Ensuring Legitimacy in Stakeholder Engagement: The ‘5 Es’ framework

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Stakeholder engagement is a vital component of many governmental and regulatory processes, which are designed to produce positive outcomes for people. Commitment to stakeholder engagement should not just be a technical consultation, but an act which reflects deep democratic values. It is important that the design of stakeholder engagement – who is involved, and how they are involved – reflects such values, to ensure the legitimacy of the outcomes which affect people’s lives. Stakeholder engagement which focuses on expediency or convenience, or which merely ‘ticks boxes’ without engaging with the fundamental purpose of the exercise, risks impacting people in ways not supported by values extolled in democratic societies.

We have developed the “5 E’s Framework” for anyone designing and evaluating stakeholder engagement processes, to help ensure the legitimacy of these processes. We have developed this in the context of the EU’s Digital Services Act, an important new regulation for minimising the risks posed by digital technologies to civic discourse, fundamental rights, and health. There are ongoing discussions around who should be engaged, and how, in implementation and enforcement of the DSA. Our Framework, and this accompanying paper, grounds these design decisions in why-questions, by providing 5 principles drawn from philosophical concepts of how to ensure legitimacy in democratic societies.

#1. Introduction: Stakeholder Engagement in the Digital Services Act

The Digital Services Act (DSA) is a new EU regulation, designed to address systemic risks and lack of transparency related to online platforms. At time of writing – January 2024 – it is in the process of being rolled out. The Very Large Online Platforms and Very Large Online Search Engines (VLOPs and VLOSEs) have been designated, have conducted risk assessments, and handed these to the European Commission; national Digital Services Coordinators are being set up to enforce the DSA; various delegated acts and codes of conduct are being developed to clarify some of the provisions. This is an important moment, in which enforcement is beginning – allowing opportunities to test effectiveness – but there is still room for decision-making which will shape the future of the regulation.
The DSA foresees that engagement with *external stakeholders* – such as independent experts, civil society groups, and industry representatives – will play various roles across its rollout and enforcement. These roles include providing expertise in auditing, to helping develop delegated acts and Codes of Conduct. The precise forms this will take is currently unclear, and there have been various discussions around practicalities of how external input will be sought and included. We provide (in Annex A) a summary of how the text of the DSA, and other associated texts, envisage stakeholder engagement, and further useful discussion can be found in Vergnolle (2023).

The aim of this paper is to address a more fundamental question which cuts across these forms of stakeholder engagement – that is, how to ensure the *legitimacy* of stakeholder engagement. Our premise is that the commitment to stakeholder engagement should not be seen as just a technical consultation, but rather an act which reflects deep democratic values. The DSA scope is broad and intended to protect people, human rights, and democracy. This in practice involves decision making – from Digital Services Coordinators, the European Commission, and courts and arbitration bodies – which may not always be clear-cut. For example, how to determine if a platform has not done enough to “diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service”? And how to ensure a range of views are engaged with, while avoiding overly complicated or burdensome forms of engagement? The outcomes of such decisions impact upon citizens, rights, and democratic processes. Therefore, how can we ensure the legitimacy of such decisionmaking?

To guide those developing or evaluating stakeholder engagement in considering these questions of legitimacy, we have developed “The Five Es” framework encompassing five guiding principles: Equity, Expertise, Effectiveness, Empowering, and Expanding Competencies. These principles are designed to evaluate who is involved in stakeholder engagement and how it is conducted, rather than outcomes. The framework is designed to assist anyone with responsibility for designing and implementing processes for stakeholder engagement, to ensure the legitimacy of outcomes which can affect people's lives and rights. It can also provide specific principles and language for external parties to refer to when providing input, opinions, and critiques of stakeholder engagement.

The Five Es Framework is presented in a separate document for those designing or evaluating stakeholder engagement. The paper below serves to explain, justify, and elaborate on the philosophical ideas and principles which make up the Framework. We introduce the concept of legitimacy in section 2; read this section if you wish to understand the rationale and methodology from which we developed the Framework. Read section 3 if you wish to engage with individual principles in more detail.
#2. Legitimacy

Legitimacy in Democratic Societies

Legitimacy partly derives from following substantive norms and rules; for instance, owning property through legitimate means rather than through theft. However, it isn't just about the adherence to a set of predefined rules. Instead, it's also about creating systems and processes that are more likely to be reasonably viewed as just, fair, and representative enough by the affected parties. Historically, legitimacy has often been tied to the permission to exercise political power, as suggested by Buchanan (2002). Buchanan's nuanced view reflects the view that entities wielding political power can be legitimate even if not everyone agrees with the outcomes of decisions.¹

On a surface level, this might seem to complicate the legitimacy of stakeholder engagement. Political representatives, being accountable to the electorate, carry a legitimacy that unelected bodies or individuals do not have. Thus, a concern could arise when non-elected entities, such as civil society organizations or research bodies, have a say in decisions that affect citizens and democracy. However, it is a conceptual mistake to assume that legitimation must derive from specific sources. Instead, what confers legitimacy is context-dependent (Adams 2020; Adams, Scherz, and Schmelzle 2020).

In the case of democratic legitimacy, reasonable individuals accept laws that are not, in their perspective, ideally just, efficient, or representative. They do so because they trust the procedure of democracy to be more likely to deliver outcomes that are just or efficient, or representative, compared to feasible alternatives, and/or because these procedures express equal respect of all citizens in the public realm.² By the "procedure of democracy" here we do not mean a simple democratic rule, e.g., majority decision. We mean the procedure of democratic legitimation occurring in a country that includes a full spectrum of constitutional measures and is based on the rule of law – a constitution which imposes substantive limits on what is acceptable, where courts have a say about unacceptable laws, where states are also bound by international law vis-a-vis other states, etc. – acting as counterweight to the majority principle (Dworkin 1977).

