



ERGA Position Paper on the Digital Services Act

ERGA 2020 Subgroup 1 - Enforcement¹

¹ ERGA comprises representatives of national audiovisual regulatory bodies of the 27 EU member states and was established by the European Commission in 2014. The role of the group is to advise the Commission on matters related to the implementation of the revised Audiovisual Media Services Directive. It also acts as a Forum for co-operation between regulatory bodies where experience and best practice can be exchanged.

Introduction

The European Commission will soon upgrade the European Union’s rules for digital platforms, services and products through the new Digital Services Act (“DSA”, or the “DSA Package”). It is anticipated that the DSA will reinforce the single market for digital services and help provide businesses of all sizes with greater legal clarity and a more level playing field. Protecting European citizens and their rights, not least the right to freedom of expression, will be central to the Commission’s efforts.

The DSA is an opportunity to reflect on the implications of changes in how online content is delivered to audiences within the Single Market and to examine the fitness of the EU’s core rules for electronic commerce in this context. Because of ERGA Members’² many years of experience as content regulators within the Single Market, and their role in upholding the values of media regulation pursuant to the Audiovisual Media Services Directive,³ in particular freedom of expression, promoting cultural diversity and plurality, sustaining and enhancing democratic discourse and protecting audiences, it is important for ERGA to contribute to this debate.

This paper, which outlines ERGA’s views on the DSA, is being delivered as part of ERGA’s ongoing work on the enforcement of EU content standards online, and pursuant to its strategic aim of supporting the European Commission’s reflection regarding the DSA Package.⁴ Primarily, although not exclusively, it focuses on issues that arise in respect of “online content regulation” i.e. the regulation of the unique role that modern online platforms play *in relation to* the content they host and provide access to, rather than the regulation of those who upload that content.⁵

In this paper ERGA has identified what it believes to be the key policy challenges relating to online content regulation to be addressed through the DSA Package and sets out what it believes to be the key principles which may usefully underpin the DSA Package. It highlights many of the key issues which are likely to arise in the context of the DSA Package debate, including consideration of matters such as the limited liability regime of the eCommerce Directive and how the further harmonisation of rules is desirable. It discusses the potential for improving European cross-border cooperation in a new regulatory framework for online content regulation and the additional NRA powers that may be necessary in order to effectively regulate the relevant services.

This paper is structured in four parts as follows:

- I. Objectives and principles of EU online content regulation
- II. Material scope and rules of EU online content regulation
- III. National regulatory authorities and cross-border cooperation for the implementation of the EU online content regulatory framework
- IV. Conclusion

² ERGA Members are also referred to as “NRAs” or “regulators” within this document, as the context requires.

³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), as amended by Directive (EU) 2018/1808. Referred to as the “AVMS Directive”, or the “revised AVMS Directive” within this document as appropriate.

⁴ ERGA 2019 Statement of Purpose, 3rd Strategic Priority (‘Forward-looking review of the media regulatory framework: monitoring market developments and potential regulatory challenges affecting the media environment’), page 4

⁵ For information, a similar distinction is made regarding the role played by video-sharing platform services in relation to the content they host pursuant to the revised AVMS Directive at Recital 48: “In light of the nature of the providers’ involvement with the content provided on video-sharing platform services, the appropriate measures to protect minors and the general public should relate to the organisation of the content and not to the content as such.”

