



Digital Services Act (DSA) – ERGA priorities for the trilogue negotiations

Online content regulation requires adapted and enhanced rules to address today's challenges. With the Digital Services Act (DSA) the European Commission aims at providing such rules. The members of the European Regulators' Group for Audiovisual Media Services (ERGA) actively followed the legislative process of this file of major importance for EU citizens since the publication of the Commission's proposal in December 2020. After publishing a common [statement](#) in March 2021, outlining aspects of the DSA Proposal which it welcomed or wished to have clarified, ERGA adopted a more detailed position paper on '[Proposals aimed at strengthening the Digital Services Act \(DSA\) with respect to online content regulation](#)' in June 2021.

As the legislative work on the DSA now enters into the phase of the trilogue negotiations, ERGA would like to take the opportunity to underline some of the numerous and most significant (from ERGA's perspective) amendments brought forward by the co-legislators and bring the attention to what ERGA believes could be further improvements to the DSA.

These views are largely based on ERGA members' expertise in relation to 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 both the offline and 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 regulation requires tailored rules and bodies – the independence of which it is vital to guarantee.

1. GENERAL PRINCIPLES TO BE FOSTERED IN THE DSA

1.1. Freedom of expression, freedom and pluralism of media

ERGA welcomes the approach proposed by both the Parliament and the Council to further strengthen in the online environment the fundamental rights and freedoms of EU citizens, in particular the freedom of expression and media. These principles are the cornerstones of the missions and activities of ERGA and its members, the national media regulatory authorities, who are in charge of the protection and promotion of media freedom and pluralism.

While a full media exemption would have potentially led to unintended negative consequences by hindering actions against disinformation, ERGA believes the new obligations suggested by the Parliament for online service providers to take into account and respect freedom of expression, and freedom and pluralism of the media, when developing their terms and conditions is a balanced approach (EP art. 12.1). Similarly, ERGA welcomes the proposal to include the perspective of the freedom and pluralism of media in the assessment of systemic risks of very large online platforms as suggested by the Parliament (EP art. 26.1b) as well as the freedom of expression as suggested by the Council (Council rec. 59). ERGA also considers that it is indeed relevant to take into account the freedom of expression and information in the framework of the identification and justification of the illegal nature of content for notice and action procedures regarding content removal as stipulated in the Council's General Approach (Council rec. 41a).

1.2. Users' protection including, in particular, protection of minors

ERGA welcomes the fact that both co-legislators not only share the Commission's intention to better protect EU citizens in the digital world but go even further by proposing a series of useful provisions.

ERGA is pleased to see that when it comes to children and minors, special attention and consequent enhanced provisions are proposed regarding notably: interface design that should be adapted in order not to deceive minors (EP art. 13a and art. 27.1.ba); terms & conditions of services primarily aimed at minors to be adapted to be well understood by minors (EP art. 12.1c and Council art. 12); the principle that notice & action and removal of content should be swifter and adapted in services aimed at minors (Council rec. 58). ERGA also welcomes the new provision proposed by the Parliament, which bans minors' profiling for targeted ads and amplification techniques (EP art. 24.1b) as it echoes art. 6a.2¹ and art. 28b.3² of the revised Audiovisual Media Services Directive (AVMSD) and the General Data Protection Regulation (GDPR).

More generally, ERGA welcomes the provisions enhancing rights and empowerment of users of online services. On the Parliament side, interesting proposals are made, especially on the transparency and intelligibility of terms & conditions (EP art. 12.2a) and increased rights in order for users to make informed choices in relation to their personal data and consent for advertising purposes, as well as an alternative access to the service if the user refuses to give consent (EP art. 24.1a). As for the Council, better user information is introduced in the mitigation of risks (Council art. 27)

ERGA also notes with interest that the proposed ban on deceptive techniques, including 'dark patterns', introduced by the Parliament and related for instance to the interface design or functionalities of the service, is particularly relevant in order to prevent users from being deceived or nudged and their judgement and choices to be impaired (EP art. 13a).

1.3. Obligations of very large online platforms and search engines VLOP(SE)s regarding these fundamental principles

The European Commission very appropriately proposed an asymmetric approach for the regulation of the big online players given the higher systemic risks they potentially present for the European citizens and for the society as a whole. **ERGA warmly welcomes the various new provisions proposed by both co-legislators aiming at an even increased accountability, stricter obligations for mitigation of risks and transparency obligations by the VLOP(SE)s.**

Notably, ERGA notes with much interest the more extensive and stringent obligations on independent external audits (EP art.28) and on the compliance function (Council art. 32) as well as the requirement to provide adequate resources for handling notices and complaints (EP art. 27.1aa). Increased transparency is required regarding advertising (EP art. 30.1 and Council art. 30.2) but also in the framework of the reporting obligations, for which details on content moderation mechanisms need to be provided (Council art. 33). Finally, the central provisions on risks have also been reinforced by the addition of a fourth type of systemic risk related to public health and well-being (EP art. 26.1.ca), stakeholders' consultations requirement for the assessment of systemic risks and the mitigation measures to address them (EP art. art. 26.1a and art. 27.1a). There are also stricter obligations regarding mitigation of systemic risks related to content moderation, minors' and children's' rights, users' rights as well the implementation of out-of-court dispute settlement bodies decisions (Council art. 27.1).

