



Proposals Aimed at Strengthening the Digital Services Act (DSA) With Respect to Online Content Regulation

Introduction

On December 15th 2020, the European Commission released its proposal for a Digital Services Act (DSA). As this text was starting to be reviewed by the European Parliament and the Council respectively, ERGA expressed its preliminary views on the DSA proposal in a statement¹ it published in March 2021.

These views are largely based on ERGA members' expertise in the implementation of the legislation supporting media regulation, including regulation of audiovisual services online, in particular when it comes to balancing key democratic objectives and citizens' fundamental rights – all of which should be equally guaranteed in the online environment. Given its crucial role in promoting and upholding fundamental European values, such as freedom of expression, cultural diversity and human dignity, ERGA firmly believes that online content regulation² requires tailored rules and bodies – the independence of which it is vital to guarantee.

In its March 2021 statement, ERGA welcomed many key aspects of the DSA proposal as a significant step forward in the area of online content regulation at EU level. It especially welcomed the proposal's aim to guarantee online safety and the protection of fundamental rights in the digital environment. It also pointed to a number of desirable clarifications or enhancements in the text as well as to aspects of the text which it believes should be reconsidered by the co-legislators

¹ ERGA Statement on the European Commission's proposals for a 'Digital Services Act' (DSA) and a 'Digital Markets Act' (DMA), March 29th 2021 (https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMA-Statement_29032021.pdf)

² In this Paper, ERGA understands 'online content regulation' – primarily though not exclusively – as the regulation of the content moderation policy implemented by online platforms (also referred to as 'systemic regulation'), rather than the regulation of those individuals who upload content on these platforms.

as part of the ordinary legislative procedure. The DSA's enforcement structures at national and European level were a particular focus for ERGA.

In this paper, ERGA intends to articulate a set of constructive and pragmatic proposals on the DSA, based on its experience and in-depth analyses. It now aims to provide solutions for the issues it identified in its first statement. It seeks to ensure that the elements of the DSA that relate to online content regulation better align with the following key principles:

- **The rules provided for by the DSA for online content regulation should as a rule prevail over standards set by private companies.** Legal certainty in relation to how the proposal interacts with applicable EU and national provisions (such as the Audiovisual Media Services Directive) should be guaranteed. The rules of the DSA should be more finely tailored to proportionately address the risks posed by the players it regulates for EU citizens;
- **The DSA must preserve the integrity of the Digital Single Market while providing all Member States with a necessary level of assurance** that their legitimate interest in affording the best protection possible to their national citizens is guaranteed;
- **The rules for online content regulation in the DSA must be enforced by independent regulatory authorities.** While providing for judicial oversight, regulators' independence from public and private spheres should continue to be a cornerstone of online content regulation. By guaranteeing that authorities responsible for the implementation and enforcement of the DSA are independent from external pressure and distinct from law-making authorities, the legitimacy, robustness and effectiveness of the regulatory framework is strengthened;
- **The DSA's enforcement structure must guarantee that infringements to rules for online content can be swiftly and efficiently resolved.** Given the speed and impact of the damage that can be caused by certain kinds of illegal or harmful content ERGA believes that any system of governance must facilitate – rather than complicate – swift and effective actions by the responsible regulatory authorities towards online players, especially very large online platforms (VLOPs). Structured cooperation schemes between authorities should guarantee adequate checks and balances and help to firmly secure fundamental EU values. Freedom of expression must be at the forefront of considerations. An even greater need for a cautious and balanced approach that takes into account all (constitutional) safeguards and the need to protect fundamental freedoms is required in respect of harmful content.

Based on these key principles, these proposals respectively pursue the following objectives:

1. **Clarify and tailor the rules of the DSA to** the specific needs of online content regulation, regarding both services in scope and the responsibilities and roles of national regulatory authorities (NRAs);
2. **Secure and optimise the interplay** between the DSA and the Audiovisual Media Services Directive (AVMSD) thereby alleviating implementation risks;
3. **Create an appropriate enforcement structure for the rules of the DSA relating to systemic online content moderation**, at both European and national levels and taking into account sectoral specificities;
4. **Foster cooperation between NRAs for online content regulation** and give suitable powers to all of them, relying on the strength **of a sectoral network**.

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Executive Summary

In March 2021, ERGA issued a first statement on the *Digital Services Act* (DSA) proposal, where it **welcomed many key aspects of the proposed regulation** as a significant step forward in the area of online content regulation at EU level. It also pointed to a number of desirable clarifications or enhancements in the text, as well as to aspects, which it believes should be reconsidered by the co-legislators.

In this Paper, ERGA intends to articulate **a set of constructive and pragmatic proposals** aimed at strengthening the parts of the DSA relating to systemic online content regulation, based on its experience and an in-depth analysis it has carried out.

These proposals aim to make the implementation of the DSA, **as it relates to systemic online content regulation**, better aligned with the following **key principles**:

- The rules provided for by the DSA, which shall clearly prevail over any standards set by private companies, shall maximise legal certainty and be proportionate to the risks posed by online content services accessible in the EU;
- The DSA must both preserve the integrity of the Digital Single Market and give all Member States assurance that their legitimate interest in affording the best protection possible to their national citizens is guaranteed;
- The DSA enforcement structure, which shall rely primarily on independent regulatory authorities, must guarantee that infringements can be swiftly and efficiently resolved.

The first set of proposals in this paper explores ways of clarifying and tailoring the rules of the DSA to the specific needs of online content regulation, regarding both services under scope and national regulatory authorities (NRAs).

To this end, ERGA puts forward a series of proposals aimed at strengthening the protection of EU fundamental values regarding online content – at the forefront, the protection of audiences and freedom of expression – by:

- ensuring that the relevant DSA rules apply appropriately to different kinds of players which should be subject to online content regulation, including major search engines and live-streaming services;
- better tailoring the rules to the nature of these services and to the level of risks their activities present for EU citizens and, where necessary, reinforcing the provisions applicable to those whose activities present high potential risks;
- empowering NRAs vis-à-vis online content services within a genuine co-regulatory approach and granting them adequate tools to carry out their duties, especially in terms of access to information and data.

The second set of proposals in this paper explores ways to secure and optimise the interplay between the DSA and the Audiovisual Media Services Directive (AVMSD), and alleviate related implementation risks.

Based on an analysis of the practical difficulties that may arise in the joint implementation of the two instruments (in the scope and jurisdiction field, in the way rules combine, and at the enforcement level), ERGA makes a set of concrete recommendations.

ERGA suggests that in each Member State the same NRA should implement and enforce the AVMSD rules on Video Sharing Platforms (VSPs) and the DSA rules concerning online content services/activities. It further suggests that ERGA should be referred to in the DSA as the competent network for dealing with cross-border issues regarding online content regulation³ and that the designated NRAs should be provided with investigation and enforcement powers derived from the DSA to implement AVMSD rules on VSPs.

The third set of proposals in this paper proposes a structure for the effective enforcement of the DSA's provisions on systemic online content moderation.

At the European level the paper proposes that sector-specific cross-border mechanisms between sectoral authorities would be relied upon, with ERGA nominated as the responsible network for online content regulation matters, and that the Digital Services Board would be refocused on strategic governance of the DSA.

At the national level, ERGA proposes to rely primarily on sectoral NRAs, with a streamlined national Digital Services Coordinator (DSC), whose remit would be focused on a set of transversal, essentially administrative, coordination functions. It would be clarified that in any case, the DSC would have no hierarchical/ supervision role towards other NRAs involved in the operational enforcement of the DSA.

The fourth set of proposals in this paper explores ways to further foster cross-border cooperation between NRAs in charge of online content regulation, relying on their collective strength as a sectoral network.

ERGA proposes to strengthen the efficiency of the country of origin principle by granting all competent NRAs that are concerned by the activities of a given player suitable ways to be involved in, and contribute to, the effective supervision of these activities. Some fundamental principles for a strengthening of ERGA ("ERGA+") in order to make it fitter for its proposed enlarged tasks under the DSA are laid down.