I. Objectives and Principles of EU Online Content Regulation

1.1 Aims of European audiovisual content regulation to date

- (1) The circumstances in which decisions must now be made about the future of EU media regulation are not dissimilar to those which have underpinned the introduction, and subsequent revision, of the Television Without Frontiers Directive in 1989.⁶ While technology has fundamentally changed how we interact with media forever, and has created many new challenges and opportunities, the importance of upholding fundamental values and principles of media regulation within the Single Market, such as freedom of expression, the independence of regulators, fairness of information, cultural diversity and the protection of audiences (including the protection of minors), remains unchanged. Likewise, concerted action at EU level can continue to ensure that all European Citizens benefit from a system that is greater than the sum of its parts.
- (2) For example, in 2010, the AVMS Directive extended the benefits of the “country of origin” principle to on-demand audiovisual media services to improve their prospects of commercial success within the single market. It also introduced a base level of protection for audiences in respect of these services. In recognition of such services’ growing popularity and influence, the revised AVMS Directive (published in 2018) further aligns the rules applicable to on-demand services to those applying to broadcasters. Significantly, and not without much debate and consideration, the revised AVMS Directive also introduces new rules for “video-sharing platform services” in recognition of the pressing need to guarantee greater protection for audiences in online environments and to create a more level-playing field between such services and audiovisual media services, as well as between traditional media and “new” media more generally.⁷
- (3) The broadening of NRAs’ responsibilities continues to be a natural progression in the regulation of media services – in terms of the nature of the content to be regulated, the areas of concern that regulation should evolve to address and the services included within the scope of regulation. ERGA agrees that media regulation can, and should, play a significant role in guaranteeing that services that host and provide access to online content support public interest objectives in the DSA Package. As set out below, it appears that many of the objectives and core principles of European audiovisual media regulation, as successfully implemented to date, are widely accepted in Europe and would continue to be appropriate for a future regulatory framework for online content regulation in the DSA package.

1.2 Audiovisual and “Others forms of content”

- (4) A defining characteristic of EU media regulation to date has been its focus on audiovisual content. Given the significant evolution in how all forms of content are delivered to

⁶ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

⁷ Video-sharing platform services are online services that provide access to videos uploaded by their users to inform, entertain or educate them. The precise legal definition of a video-sharing platform service is available in Article 1(a)(a) of the revised AVMS Directive.

users in the online media environment in recent years, whether video, audio, image-based or text-based, ERGA considered whether maintaining a distinction between audiovisual and “other forms of content” would be appropriate in an approach to online content regulation in the DSA Package. Broadly speaking, ERGA has concluded that the approach to online content regulation in the DSA Package should be neutral with regard to such content’s form (i.e. a “content-neutral” approach). A number of key reasons outlined below underpin why this approach is being advocated by ERGA.

- (5) While some platforms might focus on providing access to a particular form of content, most now blur the boundaries between different forms of content to provide “converged”, content-neutral, user-experiences. For example, Facebook promotes its video-focused Facebook Watch service as an integral part of the already well-established platform. Similarly, Instagram, which was originally a photo-sharing platform, now provides access to videos and stories. Even where platforms “focus” on videos, such as Twitch or YouTube, “other forms of content” including comments or chat functionality provide an integral and inseparable part of the overall user-experience and contribute significantly to services’ uniqueness, value and enjoyment.
- (6) Over the coming years, it is likely that the distinction between audiovisual content and “other forms of content” in an online context will continue to become less relevant for audiences given how frequently “other forms of content” are delivered through the same devices and platforms as audiovisual content. If “other forms of content” delivered through online platforms have the potential to cause harm or to influence users and public opinion in the same way that audiovisual content does, ERGA agrees that the type of regulation currently applicable to online audiovisual content should not be limited to such content alone, and that the need for distinctions between different kinds of content in online content regulation becomes less important.
- (7) A content-neutral approach to online content regulation is also desirable from the perspective of ensuring a level-playing field within the single market. Irrespective of the forms of content they provide access to, most online services that provide access to content to inform, entertain or educate users compete with one another and with audiovisual media services for the same audiences, in the same advertising market and have the same ability to influence public opinion and discourse.