This idea – that legitimacy can be conferred through the virtues of procedures that produce outcomes – can be applied to the specific question of stakeholder engagement. We describe this below as a proceduralist approach to legitimacy.

¹ This viewpoint finds resonance in Estlund's (2007) work as well.
² Or more minimally, they may believe that the procedure, while imperfect in any way, possesses some other important feature that they have good reasons to value above other considerations (e.g., inefficiency, occasional injustice), for example, the proposition that democratic procedures provide an essential guarantee against the worst injustices and inefficiencies that would be produced if a non-democratic regime were to be adopted, at least in the long run. According to Rawls's overlapping consensus idea, it is not necessary that all individuals value institutions for the same foundational reasons. For legitimacy, it is enough that the different reasons citizens have, converge in supporting the same set of institutions (Rawls 1996).
A proceduralist approach hinges on designing a process that inherently reflects certain values, shaping both the conduct of discussions and the outcomes they produce. This is widespread in recent literature, as seen in the works of scholars like Monaghan (2022) and Holm (2023), and offers a flexible and pragmatic understanding of legitimacy. We argue that legitimacy can be grounded in a claim that a procedure involving stakeholders has theoretical and practical virtues that a risk-assessment procedure without stakeholder engagement would otherwise lack. Assuming that certain goals – scientific validity, justice, trust, and social cohesion over time – are important in a democracy, a procedure for involving stakeholders can achieve legitimacy by showing that the procedure has been aptly designed to be more likely to achieve these goals.

It is important to understand that a proceduralist approach to legitimacy does not mean ignoring substantive norms, values, and rules. For example, if a platform's risk assessment did not address the legal requirements of Article 34 of the DSA, or if it somehow contributed to criminal activity or clear violations of human rights, then no procedure could confer legitimacy on the outcome. However it is likely that many outcomes will not be so clearly agreed upon. We can then consider if the procedure is legitimized by the norms and values it realizes and symbolizes, that is to say, by its ability to implement them or express them. A legitimate procedure helps to confer (but by itself does not guarantee) legitimacy to the outcomes produced through it, even if the outcomes are disputed from the point of view of substantive norms and values. However, while not sufficient, procedural legitimation is necessary to achieve overall legitimacy.

This procedural approach also engages with a different challenge of multi-stakeholderism. The scope of the DSA encompasses vast areas like democracy, human rights, and civic discourse. Given this expanse, genuine multi-stakeholder involvement would mean gathering numerous, and possibly conflicting, voices, leading to potential stalemate or lack of clear input for decisions. But if, to manage this, only selected groups participate, then doesn't this inherently limit the representation and consequently the legitimacy of the decisions made? However, the legitimacy of a decision does not solely depend on the range, quantity, and type of participants but also on the nature of representation, the inclusiveness of perspectives, and the fairness of the process – features we address in more detail in our framework.

By designing the engagement process to achieve those goals, any limitations imposed on participation would not be arbitrary exclusions; they would be intentional designs which meet the overarching objectives. When structured participation advances the broader goals of ensuring scientific validity, upholding fairness, fostering trust, and promoting social cohesion, it reinforces the legitimacy of the process. This thoughtful approach ensures that decisions aren't just made, but they're made with the kind of legitimacy that is required by that type of institution (and which may differ from the legitimacy of a different institution, e.g., the Parliament).
Application to DSA systemic risk assessments

To bridge this philosophical background and our proposed framework, we specify the role of this proceduralist approach to legitimacy of stakeholder engagement in the context of risk assessments. We believe the broad method and framework we propose in this paper is applicable to stakeholder engagement across the DSA, and maybe even in other regulations which use external stakeholders and expertise. However we focus on DSA risk assessments in our examples to provide a practical narrowing of scope, in particular drawing on the specific concept of ‘systemic risks’ outlined in Article 34. These systemic risks play important roles in the DSA, in a few ways.

**DSA Article 34(1)**

Providers of very large online platforms and of very large online search engines shall diligently 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 of their services.

They shall carry out the risk assessments by the date of application referred to in Article 33(6), second subparagraph, and at least once every year thereafter, and in any event prior to deploying functionalities that are likely to have a critical impact on the risks identified pursuant to this Article. This risk assessment shall be specific to their services and proportionate to the systemic risks, taking into consideration their severity and probability, and shall include the following systemic risks:

(a) the dissemination of illegal content through their services;

(b) any actual or foreseeable negative effects for the exercise of fundamental rights, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including the freedom and pluralism of the media, enshrined in Article 11 of the Charter, to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child enshrined in Article 24 of the Charter and to a high-level of consumer protection enshrined in Article 38 of the Charter;

(c) any actual or foreseeable negative effects on civic discourse and electoral processes, and public security;

(d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person’s physical and mental well-being.

Firstly, there are formal risk assessments which VLOPs and VLOSEs must conduct under Article 34. The first of these have already been handed to the European Commission;
though, sadly, they are not visible to outside actors, and there is little evidence of stakeholder engagement being conducted as part of these first assessments. Risk assessments will then be a key point of independent audits (Article 37), which are yet to be conducted and may provide more opportunities for auditors to consult external stakeholders. From 2024 platforms are required to annually publish the audit reports and “a report setting out the results of the risk assessment” (DSA Article 42). We also note Article 13(a) §v of the Delegated Act on how audits should be conducted includes an explicit reference to auditing “whether and how the audited provider tested assumptions on risks with groups most impacted by the specific risks”, which may suggest that future risk assessments should make greater use of stakeholder engagement, with at least these aforementioned groups.