ERGA is committed to addressing the growing challenges raised by the moderation of content online with a practical focus and respect for EU fundamental values. **ERGA stands ready to**

³ See 2.24 and 3.7 to 3.9.

further engage in constructive discussions and exchanges with the European Commission and co-legislators and to assist in formulating more detailed and/or targeted proposals as appropriate.

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1. Clarify and tailor the rules of the DSA to the specific needs of online content regulation, regarding both services in scope and the responsibilities and roles of national regulatory authorities

- 1.1. As stated in the introduction of the ERGA's March 2021 statement, *"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"*.
- 1.2. ERGA would first like to reiterate that, having regard to the importance of preserving the freedom of expression online, it is fundamental *"to clearly ensure that all aspects of an online content platform's moderation policy are subject to independent supervision by the competent regulatory authorities"*. In that respect, *"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"* (ERGA Statement, 2.3).
- 1.3. ERGA insists that the DSA should clearly and explicitly state that the terms and conditions of all players subject to online content regulation should be fully subordinated to the fundamental values and laws at European and national level and not left to the sole discretion of private companies. Further, it should be ensured that the players in scope of the DSA do not interfere with the editorial independence of media. This is particularly crucial so as to protect freedom of expression, including free and independent media, and non-discrimination in the moderation of online content.
- 1.4. ERGA now further elaborates on a number of questions, concerns or requests for clarifications it has made previously with a view to maximising the legal certainty of the rules provided by the DSA and to ensuring that these rules be tailored to the specific needs of online content regulation in a way that is proportionate to the risks raised by players' activities.
- 1.5. These proposals aim to:
 - a) Ensure that the relevant DSA rules apply to the different kinds of players which should be subject to online content regulation;
 - b) Better tailor the rules in the DSA to the nature of these players;
 - c) ... and to the level of risks their activities present for EU citizens;
 - d) Empower NRAs vis-à-vis online content players within a genuine co-regulatory approach;
 - e) Grant NRAs adequate tools to carry out their duties.

a) Ensure that the relevant DSA rules apply to the different kinds of players which should be subject to online content regulation

- 1.6. As set out in the ERGA Statement (2.1), *"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"*. This differentiation would allow *"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"* (ERGA Statement, 2.2.)
- 1.7. ERGA notes that online content platforms' services/activities are not identified as such in the proposed pyramidal structure of the DSA (sections 1 to 4 of Chapter III). While most of them could meet the definition of an online platform, some, nevertheless, are not captured by this definition because they fail to meet the *"storage of information provided by, and at the request of, a recipient of the service"* criterion, which is central to the *'hosting service'* definition.
- 1.8. The following players also implement content moderation policies and should fall within the scope of a regulatory framework for online content regulation:
- Live-streaming services of content provided by users: depending on the functionalities and modalities of the services, they would fall under the video-sharing platform (VSP) category under the AVMSD but, to the extent that they do not entail storage capabilities, they could be excluded from the notion of hosting services under the DSA. However, they apply moderation measures which can lead to real-time blocking of content or, more often, an account suspension;
 - Search engines: depending on the features of the services, they could fall out of the *'hosting services'* category, but they index websites and webpages and apply moderation measures such as de-ranking or de-referencing websites;
 - Private messaging services may also be considered to raise online content issues. Depending on the kind of service they could fall out of the *'hosting services'* category. They may however apply moderation measures when they suspend an account after the reporting of a message (which is no longer covered by the confidentiality of communications) or when they apply measures aimed at limiting the virality of certain (e.g. disinformation) messages.

1.9. While understanding the rationale for the construction of the different categories of services in the DSA, ERGA stresses the need to distinguish (primarily within the 'online platform' category but also within the other categories) the services/activities that call for a specific regulatory approach with regard to the issues raised by the exercise of content moderation policies based on law and/or on their terms and conditions. This transversal characterisation that relies on the exercise of such policies should be explicit and flexible enough to accommodate innovations. To this end, the DSA may provide an open indicative list.

b) Better tailor the rules in the DSA to the nature of these players

1.10. In its March 2021 Statement (1.2), ERGA expressed its agreement in principle *"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"*.

1.11. ERGA called for a harmonised subset of rules to apply to online content platforms' services/activities. Stricter and more detailed rules should apply when a higher risk in to fundamental European values, as enshrined in EU and national law, are identified.

1.12. ERGA notes that the intent of the pyramidal structure of the DSA in Chapter III is to apply detailed and stricter rules to players likely to raise higher risks based on their nature and/or reach. However, ERGA does not consider it takes into account all the specificities of the risks raised by content moderation in an optimal way.

1.13. ERGA proposes the following adjustments to this structure and to the allocation of obligations within each category to better reflect a risk-based approach, which is consubstantial to media regulation:

- Section 1 *Provisions applicable to all providers of intermediary services* should apply to all providers of intermediary services, including search engines;
- Section 2 *Additional provisions applicable to providers of hosting services including online platforms* should apply to live streaming and possibly messaging services/activities in addition to hosting providers. For example, article 14 *Notice and Action mechanisms* should apply to these services/activities because they may take decisions/actions after a notice, such as the removal of the content or other measures such as account suspension.

Furthermore, this section should include several obligations currently included in section 3, under articles 16 to 21. The application of these obligations (notice and action procedure and statement of reasons, on the one hand; safeguards applicable in case of content withdrawal or account suspension, on the other hand) appears fully justified and necessary with regard to the moderation policy these players exercise;

- Section 3 *Additional provisions applicable to online platforms* would still cover obligations relating to advertising transparency on online platforms and obligations for marketplaces;
- Section 4 *Additional obligations for very large online platforms to manage systemic risks*, which targets the largest players raising major risks, should apply to all the relevant players (i.e. having a moderation role making them relevant to systemic content regulation), which meet the reach criterion. This should include live streaming, search engines and potentially private messaging service providers.

c) ... and to the level of risks their activities present for EU citizens

- 1.14. While fully recognising the relevance of the principle of proportionality, and especially acknowledging that micro and small businesses should not be submitted to unproportioned obligations preventing them from growing and scaling up, ERGA affirmed in its Statement (2.4) that *“a risk-based approach would be more relevant [than a merely reach-based approach] 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”*.
- 1.15. To this end, depending on the systemic risks the services/activities of online platforms may present for society or the rights of their users, these platforms should take appropriate measures to assess and mitigate such risks⁴.
- 1.16. ERGA therefore proposes that a subset of the enhanced obligations in Section 4 of Chapter III should apply to all players above the threshold of 45 million average monthly active recipients as well as to players below this threshold which present a significant level of impact and risks. In order to determine which of these players may have an impact and risk justifying strengthened obligations, a combination of objective factors and risk assessment in terms of harm could be considered.
- 1.17. The list of these designated players should be reviewed on a regular basis and be subject to appeal. The audience criterion should be supplemented with other indicators (such as the age of users, the proportion of the population reached in one Member State, the type of content involved - including video or not -, and/or the repetitiveness of previous infringements).

⁴ This approach, in principle, is similar to the one followed in the General Data Protection Regulation (GDPR), where data controllers, regardless of their size, have to take appropriate measures depending on the risk the processing of personal data presents for the rights of the data subjects.

1.18. While very large online content platforms would be submitted to the highest standard of compliance with all the provisions of Section 4 imposed on VLOPs, smaller players with high systemic risks (i.e. found to meet a defined number of the above-mentioned indicators) would be submitted to a subset of the obligations imposed to the VLOPs. This subset, to be defined in the Regulation, should aim at ensuring that efforts involved in compliance with the provisions be commensurate to the resources services have at their disposal and potential risks to users, in accordance with the principle of proportionality. ERGA is of the preliminary opinion that it should comprise article 26 *Risk Assessment*, article 27 *Mitigation of Risks*, article 29 *Recommender systems* and article 31 *Data access and scrutiny*.

d) Empower NRAs vis-à-vis online content players within a genuine co-regulatory approach

1.19. In its Statement (2.5), ERGA considered 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"*.

1.20. ERGA therefore advocates for clarifying explicitly the direct involvement of regulatory authorities in the supervision of the implementation and enforcement of articles 26, 27 and 28 of the DSA. This should comprise both setting up the framework of the compliance mechanisms (guidelines for example) and monitoring and appraising the measures taken (see e) below on the adequate powers for NRAs).