1.3 Limited liability regime for hosting services

- (8) The ‘e-Commerce Directive’ has been the backbone of the EU’s regulatory framework for online services for two-decades.⁸ At the time it was drafted, the internet was an emerging communication network and social media did not have today’s scale and role in society. The general principles set out in the e-Commerce Directive remain in force today - one of which is the “limited liability” principle. This principle establishes the circumstances in which platforms can and cannot be held responsible for the content

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Referred to as the “e-Commerce Directive” within this document.

they host, and provides that they may generally only be held liable for content uploaded by their users where they have actual knowledge of its existence and fail to act expeditiously to remove or disable access to it.⁹

- (9) In preparing this paper, ERGA reflected upon the limited liability principle and considered whether it may disincentivise services from proactively taking measures to tackle illegal content. The views set out below have been informed by the considerations and experiences of individual ERGA members, but ERGA notes that any debate in respect of the limited liability principle would need to involve a wide range of stakeholders.
- (10) ERGA supports the general principle of limited liability as well as the continuation of a graduated scheme of liability for online services within the DSA Package. However, the current “status quo” of a purely reactive system of liability for online platforms with no proactive obligations to meaningfully tackle issues of concern arising from content must be reassessed in view of today’s realities. A framework for “online content regulation” is therefore recommended in this paper, in addition to updated complementary rules for liability.
- (11) ERGA notes that the circumstances under which Europe’s existing scheme of limited liability was designed have evolved in such a way that the original premise upon which it was based – that services play a ‘passive’ role in relation to the content they host – is no longer sustainable, particularly with respect to major online content platforms. In this context, ERGA notes that the revised AVMS Directive, as well as the Copyright Directive,¹⁰ acknowledge the key influence most major online content platforms have in the European media landscape. Both instruments have substantially enlarged the responsibilities of services that play an active role in the management and control of potentially illegal or harmful content.
- (12) ERGA recommends an approach to online content regulation whereby the continuation of relevant platforms’ limited liability should be made contingent upon them being required to build in safety features into the design and operation of the systems and services they provide. Under such an approach, a withdrawal of the benefits of limited liability would be considered where a systemic deficiency in measures provided by the platform is established by an NRA. The provisions of Article 28b of the revised AVMS Directive could be considered a helpful reference point in setting out an appropriate level of protection for users (without prejudice to an exploration of whether varied or stronger rules may be appropriate).¹¹ While being cognisant of the need to avoid the imposition of “general monitoring obligations”,¹² and having due regard for freedom of expression, service providers might furthermore be required to demonstrate proactive

⁹ The limited liability principle in respect of hosting providers is set out in Article 14 of the e-Commerce Directive.

¹⁰ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

¹¹ Article 28b of the revised AVMS Directive sets out the requirements of video-sharing platforms in the development of appropriate measures in order to protect users.

¹² Article 15(1) of the e-Commerce Directive provides that: “Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

actions, such as “stay down” measures, in relation to certain clearly identifiable types of illegal content (such as terrorist content) to retain the benefits of limited liability.

- (13) In its reflections on the limited liability principle, ERGA also considered the benefits of introducing a ‘Good Samaritan’ provision under the DSA Package. This approach, which is based on ensuring that good-faith and voluntary efforts by platforms to tackle content issues do not lead to additional legal liability, was considered insufficient. Such an approach does not formally require platforms to demonstrate that they are compliant with agreed principles and objectives of regulation. ERGA’s experience in monitoring the implementation of the voluntary European Code of Practice on Disinformation (discussed further at Paragraph 22 below) demonstrates the need for clear and genuinely effective mechanisms of accountability in respect of platforms’ activities, which are based in law and formulated in a manner that guarantees European values are upheld.