Finally, **ERGA particularly welcomes the widening of the scope of the risk analysis by the Parliament so as to cover not only intentional manipulation, but also unintended functioning of the service (EP art.26.1.c). These phenomena may foster disinformation content and/or lead to filter bubbles or a polarized/non-pluralistic presentation of views on political or general interest subjects.** They may therefore negatively impact citizens and undermine the functioning of democracies by contributing to an unbalanced media coverage. *In order to address problems related to disinformation and polarization, ERGA suggests to further elaborate article 26 to clarify that the risk analysis shall also cover the way the various pieces of content are made accessible and more or less visible/prominent to users.*

¹ AVMSD art. 6a.2: *Personal data of minors collected or otherwise generated by media service providers pursuant to paragraph 1 shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.*

² AVMSD art. 28b.3: *Personal data of minors collected or otherwise generated by video-sharing platform providers pursuant to points (f) and (h) of the third subparagraph shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.*

2. ROLE, MISSIONS AND MEANS OF CONTENT REGULATORS IN THE FRAMEWORK OF THE DSA

2.1. DSA interplay and coherence with the AVMSD

One of the main priorities laid out by ERGA in its above-mentioned Proposals was to secure and optimise the interplay between the DSA and the Audiovisual Media Services Directive (AVMSD) in order to alleviate related implementation risks and therefore ensure the effective application of both instruments. This is particularly crucial as 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.

ERGA notes that the Parliament is aware of the importance of preventing duplication and reducing potential conflicts between the DSA and other related legislative acts such as the AVMSD. However, ERGA believes that should this scheme be privileged by the co-legislators, the provision by which the Commission shall publish guidelines with regard to the relationship between the DSA and other acts (EP art. 1a.4) should be completed so as to require the Commission to consult relevant EU bodies – such as ERGA regarding the AVMSD – on its draft guidelines and to take utmost account of their opinion when adopting its guidelines³, as the audiovisual NRAs are the competent bodies for enforcing the AVMSD, acting in full independence when interpreting the relevant provisions.

In addition, while welcoming the proposal introduced by the Council (Council rec. 74) on the means for Digital Services Coordinators (DSCs) and other competent authorities, **ERGA would suggest to explicitly mention the role of the audiovisual sectoral authorities in the DSA in order to ensure proper and coherent implementation of both the AVMSD and the DSA, especially when it comes to online content regulation and video-sharing platforms pursuant to art.28b of AVMSD.** This objective could be achieved by strengthening the language on cooperation and responsibilities of sectoral authorities so as to explicitly mention audiovisual media authorities at national level⁴ and potentially EU level.

Following the welcomed specific inclusion of search engines in the DSA as called for by ERGA, among others, in its Proposals, ERGA calls for a further extension of the DSA scope in order to better align it with the AVMSD approach by including other services implementing content moderation policies which should fall within the scope of a regulatory framework for online content regulation, namely live-streaming services. Indeed, these apply moderation measures which can lead to real-time blocking of content or, more often, an account suspension.

2.2. Regulators' ability to supervise and enforce the DSA

◦ Access to data

As stated in its Proposals, ERGA opposed the possibility for online content platforms to invoke business secrecy in the context of investigations and assessments while insisting on the fact that regulators do guarantee the confidentiality of collected data covered by business secrecy. ERGA's position on this issue reflects the persistent problems it has experienced, *inter alia*, gaining access to data in the context of its contribution to the assessment of the implementation of the European Code of Practice on Disinformation. **ERGA is therefore extremely pleased to see that the Council proposed to remove the trade secrets exemption in the access to platforms' data by regulators (Council art.31.6 deleted) while calling for a cautious use of data by regulators (Council art. 31.1a),** noting that organisational and technical measures need to be taken to guarantee that. **ERGA calls the co-legislators to agree on this Council's proposal** as a crucial step forward towards a better and more effective implementation and enforcement of the DSA.