1.21. Within such a framework, clearly giving an oversight role to NRAs, ERGA firmly believes that regular dialogue and cooperation between NRAs and platforms should be a cornerstone of the enforcement of the regulation in a genuine coregulatory approach. ERGA furthermore wishes to emphasise that other players may have an important supporting role: other sectoral authorities at the national level, for instance in the field of data and general consumer protection, as well as scientific and academic communities...

e) Grant NRAs adequate tools to carry out their duties

1.22. As also pointed out in ERGA's March Statement (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)".

- 1.23. ERGA stresses that, in line with the objective of Article 38(4) of the DSA, the NRAs in charge of enforcing online content regulation in the context of the DSA should be given adequate powers, i.e. particularly the powers given to the DSC under article 31 (data access and scrutiny) and article 41 (powers of investigation – information request, on-site inspections, power to take statements – , powers of enforcement – fines, interim measures... –, power to require an action plan, power to request the judicial authority to order temporary restrictions). These powers are crucial in the online environment.
- 1.24. The DSA should provide that NRAs have adequate powers to participate in the implementation and enforcement of articles 26, 27 and 28 of the DSA (see subsection (d) above).
- 1.25. Access to online platform's data should be more clearly legally specified in the powers of the NRAs. In particular, the regulator's access to relevant data should be possible not only in the event of a suspected infringement but also for the purposes of monitoring. Furthermore, it should be stated in the DSA that it is not possible to invoke business secrecy in the context of all their investigations and assessments. NRAs should guarantee the confidentiality collected data covered by business secrecy. ERGA's position on this issue reflects the persistent issues it has experienced gaining access to data in the context on its contribution to the assessment of the implementation of the European Code of Practice on Disinformation.
- 1.26. In the same spirit, the DSA should extend the investigatory powers spelled out in Article 41. In particular, the powers to request information pursuant to Article 41(1) could also include the wording of the general power, as provided for in article 19(1) of the Digital Markets Act and Article 57(1) for the Commission, to *"require [players subject to the Regulation] to provide all necessary information, including for the purposes of monitoring, implementing and enforcing the rules laid down in this Regulation"*. This, together with the powers pursuant to Article 31, will ensure that NRAs are able, for the purpose of enforcing the DSA, to request access to and explanations of, inter alia, platforms' databases and algorithms, either by simple request or by decision. Services could be required to provide truthful and clear responses to regulators about queries they have relating to functionality on the services they provide.
- 1.27. Furthermore, ERGA advocates for the DSA to include general explicit compliance principles to make it more effective. Providers could be required to keep accurate records of the activities that they have undertaken to comply with the regulation to facilitate meaningful scrutiny of their compliance. Without this, enforcement of the regulation could prove difficult in practice for regulators.

1.28. Finally, with regard to orders to act against illegal content (Articles 8 and 9), ERGA suggests to clearly determine the procedures and competences of the authorities involved on the one hand, and the obligations of platforms on the other hand.

2. Secure and optimise the interplay between the DSA and the Audiovisual Media Services Directive (AVMSD) thereby alleviating implementation risks

Problem assessment

- 2.1. ERGA's March 2021 statement (section 3.1) pointed out that the relationship between the DSA and the Audiovisual Media Services Directive (AVMSD) raises a number of questions which need to be clarified in order to enhance the legal certainty of the enforcement of European content regulation online.
- 2.2. In principle, a system where all provisions relating to systemic content moderation by online platforms would be laid down in a single European legal instrument would appear to be preferable, for legal certainty and efficiency reasons, rather than a situation where two distinct instruments have applicable provisions, which partially overlap.
- 2.3. From this perspective, considering that media regulation essentially calls for sector-specific provisions and enforcement structures, a solution might be to rely solely on a revised version of the AVMSD where the already existing provisions on VSPs (Art. 28a & 28b) and ERGA (Art. 30b) would be supplemented by new rules, which would be closely derived from the DSA Proposal. In this way, the scope of the existing rules in the AVMSD would be widened (inter alia in order to cover other kinds of online platforms than VSPs) and deepened (to provide for more powerful instruments and enforcement rules, such as the ones foreseen by the DSA proposal).
- 2.4. However, ERGA is aware that such a solution is not compatible with the logic behind the European Commission's DSA proposal which relies on a horizontal approach. As ERGA fully agrees with the Commission on the urgency of strengthening Europe's rules for online content moderation, pragmatism strongly advocates against such a solution, which would call for the elaboration of an entirely new legislative proposal and require significant additional time before its adoption.
- 2.5. This same pragmatic approach equally leads to the discarding of another radical option which would involve the current provisions in the AVMSD dealing with VSPs being repealed and introduced into the DSA. This hypothesis would also undermine the major achievement of the European Union's co-legislators represented by the set-up of harmonised rules applicable to online audiovisual content (e.g. advertising) in the AVMSD.
- 2.6. ERGA therefore advocates for a less disruptive approach relying on a precise analysis of possible risks in the interplay between the DSA proposal and the AVMSD, and subsequent possible clarifications aimed at mitigating these risks. This would be crucial to ensure the effective application of both instruments. ERGA highlights that the revised AVMSD will remain a key legal instrument harmonising EU audiovisual content standards online, in

particular when it comes to incorporating EU content standards in terms and conditions, protecting minors from harmful content and setting qualitative advertising standards online.

2.7. The practical questions and difficulties regarding the interplay between the DSA and the AVMSD are fourfold (see **Annex 1** for a more detailed analysis on the concrete challenges posed by the interplay between the AVMSD and the proposed DSA).

- **Interpretation of the proposed text**

2.8. It is well noted that the DSA would not affect the application of the specific sectoral provisions of the AVMSD and that it would apply in a complementary manner to issues that are *'not addressed'* in the Directive. It would also apply to issues that are *'not fully addressed'* in the Directive as well as issues on which the Directive *"leaves Member States the possibility of adopting certain measures at national level"*. While the *'lex specialis rule'* carries some legal uncertainty, the unprecise wording *'not fully addressed'* may add to this uncertainty.

2.9. It is still unclear among ERGA members whether the formulations mentioned in paragraph 2.8 mean that the provisions from the DSA can be combined with the provisions of the AVMSD regarding VSPs, and/or whether the DSA is to be seen as a relevant minimum set of rules in the areas not covered by detailed specific provisions in the AVMSD.

2.10. In particular, a number of questions require clarification to ensure the EU legislative framework for online content regulation can be implemented and enforced successfully as a whole. For example, further clarification would be helpful when it comes to: the regime applicable to VSPs offering both audiovisual content covered by the AVMSD and other types of content covered by the DSA; how the provisions of the DSA can be reconciled with different approaches to transposition of the AVMSD in Member States; the impact of the DSA on the transposition measures Member States have adopted to the AVMSD's provisions on VSPs.

- **Scope and jurisdiction**

2.11. As regards certain online platforms, the material scope of the AVMSD and the DSA are not fully aligned. For instance, platforms offering live-streaming services/activities are included in the definition of VSPs in the AVMSD but depending on the functionalities of the service, they may not be covered by the definition of *'online platforms'*, and not even of *'hosting services'*, whenever they do not meet the *'storage'* criterion, in the DSA. In such case, they may not be subject to the corresponding obligations (as described above in 1. a)).

2.12. Another difficulty lies in the fact that the provisions on establishment and secondary jurisdiction differ between the two texts, in particular for third country providers. This may lead to potential situations where a double jurisdiction assessment may be needed for the

purpose of implementing the rules provided for by the AVMSD together with the additional rules provided for by the DSA.

