Reply by the European Commission to the request for information of the European Ombudsman, dated of 15 November 2024, regarding case EASE 2023/5595
Complaint by M[redacted], ref. 1746/2024/MIG

I. THE REQUEST FOR INFORMATION OF THE EUROPEAN OMBUDSMAN

The request for information relates to an access to documents request[1] pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001'). The applicant requested access to the risk assessment provided by X (Twitter) pursuant to the Digital Services Act[3] (DSA) which was refused by the Commission to protect the purpose of ongoing investigation in the file DSA.100.100 and the commercial interests of the entity concerned.

Further to a complaint submitted before the European Ombudsman on 19 September 2024 by the applicant, the European Ombudsman asked detailed information about the state of play of the investigation the Commission is conducting under Article 66(1) of the DSA. On 30 October 2024[4], the Commission replied to the European Ombudsman's request for information.

In its present request for information the European Ombudsman questions the applicability of the presumption of non-disclosure. In particular, the European Ombudsman considers that the obligation on the entity concerned to publish a non-confidential version of the risk assessment report suggests that partial access to the report should be possible.

Against this background, the European Ombudsman asks the Commission to respond to the following questions:

> *1. Does the Commission (or any other entity) monitor the timely publication of risk assessment reports by VLOPs? If yes, what steps does it take if a platform fails to publish the report on time?*
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> *2. If a VLOP withholds parts of a risk assessment report when it publishes it, does the Commission assess whether the redactions are in line with Article 42(5) of the DSA? If yes, what are the consequences if it considers the redactions made by the platform to be excessive?*

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1 Request registered on 27 September 2023 under reference EASE 2023/5595.
2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.
3 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), OJ L 277, 27.10.2022, p. 1.
4 Ares(2024)7347981

3. How does the Commission, generally, understand the relationship between proactive and reactive transparency of risk assessment reports under the DSA?

4. How does the Commission interpret Article 42(5) of the DSA in light of Regulation 1049/2001 and the exceptions under Article 4 thereof?

II. REPLY OF THE EUROPEAN COMMISSION

From the outset it should be recalled that, as acknowledged by the case-law of the Court of Justice, the legality of a decision replying to a confirmatory application for access to documents must be assessed on the basis of **the facts and the law as they stood at the time when the decision was adopted**[5].

In the case at hand, the Commission Decision C(2024)4469, replying to the confirmatory application submitted in case EASE 2023/5595, was adopted on 20 June 2024 and was communicated to the applicant the following day.

At the time when the confirmatory decision C(2024)4469 was adopted, the document requested by the applicant was part of the administrative file pertaining to the investigation DSA.100.100. By Decision C(2023)9137 of 18 December 2023[6], the Commission had initiated formal proceedings against X's provider pursuant to Article 66(1) of the DSA Regulation.

In application, by analogy, of the case-law existing in relation to proceedings in the field of competition, the Commission established that the document requested is covered by a general presumption of confidentiality and refused to grant access to it on the basis of the exceptions laid down in the first indent (the protection of commercial interests of a natural or legal person, including intellectual property) and third indent (the protection of the purpose of inspections, investigations and audits) of Article 4(2) of Regulation (EC) No 1049/2001.

As recognised by the Court of Justice, it is open to the institution to base its refusal on general presumptions 'which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature'. The Commission Decision C(2024)4469 explains that the investigation DSA.100.100, 'conducted in accordance with the DSA Regulation, is comparable and has strong procedural similarities with other types of Commission investigations aimed at assessing the compliance with EU law of the undertakings' functioning, such as the antitrust proceedings under Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'), the State aid investigations laid down in Article 108 TFEU and the proceedings applicable to mergers, set out in Regulation (EC) No 139/2004'.

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5 Judgment of the General Court of 25 September 2014, *Spirlea v Commission*, Case T-669/11, ECLI:EU:T:2014:814, paragraph 102 and the case-law cited therein.

6 Commission decision C(2023)9137 of 18.12.2023 initiating proceedings pursuant to Article 66(1) of Regulation (EU) 2022/2065, https://ec.europa.eu/newsroom/dae/redirection/document/101

Furthermore, it should be noted that the case-law of the Court of Justice recognised (1) that presumption as applicable also in cases where a single document has been the subject of a request for access[7], such as in the present case and (2) the fact that, if a document belongs to the administrative file related to a specific investigation procedure[8], this is sufficient to confer on it the benefit of the general presumption of confidentiality.

