



ERGA STATEMENT ON THE EUROPEAN COMMISSION'S PROPOSALS FOR A 'DIGITAL SERVICES ACT' (DSA) AND A 'DIGITAL MARKETS ACT' (DMA)

Introduction

On December 15th 2020, the European Commission released its proposals for a Digital Services Act (DSA) and for a Digital Markets Act (DMA). While these texts are now being reviewed by the European Parliament and the Council respectively, ERGA welcomes the opportunity to express its preliminary views on the proposals.

Prior to the release of the legislative proposal, ERGA had published a first Position Paper on the DSA¹ and responded to the Commission's public consultation². The views expressed were informed by the long-standing experience of ERGA members – as the independent regulatory authorities responsible for audiovisual media services in the EU Member States – in regulating media content and aimed to support the Commission's reflections on the implications of changes in how online content, whatever its forms, is delivered to European citizens within the Single Market.

Fundamental to ERGA's approach is the idea that the principles underpinning media regulation – including the independence of regulatory authorities - are largely transferable to the online environment. Furthermore, ERGA firmly believes that given its crucial role in promoting and upholding fundamental European values, such as freedom of expression, cultural diversity and human dignity, online content regulation requires tailored rules to address specific challenges.

To continue its contribution to public debates on matters relating to online content regulation³, and in line with its advisory role to the European Commission, ERGA sets out below its preliminary assessment of the draft DSA Regulation. The latter is largely based on ERGA members' expertise in the implementation of legislation supporting content regulation, in particular when it comes to balancing important democratic values with citizens' fundamental rights.

While being aware of the complexities and far-reaching implications of the proposal, ERGA members have a significant interest in engaging further on the policy issues at stake with all interested parties. To that end, ERGA will undertake more in-depth analyses and articulate concrete proposals in relation to some of the provisions contained in the DSA over the coming months.

¹ ERGA Position Paper on the Digital Services Act (https://erga-online.eu/wp-content/uploads/2020/06/ERGA_SG1_DSA_Position-Paper_adopted.pdf)

² Commission's consultation webpage : <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>

³ In 2020, ERGA also contributed to the public consultation related to the Commission's Action Plan for European Democracy and will closely monitor its implementation at national and European level. In parallel, ERGA will also keep on assisting the European Commission with the follow-up and enhancement of the European Code of Practice on Disinformation.

In parallel, ERGA will also follow the developments relating to the **Digital Markets Act (DMA)**. At this early stage, ERGA would like to express its endorsement for the general principles underpinning the proposal, such as ensuring that digital markets remain fair and open to all innovative service providers, small or big.

The proposed Regulation of online gatekeepers is likely to benefit European businesses and citizens alike and is consistent with some of the objectives pursued in media content regulation, especially: (i) promoting media pluralism, diversity and the findability of general interest content in the online environment; (ii) deterring anti-competitive behaviours resulting from dominant market positions in order to maintain an open access to all media services; and (iii) ensuring fairness between all players of the media value chain, especially with regard to advertising revenues which must be equitably shared between media companies and online platforms.

It is, however, important for ERGA to stress that the provisions of the DMA establishing a general non-discrimination duty for online gatekeepers should be without prejudice to the possibility of imposing findability obligations, such as Article 7a of the revised AVMS Directive which provides for ensuring the appropriate prominence of audiovisual content of general interest.

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1. What ERGA welcomes in the DSA proposal

ERGA welcomes many aspects of the DSA proposal as a significant step forward in the area of online content regulation at EU level. ERGA supports the high-level objectives of the draft Regulation, particularly as it focuses on guaranteeing online safety and the protection of fundamental rights in the digital environment.