2.13. Furthermore, Article 40, paragraph 3, of the DSA provides that “Where the provider of intermediary services fails to appoint a legal representative in accordance with article 11, all Member States shall have jurisdiction for the purposes of Chapters III and IV. Where a Member State decides to exercise jurisdiction under this paragraph, it shall inform all other Member States and ensure that the principle of *ne bis in idem* is respected”. It is unclear (i) how and under which process a Member State may impose the sanctions provided for in article 42 or take any measure against a provider that has neither an establishment nor has appointed a legal representative within the EU; and (ii) how a Member State can ensure that other Member States will respect the *ne bis in idem* principle.

- **Obligations applicable to online platforms**

2.14. As a sectoral instrument, the AVMSD sets out (in its article 28b) the responsibilities of video-sharing platform services to take appropriate measures to protect their users from certain kinds of illegal and harmful content, as well as Member States’ and NRAs’ roles in ensuring such measures are effective.

2.15. As a horizontal instrument, the DSA provides for a number of obligations and mechanisms, which could prove to be useful in implementing and enforcing the general provisions of Article 28b. This is especially true regarding the following provisions: terms and conditions, transparency obligations on online advertising, reporting and flagging mechanisms, users’ complaints and out of court settlement of disputes mechanisms and encouragement of co-regulation schemes.

2.16. However, some practical difficulties might arise in implementing this combination of rules. For example, assessment criteria used for the Article 28b measures might need to be compatible with the provisions of the DSA. Some services that have the same obligations under Article 28b might have different obligations under the DSA and *vice versa*. Varied national transposition arrangements will foreseeably add to this complexity.

- **Enforcement: authorities and tools**

2.17. One issue in this regard is whether the enforcement powers and tools provided under the DSA proposal can, where relevant, be used by NRAs to back the implementation of the provisions of the AVMSD vis-à-vis VSPs (e.g. the sanctioning mechanism). The DSA proposal indeed does not provide the possibility to use the minimum powers to enforce any other legislation, as this would not be within the scope of the overall legislation.

2.18. Other issues would require clarifications in the DSA in order to maximise overall efficiency and avoid overlaps or lack of consistent regulatory action: What would happen if an NRA responsible for implementing and enforcing the provisions of the AVMSD in relation to VSPs is not empowered to implement and enforce the provisions of the DSA in the field of online content platforms' activities? As some of the obligations imposed to VLOPs could coincide with those imposed on VSPs, who would be responsible for the assessment of measures taken by them in such a situation? The media NRA in accordance with the AVMSD, another national authority in accordance with the DSA or both?

Proposals

2.19. In view of the above, ERGA strongly advocates for the following clarifications and amendments to be made in the DSA proposal.

2.20. In order to clarify any interpretation issues, the articles of the DSA which complement the AVMSD provisions on VSPs should be explicitly identified as such, e.g. in a dedicated recital of the Regulation.

2.21. On the issue of scope, ERGA proposes the DSA to be amended to ensure that:

- All types of VSPs, as defined by the AVMSD, are explicitly identified as falling under appropriate services categories of the DSA. Subsets of rules applying to these categories will need to be supplemented, where necessary, to cover all the online content moderation measures they call for (see above, 1. b));
- Competent NRAs are not required to carry out dual jurisdiction assessments for the purposes of AVMSD implementation;
- Clarity is provided regarding the procedures that should apply when all Member States have jurisdiction under article 40(3). For example, if a Member State decides to exercise jurisdiction under this paragraph, it shall inform all other Member-States and such proceedings for the same facts shall not be open in other Member States. If such proceedings have already been opened, priority should be given to the earliest among them and all subsequent proceedings shall be suspended. The sanctions that can be imposed to a provider that has failed to designate a legal representative within the EU should be clarified as well.

2.22. To limit the possible complexity which may result from varied transpositions, the DSA should allow the NRAs to adopt common interpretations and frameworks for the application of the DSA obligations as a complement to the AVMSD provisions relating to VSPs.

- 2.23. The DSA should also comprise an explicit mention of article 28b of the AVMSD, among the obligations applicable to relevant players falling under Sections 2, 3 and 4 of Chapter III of the DSA.
- 2.24. The DSA should expressly provide that NRAs designated as responsible Authorities by Member States for VSPs under the AVMSD need to be entrusted, at national level, with the implementation and enforcement of the DSA rules concerning online content regulation. In the same way, the DSA should refer to ERGA and task it with supporting/ensuring the cross-border implementation of the DSA regarding online content regulation (see below 4.).
- 2.25. Finally, in order to guarantee and support the effectiveness of provisions relating to VSPs, it may be envisaged to explicitly provide in the AVMSD that NRAs have investigation and enforcement powers derived from the DSA.

3. Create an appropriate enforcement structure for the rules of the DSA relating to systemic online content moderation

- a) At the European level: rely on existing sector-specific networks for supporting the enforcement of the DSA and refocus the Digital Services Board on strategic and cross-cutting coordination issues**

Problem assessment

- 3.1. As was pointed out in ERGA's March 2021 statement (sections 3.3, 3.6 and 3.7), the enforcement structure put forward in the DSA proposal, including the Digital Services Board, appears to be complex and not to be optimally tailored for addressing the specific challenges of systemic online content regulation, insofar as:
- The Board's responsibilities cover a range of fundamentally different activities, such as online content platforms' and online market places' activities which raise different kinds of risks and call for distinct regulatory measures and oversight (including, when content moderation is at stake, the need to rely on independent authorities fit for balancing the freedom of expression with the protection of audiences);
 - Since the online platforms subject to the DSA rules are mostly providing their services across frontiers and, in many cases, on a pan-European scale, the main challenge in the implementation of systemic online content regulation resides in taking into account the various national contexts and ensuring appropriate cross-border coordination;
 - The presence of the national Digital Services Coordinators (DSCs) on the Board, conceived under the assumption that there is one overarching approach to all matters related to platforms, introduces an additional layer of complexity into the coordination between Member States. In particular, the DSA proposal does not fully ensure that all competent national authorities for online media regulation, in addition to the DSCs, are represented at the Board, which could subsequently have to rely on DSCs with a poor knowledge and no experience of content regulation;
 - More generally, the Board, which is comprised of DSCs, may end up having an uneven representation of authorities in charge of media content regulation. It may not be suited to dealing effectively with the day-to-day questions of operational coordination between Member States that will be raised by the regulation of online content platforms and endanger the balance achieved by the institutionalisation of ERGA by way of the AVMSD.

Proposals

- 3.2. ERGA therefore proposes to assign the task of ensuring operational cross-border cooperation needed for supporting the enforcement of the DSA's provisions in each sector to the corresponding sector-specific network (when existing), which shall gather independent competent national authorities in its field. Considering the fundamental values at stake, this would be particularly important for the systemic regulation of online content platforms, for which this task would be accomplished by ERGA, which should be adapted as far as necessary to the new needs arising from the new DSA provisions (see 4. b).
- 3.3. Nonetheless, considering the fact that the DSA is an essentially horizontal instrument, ERGA considers that there would indeed be added value in having a global, strategic, cross-sectoral oversight on the enforcement of DSA. This task could be assigned to a redefined Board, which would essentially be focused on the strategic governance of the DSA and no longer on its operational, day-to-day cross-border implementation – the latter being carried out, for online content regulation, within the sector-specific network, ERGA.
- 3.4. ERGA proposes that the redefined Board would be a forum for periodical high-level discussions between the European Commission and the DSCs, based on the experience and expertise of the sectoral European networks involved in the implementation of the DSA. It could consider the impacts of case law of the European Courts and explore difficulties encountered⁵ and possible solutions under the existing European law or via potential legislative and/or regulatory reviews. It could also contribute to the evaluation to be carried out by the European Commission pursuant to Article 73 of the DSA proposal. Furthermore, the European Commission would inform the Board when it reviews and adjusts the list of VLOPs every six months (a task, which falls on the DSC of establishment under Article 25(4) of the DSA proposal).
- 3.5. Like in the DSA proposal the Board could be chaired by the European Commission, which would bring global and strategic oversight. The Board should include representatives of the relevant sectoral networks (ERGA for content regulation) where concrete operational cross-border implementation of the DSA is made at EU level. ERGA also strongly recommends that the participation of the competent regulators' representatives on the Board be adequately guaranteed and provided for in the text of the DSA. Whenever a strategic content-related issue is raised within the Board, the proper association of competent NRAs should be fully guaranteed by the DSA.

b) At the national level: rely on NRAs, with a streamlined DSC, with a remit focused on a set of transversal, essentially administrative, coordination functions

⁵ In this context, possible difficulties of inter-sectoral coordination at European level may be addressed, should they arise.