Insofar as the request for information of the European Ombudsman focuses on the hypothetical case of public access to the DSA risk assessments not part of specific DSA proceedings initiated pursuant to Article 66(1) of the DSA, the Commission would like first to emphasize that the DSA provisions have consistent objectives with the goals of Regulation (EC) No 1049/2001 on public access to documents.

The DSA has a series of transparency provisions which are critical to enabling increased public scrutiny and accountability, elements which are in turn instrumental to the broader goals of the DSA, which is ensuring a safe, predictable and trusted online environment, where fundamental rights are protected. Through its many transparency provisions – and Article 42 is key among them – the DSA arguably creates a full-fledged transparency regime.

The **risk management framework** introduced under Articles 34 and 35 of the DSA, which constitutes one of the most innovative elements of the regulation, plays a central role in this regard. The publication of the risk assessment and audit reports pursuant to Article 42(4) DSA is a central pillar of the broader DSA transparency architecture, as these reports are crucial to informing the public debate on the systemic risks posed by providers of very large online platforms ('VLOPs') and very large online search engines ('VLOSEs'). These reports constitute a key means for the Commission, and for the public, to understand how providers of VLOPs and VLOSEs identify, analyse, assess and mitigate systemic risks stemming from their services.

Notably, the question of how providers identify and mitigate systemic risks presents a particularly prominent public interest dimension. In light of this, the legislator has mandated that providers, after submitting them to the Commission, make these risk assessment reports available to the general public (subject to the regime laid out in Article 42 DSA) every year. Providers, however, are allowed to remove information from the reports if publication 'might result in the disclosure of confidential information of that provider or of the recipients of the service, cause significant vulnerabilities for the security of its service, undermine public security or harm recipients' (Article 42(5) of the DSA). Those very same interests are also protected under Regulation (EC) No 1049/2001.

In particular, under the DSA, the Commission is tasked with direct supervision, enforcement and monitoring of VLOPs and VLOSEs' compliance with the said regulation. The DSA

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7 Judgment of the General Court of 25 March 2015, *Sea Handling SpA v Commission*, Case T-456/13, paragraph 58 and the case-law cited therein.

8 For state aid procedures, see the Judgment of the General Court of 2 March 2022, *Huhtamaki Sàrl v Commission*, Case T-134/20, paragraph 36.

transparency and reporting provisions are instrumental to enabling the regulatory function of the Commission.

When a risk assessment report is submitted to the Commission under Article 42 of the DSA, it becomes part of the Commission's case file concerning the provider's compliance with the DSA. The Commission then assesses whether the systemic risks stemming from the VLOP or VLOSE have been correctly identified and addressed through risk mitigation measures. Following the risk assessment report's publication by the providers of online platforms, the Commission also examines the public version and checks that redactions do not exceed the limits set out in Article 42(5) DSA, in order to ensure adequate transparency and public scrutiny on the operation of the businesses in question.

As a result of its assessment and taking into consideration also other relevant information and reports, the Commission may – or may not – decide to initiate proceedings in the view of the possible adoption of a non-compliance decision, on the basis of Article 66(1) DSA and/or take other enforcement initiatives. If a formal investigation is opened, the case file, with all the documents contained therein is subject to access to the file rules.

Ensuring the confidentiality of the risk assessments submitted to the Commission is key; first, to preserve the Commission's decision-making process as to whether opening an investigation or not; second, to enable the Commission to carry out an impartial and effective investigation; and third, to engage with the providers on the risks identified in the context of their service, in support of the broader DSA goal to ensure a safe online environment. Granting full/partial public access to these risk assessment reports under Regulation (EC) No 1049/2001, before their publication by the providers, as requested by the DSA, would frustrate such goals, which are crucial to achieving the broader objectives of the DSA. In any event, the publication by the providers themselves may only take place **at the latest** three months after the receipt of the audit report pursuant to Article 37(4) that must be made public itself at the same time; the full/partial public access to these risk assessment reports under Regulation (EC) No 1049/2001 before it being subject to an audit, would run counter to the objectives of this provision, for example because public reactions to the risk assessment reports may cause interferences with the work of auditors who have to analyse them as part of their auditing exercise, as well as with the providers' possibility to implement audit recommendation or alternative measures to address potential non-compliance set out in audit report pursuant to Article 37(6) of the DSA. As already stated above, once the risk assessment report is published by the provider, the Commission checks the completeness of the report, including whether the redactions comply with Article 42(5) of the DSA.

