Reply by the European Commission to the recommendation from the European Ombudsman on the institution's refusal to give public access to the risk assessment drawn up by a large social media company on its compliance with the Digital Services Act
ref. 1746/2024/MIG (EASE 2023/5595)

I. SUMMARY OF THE FACTS

On 26 September 2023, the complainant submitted a request for public access, pursuant to Article 6(1) of Regulation (EC) No 1049/2001[1], to the '[t]he risk assessment or risk assessments provided by X (Twitter) according to the Digital Services Act' (hereafter 'DSA')[2].

In its reply sent on 8 November 2023, the Directorate-General for Communication Network, Content and Technology (hereinafter 'DG Connect') identified one document as falling within the scope of this request: the risk assessment submitted to the Commission by X on 14 September 2023, registered internally under the reference number Ares(2023)6240759. DG Connect refused to grant public access to the document requested and invoked the exception to the right of access laid down in the first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Article 4(2) of Regulation (EC) No 1049/2001.

On 9 November 2023, the complainant submitted a confirmatory application pursuant to Article 7(2) of Regulation (EC) No 1049/2001, contesting the applicability of the exception laid down in the first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Article 4(2) of Regulation (EC) No 1049/2001 and asserting the existence of an overriding public interest in the disclosure of the document requested.

On 20 June 2024, by decision C(2024)4469, the Commission replied to the confirmatory application and refused to grant public access to the document requested on the basis of the exceptions laid down in the first indent (the protection 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.

On 19 September 2024, the complainant submitted the complaint in subject with the European Ombudsman, who decided to open an inquiry.

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1 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 of 31.5.2001, p. 43.

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), OJ L 277, 27.10.2022, p. 1.

During the inquiry, upon request[3], the Commission provided the Ombudsman with a copy of the risk assessment which formed the subject-matter of the complainant's application for public access and with an update on the status of the investigation DSA.100100 concerning the said risk assessment[4].

On 15 November 2024, the Ombudsman sent the Commission its preliminary views[5] in this case, indicating that the application of a general presumption of confidentiality to the risk assessment report in question constitutes maladministration. The letter also comprised four questions for the Commission, aimed at clarifying certain aspects related to the implementation of the DSA provisions related to the publication of risk assessments and their relationship with the transparency requirements set out in Regulation (EC) No 1049/2001.

On 27 November 2024, X published its 2023 risk assessment on its website[6], in accordance with the requirements laid down in Article 42(4) and (5) of the DSA.

On 6 March 2025, the Commission sent its reply[7] to the Ombudsman's preliminary views of 15 November 2024. The Commission's reply confirmed that a general presumption of non-disclosure applies to the document requested and provided the Ombudsman with the requested clarifications concerning the publication of risk assessments and the interplay between the transparency objectives provided in the DSA and those set out in Regulation (EC) No 1049/2001.

II. THE EUROPEAN OMBUDSMAN'S RECOMMENDATION

In its recommendation[8] adopted on 3 November 2025, the Ombudsman indicated that the DSA establishes a specific transparency regime for risk assessments to be carried out annually by very large online platforms and explained that the provisions on 'proactive' transparency in the DSA need to be reconciled with the 'reactive' transparency regime established by Regulation (EC) No 1049/2001.

According to the Ombudsman, the common denominator in the procedures in which the EU courts had recognised the existence of a general presumption of non-disclosure is the need to respect professional secrecy in those procedures. The Ombudsman disagreed with the Commission's view that risk assessment reports are equally sensitive and considered that the

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3 https://www.ombudsman.europa.eu/en/opening-summary/en/193130.
4 https://ec.europa.eu/newsroom/dae/redirection/document/101292.
5 https://www.ombudsman.europa.eu/en/doc/correspondence/en/199731.
6 https://transparency.x.com/content/dam/transparency-twitter/dsa/dsa-sra/dsa-sra-2023/TIUC-DSA-SRA-Report-2023.pdf.
7 https://www.ombudsman.europa.eu/en/doc/correspondence/en/214482.
8 https://www.ombudsman.europa.eu/en/recommendation/en/214486.

rules applicable to these documents, as drawn up by providers of very large online platforms and search engines under the DSA, differ significantly from the circumstances in which the EU courts have established a general presumption of non-disclosure.

