

## GNI Submission on the DSA Delegated Regulation on Independent Audits

The Global Network Initiative (GNI) is grateful for the opportunity to provide input on the draft delegated regulation on independent audits of very large online platforms and very large online search engines (“draft delegated regulation”), as required under Article 37 of the Digital Services Act (DSA). GNI has engaged in earlier stages of consultations on the DSA and consistently expressed support for its focus on incentivizing the development of internal and external systems for identifying and mitigating risks, in line with the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises (OECD Guidelines).

The role of audits is critical to the DSA’s overall compliance and enforcement architecture. Allowing third-parties to examine and verify actions that very large online platforms and very large online search engines (“covered providers”) take to implement the obligations in Chapter III of the DSA can provide flexibility, create opportunities for expert input, minimize regulatory burdens, and allow for the evolution of creative and effective provider-specific approaches to compliance. However, these benefits will depend significantly on the extent to which audits generate involvement from experienced audit practitioners, as well as technical and subject-specific experts, and the degree to which broad consensus can be established on both the substantive criteria against which Chapter III obligations should be assessed, as well as the appropriate methodologies for conducting such assessments. The objective reality is that the scope of obligations to be audited, the novelty of auditing in this context, and the relative paucity of expertise on some of the more technical aspects of compliance all combine to make the audits set out in the DSA and the draft delegated regulation highly ambitious and challenging.

Much will depend on the clarity that can be established in the delegated regulation, as well as through any further guidance and expert multistakeholder deliberation that the Commission is able to produce and encourage. We have identified several issues below that we think merit further consideration and clarification. The points raised in this submission stem from lessons GNI has learned over four cycles of multistakeholder “[assessments](#)” of the internal systems and processes used by information and communication technology (ICT) companies to identify and address risks to freedom of expression and privacy, as well as [events](#) that GNI has helped facilitate with a broader audience of experts through the [Action Coalition on Meaningful Transparency](#), which GNI helped establish and manages. We remain committed to ensuring that the DSA achieves its objectives and sets a positive global example of how to address digital risks, while upholding and expanding digital rights. We look forward to engaging in further discussion with the Commission and other stakeholders on these topics.

### I. Defining “what good looks like”

DSA Article 37(7) states that "delegated acts [on audit] shall take into account any voluntary auditing standards referred to in Article 44(1), point (e)," and Article 44(1)(e) sets out the Commission's commitment to support and promote the development of voluntary standards, including regarding "auditing of very large online platforms and of very large online search engines pursuant to Article 37." Given these references to audit standards in the DSA, it is somewhat surprising that the draft delegated regulation makes no mention of either existing auditing standards or to any intent on the Commission's part to support their development.

While GNI does not take a position on the value of any existing or potential standardization processes, we note that the establishment of detailed audit processes without accompanying standards to establish clear benchmarks against which auditors can measure the actions of covered providers is unusual. Instead, the draft delegated regulation appears to leave the establishment of benchmarks to the covered providers and auditors, while elaborating detailed provisions on how auditors should analyze, consider, and provide transparency around the audit processes (risk analyses, methodological choices, etc.).

Given the unprecedented nature of this exercise and the diversity of covered providers, there is value in allowing latitude of choice and experimentation in audit criteria and methodology. However, the Commission and others invested in this process must recognize that this approach is likely to result in auditors making determinations regarding what they consider to be "reasonable," "proportionate," or "effective" actions by covered providers, and that these subjective determinations may result in a lack of comparability across covered providers. In order to ensure that auditors develop familiarity with the underlying technologies, good practices, or risks that underpin the obligations in Chapter III as quickly as possible, **the Commission should encourage and support opportunities for auditors to engage with and learn from the broad multistakeholder community of experts that have been working to develop methodologies for identifying risks associated with digital platforms.** In this regard, we note that Section F.1 of the audit report template annexed to the draft delegated regulation requires auditors to list "third parties" they have consulted in the course of the audit. **GNI recommends that the text of the draft delegated regulation should include guidance on which types of third parties auditors are encouraged to consult and how.**

There is a corresponding risk that covered providers and auditors will be incentivized to choose relatively simplistic methodologies and benchmarks in order to facilitate what will be a very onerous and complicated audit exercise and mitigate their own exposure to liability. This is especially likely considering the short amount of time and the high degree of assurance ("reasonable assurance") required. This may be the case notwithstanding the significant work that covered providers have done and are doing to identify and mitigate risk, including through processes like GNI assessment. In order to incentivize more sophisticated methodologies and higher benchmarks, **GNI encourages the Commission to consider a lower degree of assurance, at least for the initial cycle of audits.**