Problem assessment

3.6. As was pointed out by ERGA in its March 2021 Statement (sections 3.2 and 3.4), the proposal to designate a national DSC in each Member State poses a number of questions and difficulties, namely:

- In several Member States, the obligation to appoint a national DSC would be the source of institutional difficulties and, in some cases, constitutional ones. There could be a risk of *de jure* and/or *de facto* creating a hierarchical relationship between the designated DSC and other NRAs having their own legitimacy and purpose. Moreover, although this should in theory be prevented by the sector specific independence requirements (e.g. those of the AVMSD), ERGA underlines that the DSA proposal is unclear about the operational relationship between the DSC and the rest of competent authorities responsible for all matters relating to the application and enforcement of the DSA. This may lead to a risk of interference with the independent exercise of sector-specific regulation which has been widely considered in the past few years as a major achievement in relation to sectoral oversight;
- The underlying justification for appointing such a national coordinator raises doubts. The experience of sector-specific regulation so far does not provide clear evidence of a specific need or any significant lack of coordination or cooperation between sectoral authorities. On the contrary ERGA members' experience generally suggests that cross-sectoral cooperation is operational where it is deemed necessary and justified, i.e. for issues which require to combine different kinds of expertise and/or for which competence is shared between several authorities;
- Operationally speaking, the coordination of all the competent national authorities by one of them would raise severe practical problems and undermine the enforcement's efficiency⁶, as these authorities have fundamentally different competences, fields of expertise and operating logics. In practice, the DSCs' efforts in liaising with other relevant authorities every time a new implementation issue comes up are likely to bring unnecessary costs and delays and lead to more disadvantages than benefits.

Proposals

3.7. Therefore, ERGA deems it useful to distinguish between two different types of cases that might arise under the DSA: (i) Cases which require coordination among Member States across different activities/markets/sectors and (ii) Cases which require cross-border coordination among Member States within the same activity/market/sector:

⁶ Except potentially in very few Member States, where a single independent authority is already competent e.g. both for content regulation and market places.

- In the first type of cases, ERGA agrees that it is helpful to establish mechanisms to ensure consistent application of the DSA rules throughout the different regulatory sectors involved and, moreover, to allow Member States to appoint a particular independent authority as a focal point for inter-sectoral cross-border enforcement issues. Member States should be granted with the guarantee to distribute tasks and functions of the Digital Services Coordinators freely amongst different regulatory authorities of the Member State;
 - In the second type of cases, ERGA is convinced that sector-specific cross-border enforcement mechanisms (if and when they exist) between only the sectoral authorities of the countries involved, are more effective to solve the issues at stake.
- 3.8. The existing procedure, which ERGA uses under its Memorandum of Understanding (MoU) for video-sharing platforms, is more streamlined, faster and more effective than the cooperation mechanism as proposed under Article 45 of the DSA proposal, as the latter always involve another layer of coordination and foresees an escalation stage involving the European Commission.
- 3.9. For this reason, ERGA concludes that cross-border cases regarding online content activities would better be dealt with between the few NRAs directly involved, following the procedure under the MoU extended to online content platforms issues. If, nevertheless, there is a major disagreement between the NRAs of the country of origin and that of destination, there may be a need for a mediation procedure. Regarding online content, this could easily be solved by the sector-specific network (ERGA itself) that naturally combines expertise in the field concerned with a system of checks and balances ensuring safeguards protecting the rights of the country of origin as well as the country of destination.
- 3.10. Under the current DSA proposal, cases requiring a mediation process by the European Commission (Article 45 (5)) involve the following actors: all DSCs concerned; the NRAs; in some cases the Board and the European Commission. Involving that many actors makes sense when dealing with cross-sectoral issues as different fields of expertise have to be heard and a working coordination has to be ensured. But where a case only concerns the online content sector, there is no need for the involvement of that many actors. These cases should be handled more efficiently within the sectoral network – ERGA – according to its rules and procedures.
- 3.11. ERGA proposes a more balanced governance structure including a streamlined Digital Services Coordinator for the purpose of coordinating between NRAs in cases that touch upon different sectors and, thus, the enforcement mechanism requires the inclusion of different sector-specific NRAs. As long as cases only concern NRAs from the same regulatory field, ERGA proposes that cases be dealt with only between sector-specific NRAs directly involved in the (sector-specific) matter. If mediation processes become necessary

on a case concerning only systemic online content regulation, they should be handled within ERGA (the corresponding sector-specific network), which is already equipped with a mediation function.

3.12. Furthermore, to solve the potential problems highlighted in para 3.6, ERGA recommends that:

- All the DSC's powers, as provided by the DSA proposal for implementation and enforcement purposes, should be assigned also to the competent sectoral regulatory authorities. While one of these sectoral authorities could be (in addition to its core tasks) given the role of national DSC, this role would not, *per se*, confer on it any additional implementation or enforcement powers – bearing in mind that only an independent national authority could be designated as DSC;
- In those sectors where there is already an existing independent national sectoral authority, such as online content, the DSA should clearly and explicitly specify that the DSC's role focuses on a set of well-delimited, essentially administrative, focal point and coordination functions⁷. The DSC could exercise enhanced coordination tasks in those sectors where there is no existing independent competent authority. In any case, the DSC should have no hierarchical or supervisory role towards other NRAs involved in the operational enforcement of the DSA;
- In order to ensure the efficient implementation of the DSA, operational questions arising out of its implementation should be dealt with by the sectoral NRAs (not by the DSCs as such), which should be competent regarding operational issues relating to their respective sectors.

⁷ Such as, for instance, those foreseen in the current Articles 10 *Points of contact*, 11 *Legal representatives*, and 32 *Compliance officers*.

4. Foster cooperation between NRAs for online content regulation, and give suitable powers to all of them, relying on the strength of a sectoral network

a) Strengthen the cross-border efficiency of online content regulation within the DSA by granting competent national regulatory authorities suitable ways to be involved in, and contribute to, the effective supervision of concerned activities

Problem assessment

- 4.1. As was pointed out in ERGA's March Statement (section 3.5), the DSA proposal, which is based on the country of origin principle, raises significant issues as regards the potential distribution of competences across Europe for online content regulation.
- 4.2. First, ERGA reaffirms its support to the country of origin principle and deems it necessary to supplement it in order to maximise its efficiency. As a matter of fact, the role and room for manoeuvre of NRAs other than those of the country of establishment raises problems around the prevention and/or action following the identification of suspected infringements affecting national citizens in their jurisdiction. This causes operational shortcomings as authorities of destination are often the best placed, or even the only ones equipped, to monitor online platforms' compliance in their respective territories – for reasons of language, national law, culture, access to national services and data – and to ensure access of their citizens to adequate complaints schemes. This also, more fundamentally, questions the ability of the DSA's enforcement structure to provide a satisfactory European answer to the growing demands for protection measures against online harms to be adopted at the national level, which reflects strong public expectations.
- 4.3. Secondly, in the same vein, the proposed DSA devolves strong operational powers to the European Commission, whereas the exercise of media/content regulation calls for independence from both economic players and executive powers and, as previously underlined, for a strong and effective involvement of the NRAs: in the first place, the NRA of the country of establishment, which has a direct link with the players under its jurisdiction, but also NRAs of other Member States, where online platforms are accessible, as these authorities are the only ones with a capacity to fully apprehend national (linguistic, legal, cultural) contexts and to concretely access to, and assess, online platforms' national implementations.

Proposals

- 4.4. ERGA therefore proposes to strengthen the efficiency of the enforcement of the DSA rules regarding online content regulation by (i) supplementing the country of origin principle with suitable and complementary involvement of the regulatory authorities of the countries of destination, and (ii) relying on the strength of ERGA as a body representing the collective interest of its members.

