



## ERGA position on the next instalment of the Code of Practice on Disinformation

## **A. Background**

Disinformation is a central threat to democratic processes such as elections and has a serious impact on various areas including people's health. The Code of Practice on Disinformation (the Code) is an important step in the process of building the relationship between its signatories, the EU, and the National Regulatory Authorities (NRAs) to combat this phenomenon. Following the monitoring of the implementation and the effectiveness of the Code, ERGA published its Report on Disinformation<sup>1</sup> in 2020. This report shows that the Code, alongside its positive implications, has significant weaknesses. In the report, ERGA came to several conclusions and recommendations.

Therefore, ERGA welcomes the review of the current Code.

Building on ERGA's conclusions and recommendations in its Report on Disinformation and taking into account the European Democracy Action Plan (EDAP) and the proposal for a Digital Services Act (DSA), ERGA highlights the importance of the following points for a successful update of the Code:

## **B. Issues and possible solutions**

### **1. Transparency about the Implementation of the Code**

*Issue:*

The Code relies on self-reporting but lacks a mechanism through which the information in the Self-Assessment reports can be independently verified. The information contained in the reports has been compiled by the platforms and does not contain the population of the data. In addition, the information provided by the platforms is generally aggregated for the whole EU, which makes it impossible to evaluate the impact of the Code on a national level. This issue is particularly severe since the impact and effectiveness of the Code is best monitored at a national level where language, societal and cultural factors can be taken into account.

*Possible solution:*

ERGA concludes that in order to make the Code more effective, there is a need for greater transparency about how the signatories are implementing the Code. For media regulators, transparency is the cornerstone in approaching not only the Code but also the new rules for online political advertising that are currently being drafted<sup>2</sup> and to tackle online disinformation in general. In this light, ERGA stresses the need for finding a mechanism allowing for independent verification and audit of the data in the reports. While such a mechanism is being proposed and discussed in the context of the DSA, and having regard to the fact that the strengthened Code should pave the way towards this, the work on the Code can serve to test out some of the relevant provisions of the DSA.

#### **a. Role of EDMO**

In accordance with the above, ERGA has welcomed the establishment of the European Digital Media Observatory. There are several strands of work where ERGA and EDMO shall cooperate in the coming months in order to help make any future approach to combat disinformation more effective. Among these are: access to data for researchers, and providing assistance in setting up the key performance

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<sup>1</sup> <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>

<sup>2</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12826-Transparency-of-political-advertising/public-consultation>

indicators. These should be, according to the European Commission's assessment report<sup>3</sup>, divided into structural and service-level indicators. ERGA is ready to deliver a list of proposals for both sets of indicators, divided into quantitative and qualitative indicators, for each pillar of the existing Code for the discussion with the European Commission, EDMO, signatories of the Code, and other relevant actors.

#### **b. Specific Key Performance Indicators**

In addition, ERGA is encouraging the Code's signatories and the EU Commission to improve the Code and its measures by requiring that all of the platforms comply with the set of obligations tailored to the respective services they provide in a uniform manner and adopt measurable key performance indicators (KPIs).

Below are several non-exhaustive examples of indicators, all meant to be broken down to national level, of various categories related to all pillars of the Code.

- **Scrutiny of ad-placement pillar:** Number of accounts removed for violation of platform advertising policies (e.g., policies against misrepresentation or policies aiming to avoid ad placement on disinformation websites)
- **Political advertising and issue-based advertising pillar:** Outline of tools to enable users to understand why they have been targeted by a given advertisement
- **Integrity of services pillar:** Information on policies about networks of coordinated inauthentic behaviours, including the misuse of bots and information about such bot-driven interactions.
- **Empowering the consumers pillar:** Number of users that interacted with disinformation content produced by inauthentic accounts or users that were notified when such content was removed.
- **Empowering the research community pillar:** Ratio of the number of academic or research organisations that enter into relevant arrangements with platforms or are able to access APIs and/or download the data they seek from platforms against the number of requests received. Such ratio would provide the monitoring body quantitative data on the Member State level on the level of engagement of signatories with the research community. Access to data for researchers is a crucial issue in relation to disinformation and other harmful content

#### **c. Monitoring of the Implementation of the Code**

ERGA believes that there is a need for provisions allowing the competent authorities (for example the NRAs – these could be designated by the Member States) to carry out specific monitoring activities, especially on a national level. Should permanent monitoring of the compliance with the provisions of the Code be developed, as is foreseen in EDAP, ERGA, based on its previous experience, specifically stresses the need to focus on national-level monitoring.