GNI supports aspects of the draft delegated regulation that will facilitate transparency and clarity around decisions taken regarding audit methodology and benchmarks, as this will be very useful to those, including the Commission, seeking to understand and interpret the resulting audit reports. However, we note that without more transparency about how those methods work in practice, what information was reviewed, and how audit determinations were substantiated, the Commission and the public may end up learning relatively little from the audit reports about *how* covered providers are or are not complying with Chapter III obligations. **GNI encourages the Commission to explicitly identify the importance of audit reports as a transparency mechanism and further clarify the ways in which the audit process can and should build on and contribute to the types of expert consultations addressed in Recital 90 and the research facilitated through Article 40 of the DSA.**

## **II. Auditor selection**

GNI appreciates that the draft delegated regulation acknowledges the importance of expertise and experience on the part of auditors and allows for flexibility on the part of covered providers and auditors to involve different kinds of experts in the audit exercise. While nobody has conducted systemic risk assessments or audits at the breadth and scope that are now required under the DSA, there are many experts that have complementary skills and experiences related to the various areas covered under Chapter III, including the development and application of terms of service, transparency reporting, content moderation, complaints mechanisms, advertising, recommender systems, protections of minors, combatting online gender based violence, and risk assessment. In order to support and grow this pool of expertise, **GNI calls on the Commission to encourage and support credible, multistakeholder processes that can provide training of auditors, as well as the types of certifications and declarations referenced in the draft delegated regulation.**

GNI appreciates the importance of the independence and conflict of interest criteria set out in Article 37(3) of the DSA and reinforced in the draft delegated act. Auditor independence is critical to the credibility of the audit exercise and resulting reports. However, we are concerned that strict application of these criteria could result in a situation that effectively limits the ability of recognized experts who have been previously employed by or worked with covered providers to participate in audits. This concern may be particularly acute and limiting with respect to aspects of Chapter III that require deep technical expertise and where a relatively small pool of experts exists to serve the burgeoning demand that the DSA and other regulations is fueling for such expertise, both within covered platforms and in the audit community. **GNI therefore recommends that the draft delegated regulation should afford flexibility regarding the criteria set out in Article 37(3) or create a mechanism whereby auditors can request exemptions from the Commission in order to sub-contract certain experts that might otherwise be disqualified.**

### III. Audit determinations

The draft delegated regulation allows auditors three possible conclusions for any given obligation: positive, positive with comments, or negative. While negative conclusions are appropriate “where the auditing organisation concludes with a reasonable level of assurance that the audited provider has not complied with an audited obligation or commitment,” there is no distinction between not complying, which could be the case for a variety of reasons, and situations where an auditor determines that there is a material misstatement or misrepresentation on the part of the covered provider. In order to allow for differentiation among these scenarios, **the Commission should consider including and defining a fourth type of conclusion that clearly applies to findings of material misstatements or misrepresentations** (what in other audit contexts is sometimes called “an adverse opinion”).

In addition, the draft delegated regulation stipulates that the summary audit opinion of an auditor should be “negative” if it has issued a negative audit conclusion for any single audited obligation. Given the extent to which DSA audit opinions are likely to inform media coverage, investor decisions, and public impressions of covered providers, it may be **worth considering ways in which the top-line audit conclusion can distinguish between audits that contain a small number of negative opinions, and others where a substantial number of conclusions are negative.**

### IV. Conclusion

GNI reiterates its appreciation for the opportunity to provide feedback on the draft delegated act. The recommendations highlighted above are intended to improve the overall implementation of audits conducted under the DSA by allowing for inputs from credible stakeholders, ensuring that necessary expertise is available for audits, and providing the flexibility necessary to accommodate the range of different covered providers and the unprecedented nature of the DSA. GNI remains committed to continuing to engage with the Commission and other stakeholders on these and other aspects of DSA implementation going forward.

#### *About the Global Network Initiative*

*GNI is a multistakeholder initiative that brings together 90 leading academics, information and communication technology (ICT) companies, civil society organizations, and investors, collaborating around a shared framework for the protection of freedom of expression and privacy in the ICT sector. GNI’s analysis is informed by global experiences and perspectives implementing and advocating for rights-respecting approaches in the ICT ecosystem.*