4.5. To do so, ERGA proposes to rely on the following principles (see **Annex 2**: Possible measures aimed at adequately empowering NRAs of destination):

- Proceedings concerning a provider are prepared by the authority of the country where the provider is established (“authority of establishment”);
- The authorities of the Member States, where there are a significant proportion of recipients of the provider’s services (“authorities of destination”), are also given the opportunity to initiate and/or contribute to, investigations by collecting data, making findings and carrying out analyses;
- One or more authorities of destination may raise reasoned comments to the draft decisions of the authority of establishment (this would be a possibility for the authorities of destination, not an obligation or a systematic mode of operation) and the NRA of the country of establishment would be obliged to consider any such reasoned comments submitted in response to its draft decisions. If necessary, a conciliation of different positions could be carried out by the network according to mechanisms of mediation or, if appropriate, arbitration. These mechanisms would be designed so as to provide **efficiency** (the total elapsed time before a decision is taken should be limited), **inclusiveness** (by enabling all concerned authorities to put forward their evidence and arguments) and **appropriate checks and balances** (by providing, where applicable, a transparent collective decision process – see b) below).

4.6. For VLOPs, which generally have a significant reach and impact across all EU Member States, the DSA shall ensure that, where appropriate, authorities of destination are able to participate in proceedings concerning VLOP’ systemic issues for the sake of protecting their audiences and freedom of expression in their territories. It therefore appears particularly important to rationalize and, where possible, streamline coordination and decision processes vis-à-vis VLOPs in order for the enforcement to be as effective and efficient as possible, given the importance of associated risks for EU citizens.

4.7. This could lead to considering a possible model, applicable only to VLOPs, where the fact that the systemic regulation of each VLOP is of importance to all ERGA Members would be taken into account, by enabling them to contribute to this regulation. This approach would call for strong coordination and expertise capacity to be placed in ERGA’s resources and members.

b) Lay down fundamental principles for a strengthening of ERGA (“ERGA+”) in order to make it fitter for its enlarged tasks under the DSA

4.8. All the above considerations lead to relying on the support of a sector-specific European network of cooperation for the implementation and enforcement of systemic issues relating

to online content regulation with cross-border dimension – which is generally the case for a vast number of online platforms and is always the case for VLOPs.

- 4.9. This network could support the operational enforcement of the tasks relating to systemic online content regulation which fall on the Board and/or the European Commission under the DSA proposal.

Situation assessment

- 4.10. Established by the AVMSD (Article 30b), ERGA is composed of representatives of national independent regulatory authorities or bodies in charge of the regulation of audiovisual media services. The European Commission participates in ERGA meetings. In practice, all ERGA members also have responsibility for overseeing VSPs under their jurisdiction pursuant to Article 28a / 28b of the AVMSD. As was noted previously (see 2.), VSPs in the meaning of the AVMSD in most cases are also online platforms as defined by the DSA. They are also likely to constitute a significant number of VLOPs.
- 4.11. ERGA already accomplishes a number of tasks vis-à-vis VSPs, which will be fully relevant in the context of the operational implementation of the DSA regarding online platforms in terms of content regulation. These essentially consist in the organisation of the sharing of information and good practices, and cooperation between members for the purpose of an efficient cross-border implementation. To do so, ERGA members rely on a **Memorandum of Understanding (MoU)** which they have adopted unanimously in 2020. A specific section of the MoU⁸ is dedicated to VSPs. The MoU also organises mediation, as necessary, between two ERGA members (typically the authority of establishment of a provider and an authority of destination of that provider's services).
- 4.12. ERGA is also an increasingly recognised entity which has organised significant exchanges at European level with a number of major VSPs as well as other relevant stakeholders (associations, researchers, European and national institutions, etc.), inter alia in the field of

⁸ With regard to cooperation on VSPs, the MoU sets out NRAs' common understanding of Article 28b of the AVMS Directive, in particular that VSPs should be subject to systemic supervision at the "macro" level and not at the level of individual harmful or illegal content. Under the MoU, ERGA members commit to:

- Consult closely on developments in their regulatory framework for the application of Article 28b;
- Inform each other of any developments in this regulatory framework or in the case law relating to VSPs;
- Explore the possibility of developing specific complaint mechanisms between them regarding VSPs;
- Provide assistance to NRAs having jurisdiction on VSPs – which could include contributing to the development of rules and codes for VSPs, providing input on cultural, national or linguistic aspects of VSP cases, translations, helping to assess the appropriateness of measures taken by VSPs by sharing information collected in a given territory, contributing to the assessment of the effectiveness of measures;
- Limit their requests for cooperation to those that are significant and underpinned by public interest considerations;
- Assist the competent regulators of audiovisual media services on VSPs by encouraging VSPs to take steps to strengthen the links between these AVMS and their competent authorities, and sharing information relevant to the regulation of these services with the competent authorities.

combatting disinformation. For example, since 2020, ERGA has been steadily contributing to the follow-up and enhancement of the European Code of Practice on Disinformation.

Proposed task assignment to ERGA+ for ensuring online content regulation under the DSA

- 4.13. In the following, ERGA intends to project itself into its future potential role as envisaged in this paper, and to contribute to the debate and to suggest avenues that could be further explored in the coming months.
- 4.14. In the scheme envisioned by this paper, ERGA+ would be responsible for supporting the effective regulation of online content platforms, especially VLOPs, through a broad cross-border co-operation framework for NRAs in the implementation of the DSA. The framework would complement and build on the current MoU framework for the implementation of the AVMSD. Being in charge of the cross-border operational tasks relating to online content regulation under the DSA, ERGA+ could be entrusted with a number of functions vis-à-vis online content platforms, especially VLOPs:
- Issuing recommendations addressed to a (sub)group of actors, adopting common definitions of certain regulatory concepts, common guidelines, key performance indicators, in order to ensure the Europe-wide coherence of the guidance provided to players and of the decisions taken in the field of online content regulation;
 - If appropriate, when mediation between an authority of establishment and an authority/authorities of destination under the general coordination mechanism does not suffice or is not relevant, ensuring arbitration;
 - Regarding online content regulation for VLOPs specifically, possibly adopting opinions on transparency reports submitted by on-line content VLOPs or more generally individual decisions (such as formal notices, sanctions, imposition of corrective measures) regarding VLOPs;
 - Finally, ERGA+ could be directly entrusted capacities vis-à-vis non-European players providing online content platforms services in to the EU, and liaising with non-EU authorities in this field.
- 4.15. Like today, the European Commission, while not being a member of ERGA+, should participate in its meetings. The intervention of the Commission in ERGA+'s deliberation process would provide legal expertise and contribute to securing the conformity of ERGA+'s decisions with the DSA and EU law. Furthermore, the European Commission's presence in ERGA+ would, *inter alia*, facilitate identification and reporting to the Board of any findings and difficulties encountered by ERGA+ that would benefit being addressed by the Board.

Fundamental principles guiding ERGA's transformation into ERGA+ for this purpose

4.16. In order for ERGA+ to be in a position to facilitate greater sectoral cross-border operational coordination of online content regulation pursuant to the DSA, its statute and governance could be further upgraded according to the following principles:

- ERGA+'s governance and decision-making processes should aim at fairly balancing individual positions of the national authorities through the moderating effect of the group. Its decisions should therefore be taken by a qualified majority of members and be explicitly based on the conciliation of the fundamental values of media regulation in Europe (freedom of expression, media pluralism and independence, protection of individuals), as laid down by EU law;
- The independence of its actions and decisions should be guaranteed. While ERGA has been initially set up, in 2014, as an advisory group to the European Commission, it would appear appropriate – considering its experience, the new tasks it has taken up since 2018 pursuant to the latest revision of the AVMSD and the enhanced role it could play under the future DSA – to review this statute and to consider establishing ERGA+ as an independent European body;
- Efficiency and effectiveness of ERGA+'s decisions should not be questionable. In order to achieve this, the DSA should foresee swift deadlines for the various steps of the processes which should be compatible with any applicable requirements relating to procedural fairness. Additionally, ERGA+ should be able to rely on its own qualified staff and adequate resources in order to ensure efficient coordination of its members' work and to have internal – technical and legal – expertise. Such an organisation could also, where appropriate, provide support for ERGA+'s members, particularly for coordinated actions, such as investigations, audits and analyses, while fully guaranteeing its neutrality.