II. Material Scope and Rules of EU Online Content Regulation

2.1 Updated Horizontal liability rules in the Digital Services Act (DSA)

- (14) While retaining the general principle of a graduated and conditional liability for online intermediary services seems appropriate, the European Commission might consider updating the definitions laid down in the e-Commerce Directive to better reflect the reality of today's digital services. Doing so would allow for greater clarity regarding their material scope of application. More varied and future-proof definitions would also allow for a more proportionate allocation of responsibility for services.
- (15) ERGA recommends that the pre-existing categories of content, host and access provider should be reviewed and updated. Within the 'hosting' services category, it would appear necessary to distinguish how a platform's liabilities and responsibilities for activity may need to be tailored accordingly for issues that arise where it is acting as an 'online content platform' (i.e. it is making interventions about content uploaded by third parties, including by automatic means or algorithms) or as an 'online market place' (i.e. it is providing functionality that is being used to facilitate transactions between businesses and consumers).¹³
- (16) Updated horizontal rules for graduated liability should operate harmoniously with specific proactive rules (i.e. regulation) for certain types of content and services, such as the approach to "online content regulation" outlined in this paper, and, for the avoidance of doubt, rules for audiovisual media services bearing editorial responsibility under the revised AVMS Directive. Accordingly, the DSA would maximise its potential in providing for complementary rules in relation to matters which are broadly relevant across all forms of content in an online environment, such as the protection of minors.

2.2 Specific rules for "Online Content Regulation" and substantive areas of harmonisation

- (17) ERGA supports the introduction of new harmonised rules for online content regulation within the DSA Package. ERGA emphasises that a specific regulatory approach to this issue is necessary given online content's intrinsic impact on the protection of fundamental values of EU Media Regulation, such as freedom of expression, human dignity, social cohesion, plurality and cultural diversity, the protection of minors, protection of consumers (including clearly distinguishing editorial content from commercial communications), as well as the free flow of information in the single market.
- (18) ERGA agrees that minimum harmonisation of rules for online content regulation at EU level would bring the advantage of legal certainty to online content providers while guaranteeing more effective protection for European audiences. A minimum harmonised approach also acknowledges the reality that many significant players in the

¹³ Much in the same way as under the existing e-Commerce Directive a platform can simultaneously be regarded as a content provider (where it directly provides content to its users) and a host provider (where it provides access to content uploaded by other users), a host provider would foreseeably be able to provide functionality that means it is regarded as both an "online content platform" and "online market place" in parallel, depending on the particular context or issue. A flexible approach is necessary.

online media environment operate on a pan-European basis and ensures that the benefits of the single market can be fully realised through reducing the risk or perceived need for Member States to take divergent approaches. As opposed to a full / maximum harmonization approach, it also guarantees that EU online content regulation is grounded in the long-lasting recognition of Member States' diverse media and cultural policies.

- (19) Importantly, the DSA should be without prejudice to a Member State's competency to set appropriate boundaries to permissible expression within their national law (e.g. criminal law) pursuant to the EU Charter of Fundamental Rights, and, by doing so, to determine whether online activity is harmful or illegal in their domestic legal framework. However, harmonized *content moderation rules* to ensure a consistent approach to platforms' treatment of harmful and illegal content generally across the EU should be explored.
- (20) Noting ERGA's support in principle for the harmonisation of rules for online content regulation, and having evaluated the relevance of the distinction between audiovisual and "other forms of content" in light of the evolving media environment in this context, the question now falls to be considered as to the areas of regulation that a "content-neutral"¹⁴ approach to online content regulation in the DSA Package might seek to address.
- (21) Given the ongoing relevance of the fundamental values that underpin the AVMS Directive in an online context, explored above at paragraph 17 and elsewhere in this document, ERGA strongly supports the extension of rules in the fields coordinated by the revised AVMS Directive for audiovisual content to other forms of content (e.g. images, text), particularly the protection of minors, combatting incitement to violence and hatred and terrorism. ERGA also broadly considers it appropriate to explore how and whether obligations in the fields coordinated by the AVMS Directive relating to accessibility, findability and prominence, transparency (particularly around algorithms and information relating to content moderation) and commercial communications might also be extended.
- (22) The introduction of new rules for online disinformation, misinformation, malinformation and political advertising is also strongly supported by ERGA. Notwithstanding the voluntary participation of online platforms in monitoring the implementation of the Code of Practice on Disinformation, ERGA has recorded its concern regarding the willingness of the platforms to share data in the nature and form requested by NRAs. The 2020 ERGA Report 'Assessment of Compliance with the Code of Practice commitments' sets out a range of recommendations that should be considered in the context of the debate on the DSA Package, including a co-regulatory mechanism whereby online content platforms would be required to demonstrate compliance with clear reporting obligations, more harmonised procedures and appropriate timeframes