In addition to these formal risk assessments, a broader idea of assessing and mitigating systemic risks runs throughout provisions which are applicable to a broader range of actors. The European Board for Digital Services, comprised of the national Digital Services Coordinators, will publish annual reports on “identification and assessment of the most prominent and recurrent systemic risks” and “best practices for providers of very large online platforms and of very large online search engines to mitigate the systemic risks identified” (Article 35(2)). These reports will draw, amongst other sources, on research made possible by new data access provisions (Article 40) which allow external researchers to access data which is relevant for understanding and mitigating systemic risks.

Finally, there is a role for external actors to help conceptual work of defining systemic risks and best-practices responses to them. Despite the list of risks in the Article 34(1), and the fact that risk assessments have already been conducted, there is still considerable uncertainty over what counts as a ‘systemic risk’. Various organisations, AlgorithmWatch included, are therefore developing methods and frameworks to assist platforms, auditors, and the Commission in the work of conducting and evaluating risk assessments.

As mentioned in our introduction, we have summarised text related to stakeholder engagement opportunities in enforcement of the DSA in Annex A.

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2. Although again, there is still some uncertainty over exactly how this will work in practice – see https://algorithmwatch.org/en/dsa-empower-public-interest-research-data-access/ and https://www.weizenbaum-institut.de/media/Publikationen/Weizenbaum_Policy_Paper/WPP8_Klinger_Ohme_EN.pdf
4. AlgorithmWatch: Making Sense of the Digital Services Act: How to define platforms systemic risks to democracy
5. Panoptikon Foundation/ Irish Council for Civil Liberties, Fixing Recommender Systems: From identification of risk factors to meaningful transparency and mitigation – People vs. Big Tech
6. Access Now and ECNL, Towards meaningful fundamental rights impact assessments under the DSA
7. Stiftung Neue Verantwortung (SNV), Auditing Recommender Systems
The question which underpins the rest of this paper, and the accompanying framework, is: **when stakeholder engagement is used to define, assess, or evaluate responses to systemic risks under the DSA, how to apply a proceduralist perspective to ensure legitimacy?**

In traditional understandings, risk assessment focuses on outcomes—on quantifiable metrics of success and failure. However, a proceduralist perspective would argue that the legitimacy of these assessments is about the journey as well as the destination. There are two main ways we propose a proceduralist framework, of the sort we outline in section 3, can be used in practice. The first is as a guide when developing procedures, to ensure and justify the legitimacy of outcomes produced by these procedures. The second is to focus challenges to contest the legitimacy of a procedure which has already taken place, even when it ostensibly checked all the boxes on formal grounds (e.g. adhering to letter of the requirements of the DSA). When stakeholders – be they individuals, groups, or entities – wish to challenge the legitimacy of a procedure, they can, and should, appeal to these core principles. They offer a structured way to articulate contestations.

To conclude before moving onto our 5 E's framework: It is of course worth noting, when both designing and critiquing procedures, that merely having a procedure in place isn't adequate for legitimizing outcomes. A mere counterfactual procedure – the idea that a result *could have been produced* by a valid procedure – is not sufficient for legitimation. We should also add that there will be multiple and varied ways in which the principles can be met in practice, depending on context, and we do not go into specific details here (e.g. exactly how stakeholders can be found, discussions held, participants compensated, etc.). We can recommend other useful pieces on the topics. However our framework is nonetheless intended to support these decisions, by providing a structured way to evaluate whether engagements, resources, and attention are directed towards ultimately legitimate ends.

#3. Introducing the Five E’s Framework

We present the Framework as a tool for anyone with responsibility for designing and implementing processes for stakeholder engagement with outcomes which affect people’s lives and rights. Ensuring the stakeholder engagement meets all these five

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(Stiftung Neue Verantwortung, 2023). *New EU Rules for Digital Services: Why Germany Needs Strong Platform Oversight Structures*
principles will strengthen the legitimacy of the process by which important decisions are made. This Framework can also provide specific principles and language for external parties to refer to when providing input, opinions, and critiques of stakeholder engagement which has already occurred. The practical ways in which these principles can be met will vary from case to case (though we provide some guiding examples). In some cases, the principles can be met using familiar practices of good stakeholder engagement. In other scenarios, the principles may prompt or require novel approaches.

The full Framework is included separately. In the rest of this paper we outline and elaborate on the background of the Framework and each of the principles. We do so both to explain where these principles arise from, and also to provide further information which may help users to fully engage with these principles as they design or evaluate stakeholder engagement.

In order to identify these principles, we employed a top-down method based on distinguishing different kinds of reasons for engaging stakeholders. When we say that these reasons are different, we mean to say that they reflect a different type of moral concern. So, the principle of equity is derived from the idea that each individual human being has moral claims against claims against people with specific responsibilities (e.g., platform managers and platform regulators), deriving from the very needs or exposure to harm or wrongs of that individual. The principle of expertise is derived from epistemic values, the idea that knowledge about facts (and the capacity to generate such knowledge) gives people a claim to be considered within a procedure that aims to be factually informed. The principle of effectiveness includes means-end considerations (does the process favour achieving the goal set for it); the principle of empowering is motivated by respect for persons and the different cultural traditions they embody and the principle of expand competencies is justified by a forward-looking (i.e. consequentialist) consideration of the societal benefits of engaging stakeholders that may otherwise be side-lined in the process. As indicated under each principle below, each of these different reasons can be traced back to different philosophical theories.