*

Concluding remarks

The DSA proposal put forward by the European Commission is an adequate, necessary and urgent answer to the growing challenges raised by the moderation of content online, which have the potential of directly affecting European citizens' private lives and personal rights, as well as the functioning of our democracies.

With these proposals, which are based on ERGA members' experience in media regulation and its analysis of the impact of the DSA's proposed provisions, ERGA intends to contribute to making

the text more robust and fitter to handle the specific challenges of online content regulation in an adequate and operationally concrete way that is respectful of fundamental EU values.

These proposals are intended to feed into general discussions and do not constitute an end point to the NRAs' reflections. ERGA is firmly committed to a constructive position of openness and flexibility to accompany further work on the DSA proposal. It stands ready to further engage in reflections and exchanges with the European Commission and co-legislators and, where appropriate, assist in formulating more detailed and/or targeted proposals.

ANNEX 1

Analysis of the concrete challenges posed by the interplay between the AVMSD and the proposed DSA

The practical difficulties foreseen in the interplay between the DSA and the AVMSD are fourfold.

- **Interpretation of the proposed text**

The Explanatory Memorandum⁹, Recital 9¹⁰ and Article 1(5)¹¹ of the DSA make it clear that the Regulation is not intended to affect the application of the specific sectoral provisions of the AVMS Directive, and complements the Directive in some cases. Thus, the DSA applies in a complementary manner to *issues that are not addressed in the Directive*. It also applies to *issues that are “not fully addressed” by the Directive as well as issues on which the Directive “leave Member States the possibility of adopting certain measures at national level”*.

How the ‘lex specialis rule’ applies in this case creates some legal uncertainty. There are different interpretations that need to be clarified. It is still unclear among ERGA members whether they mean that additional provisions from the DSA can be combined with the provisions of the AVMSD regarding video-sharing platforms (VSPs), and/or whether the DSA is to be seen as a relevant minimum set of rules in the areas not covered by detailed specific provisions in the AVMSD.

As an example of an issue related to the interpretation of ‘not fully addressed’, the AVMSD imposes certain obligations on VSPs with regard to audiovisual content. Other types of content are not covered by the AVMSD and the DSA is supposed to apply in relation to such content. Does this mean that the DSA will prevail also in relation to audiovisual content (in those areas where there is an overlap) or that there will be different types of oversight, for the same service providers, depending on the type of content in question?

⁹ The DSA Explanatory Memorandum states that the proposed Regulation “introduces a horizontal framework for all categories of content, products, services and activities on intermediary services”. ‘The proposed Regulation complements existing sector-specific legislation and does not affect the application of existing EU laws regulating certain aspects of the provision of information society services, which apply as lex specialis’. The obligations set out in the Audiovisual Media Services Directive (AVMSD) on video-sharing platform providers ‘as regards audiovisual content and audiovisual commercial communications will continue to apply. However, this Regulation applies to those providers to the extent that the AVMSD (...), do not contain more specific provisions applicable to them’.

¹⁰ Recital 9 provides that the Regulation complements, yet not affects the application of rules resulting from other acts of Union law, including but not limited to, the AVMSD: ‘this Regulation leaves those other acts, which are to be considered lex specialis in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level’.

¹¹ Article 1(5) of the DSA provides that the proposed Regulation is without prejudice to the rules laid down by, inter alia, the AVMSD.

Furthermore, as the provisions of the AVMSD are transposed, the rules applicable to VSPs can be more or less strict and/or detailed depending on the Member States. The additional provisions of the DSA applicable may therefore vary according to the degree and substance of the approach to transposition of the AVMSD chosen in each Member State.

Does “as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level” mean that the stricter and/or more detailed measures already taken by Member States in sector-specific legislation for the purpose of transposition (e.g. Article 7a¹² of the AVMSD), and which do not contradict other EU legal instruments applying to the regulated sector (as set out by articles 4(1) and 28b(6) of the AVMSD), have to be reviewed to comply with or to take over what is set out in the DSA?

- **Scope and jurisdiction**

As regards online platforms, the material scope of the AVMSD and the DSA do not fully overlap. In particular, the AVMSD platforms offering live streaming services/activities are included in the definition of VSPs. In the DSA these services and activities may not be covered by the definition of ‘online platforms’ depending on the means by which they are provided, and perhaps not even be ‘hosting services’ where it is concluded that they do not meet the ‘storage’ criterion. This means that in specific cases they could not be subject to the provisions applicable to online platforms (Articles 16 to 24 of the DSA), nor to hosting services (Articles 14 and 15), although a number of these would appear to be fully relevant (notice and action mechanism, statement of reasons, internal complaint-handling system, trusted flaggers, ...).

Another difficulty lies in the fact that the provisions on establishment and jurisdiction differ between the two texts. Article 40(1) of the DSA provides that “The Member State in which the main establishment of the provider of intermediary services is located shall have jurisdiction for the purposes of Chapters III and IV of this Regulation” and Article 40(2) provides that “A provider of intermediary services which does not have an establishment in the Union but which offers services in the Union shall, for the purposes of Chapters III and IV, be deemed to be under the jurisdiction of the Member State where its legal representative resides or is established”. On the other hand, Article 28a(2) of the AVMSD provides secondary criteria for determining the jurisdiction of VSPs. A VSP of a third country would be deemed to be established in a Member State if a parent or subsidiary undertaking or an undertaking member of the same group is established in that Member State. Therefore, in certain situations, to implement the rules provided for by the AVMSD together with the additional rules provided for by the DSA, a double jurisdiction assessment would have to be conducted.

¹² Article 7a provides that “Members States may take measures to ensure the appropriate prominence of audiovisual media services of general interest”.

Furthermore, article 40 (3) provides “Where a provider of intermediary services fails to appoint a legal representative in accordance with Article 11, all Member States shall have jurisdiction for the purposes of Chapters III and IV. Where a Member State decides to exercise jurisdiction under this paragraph, it shall inform all other Member States and ensure that the principle of *ne bis in idem* is respected”. It is unclear how and under what processes a Member State will be able (i) to implement the provisions of the DSA or take any measure (besides the restriction of the provision of these services) against a provider that has neither an establishment nor has appointed a legal representative in EU and (ii) ensure that other Member States have to respect the *ne bis in idem* principle.

- **Obligations applicable to online platforms**

The provisions of the AVMSD relating to VSPs aim to protect minors and the general public from certain clearly identified illegal and harmful content (programmes, user-generated videos, audiovisual commercial communications harmful to minors, containing incitement to hatred or violence, constituting a criminal offence related to terrorism, child pornography, racism and xenophobia). As a horizontal instrument, the DSA does not focus on sectoral contents and policy objectives. By construction, it can embrace broader issues.