More specifically, ERGA wishes to highlight the following well-grounded proposals:

- 1.1. The **systemic approach** to the regulation of online content platforms⁴ is strongly endorsed by ERGA members. Such an approach is consistent with the objective of making online content platforms more accountable as a result of the unique role they play *in relation to* the content they host and provide access to. It also rightly recognises that, given the amount of content available on these services, it is no longer sufficient to ground regulation on traditional take-down processes. Regulators' tasks should therefore focus on evaluating how online platforms respond with appropriate measures to the identified large-scale risks;
- 1.2. The **significant diligence obligations** which online content platforms will be subject to (in terms of transparency requirements, risk-mitigating measures and accountability), as well as the possibility for independent regulatory authorities to impose deterring sanctions, are fully consistent with the abovementioned systemic approach. In principle, ERGA agrees with the introduction of harmonized rules for online content moderation which brings a consistent regulatory approach to matters which are broadly relevant across all kinds of content platforms in the online environment. ERGA also notes that the Commission rightly proposes not to harmonise the definitions of what may constitute

⁴ It is acknowledged by ERGA that the DSA focuses primarily – though not exclusively – on issues that arise in respect of the regulation of the content moderation policy implemented by online platforms (i.e. 'systemic regulation'), rather than the regulation of those who upload the content.

illegal content but makes a general reference to Union law and Member States' law in that area;

- 1.3. ERGA also welcomes the proposal for the draft Regulation to have an **extra-territorial reach** and to be applicable to all intermediary services provided in the EU, irrespective of the place of establishment of these services. Taking reasonable and appropriate measures to protect European users of these services must be recognized as a requirement for online content platforms which provide their services in the Single Market;
- 1.4. ERGA supports the proposal **to maintain the Country of Origin (COO) principle** as a foundational principle of the draft Regulation in order to avoid a fragmentation of the EU legal framework and to ensure legal certainty for digital services. ERGA stresses, however, that making the COO principle work in practice - and therefore ensuring that the rules are effectively and swiftly enforced throughout the territory of the European Union - requires the establishment of efficient and functional cross-border cooperation mechanisms between the competent authorities of the Member States.

2. What ERGA would like to see clarified or improved

There are several aspects of the DSA proposal on which ERGA would welcome clarification or which may require further strengthening. In particular, the following issues are highlighted:

- 2.1. Consideration should be given to providing **an explicit list of the types of online activities in scope of the DSA**. As it stands, the draft Regulation refers to broad categories, such as 'online platforms', but without providing details on the potentially very diverse range of services and activities which may fall into each category. Notwithstanding the horizontal approach of the draft Regulation, it could be useful to provide more granular definitions of the online activities in scope in order to capture specific kinds of functionality that may require a more targeted regulatory approach. For example, it is particularly important to clearly distinguish how an online platform's responsibilities may need to be tailored when it is acting as an 'online content platform' (i.e. when it is making interventions about content uploaded by third parties, including by automatic means or algorithms) from when it is acting as an 'online market place' (i.e. when it is providing functionality that is being used to facilitate transactions between businesses and consumers) as these two types of activities are fundamentally different in nature and call for distinct regulatory measures and oversight;
- 2.2. The above suggestion is intended to pave the way for a **more adequate and flexible allocation of responsibility for services** – and consequently a more appropriate **regulatory oversight** – according to the (potentially) evolving nature of their activities. In light of the specific challenges raised by online content regulation, ERGA believes there is a persuasive case to support a more tailored approach whereby the potentially wide range of services falling within the general category of 'online platforms' (e.g. search engines, content-sharing platforms, market places, etc.) would be regulated according to the activities they are used for and the specific risks raised by the functionalities provided on their services – which may change over time;

