



Subgroup 1

**Consistent implementation and enforcement
of the new AVMSD framework**

**Deliverable: Guidance and recommendations concerning implementation of
Article 28b**



Table of content

Introduction	3
PART I: High-Level Discussion of Article 28b.....	4
1. Introduction	4
2. Interpreting Article 28b.3	4
3. Impact of Approach to Transposition on Assessing the Appropriateness of the Measures	8
4. Thinking about the Article 28b.3 Measures in More Detail.....	9
5. Suggestions on How to Assess the Appropriateness of the Measures.....	11
6. Implementation of the Out of Court Redress Mechanism	14
PART II: Implementation - Practical Examples	17
1. Introduction	17
2. Approaches to Implementation	17
PART III: Learning from different approaches to Transposition	21
1. Introduction	21
2. Three Criteria	21
PART IV: Conclusions.....	25



Introduction

One of ERGA SG1's core aims is to issue guidance on the interpretation and implementation of certain complex new provisions of the revised AVMSD.¹ The purpose of this section of Subgroup 1's report is to explore critical issues relating to the interpretation of Article 28b and to provide guidance on best practice in the implementation and enforcement of Article 28b.

This report has been informed by work carried out by the Subgroup during the year. It aims to synthesise the Subgroup's work on Article 28b into a report comprised of general guidance and recommendations that NRAs may find helpful. The work of the Subgroup has included: -

- Several Meetings, including drafters' meetings.
- A qualitative survey of the membership of the Subgroup about how Article 28b has been transposed in their jurisdiction.
- A workshop discussing Article 28b that ERGA Members, TikTok, YouTube, an academic and Article 19 participated in.

The report begins in Part I by exploring several issues relating to Article 28b at a high level. This includes issues relating to how to assess the appropriateness of the measures adopted by VSPs. It then explores approaches to transposition that have or will be adopted to Article 28b in four Member States in Part II. These approaches to transposition are then compared in Part III. Finally, conclusions are explored in Part IV.

Video-sharing platform service (VSP) regulation is a new and evolving area of interest for all NRAs. At the time when this report is being written, Article 28b is still being transposed in Member States or has only recently been transposed. Many regulators are in the early stages of regulating VSPs or have not yet commenced regulating them. This report will therefore focus on issues relating to Article 28b which are likely to be important for NRAs to consider in the early stages of regulating VSPs.

¹ https://erga-online.eu/wp-content/uploads/2021/02/SG1_ToR_2021_final.pdf



PART I: High-Level Discussion of Article 28b

1. Introduction

Article 28b requires Member States to ensure that video-sharing platform services take appropriate measures to protect their users from certain kinds of audiovisual content and to do so in a way that promotes certain rights and values, such as freedom of expression. The areas covered by Article 28b include in particular the protection of minors, incitement to violence and hatred, terrorism and audiovisual commercial communications. The measures that Member States must ensure VSP providers implement are listed in Article 28b.3. These measures must be implemented by VSP providers under national systems of regulation transposing the Directive.

The objectives of Article 28b are quite clear. However, responses to the survey circulated to Subgroup Members indicate that many NRAs recognise that there will be complex issues implementing and enforcing it. Some of these challenges have been explored by ERGA before. For example, Annex II to the Report of Subgroup 3 from 2019 explores some of the practical challenges in applying the legal definition of a video-sharing platform and factors to consider in assessing the appropriateness of the measures adopted by VSPs.² ERGA's Memorandum of Understanding (MoU) also envisions cooperation between NRAs to tackle challenges in the implementation and enforcement of Article 28b. This report will now explore some of the challenges associated with Article 28b in greater detail. In particular, it will explore ways to assess the appropriateness of the measures adopted by VSPs.

2. Interpreting Article 28b.3

It is important to first consider the purpose and legal effect of the provisions of Article 28b in detail before considering how NRAs might assess the appropriateness of the measures adopted by VSPs. This section of the report will therefore focus on how to interpret Article 28b and the Article 28b.3 measures at a high level.

Article 28b.3 contains a list of ten measures that Member States must ensure VSP Providers take as appropriate. These are as follows:

- "a) including and applying in the terms and conditions of the video-sharing platform services the requirements referred to in paragraph 1;***
- b) including and applying in the terms and conditions of the video-sharing platform services the requirements set out in Article 9(1) for audiovisual commercial communications that are not marketed, sold or arranged by the video-sharing platform providers;***
- c) having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know;***

² https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report_Annex-II_TF2-Paper.pdf



- d) establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 provided on its platform;***
- e) establishing and operating systems through which video-sharing platform providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (d);***
- f) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;***
- g) establishing and operating easy-to-use systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;***
- h) providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors;***
- i) establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h);***
- j) providing for effective media literacy measures and tools and raising users' awareness of those measures and tools."***

Rules about how the measures should be implemented are contained in the first two sub-paragraphs of Article 28b.3:

"For the purposes of paragraphs 1 and 2, the appropriate measures shall be determined in light of the nature of the content in question, 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 video-sharing platform providers and the users having created or uploaded the content as well as the general public interest.

Member States shall ensure that all video-sharing platform providers under their jurisdiction apply such measures. Those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided. Those measures shall not lead to any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC. For the purposes of the protection of minors, provided for in point (a) of paragraph 1 of this Article, the most harmful content shall be subject to the strictest access control measures."