¹⁴ See Paragraph (4).

to NRAs.¹⁵ In addition, ERGA recommends that the role and functions of the new European Digital Media Observatory could be explored further in this regard.

- (23) Finally, ERGA also considers it appropriate to give consideration to the introduction of rules to tackle serious “personal” online harms, such as cyberbullying, or material which encourages or promotes nutritional deprivation or suicide.

2.3 Illegal vs. Harmful Content, Preventive measures, transparency, notice and action procedures

- (24) The DSA should tackle issues arising from both illegal and harmful online content in its new rules for online content regulation. However, a clear distinction between these two kinds of content should be maintained in the approach taken. The ever-changing nature of harmful content would seem to favour a more nuanced approach to regulation, having due regard for freedom of expression. Given that illegal content is more clearly identifiable, and given that its swift removal is essential to limiting its wider dissemination and impact, a firmer approach with a stronger focus on harmonised notice and action-“like” mechanisms and obligations would appear appropriate.

- (25) In terms of preventive measures aiming to tackle ‘large scale’ content issues at a macro-level, the DSA could make all online content platforms responsible for implementing certain kinds of technical measures by default (e.g. age verification and parental control systems, user complaint mechanisms, rating and notification tools, etc.).¹⁶ The appropriateness of the measures taken should be evaluated by independent NRAs on the basis of transparent indicators. As explored in paragraph 12, a systemic failure to demonstrate the appropriateness of these measures before supervisory authorities could result in the platform losing the benefits of the limited liability regime. Additionally, in the same way the GDPR cemented the idea of “protection by design” within European Union law, an approach which transfers the burden of demonstrating compliance with regulation on to platforms is favoured by ERGA.

- (26) While the proposed approach has potential to ensure that swifter and more diligent decisions are made about illegal content, there is also a need to apply additional appropriate safeguards under public oversight. Binding transparency obligations should also be at the heart of making online content platforms more accountable. Transparency could be achieved by requiring services to report publicly about the implementation of their content moderation practices (e.g. the criteria used in the determination of infringements, data related to notifications and subsequent content removals, the human and technological resources dedicated to content moderation, the timeliness in dealing with users’ complaints, etc.). Transparency obligations could be expanded, upon reasoned request from public authorities only, to disclosing information about algorithmic recommendation systems, such as newsfeeds.

¹⁵ ERGA Report on disinformation: Assessment of the implementation of the Code of Practice (2020)

¹⁶ Such rules are already provided for in Article 28b of the revised Audiovisual Media Services Directive in respect of video-sharing platforms services; they would thus need to be extended to a larger number of online content platforms.

(27) More effective harmonised procedures for illegal content, including rules on the steps that platforms should take when they encounter illegal content, should be established. A gradual alignment of existing practices would be likely to increase the effectiveness of tackling illegal online content, provided that a set of guiding principles (including respect for the fundamental rights protected in the EU's legal order, such as the right to freedom of expression) are followed by Member States and the services concerned in this regard. Broadly speaking, and subject to the abovementioned safeguards, ERGA supports the promotion of notice and action mechanisms that facilitate the notification of illegal content by all users or entities who wish to do so. The European Commission might also consider, having regard to relevant case-law, providing more clarity about existing concepts such as what may or may not constitute 'knowledge or awareness of illegal activities' in the context of notice and action procedures.

