to the extension of the terms of disclosure to specified individuals or undertakings for the documents in question only.
9. In the event that the party that submitted the documents in question does not agree, the Commission shall adopt a decision setting out the terms of disclosure for the documents in question.
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 concerning the application of Regulation (EU) 2022/2065 that are 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(3) 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. Unless otherwise provided for in Regulation (EU) 2022/2065 or Article 5 of this Regulation, information or documents collected or obtained by the Commission shall not be disclosed or made accessible by the Commission in so far as they contain business secrets or other confidential information of any natural or legal person.
2. When seizing documents or receiving voluntary access to documents during inspections pursuant to Article 69 of Regulation (EU) 2022/2065, or otherwise receiving documents or access to information pursuant to Article 72 of Regulation (EU) 2022/2065, the Commission shall inform the 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, that access to that information may be granted pursuant to Article 5 of this Regulation. In any event, when very large online platforms or very large online search engines or, where applicable, other natural or legal person concerned voluntarily provide information to the Commission under Regulation (EU) 2022/2065 or this Regulation they agree that access to that information may be granted pursuant to Article 5 of this Regulation.
3. Without prejudice to paragraph 2, the Commission may require very large online platforms or very large online search engines or, where applicable, other natural or legal person concerned who are the originators of documents in its file to identify the documents, statements or parts thereof which they consider to contain business secrets or other confidential information and to identify the natural and legal persons in relation to whom that information is considered

to be confidential. The Commission may also set a time-limit for the 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 any part of a Commission decision which in their view contains business secrets or other confidential information.

4. 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 in a clear and intelligible manner;
- (c) provide a concise, non-confidential, description of each piece of redacted information.

5. If 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 consider that the information concerned do not contain business secrets or other confidential information.

6. If the Commission determines that certain information that is claimed to be confidential by 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, may be disclosed, either because this information does not constitute a business secret or other confidential information, or because there is an overriding interest in its disclosure, it shall inform the concerned providers or natural or legal person, that it intends to disclose such information unless it receives objections within one week. Should the providers or natural or legal person in question object, the Commission may adopt a reasoned decision specifying the date after which the information will be disclosed. This date shall not be less than one week from the date of notification. The decision shall be notified to the concerned providers or natural or legal person.

Article 7

Transmission and receipt 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 issued or 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 Council ⁽²⁾.

3. Documents transmitted to the Commission by digital means shall be deemed to have been received on the day when an acknowledgement of receipt is sent by the Commission.

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;

⁽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).

- (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 and rectify the situation within a reasonable time limit.
7. By way of derogation from paragraph 1, under exceptional circumstances which make transmission by digital means impossible or exceedingly difficult, documents may be transmitted to the Commission by registered mail. 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.
8. By way of derogation from paragraph 1, under exceptional circumstances which make transmission by digital means and registered mail impossible or exceedingly difficult, documents may be transmitted to the Commission by means of hand delivery. Those documents shall be deemed to have been received 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

This Regulation shall enter into force on the twentieth day following that of 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.

Done at Brussels, 21 June 2023.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

Format and length of observations submitted pursuant to Article 4

Written observations submitted to the Commission pursuant to Article 4 of this Regulation shall be submitted in a format allowing the Commission to process them electronically and, in particular, enabling their digitisation and character recognition.

For this purpose, the following requirements shall be complied with:

- (a) the text, in A4 format, shall be easily legible and appear on one side of the page only;
- (b) documents produced in paper format shall be assembled in such a way as to be easily separable (not bound together or permanently attached by other means, such as glue or staples);
- (c) the text shall be in a commonly-used font (such as Times New Roman, Courier or Arial) in at least 12 point in the body of the text and at least 10 point in the footnotes, with single line spacing, and upper, lower, left and right margins of at least 2,5 cm (maximum 4 700 characters per page);
- (d) the pages and paragraphs of each document shall be numbered consecutively.

Written observations submitted to the Commission pursuant to Article 4 of this Regulation shall not exceed 50 pages in length. Any annexes accompanying those observations shall not count towards the applicable page limits, provided those annexes have a purely evidential and instrumental function and are proportionate in number and length.