- 2.3. It is also important to clearly ensure that **all aspects of an online content platform's moderation policy** are subject to independent supervision by the competent regulatory authorities given that, in practice, these services apply their terms and conditions to any piece of content. While it is anticipated that the DSA focuses primarily on accountability measures to fight against illegal content online, ERGA emphasises that a fully-fledged and consistent approach to online content platforms' moderation of harmful content is also necessary. Having regard to the importance of preserving freedom of expression online, it is vitally important to create the appropriate safeguard mechanisms whereby national regulatory authorities would also be able to prevent excessive and/or discriminatory moderation in relation to this type of content. In addition, the DSA proposal should clarify the fact that online platforms' terms and conditions must comply with national and EU legislation prohibiting illegal content across the EU. In this context, illegal content should be understood broadly so as to unambiguously cover content which is prohibited by any legislation and not only criminal law;
- 2.4. On a general level, ERGA is cautious about the proposed approach to separate online platforms solely according to their **audience reach**. While it acknowledges that the principle of proportionality would naturally suggest a desire to make it less challenging for small platform providers to comply, ERGA affirms that a risk-based approach would be more relevant from a content regulation perspective as experience shows that it is frequently the case that emerging (typically smaller) platforms present significant risks to human dignity and for the protection of minors. There is also a risk of 'migration' from large platforms to smaller platforms e.g. when individuals or groups of individuals are banned from very large online content platforms because they disseminate illegal or disinformation content;
- 2.5. ERGA considers that the **risk assessment, the risk-mitigation measures and the audits** which very large online platforms have to implement (Articles 26, 27 & 28) should be subject to appropriate supervision by independent regulatory authorities in order to ensure that a comprehensive set of risks are effectively taken into account and that appropriate measures are implemented as a result;
- 2.6. Considering the sensitivity of the issues at stake, the system of regulation established by the DSA proposal should further clarify in Article 38(4) that **the independent national regulatory authorities in charge of the enforcement of the rules** applicable to online content platforms (as part of their diligence obligations) are granted all necessary powers in respect of all services in scope. In this regard, it is particularly important to ensure that regulatory authorities have the ability to collect evidence (e.g. the power to request a service provider to supply information and/or data in a format specified by them, as well as to collect data from the platform by their own means, in compliance with the GDPR and any other applicable national legislation);
- 2.7. Furthermore, in those Member States where media regulatory authorities have the competence to issue **orders to act against a specific item of illegal content or to provide a specific item of information about one or more specific recipients of the service** (Articles 8 and 9), the specificities of media content regulation should be taken into account and more legal certainty should be guaranteed in order to increase the efficiency of the procedures foreseen by the draft Regulation. For instance, more legal certainty could be provided as regards to: (i) how orders can be directed to providers of intermediary services, irrespective of their place of establishment; (ii) the territorial scope

of orders in order to make sure they do not exceed what is strictly necessary to achieve the objective; and (iii) the fact that orders can be issued in one of the three working languages of the EU.

3. What ERGA considers to be the source of potential risks from the perspective of content regulation

Finally, there are aspects of the DSA proposal which ERGA believes should be reconsidered by the co-legislators as part of the ordinary legislative procedure. While not precluding additional issues being raised at a later stage, ERGA has identified the following significant challenges:

- 3.1. The **interplay between the DSA and existing EU content legislation, such as the revised Audiovisual Media Services Directive (AVMSD), raises several questions which must be clarified.** It is anticipated that the DSA should complement sector-specific legislation, including the AVMSD. However, because the two legal instruments overlap in terms of the services in scope (e.g. video-sharing platforms), it appears necessary to provide more clarity as to what rules and mechanisms shall prevail and in what situations. ERGA believes that providing clear guidance on this issue would be instrumental in ensuring more legal certainty, especially where more stringent and/or additional rules are provided due to the specific risks raised in respect of some online content platforms;
- 3.2. While ERGA notes the Commission's transversal approach to the issues at stake, it however expresses its doubts regarding the added-value of **the proposed governance system.** It does not share the view that law enforcement in the online environment would suffer from a lack of trust and coordination, or that cross-sectorial issues would raise conflicts of competences between national authorities and therefore could not be resolved, on a European and national level. Considering the above, and while acknowledging the benefits of having a limited number of well-identified points of contact in the Member States for a convergent implementation of the DSA, ERGA is doubtful that the obligation to nominate a Digital Services Coordinator (DSC) in each Member State would bring actual benefits from an enforcement perspective. Instead, the proposed system *de facto* creates an additional layer of cooperation at national level, and across sectors, which is unnecessary in most cases and may generate extra operational costs for NRAs. Furthermore, from a cross-border enforcement perspective, it could result in undermining the benefits of existing cross-border cooperation arrangements between sector-specific national authorities involved in the implementation of the DSA;
- 3.3. Under any proposals concerning the DSA governance system, ERGA stresses that further clarity is required in the **division of competences and relationships** between existing national independent regulatory authorities and European networks (including, but not limited to, ERGA) on the one hand, and those foreseen in the DSA proposal (i.e. the European Commission, the Digital Services Board, and the Digital Services Coordinators) on the other hand. ERGA is concerned with the proposed approach which brings distinct areas of regulation (i.e. the systemic approach to the regulation of online content platforms; the regulation of online market places; and law-enforcement measures against specific items of illegal content and/or specific individual recipients of the services) under a single pan-European supervisory structure. Instead, ERGA believes