The Ombudsman noted that the DSA emphasises transparency and accountability, especially for very large online platforms and search engines due to their special role and reach. These platforms must disclose a significant amount of information, including annual risk assessments, regardless of ongoing investigations. According to the Ombudsman, the fact that the report publication timeline can precede the completion of the Commission's investigations suggests that transparency and enforcement are not mutually exclusive.

The Ombudsman acknowledged that some information may remain undisclosed in a risk assessment report, including due to commercial sensitivity, and considered that, since the report is eventually made public, it is unreasonable to treat its entire content as commercially sensitive or covered by the principle of professional secrecy.

The Ombudsman noted that Article 42(4) of the DSA does not prevent the providers of very large online platforms and search engines from publishing their risk assessment report even before the independent audit had been completed. Moreover, it pointed out that the Commission published information on its investigations into the provider’s compliance with its obligations under the DSA before the audit had been completed.

The Ombudsman considered that requests for public access to the risk assessment reports provided according to DSA, which were requested under Regulation (EC) No 1049/2001, must not be necessarily rejected before their publication by the providers of very large online platforms and search engines in accordance with the DSA. The Ombudsman argued that, if the platform concerned has not yet published the risk assessment report in accordance with the law or proactively, the Commission should take this into account in its assessment of the document under Regulation (EC) No 1049/2001 and, if it is not clear whether public access can be granted, the Commission should consult the platform on whether any of the exceptions provided for in Article 4 of that regulation might apply.

Finally, the Ombudsman invited the Commission to ‘conduct a concrete and individual assessment of the risk assessment report at issue with a view to granting the widest public access possible, including to those parts of the report that have been redacted in the version that was published by the platform concerned’. The recommendation further stated that, ‘[i]f the Commission concludes that no access can be granted to certain parts of the report, [the institution] should explain, why, specifically and actually, their disclosure is prevented in light of the exceptions laid down in Article 4 of Regulation 1049/2001’.

III. THE EUROPEAN COMMISSION'S REPLY TO THE RECOMMENDATION OF THE EUROPEAN OMBUDSMAN

As noted by the Ombudsman, the risk assessment report requested by the complainant falls within the scope of a specific legal framework, the DSA, which contains concrete accessibility and transparency rules, and for which consistent application with Regulation (EC) No 1049/2001 is necessary.

From the outset it must be recalled that Regulation (EC) No 1049/2001, which represented the legal basis for the complainant's access to documents request, and the DSA have equal status and are binding legislative acts of general application. They have different objectives and do not contain any provision expressly giving one regulation primacy over the other:

- Regulation (EC) No 1049/2001 is designed to ensure the greatest possible transparency in the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices[9].

- The DSA, according to Article 1 thereof, is designed to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.

As a means to attain its objectives, the DSA sets out in Chapter III specific due diligence obligations for a transparent and safe online environment, among which the publication, by the providers of very large online platforms or of very large online search engines themselves, of a report setting out the results of the risk assessment pursuant to Article 34. As evidenced in the formulation used in Article 42(4) and (5) of the DSA, the legislator deemed it essential to establish this due diligence obligation on the respective providers, alongside effective EU oversight and an independent audit system over the platforms' actions and risk assessments. The impact assessment that accompanied the Commission's proposal for the adoption of the DSA indicated already at the preparatory stage of the legislative act that a supervised risk management approach for very large platforms was considered by 76% of the responding stakeholders as an oversight mechanism particularly necessary in the context of addressing the spread of disinformation online[10].

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[9] See the Judgment of the General Court of 3 May 2018, Case T-653/16, *Malta* v *Commission*, ECLI:EU:T:2018:241, paragraph 136 and the case-law cited therein.

[10] See pages 47-48 in the 'Impact assessment part1' and page 20 in the 'Impact assessment part2', available at: https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act.

The Commission understands that the Ombudsman agrees with its view that the two regulations should be applied in a consistent and coherent manner. However:

1. The Ombudsman contends that a **general presumption of confidentiality** cannot apply to this category of documents and argues that the rules that apply to risk assessment reports drawn up under the DSA - which emphasises the importance of transparency and accountability of online services - deviate significantly from the circumstances in which the EU courts have recognised the possibility to make use of a general presumption of non-disclosure. The Commission disagrees with this assessment.

   First, **the risk assessments are subject to monitoring by the Commission**. In accordance with Article 56(2) of the DSA, the European Commission has the exclusive prerogative to supervise and enforce the compliance of the providers of Very Large Online Platforms (VLOP) and Very Large Online Search Engines (VLOSE) with the obligations to manage systemic risks, set out in Section 5 of Chapter III (Articles 33-43) of the DSA.