Therefore, beyond the fixed mandatory publications by the providers envisaged in the DSA, the confidential risk assessment reports the providers of VLOPs and VLOSEs submit to the Commission deserve protection from generalized access. The DSA Regulation, just like competition rules, seeks to ensure a balance between, on the one hand, the obligation on the providers to send the Commission sensitive information to enable it to assess compliance with the DSA and, on the other hand, the need to ensure professional secrecy and confidentiality of

business secrets. To that end, the DSA Regulation contains specific provisions on access to the file and confidentiality.

In response to the questions raised in the request for information of 15 November 2024, the Commission provides the following replies:

1. **Does the Commission (or any other entity) monitor the timely publication of risk assessment reports by VLOPs? If yes, what steps does it take if a platform fails to publish the report on time?**

The providers of VLOPs and VLOSEs are subject to comprehensive reporting obligations and to the obligation to make a non-confidential version of their risk assessment reports publicly available. The Commission ensures that such obligations are complied with by each provider and may open an investigation in case it suspects an infringement.

Pursuant to Article 42 of the DSA, the providers of VLOPs and VLOSEs must fulfill transparency reporting obligations, namely publication of the report setting out the results of the risk assessment which, pursuant to Articles 34 and 35 DSA, concerns the identification and management of systemic risk. In particular, they have an obligation to publish reports on their risk assessments (including ad hoc risk assessment reports prior to deploying new functionalities that can have an impact on systemic risks), their risk mitigation measures, as well as their audit reports and audit implementation reports, the latter of which can, depending on the recommendations made by auditors, include details of measures to be adopted to address systemic risk and their implementation status. Where applicable, they must also publish information about consultations they conducted with external experts in support of the risk assessments and of the design of risk mitigation measures. In addition, recital 100 of the DSA states that providers of VLOPs and VLOSEs should report 'comprehensively' on their risk assessment. In accordance with Article 42(4) of the DSA, risk assessment reports must be published at the latest three months after the receipt of an audit report.

On 27 November 2024, the Commission published a guidance document clarifying the extent and scope of the relevant transparency obligations applicable to the providers of VLOPs and VLOSEs. The document is publicly available at: Q&A on risk assessment reports, audit reports and audit implementation reports under DSA | Shaping Europe's digital future.

The Commission ensures the follow-up with the VLOPs and VLOSEs on their obligation to publish their risk assessment reports and monitors the timeliness of the publication under Article 42(4) of the DSA. With regard to the risk assessment report of X, which is subject to the request of the complainant, the Commission would like to point out that it was published 27 November 2024 and can be found on the following webpage https://transparency.x.com/en/reports/dsa-risk-assessment-report.

Where a provider of VLOP or VLOSE fails to publish its report or delays the publication in a way that it could be deemed not in compliance with its transparency obligations, the Commission may consider that this constitutes an infringement of the DSA and take appropriate action.

The Commission services engaged with the providers of VLOPs and VLOSEs, emphasizing that the risk assessment reports are to be published at the latest three months after the receipt of an audit report, in line with the obligation set out in Article 42(4) of the DSA. The Commission services are performing due assessment of compliance with the reporting obligation in this context. Those providers who published their risk assessment report of the year preceding their first DSA compliance audit report but not the report of the ongoing year must also publish the report of the ongoing year.

2. **If a VLOP withholds parts of a risk assessment report when it publishes it, does the Commission assess whether the redactions are in line with Article 42(5) of the DSA? If yes, what are the consequences if it considers the redactions made by the platform to be excessive?**

The Commission assesses whether the reports published are excessively redacted and whether they ensure an adequate level of transparency.

Pursuant to Article 42(5) of the DSA, providers of VLOPs and VLOSEs are allowed to redact certain sensitive information from the publicly available reports. In particular, they may remove information where the publication of that information '*might result in disclosure of the confidential information of that provider or of the recipients of the service, cause significant vulnerabilities for the security of its service, undermine public security or harm recipients*'. Nevertheless, the providers must transmit the complete version of the report to the Digital Services Coordinator of establishment and to the Commission, providing a statement of reasons for any redactions applied to the published version of the report. The statements of reasons must thoroughly justify each redaction and specifically explain why, in the view of the provider of the VLOP or VLOSE, the redactions are justified under Article 42(5) of the DSA.