III. National regulatory authorities and cross-border cooperation for the implementation of the EU online content regulatory framework

3.1 Country of Origin principle and cross-border cooperation

(28) The “Country of Origin” Principle is a foundational principle of both the revised AVMS Directive and the e-Commerce Directive. Insofar as an area of law has been harmonised at EU-level, the country of origin principle provides that the relevant rules that digital services must follow within the EU are those of the jurisdiction in which they are established. Accordingly, Member States where online services are “received” cannot generally impose conflicting rules which affect how those services are provided in their jurisdiction. Serious events and/or recent societal concerns in Europe may have raised questions about the effectiveness and timeliness of EU online content regulation and some Member States have reacted by adopting national legislation that has been the subject of debate pursuant to the country of origin principle. The DSA initiative therefore comes at a timely moment to examine once again how to appropriately combine all Member States’ legitimate interest in affording the best protection possible for their citizens with the continued application of the country of origin principle.¹⁷

(29) First and foremost, in order to avoid a detrimental fragmentation of the EU Digital Single Market, ERGA underlines the continued relevance of the country of origin principle as the cornerstone of EU online content regulation. In order to enhance the effectiveness of the country of origin principle, ERGA is determined to contribute to improving end-to-end cooperation between regulators on cross-border issues (i.e. cooperation that encompasses more than just law enforcement actions).

(30) Within a new framework for online content regulation, the country of origin principle should be enhanced through close cooperation between Member States’ national authorities in matters related to the monitoring of services’ compliance with their general obligation to create a ‘safety by default’ environment for their users all across the EU. NRAs other than the NRA of the Member State of establishment could report on large-scale issues which may have caused harm to users at a national or local level. Where appropriate, cross-border cooperation might expand to cases of disputes between users and service providers. For example, the competent NRA in the country of establishment might provide an appropriate mechanism whereby the NRA in the Member State where the complaining user is located could contribute to the swift and effective settlement of issues that arise.

(31) Under the current framework, should other Member States (than the Member State of establishment) wish to make use of the possibility provided for in the e-Commerce Directive to take measures in relation to services “received” in their jurisdiction that disseminate content that may cause harm to their national citizens, it may only be

¹⁷ Other areas of EU legislation, such as data protection and digital taxation, might be useful sources of inspiration in that respect: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data; Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by several Council Directives since then.

following a thorough cooperation procedure with the country of origin (and the European Commission); justified on a restricted number of legitimate grounds; and only in case of emergency¹⁸.

- (32) Given the speed and impact of the damage that can manifest at national level by certain kinds of illegal and harmful content, exploring the effectiveness of joint action by regulators under accelerated procedures (including specific derogation procedures) applicable in the online environment may be helpful. For example, tailored content removal-“like” mechanisms (i.e. non *ex-ante* measures) in respect of clearly identifiable categories of illegal content in certain limited circumstances could be explored. Such mechanisms would need to be accompanied by appropriate safeguard measures, including the proper involvement of the country of origin in the framework of an emergency joint cooperation and action procedure.

3.2 Cooperation at an EU level

- (33) In order to ensure consistency and as close as possible cooperation between Member States in the implementation of the new regulatory framework, the DSA initiative could be an opportunity to lay out a more detailed system of EU-wide cooperation, including in the area of online content regulation. Whereas enforcement powers should always remain in the hands of competent national regulatory authorities, the overall effectiveness of the regulatory framework could be strengthened through parallel and complementary cooperation in the monitoring of online content platforms at an EU level. Against this background, some cross-border issues relating to the moderation of content by major online content platforms could be coordinated through ERGA.¹⁹
- (34) Strengthening cooperation in cross-border cases is one of ERGA’s strategic objectives for the period 2020-2023²⁰. This year, it has undertaken on elaborating a standard Memorandum of Understanding whose main purpose is to design cooperation arrangements that ERGA members are willing to follow in order to resolve practical issues emerging from the implementation of the revised AVMS Directive. This ongoing practical work on cross-border cooperation, while certainly of added-value to ensure consistency in the implementation of the current legislative framework, reaches the limits in terms of what can be achieved because of its informal and voluntary nature.
- (35) As regulators of audiovisual media services pursuant to three previous iterations of the revised AVMS Directive, ERGA members have played a significant role in supporting work at the European and national levels in the roll-out and implementation of legislation to support content regulation. Given their accumulated regulatory practice in the area of audiovisual regulation over this time, ERGA members have developed extensive experience and knowledge in regulatory practice, and in exercising judgment