   Among others, Section 5 of Chapter III (Articles 33-43) of the DSA includes those providers' obligations:

   1) under Article 34(1) and (2) of the DSA, to carry out risk assessments which identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services, while taking into account certain predetermined factors that influence any of the systemic risks; and

   2) under Article 42(4) and (5) of the DSA, to transmit upon completion a report setting out the results of the risk assessment pursuant to Article 34 to the Digital Services Coordinator of establishment and the Commission and to make publicly available the said report at the latest three months after the receipt of each audit report pursuant to Article 37(4), subject to the possibility to remove certain confidential information.

   As explained in the Commission's reply of 6 March 2025 to the Ombudsman's preliminary views, when a risk assessment report is submitted to the Commission under Article 42(4) of the DSA, it becomes part of the Commission's case file concerning the provider's compliance with the DSA. The Commission then takes the report into account in assessing whether the systemic risks stemming from the VLOP or VLOSE have been correctly identified and addressed through risk mitigation measures.

It is undisputed, on the basis of the above-mentioned provisions and of the timelines shown in Section I above, that the document requested in EASE 2023/5595 was included in the administrative file of the investigation DSA.100100 at the time of the confirmatory reply and that the provider of X had not at that stage published the report pursuant to Article 42(4) of the DSA.

Secondly, it should be recalled that the **DSA includes specific provisions on access to the file and confidentiality**. As indicated on page 8 of the contested decision, C(2024)4469:

1) Article 79(4) of the DSA sets out the right of the 'parties concerned' to have access to the Commission's file, 'under the terms of a negotiated disclosure, subject to the legitimate interest of the provider of the very large online platform or of the very large online search engine or other person concerned in the protection of their business secrets'. It follows that third parties do not, under such proceedings, have any right of access to the documents in the Commission's file. Article 5 of the Commission Implementing Regulation (EU) 2023/1201[11] sets out detailed arrangements applicable to the right of access to the file.

2) Article 84 of the DSA lays down the treatment of information obtained in the context of DSA proceedings, designed to ensure the observance of professional secrecy. Natural and legal persons submitting information under the DSA have a legitimate right to expect that – apart from the publication, as mentioned in Article 80(2), of the decisions with any confidential information removed from it – the information they supply to the Commission on an obligatory or voluntary basis will not be disclosed to the public. Detailed arrangements for the protection of confidential information are further laid down in Article 6 of the Commission Implementing Regulation (EU) 2023/1201, referred to above.

The fact that the providers of VLOPs and VLOSEs are obliged to publish their risk assessments under the conditions set out in Article 42(4) and (5) does not entail that public access must be granted to the Commission's file, nor that the confidentiality of information obtained by the Commission (or, for that matter, by the other recipients referred to in Article 84 of the DSA, i.e. the Board, Member States' competent authorities and their respective officials, servants and other persons working under their supervision, and any other natural or legal person involved, including auditors and experts) in the context of DSA proceedings is waived in respect of this category of documents.

[11] 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') C/2023/3946, OJ L 159, 22.6.2023, pp. 51–59.

Thirdly, irrespective of the field to which a document requested relates, the Commission is, in principle, indeed obliged to carry out a specific, individual assessment of its content. However, that **examination may not be necessary where, because of the particular circumstances of the case, access must be refused or, on the contrary, granted**. That could be the case if a certain document was either manifestly covered in its entirety by an exception to the right of access, or was manifestly accessible in its entirety, or had already been the subject of an individual assessment by the Commission in similar circumstances.

In the Commission's view, at the time of the adoption of the contested decision C(2024)4469, access to the risk assessment requested had to be rejected since it was manifestly covered in its entirety by the exceptions laid down in the first indent (the protection 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 explained on page 8 of the decision C(2024)4469, the Commission found that the DSA investigations have strong similarities with the investigations in the field of competition law, whereby a decision of the institution has to be based on a complex assessment of facts collected during an investigation concerning the respective undertakings. The Commission enjoys similar investigative powers under the DSA as in the field of competition law (i.e. powers to issue requests for information, powers to take interviews and statements, powers to conduct inspections at the premises of undertakings, and even powers to issue fines for non-compliance with the DSA obligations) and, as mentioned above, the DSA includes similar provisions on access to the file and confidentiality. Although the antitrust, State aid, merger control and DSA procedures differ in nature, the commercial interests of the undertakings concerned, which are protected across all these procedures, are nonetheless similar.