This top-down philosophical methodology, based on distinguishing complementary grounds for the principles, is opposed to a bottom-up one which would synthesise existing procedures. One result is that some principles, while differing relative to their rationale, may seem to overlap in their practical implications. For instance, a particular at-risk group may have specific knowledge, and their inclusion would help meet the expertise principle. Their inclusion may also help engender trust that the process has accounted for the risks they face, helping meet the principle of equity. Nonetheless, when using the Framework, it is important to ensure that each principle and the reasoning behind it is fully engaged with. For instance, designing a process which simply includes the above group in discussions, but does not consider whether their input will engender trust – e.g. if final decisions are made in ways which disregard their input – would not meet both principles. By grounding each principle in a philosophical rationale, we aim to help users of the Framework to understand the value of all the principles in ensuring the legitimacy of stakeholder engagement.
Who is engaged?

1. **Equity**: Are valid moral and legal claims appropriately represented?
2. **Expertise**: Is the influence of stakeholders in the process aligned with their proven expertise and competence relevant to the primary objectives?

How is engagement conducted?

3. **Effective**: Does the process achieve its intended outcomes?
4. **Empowering**: Is there due consideration of “low-power”\(^9\) stakeholders and parties affected by the outcome?
5. **Expand Competencies**: Does the risk evaluation process provide opportunities for individuals and groups to display their skills, gain recognition, enhance their status, and develop their capacities?

Who is engaged?

1. **Equity**: Are valid moral and legal claims appropriately represented?

The word ‘equity’ has a double meaning, both of which are relevant here. Equity can be a measure of the stake someone has in some expected future outcome, represented (for example) by shares in a company or potential winnings of a pot in poker. In discussions of justice and fairness, equity means distributing resources to favour those most in need (contrasted with equality, where everyone gets the same). Our principle of equity is designed to capture the fact that people have a stake in the outcome of a risk assessments, and that some groups may have greater needs than others or be more intensely affected. This concern is also reflected in Article 13(a) §v of the Delegated Act on auditing under the DSA, which includes an explicit reference to “whether and how the audited provider tested assumptions on risks with groups most impacted by the specific risks”\(^10\).

Of the five principles, equity is the most complicated to fully outline – but doing so also helps establish useful grounding for the other principles. It involves balancing (i) the importance of hearing a diverse range of voices speaking to potential impacts and harms, with (ii) the need to be selective and consider which issues should have direct spokespeople versus engaging with (for example) existing research. However failing to account for equity can fundamentally undermine a fundamental purpose of risk assessments, viz. to understand and minimise harms including to particularly at-risk groups; and also to demonstrate and build trust that the process has actually contributed towards this end.

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\(^9\) Low-power here is a reference to the stakeholder category with the features identified by (Mitchell, Agle, and Wood 1997).

We therefore lay out a three-step process below designed to draw out these key issues.

1. Establishing valid claims to address, and their relevant groups.
2. Of the valid claims, weighing their urgency.
3. Establishing how claims should be represented and by whom.

**Step 1: Establishing Validity**

Our thinking here draws on the Mitchell/Agle/Wood framework delineation of "legitimate stakeholders" (Mitchell, Agle, and Wood 1997). Within the purview of business ethics, legitimate stakeholders are those with moral and legal claims pertinent to the business operations. These claims are labelled as *valid* to indicate that the claims are not merely occurring in public discourse, but they provide decision makers with good reasons for structuring the process in a specific way. Intuitively, consideration of all the valid moral and legal claims in question enhances the legitimation of the process.¹¹ Valid *moral* claims are claims providing the deliberators with objectively *good* reasons to, for example, modify an algorithm. Valid *legal* claims are claims that, hypothetically, would have a good chance to stand in a court case.

In the context of a risk assessment, it is helpful to recall that the DSA's framework has pinpointed specific harms warranting attention, hence necessitating consideration of those disproportionately impacted by (a) the dissemination of illicit content, (b) threats to fundamental rights, (c) electoral processes, and (d) potential victims of gender-based violence, minors, and individuals with specific vulnerabilities tied to public health and mental well-being. In addition, the delegated act on how audits should be conducted under the DSA includes an explicit reference to “whether and how the audited provider tested assumptions on risks with groups most impacted by the specific risks” (Art. 13(a)(v)).¹² Within the framework of the DSA, a good heuristic to identify groups with valid moral claims is to treat all groups impacted by such harms as bearers of at least *potentially* morally valid claims that their interests should be considered.

**Step 2: Urgency**

It is, of course, challenging to ensure *all* affected stakeholders are included, and it's important to note that mere powerlessness doesn't automatically justify inclusion. This makes the criterion of urgency crucial to prioritize which stakeholders to involve. This is the criterion that among moral or legal claims individuals have (a claim which emerges from any degree of exposure to harm caused by the platform, for example), one ought to

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¹¹ One may assume a realist (Dancy 2000) or quasi-realist (Blackburn 1993) metaethics of validity, where certain reasons just are good reasons *objectively* independently of the desires and beliefs of the stakeholders engaged in deliberation. So, a valid moral claim is one that provides (objectively) good reasons in favor of an action or decision. The task for the parties designing the procedure is then to understand which stakeholder groups are most likely to have such claims. Alternatively, validity may be understood as the end of inquiry that is never reached in actuality but provides a regulative goal that designers of procedures should strive to approximate.

prioritize the claims that are more urgent. There is no algorithm to rank moral claims in terms of their urgency, but there are a few key considerations:

1. The overall prospects of the individuals – other things equal individuals with the worst prospects have more urgent claims, considered through absolute levels of well-being for the parties involved (Parfit 2003).
2. Whether the impact, in and of itself, constitutes an exceptionally significant moral or legal transgression – e.g., activity which is hateful or disrespectful towards particular individuals, even though they are not (and will not become as a result) the worst off in society.
3. Irreversibility – the fact that a harm or a wrong cannot be undone at a later time.
4. Non-redressability, the fact that there is no adequate compensation (monetary or otherwise) for the harm or wrong received.