¹⁸ It is also worth noting that while the AVMS Directive provides for similar derogation procedures in relation to TV and on-demand audiovisual media services, such a possibility is not foreseen for video-sharing platforms.

¹⁹ As opposed to issues relating to the legality of content as such (and corresponding liability), which might be better suited primarily for the cooperation between judicial authorities.

²⁰ See ERGA ‘Statement of Purpose’: http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf

in the application of content regulation principles, all of which is readily transferable to other forms of content regulation. Furthermore, their decisions are supported by an evidence-based approach.

- (36) ERGA considers there to be a persuasive case for grounding content regulation with NRAs experienced in promoting freedom of expression as a fundamental principle underpinning all their regulatory activities. Its members have the expertise needed in balancing important democratic values and fundamental rights with the rights of citizens, as well as sustaining and enhancing democratic discourse, and facilitating linguistic and cultural diversity. Furthermore, extending the responsibilities of audiovisual NRAs to encompass online content platforms which may fall under a new DSA Package has the potential to offer a number of benefits including: the development of a holistic vision for the future regulation of media content across all platforms and services; ensuring consistency in the application of regulatory principles, policies and rules across all areas of content regulation; offering efficiency for regulated entities in dealing with a single NRA for all forms of content on their platform; and offering a coherent and harmonious approach, and, therefore, greater clarity for users.
- (37) Notwithstanding the importance of mechanisms to ensure NRAs' actions are subject to judicial and political oversight, NRAs' continued independence from public and private spheres should form a cornerstone of the overall approach adopted to cooperation, and to online content regulation more generally. By guaranteeing that NRAs' are appropriately safeguarded from external pressure, the robustness and effectiveness of the regulatory framework is strengthened, and the common European values that bring NRAs together in cooperation can function as bonds that transcend national boundaries and interests. NRAs' independence can also help to engender public trust in NRAs as "champions" of the public goods they seek to protect.
- (38) The above considerations form an appropriate base upon which to consider a decentralised structure of cooperation between the NRAs of the EU Member States for online content regulation. By contrast, a single pan-European enforcement structure overseeing online platforms across multiple sectors would not appear appropriate. Such a centralised and cross-sectoral approach would particularly fail to take into account the specificities of online content regulation, including the need to sometimes take into account the circumstances of the national/local context in which damages occur.
- (39) ERGA has then considered what its potential role could be in such a new structure of cooperation. It has concluded that a significant reformulation of ERGA's current tasks and operations would need to be set on the basis of agreed objectives. Firstly, a more consistent approach to ERGA members' competences and capabilities (including remit, staff and financial resources) on a national level might be necessary. This would facilitate more effective common regulatory approaches to issues and all members being able to contribute as effectively as possible to the work of ERGA. Secondly, ERGA would need to have statutory independence from the European Commission and be able to rely on a permanent secretariat with adequate resources. This would facilitate a more effective realisation of ERGA's new remit and increase its capacity to carry out new activities.

(40) While again emphasising that enforcement powers should be retained by NRAs in line with the country of origin principle, there would be potential to reinforce ERGA's tasks to improve the overall implementation of the new regulatory framework. The latter might for instance include: for ERGA members to cooperate on matters falling within the scope of the 'macro-regulation' of online content platforms (e.g. cross-reporting about large-scale issues, joint auditing capacities including request for relevant data, common guidelines with regard to the definition of key concepts and handling cross-border complaints, etc.); to develop common performance indicators, in consultation with the service providers concerned, the European Commission, and other relevant stakeholders; to provide opinions and/or general recommendations on matters relating to the services' compliance with their obligations; to exchange and provide EU-wide information and guidance about emerging issues.