More specifically, access to the document requested was refused in this case as it had been included in the category of documents represented by the administrative file of a formal DSA investigation into compliance by X with its obligations under Articles 34(1) and (2), 35(1), 16(5) and (6) of the DSA. Therefore, for the purposes of interpretation of the exceptions set out in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001, the Commission considered necessary to acknowledge the existence of a general presumption that the disclosure of documents gathered by the Commission in the context of those DSA proceedings undermines, in principle, both the protection of the purpose of inspections, investigations and audits of the institutions of the European Union and the protection of the commercial interests of the undertaking involved in that procedure.

The Ombudsman's reasoning regarding risk assessments as a standalone category of documents will be addressed in section 2 below.

2. The Ombudsman asserts that the **(partial) disclosure** of the risks assessment reports in reply to access to documents requests submitted pursuant to Regulation (EC) No 1049/2001 **is possible before their publication by the providers of VLOPs and VLOSEs**. The Commission disagrees with this assessment.

On the one hand, undisputedly the risk assessments provided to the Commission under the DSA are 'documents' within the meaning of Regulation (EC) No 1049/2001 and can be subject to an access to documents request. The Commission's assessment on the potential disclosure of a document requested must take into account all elements of fact and law existing at the time of its decision. This includes any applicable sectoral framework that could set out a particular transparency or confidentiality regime, as well as any information already disclosed lawfully to the public. The right of access to documents is not absolute, but subject to certain limits based on a public or private interest, as it is apparent from Article 4 of Regulation (EC) No 1049/2001.

On the other hand, under the DSA, which does not exclude the application of Regulation (EC) No 1049/2001, the risk assessments are subject to a specific transparency regime. Under Article 42(4) of the DSA, the providers of VLOPs and VLOSEs must publish their risk assessments. According to Article 42(5), the providers of VLOPs and VLOSEs have a possibility to remove certain information from the publicly available reports if they consider that the publication of this information might result in the disclosure of confidential information, cause significant vulnerabilities for the security of their service, undermine public security or harm recipients. These interests are also protected under Regulation (EC) No 1049/2001.

In the Commission's view, the need to ensure a coherent and consistent application of Regulation (EC) No 1049/2001 and the DSA must result in the coherent application of all relevant provisions, without risking that some provisions render the others ineffective. This would be the case if the risk assessments had been granted (partial) public access by the Commission under the regime set out by Regulation (EC) No 1049/2001 before they are published by the providers themselves under the conditions set out in Article 42(4) and (5) of the DSA, because this would mean:

- Bypassing the DSA provisions, as (1) the general public would be given the possibility to choose an alternative legal framework under which it may access the same document with the effect of DSA specific access to the file and confidentiality requirements being evaded and (2) the transparency reporting obligation that is on the charge of the providers of VLOPs and VLOSEs becomes devoid of purpose and

without any substance, as the risk assessment would have been already disclosed by the Commission before their action.

The DSA puts a particular emphasis on the importance of transparency and accountability from the part of the providers of online services themselves and it is the prerogative of the Commission to monitor and enforce the respect of this obligation. The Commission's assessment of an access to documents request concerning a document which has not yet been required to be published under the DSA framework would not only possibly deprive the platforms of their right to withhold confidential information pursuant to Article 42(5) DSA, but alternatively, in the potential absence of a reply from the providers of VLOPs and VLOSEs to a third party consultation pursuant to Article 4(4) of Regulation (EC) No 1049/2001, would put on the Commission the need to decide which part of the document may cause a significant vulnerabilities for the security of the designated service, undermine public security or harm recipients of the service. It would thus potentially lead to the assessment of highly sensitive information by the Commission, not only opening a potential legal challenge by the designated services but also affecting the very purpose of the risk assessment reporting and dialogue between the Commission services and the providers of VLOPs and VLOSEs.

The assessment by the Commission of unpublished risk assessments under an access to documents request would completely alter the nature of the provision of Article 42(5) which is placed on providers of very large online platforms and very large online search engines as the obligation would be placed with the Commission to assess the risk assessment reports and provide access to the requested documents.