This is not meant as an exhaustive list – what makes a claim urgent is often only visible by attending to the peculiarities of the context (Dancy 2000). Clearly, legal principles such as human rights are relevant to defining urgency: human rights violation tend to be an especially serious category of wrongs where the human dignity, and not just the interests, of the sufferer is at stake (Griffin 2008; Beitz 2009). Human rights are, therefore, exceptionally significant in judging the second cluster of urgency needs, above.

The main practical consideration under our proceduralist framework is that considerations of validity and urgency from the group designing and running the engagement are made clear, as is their role in deciding how claims are represented and by whom – the final step of this process.

Step 3: How claims are represented and by whom

The equity principle is fulfilled by ascertaining that the issues relevant to certain stakeholder group are considered and weighted appropriately in the process. This involves considering both individuals and the overall group involved the engagement.

The first key question is whether issues are represented by individuals present in the group, and if so who those individuals are. In the case of the DSA risk assessment, subject matter experts could make the case for considering a certain type of harm to a given demographic as a valid reason to treat a given platform feature as a risk. Subject matter experts – whether researchers, specialist representatives from advocacy groups, or other sorts of expert – may be able to discern the issues that are most relevant for specific stakeholder groups and build fair outcomes. However, in some cases, the result would still be lacking legitimacy. Legitimacy, in our account, requires the ability to sustain trust in the institution that delivers such results. This potential trust gap arises because the less powerful stakeholders have an inherent right to doubt that their concerns and needs are genuinely and adequately addressed when they are not directly involved in the process.
As such, for the most urgent claims, it is worth considering whether member(s) of affected communities should be directly engaged with it; and, to avoid an overwhelming number of participants, whether least urgent claims could be represented in the process via secondary research.

As an example, imagine a platform conducting a risk assessment for a change to recommender systems which would downrank established news sources in favour of a wider range of voices. Ideally, to explore all risks, one would engage representatives of publishers and journalists to speak to potential impacts on their business models (which has relevance to media pluralism, and also to access to reliable information), as well as groups who can speak to risks of potential increases in prevalence of extreme disinformation and hate speech. All these perspectives are valuable and should be accounted for. However, should including all these groups in direct engagement be challenging, we would argue the urgency of claims of groups vulnerable to threats to their dignity and safety should be considered, and arguably prioritised for more direct engagement. By contrast, if the algorithm was changed such that established media outlets were prioritised over other voices, the attendant risks to media pluralism and freedom of speech might create more urgency for groups representing, for example, smaller outlets and independent journalists to be directly engaged.

In addition to these individual considerations, the group taken together must represent different perspectives – moral or ideological framing assumptions – as well as representing different issues. This helps explore and reveal perspectives, or moral or ideological framing assumptions, that are embedded or taken for granted in the first and second step. For instance, the example above was written by an author with research and regulatory expertise around online platforms, but not direct professional expertise as a journalist and with little experience of online abuse. Others with different perspectives may have different views, and should be given opportunity to challenge the framing of the above example; potentially even changing the composition of the stakeholder group. This can also help to build trust in a wider array of audiences and further build legitimacy, as outlined above.

Again, there is no algorithm on how to come to a substantively ‘correct’ answer of who and how should be involved in the engagement, and there may be disagreements on decisions made; but within a proceduralist framework, decisions should be made and clearly justified on the basis of the considerations we have laid out here to confer legitimacy to the process.

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13 This right is fundamentally epistemic as it serves the purpose of ensuring that stakeholders, particularly those in less empowered societal positions, can confidently understand that their claims have been adequately considered. Participation becomes a necessary tool to affirm this knowledge, especially for groups who, due to their societal standing, may reasonably doubt whether their perspectives are factored in without their direct involvement. This emphasis on the epistemic aspect distinguishes this rationale for inclusion from another, where participation is viewed merely as a means to ensure the thoroughness of the risk assessment process. The epistemic right alone does not ground an ultimate right to participation. Rather, it is the urgency of the moral claim combined with the epistemic right to mistrust the procedure that confers this right. For epistemic rights, in general, see (Watson 2021).
In summary, to ensure equity, stakeholders must be actively selected in order to represent as comprehensive an array of exposures to prospective harms and wrongs, and absent that at least a sample of the most urgent. When assessing claims and their urgency, a rich tapestry of moral values, ethical perspectives, and normative priorities should be considered. Moreover, it must be done in such a way that recognises dominant norms, and inbalances of power and resources which can affect abilities to influence the process. Considering who has expertise, and how to address inbalances of power and resources, are subjects of other principles which we will discuss further down.

**Example(s) of how to ensure equity:**

Use prior research to establish at-risk groups, and consider whether they are directly represented in stakeholder engagement, and justify their exclusion if not. Assess also the full range of direct experiences and perspectives of the assembled group, not merely their subject areas and specialisms.

Consider and, if necessary, justify the exclusion of direct representation and consider suitable alternatives to represent less urgent risks.