The above-mentioned publicly available Q&A reminds the providers of VLOPs and VLOSEs about this obligation.[9] It also provides further guidance on what information falls under the definition of confidential information, and it clearly indicates that exceptions to the obligation of publication are to be interpreted restrictively.[10]
The Commission performs a substantive assessment of compliance of the providers with the abovementioned obligation to publish their reports and assesses the application of redactions

[9] Q&A on risk assessment reports, audit reports and audit implementation reports under DSA: How should providers of VLOPs and VLOSEs approach confidentiality needs and redactions under Article 42(5) DSA?
[10] Q&A on risk assessment reports, audit reports and audit implementation reports under DSA: What is considered as confidential information that may be redacted from reports that providers of VLOPs and VLOSEs must publish under the DSA?

to the publicly available version of the reports. Where the Commission considers that redactions are unjustified and that a provider did not comply with its transparency obligations, similarly to the situation in which a provider fails to publish its report, the Commission may consider this as an infringement of the DSA and take appropriate action.

3. How does the Commission, generally, understand the relationship between proactive and reactive transparency of risk assessment reports under the DSA?

The DSA pursues broad transparency and public scrutiny goals.[11] The publication of reports concerning the risk assessments, and also of risk mitigation measures and yearly DSA compliance audits are crucial for informing the public (including civil society organisations, media representatives, researchers) and for fostering a societal debate about the systemic risks stemming from VLOPs and VLOSEs and the risk mitigation measures adopted by their providers.

Therefore, the reports that providers publish must be as complete as possible. Under the DSA, the legislator has mandated that the risk assessment reports are to be shared with the Digital Services Coordinator and the Commission upon their completion and be made proactively available to the public at the latest three months after the receipt of audit report (pursuant to Article 37(4) of the DSA). The time intervals applicable to the above obligation allow for the public scrutiny of the content of the reports, while safeguarding possible action that the Commission may take in pursuing of the objectives of the DSA. A potential 'reactive' publication of risk assessment report under Regulation (EC) No 1049/2001, prior to its publication by the providers within the three months deadline and any follow-up activity that the Commission may deem necessary, would undermine the effectiveness of the proactive 'transparency' publication envisaged by the DSA under its specific timeline. In addition, this could also discourage the providers from including certain information in the reports that they have to submit to the Commission.

4. How does the Commission interpret Article 42(5) of the DSA in light of Regulation 1049/2001 and the exceptions under Article 4 thereof?

Article 42(5) of the DSA provides that '[w]here a provider of very large online platform or of very large online search engine considers that the publication of information pursuant to paragraph 4 might result in the disclosure of confidential information of that provider or of the recipients of the service, cause significant vulnerabilities for the security of its service, undermine public security or harm recipients, the provider may remove such information from the publicly available reports. In that case, the provider shall transmit the complete reports to the Digital Services Coordinator of establishment and the Commission, accompanied by a statement of the reasons for removing the information from the publicly available reports'.

[11] As confirmed by the Vice-President of the Court of Justice of the European Union in its orders in Cases C-639/23 P(R), C-511/24 P(R)), and C-620/24 P(R) concerning interim relief requested in relation to the obligation laid down in Article 39 DSA.

The Commission first observes that the DSA Regulation and Regulation (EC) No 1049/2001 pursue generally different aims, and do not contain any provision expressly giving one regulation primacy over the other. According to the settled case-law ,[12] it is necessary for the Commission to make sure that each of these regulations is applied in a manner which is compatible with the other and which enables a coherent application of them.

Secondly, in corroborating the aforementioned provisions of Article 42(5) of the DSA with those of Regulation (EC) No 1049/2001, the Commission can point out to the similarities of both sets of rules, and namely to the fact that both regulations pursue transparency goals and, at the same time, protect similar interests as an exception to such principle.