– Undermining the Commission's authority and making it unable to properly carry out its supervision tasks under the DSA: in its role as enforcer of the DSA obligations against the providers of VLOPs and VLOSEs, the Commission is monitoring their compliance with all obligations, including their transparency obligations. As a result of its assessment, the Commission may decide to initiate proceedings in the view of the possible adoption of a non-compliance decision, based on Article 66(1) DSA and/or take other enforcement initiatives. A decision taken in implementation of Regulation (EC) No 1049/2001 cannot prejudge neither the possibility to launch (potential) investigations, nor the outcome of the Commission's assessment on the implementation of Article 42(5) of the DSA by the providers of VLOPs and VLOSEs. In this context, Commission procedures provide for statutory safeguards to transparency and accountability towards the public (e.g. the duty to provide the reasoning of the decisions adopted, and informing the public about its supervisory

activities[12]), but also towards the entities and persons subject to the supervision, whose rights and legitimate interests[13], including the right to be heard, must be ensured[14].

Regarding the prominent **public interest dimension** in the question of how providers identify and mitigate systemic risks, it should be clarified that this observation concerned the implementation of the DSA requirements. The Commission's reply of 6 March 2025 to the Ombudsman's preliminary views specifically referred to the reporting obligation set in Article 42 of the DSA on the providers themselves, established as means to ensure transparency on questions which are particularly prominent from a public interest and societal perspective.

In this respect, the contested decision C(2024)4469 could only assess the possible existence of an overriding public interest in the disclosure of the document requested in accordance with the principles underlying Regulation (EC) No 1049/2001. According to the case-law, an applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the document concerned and, on the other hand, demonstrate precisely in what way disclosure of the document would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal[15].

An individual interest in accessing the report before its due publication date, as set out in the DSA, or in scrutinising a VLOP or VLOSE provider's compliance with the provisions set out in the DSA, does not constitute an overriding public interest in the disclosure of documents sent to the Commission for the purpose of overseeing the proper implementation of this regulation. Also, on a general note, an interest of understanding the risks related to the use of a platform's service constitutes a private interest just as much as an interest underlying a request for access to certain documents with the aim to facilitate the exercise of the individual rights in judicial proceedings. As a matter of principle, the addition of private interests does not transform them into a public interest[16]. The public interest at stake, namely the correct implementation of the DSA by all concerned providers, is best protected when assessed by the Commission, which supervises VLOPs and VLOSEs subject to the additional due diligence obligations

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12 Article 80 of the DSA.

13 Article 80(2) of the DSA.

14 Article 79 of the DSA.

15 Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s* v *Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC* v *Commission*, T-875/16, EU:T:2018:877, paragraph 84.

16 Judgment of the General Court of 9 October 2018, *Anikó Pint* v *Commission*, T-634/17, EU:T:2018:662, paragraph 59.

The claim that disclosing risk assessments under Regulation (EC) No 1049/2001 would promote the DSA's transparency and accountability objectives is effectively very general and, as acknowledged in the case-law, general considerations do not provide sufficient grounds for establishing an overriding public interest[17].

As it is the case with its enforcement activities in other fields, notably in the field of competition and in the assessment of breaches of EU law, the Commission considers of utmost importance informing the public of the actions taken by the Commission to supervise and enforce the DSA[18]. However, a public or individual right of access to documents included in the respective files cannot be derived from the fact that the Commission makes public its findings and the progress of its investigations in such cases.

IV. CONCLUSIONS

For the reasons set out above, the Commission considers that its confirmatory decision was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time when it was taken.

The Commission maintains its view that disclosure of the document requested was likely to compromise, actually and specifically, the purpose pursued by the Commission's investigations at that time and their follow-up, and the commercial interests of the provider concerned. The refusal to grant public access to the document at issue was justified by the general presumption of confidentiality applicable to documents included in the administrative file relating to the DSA.100100 investigative procedure.

For the 2023 risk assessment provided to the Commission by X, the Commission refers to the public version set out by this provider, available on its website at TIUC-DSA-SRA-Report-2023.pdf. The Commission has not contested the confidential information withheld by X pursuant to Article 42(5) of the DSA in the published document.

CERTIFIED COPY
For the Secretary-General

[redacted]

Director
Decision-making & Collegiality
EUROPEAN COMMISSION

For the Commission
Maroš ŠEFČOVIČ
Member of the Commission

[17] Judgment of the General Court of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, paragraph 81.

[18] See the overview of the enforcement activities for the designated VLOPs and VLOSEs at https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses and the overview of their respective transparency reports at https://digital-strategy.ec.europa.eu/en/policies/dsa-brings-transparency.