## **2. The scope of the Code**

The Code states that the “application of this Code is limited for each Signatory to services provided in the States that are Contracting Parties to the European Economic Area.” However, the Signatories to the Code have not applied the obligations to the EEA Member States. It is vital that the Signatories fulfil their obligations in all Member States according to the scope of the Code.

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<sup>3</sup> <https://ec.europa.eu/digital-single-market/en/news/assessment-code-practice-disinformation-achievements-and-areas-further-improvement>

### 3. Uniformity in Content and Structure

#### *Issue:*

ERGA believes that the measures of the Code are too general in terms of content and structure. In specific, the lack of uniformity in the definitions adopted by the different platforms means that there are great differences with regard to the implementation of the commitments to the Code.

#### *Possible solution:*

ERGA highlights the need for a harmonised approach to ensure consistency in implementation. Such a uniform approach can only be implemented if the definitions are provided by the national or European legislators and not by the platforms. Also, from a media regulatory point of view, the determination of what is disinformation and a common understanding of its key characteristics should not be decided by the platforms, i.e. the industry. It should not be up to private companies to decide what is covered by freedom of expression – this is the task of society, and thus of the legislators. To assist the national legislators and the European Commission with finding harmonised definitions of key terms, ERGA adopted the report *Notions of disinformation and related concepts*<sup>4</sup> in December 2020. The aim of the report is to identify relevant elements and characteristics of notions of disinformation and related concepts such as misinformation, malinformation, etc. The report's recommendations contain suggestions for more uniform definitions and common understandings, also in the sphere of political and issue-based advertising. It also highlights the need that any definition of disinformation in legislation or other regulation, such as regulatory guidance, must take into account the serious implications for freedom of expression and media freedom. In addition, ERGA has published additional specific recommendations in relation to several pillars of the Code in the reports focusing on strengthening fact-checking across the EU<sup>5</sup>, improving media literacy campaigns on disinformation<sup>6</sup>, and improving procedures as regards consumer complaints and flagging<sup>7</sup>.

### 4. Co-Regulation

#### *Issue:*

One of the challenges with the Code is its self-regulatory nature. In essence, the platforms set their own structure and commitments. However, this self-regulation does not provide for a monitoring mechanism enabling the competent authorities to assess compliance with the commitments.

#### *Possible solution:*

In its 2020 report on disinformation, ERGA already stated that moving from the current self-regulatory model to more structured co-regulation may prove to be more effective to counter disinformation online. The recommendation to move towards a co-regulatory approach was also highlighted in the ERGA position paper on European Democracy Action Plan<sup>8</sup>. Both EDAP and the DSA proposal foresee a co-regulatory approach to disinformation.

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<sup>4</sup> [Reports and opinions || ERGA \(erga-online.eu\)](#).

<sup>5</sup> <https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG2-Report-2020-Strengthening-factchecking-across-the-European-Union.pdf>

<sup>6</sup> <https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG2-Report-2020-Improving-Media-Literacy-campaigns-on-disinformation.pdf>

<sup>7</sup> <https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG2-Report-2020-How-to-improve-procedures-related-to-consumers-complaints.pdf>

<sup>8</sup> [https://erga-online.eu/wp-content/uploads/2020/10/ERGA\\_Position\\_EDAP-Consultation\\_Summary.pdf](https://erga-online.eu/wp-content/uploads/2020/10/ERGA_Position_EDAP-Consultation_Summary.pdf)

### **a. Main Principles for Co-Regulation**

ERGA welcomes these initiatives and based on its experience, i.e. with the implementation of the revised Audiovisual Media Services Directive (AVMSD), has several suggestions about guiding principles when designing a co-regulatory mechanism.