Assess the full range of direct experiences and perspectives of the planned group, not merely their subject areas and specialisms.

Assess the overall capacities of experts and representatives to take into due consideration the range of reasonable but different political and moral views characterizing pluralist societies.

**Example(s) of how to challenge equity:**

Each of the risks listed in DSA Article 34 are given equal weight, as a “tick-box exercise”, even though some were clearly more pressing in the particular context. Perspectives of an urgently at-risk group were accounted for merely through a secondary literature review.

Even though stakeholders provided specialist input on a range of risks, they all brought academic / pure research perspectives on these risks.

*Further examples are given in the Framework Document*
2. Expertise: Is the influence of stakeholders in the process aligned with their proven expertise and competence relevant to the primary objectives?

By contrast with equity, this a relatively self-evident and straightforward principle. Stakeholders' input and influence in the process should be aligned to their knowledge, expertise, and demonstrable competence relevant to the main outcome of the process. The justification for this principle is twofold:

1. By harnessing the specialized knowledge and competence of relevant stakeholders, the process is better equipped to make informed decisions that address complex challenges.
2. It ensures that stakeholders are recognized and valued not just for their moral or legal claims, but also for their competence and expertise, fostering a sense of respect and trust among members involved.

The second justification highlights that this principle is not just an instrumental one – i.e. finding experts who can effectively analyse relevant information – but also based in engendering mutual respect and trust amongst the members involved.

The participation of stakeholders with demonstrable expertise in the subject matter must not be purely tokenistic, but should be conducted with the expectation that the whole group will be able to increase effectiveness. This is linked to the principle of empowerment, discussed later – the process should be designed such that participants are all empowered to affect outcomes, even if they come into the group with differing levels of power. This should be accounted for when initially selecting experts; it would be harder to create a legitimately empowering process if one domain was entirely represented by small organisations with limited resources to participate.

Designers should also account for the fact that stakeholder engagement is itself a competence; a stakeholder may have highly relevant domain-specific expertise or experiences, but be ineffective (or indeed counterproductive) within stakeholder engagement. This is not to militate against bringing groups with less experience of stakeholder engagement into the process, particularly if they have particularly relevant or niche expertise. However, as above, the balance of how different domains and views are represented within the group as a whole should be considered.
Example(s) of how to ensure expertise:

Experts should be chosen for their demonstrable relevance to the problem and their potential contribution to the overall stakeholder group.

Inequalities of power and resources between different experts should be considered, to ensure that unequal levels of power and resources can be realistically levelled out during engagement (see empowerment).

Take time to seek out those with nuanced understandings of the possible risks at hand, particularly from lesser-known or niche areas, to provide a complete picture.

Example(s) of how to challenge expertise:

Potential participants with highly relevant expertise were not considered, in favour of a more familiar group with less relevant expertise.

Participants providing one form of expertise were selected from institutions with extensive experience of stakeholder engagement, while participants providing a different form of expertise were selected only from relatively untested organisations with little experience of providing policy-relevant input.

Further examples are given in the Framework Document

How is engagement conducted?

3. Effectiveness: Does the process achieve its intended outcomes?

The general formulation asks whether the process achieves its intended outcomes. In the case of DSA risk assessments, the intended outcome is sound and robust risk evaluation. The risk assessment procedure should be a robust means to this specific end: accurately evaluating risks posed by large platforms, paying particular attention to the systemic features highlighted by the DSA text. Although we are evaluating procedures, not outcomes, nonetheless a procedure which is unlikely to deliver this outcome cannot be considered legitimate even if it were to be equitable, expert-based, etc. In order to ensure effectiveness, procedures should ensure that stakeholders are equipped with relevant and accurate data, make use of appropriate and up-to-date methods, and incorporate opportunities to provide scrutiny.

We noted earlier (under the heading ‘application to DSA systemic risk assessments’) that there are uncertainties over the substantive criteria of risk assessments (what exactly counts as a systemic risk, a reasonable mitigation etc.), as well as how much information
will be available to external parties. We would note here that building in appropriate transparency can support effectiveness, by providing more opportunities to critique how analysis and decision-making was made in support of the intended outcome. Lack of transparency – for example, through limited reporting on methodology and/or overly strong confidentiality requirements on external parties involved in risk assessments - would conversely hinder these opportunities to support effectiveness.

Example(s) of how to ensure effectiveness:

Methods for collecting and analyzing data should be demonstrably appropriate and up-to-date.

The process should ensure rigour by building in opportunities for independent check and challenge from stakeholders of different backgrounds.

Any gaps in data or tools, access to which could have improved the outcome, should be clearly highlighted.

Example(s) of how to challenge effectiveness:

Although data was analysed by relevant experts, the data made available for and used in the analysis was not the most relevant or sufficient data for the question at hand.

Results of existing research findings were selectively cited to ignore findings which might undermine the risk assessment.

Opportunities for independent challenge were limited.

Further examples are given in the Framework Document

4. Empowering: Is there due consideration of “low-power” stakeholders and parties affected by the outcome?

Empowering means actively being sensitive to the inputs (opinions and preferences) of the least powerful stakeholders with the most urgent moral and legal claims related to the main outcome of the process. This principle is linked to many of the concerns outlined in Equity, but addresses the how rather than the who.

The Mitchell/Agle/Wood framework (Mitchell, Agle, and Wood 1997) introduces the idea of impacted parties characterized by low power but high urgency. The principles of Equity
and Expertise should encourage selection of stakeholders who are able to represent these impacted parties. Empowerment is rooted in these stakeholders' ability to ensure their voices are actually heard and needs addressed. Empowerment, therefore, is not simply achieved by reserving a seat at the table for specific stakeholders (or engaging them through other means, if suggested by the principle of Equity). It requires ensuring that the procedure is designed in a way that ensures sensitivity to their input.