that distinct regulatory structures and mechanisms – on both national and EU level – are more appropriate in order to ensure that the objectives pursued by the DSA are achieved;

- 3.4. Furthermore, as it stands, ERGA believes that the proposed regulatory structures for the regulation of online content platforms, involving a Digital Services Coordinator which would coordinate the implementation of the DSA across different areas of regulation on a national level, do not provide sufficient guarantees in terms of:
- (i) **independence of sectorial regulation** (i.e. sector-specific regulation requires strict independence of the regulatory authorities in the exercise of their tasks);
 - (ii) **workability** (e.g. the enforcement timelines foreseen in the draft Regulation need further consideration in order to ensure that they are in accord with national legal systems) and;
 - (iii) **efficiency** (e.g. the procedures foreseen under the enhanced supervision mechanism for very large online platforms are unclear and not necessarily practicable);
- 3.5. With regard to territorial jurisdiction matters, ERGA is concerned that the **cross-border cooperation mechanisms** foreseen in the DSA proposal (Article 45) leaves Digital Services Coordinators in Member States other than the country of establishment with, by far, too limited a capacity to prevent, and/or act upon identification of, a suspected infringement of the DSA affecting national citizens in their jurisdiction. In a significant number of cases, an understanding of the specificities of national law and/or context is required (e.g. the language and contents of the service's terms and conditions is often adapted according to the country in which the service is available). Those situations call for an active and more direct involvement from the regulatory authority in the Member State(s) of destination to ensure a swift and efficient resolution to the matter (e.g. to be able to carry out its own investigation and request that the platform make available data and information which are relevant to the suspected infringement);
- 3.6. In light of the above, and with the aim of accommodating the specificities of each distinct area of regulation, the possibility to **reinforce European sector-specific networks of cooperation**, such as ERGA, should be explored. ERGA members believe there is a persuasive case for relying primarily on these existing and operational structures of cooperation – which, in the case of media/content regulation, is composed of national regulatory authorities experienced in promoting freedom of expression as a fundamental principle underpinning all their regulatory activities – for the purpose of the enforcing the rules established by the DSA;
- 3.7. From this perspective, a significant reformulation of the **Digital Services Board's tasks, competences, composition and governance** would be necessary. Among other things, consideration should be given to involving sector-specific networks of cooperation (such as ERGA, CPC, etc.). While implementation and enforcement of systemic issues relating to online content regulation with a cross-border dimension would be addressed within an enhanced ERGA, the Digital Services Board, coordinated by the European Commission, could be tasked with providing strategic guidance for the overall implementation of the DSA and supporting existing European networks of cooperation in matters of cross-sectorial interest.

Concluding remarks

This paper represents ERGA's first contribution to the wider European debate on the DSA proposal. Its principal aim is to bring the experience and perspective of European audiovisual regulators to bear in identifying the key proposals addressing online content regulation in the draft text and the likely challenges arising. ERGA recognises that the best way forward in this critical area is not an easy task and will pursue its own reflections over the coming months in order to develop more concrete proposals.

These will be inspired by the firm belief that content regulation, by its nature, occupies a unique position requiring a bespoke legislative response. In this context, ERGA welcomes further engagement with all interested parties, including the European Institutions, over the coming weeks and months.