

## CNMC POSITION PAPER

### on the Digital Services Act (DSA) from the point of view of content

*How to focus analysis?*

*In this order...*

1. **WHAT we seek:** Need to focus what objectives we pursue, what problems we are trying to solve (from the CNMC perspective)
2. **HOW we get it:** Determine which instruments are most suitable (economic and legal point of view)
3. **WHO executes:** How to articulate the enforcement of these instruments

## 1. WHAT WE SEEK

To protect users in online environments from being exposed to any type of content (video, text, images and/or sound) that may be illegal or harmful. Specifically:

- To protect users against possible illegal or harmful content: incitement to hatred and violence, terrorism, racist and xenophobic content, protection of minors, gender discrimination, etc.
- To protect consumers: from exposure to illegal advertising, surreptitious advertising, excess advertising, illegal content, etc.
- To guarantee the free flow of ideas, opinion and information: the free circulation of ideas to shape public opinion must continue to be a fundamental principle. To this end, we must prevent the dissemination of instruments of disinformation that threaten Europe's democratic principles.

The role of platforms, as intermediaries in the dissemination of information, opinion, content, etc., is not always clear and has contributed, to some extent, to the development in online environments of practices that are prohibited outside these settings, since they jeopardise public interest objectives that must be safeguarded.

In this regard, the basic principles of European broadcast media laws, as they have been successfully implemented to date, are widely accepted in Europe and remain appropriate for a future framework to regulate online content in the DSA.

## 2. THE HOW

The instruments to be implemented necessarily involve requiring platforms to play a more active role in achieving these goals, even when they act as mere intermediaries, with no responsibility for the content they host.

In this regard, it is necessary that these platforms adopt measures to prevent the distribution of illegal or harmful content (such as incitement to hatred or violence), to help avoid exposing groups requiring special protection to inappropriate content (pornography, etc.) and to allow tackling new threats, such as disinformation. Parental controls, age verification mechanisms and content "notification and take down" systems

are examples of measures that can be imposed on platforms to help achieve these objectives when the platforms are not responsible for the content.

All these measures must be accompanied by transparency requirements and an effective system of accountability in order to determine who is responsible for the content and the results of the measures taken.

It is important to note that in general, when the platforms are not directly responsible for the content disseminated, any calls for action must be limited to the establishment of prevention mechanisms, but not to the content itself. For illegal or more harmful content, platforms must be required to be more proactive in their oversight (the draft Regulation on preventing the dissemination of terrorist online content is exploring the limits of liability applicable to the platforms). Obviously, when the platform is responsible, for example for the advertising it inserts, in that case the requirement of regulatory responsibilities should be directly applicable to it.

In this regard, as a starting point one model to consider would be the obligations laid out in Article 28b of the revised Audiovisual Media Services Directive for Video-Sharing Platforms.

Regarding the intensity of the regulation, it must be proportionate to the size of the platform and the risk that it seeks to avoid. Therefore, an asymmetric regulation based on these criteria is advisable.

It is important to keep in mind that online content platforms may also be subject to audiovisual laws, meaning discordant regulations should be avoided.

### 3. THE WHO

A large part of the platforms and online service providers host, exchange and disseminate audiovisual content (video), photos and text on their websites and apps indiscriminately, and yet the laws on the audiovisual sector, which affect the video format, are more demanding than the horizontal law on information society services.

Therefore, if the idea is to achieve a safe online environment, content regulation must overcome the current asymmetry and be neutral regarding the type of content. Indeed, given that the ultimate goal is to safeguard the same objectives, regardless of the type of content in question, the approach must be uniform and the authority in charge of overseeing it within a given territorial scope, should also be the same.

In this regard, audiovisual authorities have the necessary experience to carry out these functions, and in some countries, they are already taking on the task of supervising all online content, not just video content. In fact, in the section on Governance of the Public Consultation, the EC expressly cites ERGA (network of independent audiovisual regulators) as the best-qualified body to exercise these functions. In the case of Spain, that would be the CNMC.

However, it is important to note that in an online setting, as happens in an audiovisual environment, the country of origin principle governs, meaning not every case that occurs in Spain will be subject to Spanish law or be decided by this Commission. Everything will depend on where the platform is based.

Given the specialty of it, it follows a brief explanation of this principle.

- **Country of origin principle**

The country of origin principle (COP) assumes that only one authority, that of the country where the company is established (country of origin), is responsible for supervising the

agents, even when the reported behaviour is carried out in another country (country of destination) within the EU.

This principle, embedded from the beginning in audiovisual regulation, was incorporated into the services of the information society to, on the one hand, allow for the free flow of information and services in online environments and, on the other hand, avoid dual oversight by the States.

Although the Authority in the country of destination is allowed to intervene if the Authority in the country of establishment fails to comply with its obligations, this procedure in practice is very complex, slow, with many steps, and includes the participation of the EC, which ultimately delays the resolution of the case.

Similarly, the effectiveness of this principle in cross-border cases, in practice, has been limited. Indeed, there are countries that do not seem to exhibit the same diligence to a claim filed in their country as to those filed in other countries.

This lack of diligence can lead, on the one hand, to forum shopping problems, since in the end companies can establish themselves in those countries that provide a less strict regulatory burden and direct their content to the entire EU; and, on the other hand, the lack of protection of users, who do not enjoy the same protections against similar content.

This circumstance has led ERGA to promote the implementation of enhanced collaboration mechanisms (MoU) to ensure effective compliance with the Audiovisual Media Services Directive.

Taking this experience into account, and given that the situation in the field of information society services is even worse, since there are no independent national regulators or a body that brings them together at the EU level, the future DSA should introduce greater measures to offset the country of origin principle. Currently, both the Audiovisual Media Services Directive and the Electronic Commerce Directive establish very limited grounds for allowing countries of destination to derogate this principle. In some cases, these exceptions are very difficult to apply, involve long deadlines and in the case of online content, they do not always adapt adequately to its dynamic nature, which would require rapid intervention, resulting in a failure to avoid the non-compliance with the rule. Therefore, a greater capacity for the authority in the destination country to intervene would be needed to discipline those agents who do not comply with the regulations.

Such a case could arise where an agent established in country A directs its content solely and exclusively to another country B, without being seen in any other country. In this case, in order for country B to intervene, it would have to show that the agent established itself in A for the sole purpose of circumventing the regulation of country B (whether or not it is stricter), a claim that is very difficult to prove. In this case, country B should have a greater influence on the agent's broadcasts, since the sensibilities of each country's citizenry are different and the broadcasts are aimed exclusively at its territory. A different situation would be if the agent established in country A broadcast the same content throughout Europe. Here, it makes sense for just one country, the country of origin, to intervene, since otherwise the market would fragment. But, as in the first case, if the provider already differentiates its content and *de facto* fragments the market, it makes sense for the country of destination of the service to have a higher capacity to review the content.

To ensure regulatory compliance, in cases where the destination country is not assigned a direct intervention role, it would be advisable to introduce measures that help or, where

appropriate, force the country of origin to comply with the regulation. These measures can be enhanced bilateral or multilateral cooperation instruments, such as MoUs, that help to enforce the law through systems of disciplinary or reputational responsibility in the country of origin. Likewise, mechanisms must be put in place for a supranational entity to solve discrepancies between the authority in which a provider is established and the authority of the country of destination.

Ultimately, the best way to ensure the effectiveness of the COP, when there is no direct intervention by the country of destination, is to strengthen cooperation between States such that the regulatory response is the same, regardless of the location of an offence.