Here those designing processes can learn from numerous studies and frameworks in how to run effective dialogic processes. They can also learn from previous practical experiences, for example, from the Covid pandemic, where multidisciplinary expert groups were sometimes assembled – only for non-epidemiologists to feel they were being sidelined. While ensuring that engagement processes have structure – timelines, key questions, agendas, etc. – it is important to allow for flexibility if these turn out to restrict the voices of stakeholders in a way which disempowers them from effectively shaping outcomes.

This has a particular consideration regarding risk assessment. Every known methodology in risk assessment, even the most systematic, mirrors a particular set of moral values and normative priorities; at a minimum, where to set thresholds of ‘acceptable’ or ‘actionable’ risk (Aven and Thekdi 2021; Ebert, Smith, and Durbach 2020; Hayenhjelm and Wolff 2012; Roeser et al. 2012). An overly constrained lens here can inadvertently sideline alternative ethical considerations and societal values. It is therefore important to ensure low-power actors are able to actively shape considerations of whether, in the language of DSA Article 34 and 35, platforms have “diligently” identified systemic risks and whether mitigations are “reasonable, proportionate and effective”.

**Example(s) of how to ensure empowerment:**

Draw on best practice for facilitating inclusive forums, particularly for low-power stakeholders.

Ensure that stakeholder perspectives are genuinely able to shape outcomes all along the engagement process – how engagement is conducted, the topics discussed, how decisions are made, and actions emerging from the engagement.

Provide resources and training tailored to specific participants as needed, to enhance their participation effectiveness.

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14 Some examples collected in [https://www.nesta.org.uk/blog/meaningful-meetings-how-can-meetings-be-made-better/](https://www.nesta.org.uk/blog/meaningful-meetings-how-can-meetings-be-made-better/)
Example(s) of how to challenge effectiveness:

Key discussion points and decision-making criteria were imposed without due consultation with stakeholders, and with no flexibility to adapt to their input.

The consultation was only conducted using language which was more familiar to some stakeholders than others, with no accommodations; or was lacking other accommodations such as e.g. for disabilities.

The process requires extensive time commitment or resources (such as travel for in-person meeting) without compensating participants for whom this is a disproportionate burden.

Further examples are given in the Framework Document

5. Expand Competencies: Does the risk evaluation process provide opportunities for individuals and groups to display their skills, gain recognition, enhance their status, and develop their capacities?

This principle considers whether the engagement process actively fosters individual and collective opportunities for stakeholders to manifest abilities, attain acknowledgment, and further develop capacities in ways beneficial to both the main outcome and the wider influence of the DSA.

This principle, somewhat unlike the others, takes a dynamic view of the contribution of that different stakeholders bring to the table. That is to say, it treats the process as an opportunity to elevate the skills and competences of the participants, and evaluates the long-term impact of this transformation for society. It sees active participation not just as a right, but as a potential catalyst for positive transformation. The empowerment philosophy resonates with the classical democratic ideals, viewing participation not just as a means to influence but as a transformative experience in its own right (Pateman 1970).

This is also an additional factor militating against unbridled inclusivity. When assessing whether and how a stakeholder group can and should contribute, one should identify the broader consequences of that group taking an active stance in the process of regulation, thus growing their influence and status in the process. For certain specific stakeholder groups, the implications of further expanding competencies may harm the goals of the process, which would justify expanding competencies of some groups more than others, or indeed excluding some groups from the process. This would be the case, for example, for groups with a demonstrable interest in participating in order to potentially undermine or sabotage basic aims of the DSA (for instance, groups fundamentally opposed to any
external influence on online platforms). In some cases, it could also militate against including representatives of industries, as the expanded capabilities here could include undermining the goal of compliance, or influencing regulatory decisions to the detriment of competitors.\(^\text{16}\)

**Example(s) of how to ensure expansion of capacities:**

The process encourages stakeholders to collaboratively interact, transparently share information, and learn from one another’s expertise; and facilitates sharing of experiences and expertise gained with wider networks.

The process embeds feedback and evaluation opportunities of the engagement, to facilitate improvements of (i) future engagement processes and (ii) individual participants’ abilities to contribute to other engagements.

Any value created in the engagement process and outcomes is fairly distributed amongst participants.

**Example(s) of how to challenge expansion of capacities:**

The process was unable to or did not respond to clear signs of behavior by participants which could negatively impact upon other organisations, and/or undermine the stakeholder engagement or its purpose.

The stakeholder engagement led to innovative measurement methodologies which may bring benefits and value to platforms, but some stakeholders who developed these methods do not receive a proportionate recognition or ability to gain their own value.

Particular members use their participation to gain disproportionate influence, leading to policies favoring local interests but neglecting wider societal needs.

*Further examples are given in the Framework Document*

**Conclusion**

The design of stakeholder engagement – both who is involved, and how it proceeds – should be done in a manner which ensures legitimacy. This argument is based in

\(^{16}\) In the case of the DSA implementation, arguably the representatives of industry should *not* gain even influence through stakeholder engagement, as this risks undermining the goal of compliance and as it may produce unfairness when an industry players influences regulation to the detriment of a competitor (Vergnolle 2023).
fundamental principles that decisions which affect people and human rights should be reasonably viewed as just, fair, and representative enough by the affected parties, and processes which impact these decisions should be designed with this in mind. We have therefore developed the 5E’s Framework: a set of principles which can be used when designing stakeholder engagement, or to underpin challenges which aim to improve sub-standard processes, with the aim of ensuring legitimacy.