In particular, Article 42(5) of the DSA allows for removal from public versions of risk assessment reports of '*confidential information of that provider or of the recipients of the service, [which may] cause significant vulnerabilities for the security of its service, undermine public security or harm recipients.*'

At the same time, the first indent of Article 4(1)(a), Article 4(1)(b) and the first indent of Article 4(2) of Regulation (EC) No 1049/2001 provide that access to a document may be refused where its disclosure would undermine the protection of '*(a) the public interest as regards: public security, (…), (b) privacy and the integrity of the individual'* and of *'commercial interests of a natural or legal person, including intellectual property (…)*'.

It is therefore apparent that both regulations are aligned with each other as to what interests are to be protected against harm that could occur pursuant to the disclosure of documents containing specific information.

Thirdly, it cannot be disregarded that Regulation (EC) No 1049/2001 also protects, according to the third intend of Article 4(2), 'the purpose of investigations' carried out by the Commission and that the DSA investigations are regulated by specific access to the file and confidentiality rules, set out in Article 79(4) and respectively Article 84 of the DSA Regulation. As mentioned above, the Commission carries out a series of investigative activities to examine whether the VLOP and VLOSE providers respect their DSA obligations to identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems or from the use made of their services and whether the public version of the risk assessment reports has been excessively redacted. In this context, Article 65(1) of the DSA establishes that '*the Commission may exercise* [its] *(…) investigatory powers (…) even before initiating proceedings pursuant to Article 66(2)* [of the DSA]". The broad concept of an investigation, which extends beyond formal opening of an investigation has been recognised by the EU courts, according to which '[t]*he concept of*

[12] Judgment of the Court of Justice of the European Union of 28 June 2012, Case C-477/10 P, *Agrofert Holding* v *Commission*, ECLI:EU:C:2012:394, paragraph 52. See also the Judgment of the General Court of 3 May 2018, *Malta v Commission.*, T-653/16, ECLI:EU:C:2018:241, paragraph 137 and the case-law cited therein.

'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation'.[13]

The publication of the risk assessment reports, as a reporting obligation set on the providers themselves (only after they have been audited and under the oversight of the Commission), was established as means to ensure transparency on questions which are particularly prominent from a public interest and societal perspective (i.e., the providers' management of systemic risks 'stemming from the design and functioning of their service and its related systems'). A possible public disclosure, pursuant to an application submitted under Regulation (EC) No 1049/2001, of the reports submitted to the Commission, in anticipation or after the publication by the providers themselves, may be seen as:

- circumventing the transparency reporting system set out in the DSA regulation, by depriving the reporting obligation and the confidentiality requirements set out in Article 42(5) therein of their effect;
- prejudicial on the purpose of the DSA investigations, as the reports submitted to the Commission – even those partially published by the providers – constitute essential components of the Commission's case file on the basis of which the Commission assesses compliance with the DSA and, hence, decides whether to initiate proceedings under Article 66(1) of the DSA (in addition, recital 85 of the DSA regulation provides that '*subsequent risk assessments [are expected to] build on each other and show the evolution of the risks identified*');
- evading the specific access to the file and confidentiality rules applicable to DSA investigations.

The Detailed rules of application of Regulation (EC) No 1049/2001, annexed to Rules of Procedure of the Commission[14], recognise, in Article 4(2)(e), that there is a presumption that access to documents being part of DSA procedures undermines the interests protected by Article 4(1) to (3) of Regulation (EC) No 1049/2001. No access to those documents can therefore be granted, unless the applicant demonstrates an overriding public interest in providing access prevailing over the interests protected by Article 4(2) to 4(3) of Regulation (EC) No 1049/2001.

III. CONCLUSIONS

Transparency is a key principle for the Commission's activities. The Commission is fully committed to monitor transparency obligations in the context of DSA proceedings, ensuring that the timelines for proactive publication of risk assessment reports are respected and that the application of the new DSA framework does not result in any undue withholding of

[13] Judgment of the General Court of 4 October 2018, Case T-128/14, ECLI:EU:T:2018:643, *Daimler AG vs. Commission*, paragraphs 131-132.

[14] Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 (OJ L, 2024/3080, 5.12.2024, ELI: http://data.europa.eu/eli/dec/2024/3080/oj)

information of public interest, while at the same time enabling the Commission to perform its supervisory and enforcement tasks in pursuing a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights of European citizens are adequately protected.

For the Commission
Henna VIRKKUNEN
Executive Vice-President

CERTIFIED COPY
For the Secretary-General

[redacted]
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