³ The proposed amendment to the EP art.1a.4 could read as follows: **4. By [12 months after the entry into force of this Regulation] the Commission shall publish guidelines with regard to the relationship between this Regulation and the legal acts referred to in Article 1a (3). In developing these guidelines the Commission shall duly take into account the opinion of relevant sectoral EU bodies concerned by the legal acts referred to in Article 1a (3).**

⁴ For instance, the recital 74 on the DSCs and other competent authorities as proposed by the Council could be further be amended as follows: **(...) It should also not prevent the exercise of judicial review, or the possibility to consult or regularly exchange views with other national authorities, including law enforcement authorities ~~or~~, crisis management authorities, ~~or~~ consumer protection authorities or audiovisual media authorities, where appropriate, such as informing each other about ongoing investigations, without affecting the exercise of their respective powers.**

ERGA also supports the Council and Parliament amendments giving regulators access to the required information about the design, logic and functioning of algorithms (EP art. 31.1a) and especially during inspections carried out by regulators and relevant authorities (Council art. 54.1a).

◦ Means

Providing regulators with the appropriate means for the supervision and enforcement of the DSA was also one of ERGA's Proposals. ERGA therefore welcomes the Council and Parliament approach granting the Digital Services Coordinators as well as other competent authorities appropriate human and financial resources (EP art. 38.4a), and an adequate budgetary autonomy to carry out their missions in order not to affect the regulators' necessary independence (Council art. 39).

◦ Orders

Regarding orders to act and orders to provide information, ERGA welcomes two proposals by the Parliament - the limitation of the territorial scope to the issuing Member States unless an infringement of EU law justifies the extension of territorial scope (EP art.8.2.b) and the possibility for the Member State issuing the order to formulate it in its own language (EP art.8.2.c and art.9.2.c). ERGA also welcomes the obligation for the platform to give an explanation in case no effect was given to the order, as proposed by the Council (Council art.8.1 and art.9.1). These are very useful clarifications from the perspective of national regulators.

◦ Effective supervision by independent authorities

As expressed by ERGA in its Statement, *"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"*.

ERGA believes that the DSA could be further improved in order to provide regulators with an enhanced role in the supervision of crucial aspects of the Regulation, which for the moment are exclusively the responsibility of online platforms, including the following:

- *Relevant sectoral competent authorities should play a role in the assessment of systemic risks and the mitigation measures envisaged by VLOPSEs. This could be introduced in the text through the amendment of the new Parliaments provision inviting the platforms to carry out stakeholders' consultations for risk assessments and to design the risk mitigation measures with the involvement of stakeholders (EP art. 26.2a and art. 27.1a) by completing the list of stakeholders to consult with "and relevant competent authorities" and specifying that their input shall be duly taken into account.*
- *In order to ensure that independent audits are fit for purpose, more detailed guidelines should be developed in order to go beyond the specifications laid out in art. 28, as proposed by the Commission in art. 34.1.d on standards. Relevant competent EU bodies such as ERGA should be able to contribute to any guidelines regarding the content and modalities of the independent audits.*
- *Last but not least, a role for relevant audiovisual media authorities in the assessment of online platforms terms and conditions especially from the perspective of fundamental rights, minors' and users' protection and content moderation, in line with the AVMSD, should be foreseen.*

2.3. EU enforcement and cross-border cooperation

As per its Proposals, 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 regulators 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. ERGA therefore welcomes the modifications proposed by the Council, who while preserving the country of origin principle, gives more flexibility and an enhanced role for the DSCs and relevant competent authorities of the Member State of destination. This includes increased powers in joint investigations (Council art. 46.4), the possibility for the DSC of destination to ask the DSC of establishment to investigate a case based on well substantiated evidence (Council art. 45.1) as well as the possibility for only one DSC of destination instead of three to request the Commission to investigate a VLOPSE (Council art. 46.4). ERGA also welcomes the proposal of the Parliament giving the DSC of destination the option to initiate joint investigations in cross-border cases with an explicit reference to bilateral agreements between the concerned countries (EP art 46.1a).

Finally, ERGA notes the proposal of the Council to provide the Commission with exclusive powers for the supervision and enforcement of the DSA obligations applicable exclusively to VLOPSEs (Council art. 44a). The

Parliament's proposal putting an evaluation duty of the implementation and effectiveness of mitigating measures on the Commission (EP art. 27.1c) is of interest as well as the call to ensure consistency between the DSA and existing enforcement mechanisms, such as those in the area of electronic communications or media and with independent regulatory structures in these fields as defined by Union and national law (EP rec.69).

While providing the Commission with exclusive powers over VLOPSEs probably has merits in terms of simplicity and coherence with the pan-European nature and reach of the VLOPSEs, ERGA underlines that it raises questions linked to the independence of the supervision, which is of utmost importance, as well as the need to take into account national specificities and experience. *Therefore, if exclusive powers are conferred upon the Commission regarding VLOPSEs, the Commission should be required to consult with the relevant EU and national bodies and authorities, such as ERGA and independent national audiovisual regulatory authorities. Therefore, should this scheme be privileged by the co-legislators, the DSA should explicitly provide for the involvement of independent NRAs and of ERGA.*

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

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