When designing stakeholder engagement, the practical steps that can be taken to meet these principles will vary from case to case; sometimes by codifying familiar good practices, other times be prompting more novel approaches. Engaging fully with the principles can connect thinking around the who and how questions of engagement to deeper questions of why such engagement is valuable, grounded in a philosophically-informed understanding of democratic values.

We intend this Framework as an aid to anyone designing or critiquing stakeholder engagement procedures which produce outcomes which impact upon peoples' lives and rights in a democratic society. We have developed it in the context of the DSA, paying particular attention to the topic of systemic risks, but we hope it may be of broader use. However in concluding we should note some implications regarding accountability and competent authorities within the DSA.

Enforcement of the DSA risk assessment and mitigation provisions falls largely to the European Commission, supported by the Digital Services Coordinators and Board. They have the most substantial role in holding VLOPs and VLOSEs accountable for risks and assessments thereof. We hope that in doing so they will encourage more stakeholder engagement by platforms in future risk assessments, than (as far as we can tell) has been the case in the first round of risk assessments. We also hope that decisionmaking by the EU Commission and Digital Services Coordinators will make extensive use of the stakeholder engagement opportunities provided by the DSA (Annex A). And in doing so, we urge them to draw upon advice and thinking around optimizing stakeholder engagement – amongst which we hope this framework can be counted, in addition to a range of other research and proposals.

Bibliography


17 As noted above, we are heartened by the text from the Delegated Act on Audits which refers to platforms testing assumptions on risks “with groups most impacted by the specific risks” Article 13(a) §v, although this is still only a limited form of stakeholder engagement.


Annex A: Stakeholder Engagement under the DSA and related texts

The EU Commission is responsible for enforcing the DSA against VLOPs and VLOSEs, while national DSCs and the Digital Services Board comprised of them, enforce the rules against other online intermediaries located in their country (Art. 56). The DSA contains a few provisions which broadly encourage these bodies to consult external expertise and stakeholders in general:

- Article 72, on the Commission’s monitoring of implementation of and compliance with the DSA, states that their actions “may include the appointment of independent external experts and auditors ... to assist the Commission in monitoring the effective implementation and compliance with the relevant provisions of this Regulation and to provide specific expertise or knowledge to the Commission” (see also Recital 124).
- Article 64 calls for the Commission and the Digital Services Board to “develop Union expertise and capabilities” and “coordinate the assessment of systemic and emerging issues across the Union”, and for Member States to “cooperate with the Commission... including by making available their expertise and capabilities”. Recital 137 refers to the Commission doing so by drawing on the expertise of “relevant expert bodies... vetted researchers, representatives of Union agencies and bodies, industry representatives, associations representing users or civil society, international organisations, experts from the private sector, as well as other stakeholders”.
- Article 62(5) states that the Digital Services Board “may invite experts and observers to attend its meetings, and may cooperate with other Union bodies, offices, agencies and advisory groups, as well as external experts as appropriate. The Board shall make the results of this cooperation publicly available. Recital 134 states that the Board should be allowed to cooperate with a range of groups including “advisory groups with responsibilities in fields such as equality, including gender equality, and non-discrimination, data protection, electronic communications” amongst other fields.

In addition to these broad provisions, as noted by Susan Vergnolle, “The DSA’s enforcement system involves various actors alongside the European Commission in a maze of roles and responsibilities”, which spread across developing guidance and delegated acts to monitoring and enforcing compliance. Fully understanding roles for stakeholder engagement in the DSA therefore benefits from consideration of specific objectives and articles.

One important example, which we will return to throughout the paper, is that VLOPs and VLOSEs must conduct risk assessments to identify potential systemic risks they present (Article 34) and put proportionate mitigations in place against any they discover.

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(Article 35). These risk assessments are annually submitted to the European Commission, the first having been submitted 25 August 2023. VLOPS must also undergo independent audits to assess their compliance with numerous aspects of the DSA, with inspection of risk assessments playing a key role (Article 37).

Exactly how these assessments and audits should be conducted, and what count as “systemic risks” and “reasonable mitigations”, is still ill-defined and will iterate over time. There are roles for stakeholder engagement in both developing and implementing how these articles will work in practice, as well as assisting the Commission in enforcing them. Some examples which are written into the DSA and associated legislation include:

- Article 35(3) states that “The Commission, in cooperation with the Digital Services Coordinators, may issue guidelines on … [mitigation measures for] specific risks, in particular to present best practices and recommend possible measures, having due regard to the possible consequences of the measures on fundamental rights enshrined in the Charter of all parties involved. When preparing those guidelines the Commission shall organise public consultations.”
- Article 45 allows that, where significant systemic risk within the meaning of Article 34(1) emerge and concern several VLOPs or VLOSEs, the European Commission may invite actors including “relevant competent authorities, civil society organisations and other relevant stakeholders” to develop codes of conduct with commitments to specific risk mitigation measures and regular reporting.
- Article 13(a) §v of the Delegated Act on how audits should be conducted under the DSA includes an explicit reference to auditing “whether and how the audited provider tested assumptions on risks with groups most impacted by the specific risks”.

As with the DSA more broadly (and other EU legislating in general), there may be additional opportunities, beyond those explicitly stated in the text of the DSA, for external stakeholders to produce input into consultation, guidance, research and monitoring which may inform enforcement, and other activities.