



ERGA's submission to the European Commission's call for evidence concerning guidelines on article 28 DSA

On the 31st of July 2024, the European Commission called for a consultation with relevant stakeholders, including media regulators, on its forthcoming guidelines on the application of article 28 (on the enforcement of the protection of minors online) of Regulation EU/2022/2065 (Digital Services Act – DSA).

In line with ERGA's overall mission, ERGA takes part in the aforementioned consultation. ERGA, as an expert group to the European Commission, with longstanding experience in regards of the protection of minors welcomes the Commission's explicit wish to gather input by media regulatory authorities and appreciates a timely adoption of the guidelines. ERGA will respond to each of the questions outlined by the Commission in the announcement paper individually.

1. Scope of the guidelines

The Commission has announced that their guidelines seek to support online platforms when applying article 28 DSA, namely providing a high level of privacy, safety, and security of minors. The Commission explicitly notes that adult platforms are also within the scope of the proposed guidelines. ERGA agrees with this open approach by the Commission.

Furthermore, the Commission notes that its guidelines will consider ongoing activities on a harmonised framework for age verification. ERGA agrees with the Commission that such harmonized standards may be of value for providers, users and regulators alike when it comes to a safe and effective way of determining one's age online. ERGA invites the Commission to build on existing work performed by media regulators within the scope of Directive 2010/13/EU (Audiovisual Media Services Directive – AVMSD) or other relevant national laws. Although pertinent, the pursuit of a fully harmonized, privacy-preserving, age verification tool should not preclude the platforms from complying with the legal obligations concerning protection of minors.

By way of revision of the AVMSD (Directive (EU) 2018/1808), video-sharing-platforms (VSPs) were explicitly included into the scope of the Directive, aiming in particular at safeguarding the core value of protection of minors. These provisions were transposed into national legislation by the Member States aiming to protect minors from illegal and harmful content¹, by taking appropriate measures as specified in article 28b of AVMSD. Additionally, some media regulatory authorities have taken action against specific content available on the VSPs, including those offering adult content whilst not providing for adequate age verification systems.

As the AVMSD requires Member States to impose their own measures, to protect minors using VSPs, a harmonised standard for age verification should be coherent and build on, where relevant, national requirements and approaches that have already been implemented through AVMSD transpositions. In that sense, national measures (including those following a Zero Knowledge Proof approach) under article 28b AVMSD, which are considered to be effective, should be mentioned in the guidelines as best practices and an illustration of the European DSA-related new approach to age verification. This would also help ensuring coherent approach towards the DSA and the AVMSD.

2. Comments in relation to any major risks and concerns related to ensuring a high level of privacy, safety and security for minors online

ERGA is generally convinced that the most significant risk currently facing children online is exposure to harmful content that directly impairs their development (e.g. pornographic and violent content). In addition to risks

¹ For an overview of the very first assessments done under the AVMSD's framework, see ERGA's report on the implementation of art. 28b AVMSD issued in 2022: <https://erga-online.eu/wp-content/uploads/2022/12/2022-12-ERGA-SG1-Report-Article-28b.pdf>.

associated to *content*, minors can also be exposed to malicious - sometimes criminal - *behaviours* (e. g. grooming activities, online hate), as well as risks caused by the *design* of the platforms (e. g. “rabbit hole” effect, addictive use). ERGA welcomes the Commission’s comprehensive approach to all the risks minors are exposed to online. When it comes to age verification, we should not seek a unique solution to protect minors against these risks. Indeed, requiring age verification indiscriminately on all platforms could seem ineffective and not proportionate. Other tools can help parents and tutors better supervise their children’s experience online; for instance, by configuring their privacy restrictions, interactions with potential strangers, screen-time management and content exposure. Likewise, it is recommended to include age verification systems in the guidelines for VSPs with pornographic content. More broadly, a more horizontal approach could be taken into consideration regarding interoperability and operating systems, which would allow for complementary parental controls. Such solutions need to ensure compliance with data protection principles. Any data obtained, i. e. through family accounts, need to be used in compliance with the prohibition to use children’s data for commercial purposes as outlined in Art. 28b (3) AVMSD.

Furthermore, ERGA urges the Commission to consider the potential side-effect that its guidelines and a harmonised age verification system could lead providers to delay the implementation of effective youth protection measures. The fact that the Commission’s guidelines and the harmonised age verification system are not yet operational, do not affect the providers’ obligations under national law – and, thus, does not exempt regulated entities of national requirements for addressing content that is illegal or harmful to children’s development, as stipulated by Member State and EU laws. Moreover, as technical solutions and national standards exist, the future guidelines should build on these standards and enable their immediate enforcement. ERGA welcomes the Commission’s efforts to adopt these guidelines as soon as possible. It must ensure regulators are able to initiate enforcement under article 28 of the DSA in the short run, even if this involves adopting minimal and basic guidelines at first and as swiftly as possible (with the possibility to revise them in the medium run).

3. Comments on the 5C typology of risks

ERGA welcomes the Commission’s intention to use the 5C risk typology as the basis for its guidelines. As the Commission rightly recognises, age assurance can be carried out in different ways depending on the risk of a platform. ERGA supports this graduated approach, resulting from the list as provided by the Commission.

ERGA also urges the Commission to consider that the most harmful content (such as pornographic or violent content) should only be accessible with the strictest age assurance measures, such as age verification. If such content is displayed without adequate protection mechanisms, it must be made inaccessible by the service providers in accordance with some national legal systems. The guidelines should address these existing national and European requirements, as outlined in the AVMSD.

4. Good practices or recommendations addressing risks in the 5C typology

ERGA welcomes the Commission’s initiative to seek input from experienced players in the field of youth protection regarding good practices. In this line, ERGA points out that the Commission’s consultation document refers to adult platforms “that still have underage users due to inadequate or non-existent age-verification tools”, which could be misleading for some readers.

This phrasing may imply that the lack of safety measures is solely due to the absence of technological solutions. In reality, as the Commission is aware from various discussions with regulators, some age verification systems are already available on the market, and some have been approved for safe use by media regulators. Therefore, it should be noted that the continued access of children to adult platforms is not due to a lack of technical solutions but rather because leading companies are failing to comply with legal requirements and are unwilling to implement the available measures.

Further, ERGA stands ready to gather experience by its members and seeks a continued best practices exchange with the Commission on youth protection measures. This includes age verification and other measures assuring a safe use of online platforms for minors, such as more easy-to-use, accessible and interoperable parental control tools as well as content classification systems to be applied by active users of the platform. Further, ERGA invites the Commission to acknowledge the relevance of media literacy initiatives to protect children online. ERGA recalls that these solutions need to take into account the principles of the General Data Protection Regulation if personal data are processed such as accountability, data minimization and data protection by design and by default.

5. Conclusion

Overall, ERGA welcomes the Commission's intention to develop guidelines on the application of article 28 DSA. ERGA is also eager to actively contribute to the formulation of these guidelines and the general discussion around effective measures to protect the youth online². The Commission should ensure these guidelines are adopted as soon as possible, in order to enable swift and effective enforcement by regulators under the DSA framework. Additionally, ERGA asks the Commission to consider existing solutions for both age estimation and age verification. ERGA is convinced that media regulators and the Commission can effectively work together to guarantee a higher level of youth protection online.

² By the end of the year, ERGA will adopt a report around regulators' experiences with measures aiming to protect minors, especially with regards to the implementation and enforcement of the relevant provisions in article 28b AVMSD.