Although a sectoral instrument, the AVMSD sets out in general terms the responsibilities of VSPs, Member States and NRAs in establishing and supervising appropriate measures (article 28b). In this context, it appears that a number of obligations and mechanisms of the DSA are useful in clarifying how the provisions of Article 28b can be implemented and complete them. In other words, on several aspects, the *lex generalis* (the DSA) appears to be more precise and instrumental to the concrete enforcement than the *lex specialis* (the AVMSD). This is especially true regarding the following:

- Terms and conditions: On the one hand, the AVMSD provides that they should include the requirement of protection of audiences from some unwanted content, as well as qualitative rules applicable to audiovisual commercial communications. On the other hand, the DSA provides that the terms and conditions shall include clear information for users about any restriction that the intermediary decides to adopt as regards information provided by the recipients of their services and the main features of their moderation policies (Article 12 *Terms and conditions* and Article 29 *Recommender systems* - VLOPs). In addition, the DSA provides for additional transparency obligations on moderation policy according to the type of providers (Articles 13, 23 and 33 *Transparency reporting obligations for providers of intermediary services, for providers of online platforms and for VLOPs*), which are closely linked to their terms and conditions;
- Transparency obligations on online advertising: General requirements relating to the compliance with the qualitative rules on audiovisual commercial communications set out in Article 9(1) of the AVMSD and to the users’ information (article 28b(2)), and measures concerning a functionality enabling users to declare audiovisual commercial

communications in user-generated videos (28b(3)(c)) can be supplemented by the DSA's related provisions (articles 24 and 30 *Online advertising transparency* and *Additional online advertising transparency*);

- Reporting and flagging mechanisms: AVMSD's provisions concerning such mechanisms (Article 28b(3)(d)) and follow-up to these actions (Article 28b(3)(e)) could be developed on the basis of the detailed rules provided by the DSA (article 14 *Notice and Action mechanisms*, article 15 *Statement of reasons*, article 19 *Trusted flaggers*, article 20 *Measures and protection against misuse*, article 21 *Notification of suspicions of criminal offences*);
- Users' complaints and out of court settlement of disputes: AVMSD's provisions concerning the establishment of mechanisms for the handling and resolution of users' complaints to VSP providers (Article 28(b)(i)) and of out of court settlement of disputes between users and video sharing platform providers (Article 28b 7) may be detailed according to the DSA's rules provided in Article 17 *Internal handling system* and Article 18 *Out of court dispute settlement*;
- Encouragement of co-regulation schemes: Provisions in the AVMSD are stated in general terms and focus on the objectives of such codes (Article 4a in conjunction with Articles 28b(4) and 28b(9)), while these in the DSA are more detailed when it comes to the issues that should be covered (Article 34 *Standards*, Article 35 *Codes of conduct*, Article 36 *Codes of conduct for online advertising*, Article 37 *Crisis protocols*).

Thus, the horizontal rules of the DSA appear to be useful in detailing and complementing the generally stated sectoral rules. However, it is important to note practical difficulties in implementing this combination of rules.

Firstly, the DSA rules are modulated only according to the categories of providers and, in the case of platforms, their reach. The AVMSD states that the measures - *practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided* - must be applied by all VSPs. The appropriateness of the measures is determined in the light of various parameters – the nature of the content, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the VSP providers and the users having created or uploaded the content as well as the general public interest (Article 28b(3)).

Secondly, the provisions of the AVMSD are (almost) already transposed by the Member States, which are free to adopt stricter or more detailed rules. The way in which the DSA rules will interplay with national arrangements may therefore vary, unless common frameworks are found.

- **Enforcement: authorities and tools**

NRAs designated by Member States in charge of the enforcement of the AVMSD's provisions are responsible for the regulating of VSPs. For VLOPs in the DSA, enforcement proceedings are initiated by the competent authorities, but can be complemented by the European Commission, with the possible advisory role of the Board, which raises potential enforcement conflicts or difficulties (see below) and calls for clarifying the role NRAs should play in the enforcement of the DSA.

The rules created by the proposed DSA could not only complement the AVMSD rules but also be used as a way to maximise their effectiveness. In particular, the transparency and monitoring obligations placed on online platforms, as well as the deterrent sanction mechanisms, might assist competent NRAs in determining and ensuring platforms' compliance with Article 28b of the AVMSD, with an important caveat linked to potential variations in the national transpositions.

The main issue here is whether the enforcement powers and tools provided under the DSA proposal (article 41 *Powers of the DSC*: powers of investigation (information request, on-site inspections...), powers of enforcement (fines, interim measures...), power to require an action plan, power to request the judicial authority to order temporary restrictions; article 31 *Data access and scrutiny*) can, where relevant, be used by NRAs in order to implement the provisions of the AVMSD on VSPs (and not only to implement the DSA).

The DSA assigns particular tasks to the DSC, the Board and the Commission. What happens when a regulatory authority responsible for implementing and enforcing the provisions of the AVMSD in relation to VSPs is not responsible for implementing and enforcing the provisions of the DSA in the field of online content platforms' activities because these tasks are assigned to a separate authority (which, in turn, may be the national DSC or not)?

Insofar as only the DSA provides for these tools, should it be considered that it prevails over the AVMSD and that the enforcement of the VSPs provisions is entrusted not to the regulators but to the entities provided for in the DSA?

As some of the obligations imposed to VLOPs coincide with those imposed on the VSPs, who will be responsible for the assessment of measures taken by them (article 28b(5) of the AVMSD in relation to article 28 *Independent audit* on VLOPs in the DSA)?

ANNEX 2

Possible measures aimed at adequately empowering national regulatory authorities of destination

Note: for the purpose of this annex:

- "NRA" means a national regulatory authority competent for online content regulation;
- "NRA of establishment" means the NRA of the Member State, where a given provider of online content services/activities is established;
- "NRA of destination" means the NRA of a Member State, which does not have competence on a given provider of online content services/activities, but where the latter has a significant number of recipients.

In order to strengthen the efficiency of the enforcement of the DSA rules regarding online content regulation by supplementing the country of origin principle with suitable and complementary involvement of the NRAs of destination in investigations and decisions regarding providers of online content services/activities, ERGA proposes to consider the following non-exhaustive list of possible provisions, most of which are inspired by provisions existing in other EU instruments.

1. Right to access relevant data

- Give the NRA of destination a right to access confidential versions of transparency reports and audit reports sent by the provider of online content services/activities to the NRA of establishment (pursuant to Articles 13, 23, 33);
- Give the NRA of destination the ability to request from the NRA of establishment the data it has collected pursuant to its supervisory mission and which concern the territory of the NRA of destination;
- Give the NRA of destination a right to access the service's data in the event of suspected infringement (no possibility for the platforms to invoke business secrecy);
- Enable the NRA of destination to be the contact person to whom users in its country can report systemic breaches of the DSA.

2. Right to adopt interim measures

Give the NRA of destination the possibility to take exceptional temporary measures (for a specified period of time) in case of duly justified urgency linked to a risk of serious damage to the recipients of the services, and while informing the other NRAs

3. Reallocation of cases concerning a single Member State to the relevant NRA, with the agreement of the NRA of establishment

- Provide that, in case of a suspected infringement with effects concentrated on the territory of a single Member State, the NRA of that Member State may inform the NRA of establishment of its intention to initiate proceedings;
- This reallocation would be effective unless the NRA of establishment wishes to handle the case, which it should indicate within a fixed time limit.

4. Right to refer a case to the NRA of establishment and right to be involved in the case

- Give the NRA of destination a right to refer a case to the NRA of establishment for VLOPs (Article 50) as is the case for non-VLOPs (Article 45);
- The NRA of establishment would then have to justify its decision on whether or not to act on the request, and the investigation or enquiry measures envisaged;
- In cases where the NRA of establishment has taken over the case at the request of an NRA of destination: throughout the investigation carried out by the NRA of establishment, give the NRA of destination at the origin of the request access to all the data and information provided by the platform suspected of infringement. This will enable it to make its own independent assessment of the suspected infringement;
- If the NRA of establishment fails to act, give the NRA of destination the right to ask for conciliation or mediation by the network (ERGA+).

5. Information and involvement in the adoption of an infringement decision

- Provide for information of the network before an infringement (or non-infringement) decision is taken: (i) in all cases, for VLOPs; (ii) in cases with a cross-border dimension, for other online platforms;
- Set up a mechanism of reasoned comments whereby, at the end of the investigation, an NRA of destination referring the case may propose its analysis on the draft decision by the competent NRA. In the event of a disagreement on the decision, several options may be envisaged, possibly to be combined:

- The NRA of establishment shall justify its refusal to take into account the comments of the referring NRA;
- If the disagreement persists, a mediation may be carried out by the network (ERGA+);
- If appropriate, arbitration could be made by the network (ERGA+), with the Commission playing a role of legal clarification and monitoring compliance with the DSA and EU law.

6. Monitoring of implementation

- Entitle any NRA of destination to participate in the monitoring of the execution of injunctions/safeguards or the implementation of commitments (Art. 56 and 57 to be amended for VLOPs).