3.3 Tasks and Powers of National Regulatory Authorities

(41) ERGA members are already confronted with the challenges of having to enforce and adapt rules dynamically and in a timely manner, and to adapt their resources and processes accordingly. When it comes to dealing with fast-changing and globally operating digital services, NRAs may benefit from further upgrading and expanding their capabilities (training for public servants, recruitment of data scientists, monitoring technologies, etc.). Furthermore, in order to be able to act consistently with the proposed 'macro-level' approach to online content regulation and related prioritisation of 'large-scale' issues, the powers available to NRAs would need to be adapted and tailored accordingly.

(42) The determination of the NRAs' compliance and enforcement powers should be underpinned by a series of principles which are particularly adapted to that new regulatory context: effectiveness (i.e. to facilitate an effective regulatory response and act as a deterrent to future breaches of statute); proportionality (i.e. to act proportionately, particularly having regard to the wider objectives of the regulator in promoting freedom of expression); flexibility (i.e. to facilitate an appropriate range of responses, tailored to the specific circumstances of a breach, as well as the nature of the content and platform upon which the content is carried); risk-based approach (i.e. to ensure that regulatory actions are targeted at content likely to have greatest impact or cause most harm); evidence-based (i.e. to ensure the regulator's response is underpinned by a credible evidence base); and cooperation (i.e. to co-operate and regularly engage with online content platforms, in addressing issues in a timely manner).

(43) In light of the above, the powers available to any modern online content regulator may include, inter alia: the power to compel regulated entities to submit reports and statements of commitments in respect of their legal obligations; the power to compel regulated entities to adhere to statutory recommendations and/or to supply a compliance plan of action; the power to request the supply of data and information in a format specified by the regulator; the power to issue public findings and recommendations arising from the regulator's compliance activities and from an inspection, investigation or audit; the power to issue notifications, warning notices and

final warning notices to services in relation to failures of compliance and the power to seek injunctive relief to enforce the notices of the regulator; the power to issue administrative fines, etc.

IV. Conclusion

This paper represents ERGA's first contribution to the wider European debate on the DSA Package. Our principal aim has been to bring the experience and perspective of European audiovisual regulators to bear in identifying the key challenges likely to underpin the future of online content regulation within the EU, and to advise the Commission on the best approach forward in this critical area.

In summary, ERGA concludes that:

- The fundamental values that have underpinned content regulation in Europe to date (such as freedom of expression and the protection of minors) remain as relevant as ever in the online environment. Specific regulation for the role that Online Content Platforms play as intermediaries of online content is now vital to protecting these fundamental European values within the Single Market.
- The approach taken to introducing new regulation for online content platforms in the DSA should not discriminate between different forms of content (e.g. whether video, audio, text-based).
- New minimum harmonised rules should be introduced to cover matters co-ordinated by the revised AVMS Directive and to address new threats such as Disinformation. The framework should cover both harmful and illegal content and require services to proactively introduce systems to protect their users.
- A system of graduated liability for hosting services should continue. However, the definitions used in the e-Commerce Directive should be updated to reflect the reality that many services no longer play a "passive" role in relation to the content they host.
- ERGA underlines the continued relevance of the country of origin principle; to further enhance the efficiency of enforcement, it recommends a greater degree of close and enhanced co-operation and suggests exploring the effectiveness of joint action by regulators under accelerated procedures (including derogation procedures) applicable in the online environment.

ERGA welcomes this opportunity to contribute to the wider debate on the future regulation of online platforms and the DSA Package more specifically. We recognise that there is a wide and varied range of interests in this discussion and we look forward to constructive engagement with relevant stakeholders with a view to developing our position further as the debate on the DSA Package evolves.