In 2018 ERGA published a Framework for Effective Co-Regulation of Video Sharing Platforms<sup>9</sup>. This framework sets out six principles that NRAs could consider while assessing the appropriateness of co-regulatory or self-regulatory measures taken by the providers of video-sharing platforms (VSPs). While these principles relate specifically to VSPs, ERGA believes that this approach could also guide the process of setting up a co-regulatory backstop as set out in the DSA proposal for online platforms in relation to policies around content. The main principles are outlined below:

- **Openness/ transparency to users**

The user should have clear visibility of a platform's content policies and processes and should be able to understand how those affect the content and functionality of the platform.

- **Accessibility of complaints procedures**

The overall system for dealing with complaints should be promoted widely so that users are aware of it. This includes making the complaints procedures readily available to users. Making a complaint about content potentially in violation of the platform's policies should be an option easily and readily available to all users.

- **Effective handling and resolution**

In the application of a complaints-driven approach to content regulation by platform providers, two types of users will be affected: the complainants and the persons posting the user-generated content that the complaint refers to. Both types of individuals should be treated fairly, and their rights should be respected. Complaints should be considered and resolved appropriately under the platform's published procedures.

- **Iterative improvements**

The platform providers' measures should be characterised by an iterative process of 'learning by doing, refining the measures in light of changes in technology, user behaviour, experience, and expectations, and assessment against the objectives in the Directive.

### **b. Accountability to the NRA**

The NRA may ultimately need to get involved if the measures taken by platform providers themselves are found to be inappropriate or inadequate.

This point is closely related to point 1 and the need for sufficient access to data. The platform providers should retain all records of complaints handling and consequent actions for a period of time, and should, if necessary, provide sufficient information for the NRA to audit and/or to investigate in specific cases of concern. The NRA should routinely have visibility of the measures taken by the platform providers, and the outcomes of those measures. This may be achieved through a regular reporting pattern. It may also be necessary for the NRA to have some visibility of the content on the platform, to understand the potential risks to users.

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<sup>9</sup> [https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2018-09-SG4-Framework-for-Effective-CR-of-VSPs-vz\\_3.pdf](https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2018-09-SG4-Framework-for-Effective-CR-of-VSPs-vz_3.pdf)

In order to strengthen the Code and to guarantee compliance with the commitments, a monitoring system should be established that enables the monitoring of the implementation of the commitments made on a regular basis.

If it becomes apparent that the commitments are not being met, this permanent monitoring should be linked to the possibility for the NRAs or ERGA to issue a formal public reprimand to ensure that the commitments are met in the future.

### **c. Enhanced cooperation between regulators**

ERGA has adopted a Memorandum of Understanding<sup>10</sup> between its members that provides a framework for seamless cooperation by regulators across borders. In line with this, ERGA is ready to assist the European Commission in establishing the effective pan-European mechanism.

## **5. Regulatory Backstop**

In the long term, further strengthening of the Code should be considered.

A first step has already been initiated with the DSA proposal. The DSA proposal sets out the notion of a “*co-regulatory backstop*” with the idea of building on existing voluntary initiatives. To this end, a link should also be established between the future DSA and the Code in the sense of more specific enforcement powers and sanctions if commitments on a voluntary basis prove to be insufficient. Such enforcement and sanctioning possibilities require a regulatory framework. The Guidance which is being prepared by the European Commission aims at evolving the existing Code towards a co-regulatory instrument, i.e. a “Code of Conduct” as foreseen in the DSA. The Guidance will bridge the period before the adoption of the DSA through a strengthened Code.

In addition, to ensure transparency rules in the area of political advertising (through the Code and the anticipated proposal on the transparency of political advertising), other areas such as the violation of journalistic due diligence and the inauthentic use or automated exploitation of service could be looked at more closely in the future to supplement the Code.

### **About ERGA**

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 cooperation between regulatory bodies where experience and best practices can be exchanged.

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<sup>10</sup> [https://erga-online.eu/wp-content/uploads/2020/12/ERGA\\_Memorandum\\_of\\_Understanding\\_adopted\\_03-12-2020\\_l.pdf](https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_l.pdf)