An important starting point in analysing Article 28b is to recognise that the obligation to comply with it rests with Member States rather than VSPs. The Directive requires Member States to create a legal system which gives effect to the objectives of Article 28b in their jurisdiction by ensuring VSPs take



appropriate measures. VSPs are therefore responsible for complying with national measures transposing Article 28b rather than the complying with the provisions of the Directive itself.

Understanding Article 28b as being directed at Member States (and NRAs assessing the appropriateness of measures taken by VSPs, by extension) provides a helpful starting point to explore how to interpret the Article 28b.3 measures at a high level.

Bearing this in mind, the following observations can be made:

- Every Member State must ensure that the objectives of Article 28b are satisfied in their approach to transposition. General principles about how EU law should be interpreted should be followed to determine what these objectives are. One important principle is taking a teleological interpretation of the law.³ This means EU law, and national measures implementing EU law, must be interpreted and applied having regard to their purpose, the underlying context in which the EU law was introduced and how it connects with the objectives of other instruments of EU law. Guidance provided by the Directive's recitals is therefore important to consider. Another important principle is to ensure that EU Law is fully effective. It must be interpreted and applied in a way that gives full effect to its objectives.⁴
- The EU's general rules about how Member States should implement Directives apply to Article 28b and, more specifically, the Article 28b.3 measures.⁵ Every Member State therefore enjoys a reasonable discretion in deciding how VSPs should be required to implement the Article 28b.3 measures within their jurisdiction provided they so do in a way that satisfies the minimum standards of protection required by the Directive.
- Any national approach to regulating VSPs pursuant to Article 28b must recognise the significance of the limited liability principle. Recital 48 of the Directive makes this clear: *"In light of the nature of the providers' involvement with the content provided on video-sharing platform services, the appropriate measures to protect minors and the general public should relate to the organisation of the content and not to the content as such. The requirements in this regard as set out in Directive 2010/13/EU should therefore apply without prejudice to Articles 12 to 14 of Directive 2000/31/EC, which provide for an exemption from liability for*

³ Niall Fennelly, Legal Interpretation at the European Court of Justice (fordham.edu) (<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1526&context=ilj>).

⁴ Case C-378/17: "Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law" ... "It follows from the principle of primacy of EU law..., that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, dis-applying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means.

⁵ See Article 288 TFEU: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."



illegal information transmitted, or automatically, intermediately and temporarily stored, or stored by certain providers of information society services.” The focus of Article 28b is to ensure VSP Providers take appropriate measures in relation to content, rather than on users of services who may upload harmful or illegal content.

- The first two sub-paragraphs of Article 28b.3 create a “framework” for determining the minimum standard of protection audiences should be able to expect from VSPs across the EU. A range of factors need to be considered in determining whether these minimum standards are being met by VSPs, including “the nature of the content in question, 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 video-sharing platform providers and the users having created or uploaded the content as well as the general public interest” and also whether it is practical and proportionate for the VSP Provider to take the measure.
- Article 28b.6 gives Member States a broad power to require VSPs to adopt more detailed or stricter measures than those referred to in Article 28b.3 specifically. These stricter or more detailed measures must fall within the scope of the fields coordinated by the Directive. Member States could, for example, require VSPs to minimise minors’ exposure to harmful audiovisual content in their algorithms. Stricter or more detailed measures must of course also respect the norms of EU and national constitutional law and comply with the prohibition on the creation of new ex-ante control measures and upload filtering.
- Article 28b’s goal is to ensure that VSPs provide a minimum standard of protection for audiences in the EU and uphold certain values in doing so. The factors listed in the first two sub-paragraphs of Article 28b.3 such as the nature of the content in question, proportionality, practicality etc ... create an objective test to determine whether this minimum standard of protection has been met. These factors can also be understood as overarching objectives and / or principles that can be distilled into national systems of regulation transposing Article 28b. For example, a Member State may introduce a piece of legislation for video-sharing platform services that sets out rules on the protection of minors. When drafting this legislation due consideration could be given to the factors listed in Article 28b.3. The legislation is then the mechanism that ensures VSP Providers take the measures. However, the fact that a platform may be compliant with a provision of national legislation is not, *in and of itself*, indicative that the platform is taking appropriate measures per the objective standard of protection required by the first two sub-paragraphs of Article 28b.3. Otherwise, a provision of national law could interfere with the effectiveness of the Directive.
- Article 28b.3 does not require Member States to introduce mechanisms in national law that tell VSP Providers specifically what measures they should take in advance of them being taken. Rather, it requires Member States to ensure that appropriate measures are taken. The results of the survey of ERGA members undertaken as part of the work of Subgroup 1 indicate that many Member States have taken the opportunity to provide VSPs with flexibility to determine the specific measures they take by referencing the Article 28b.3 criteria or the wording of Article 28b itself in their national approach to transposition. Whether measures taken are appropriate must always be assessed by NRAs (Art 28b.5).



- Article 28b.3 presumes that all the Article 28b.3 measures should be applied by VSP Providers. However, it may not be necessary or appropriate for a platform to take a measure in certain cases if the adoption of the measure isn't justified. For example, if a service that provides access to pornography operates a robust age-verification system that very effectively prohibits minors from accessing a service, it may not be necessary for the service to introduce parental control mechanisms. The rationale for requiring a platform to introduce a system intended to allow parents to oversee their child's usage of a service when a child, in principle, cannot access the service may require consideration. This is obviously without prejudice to Member States' competence to require platforms to adopt stricter or more detailed measures. Similarly, the size or reach of a video-sharing platform service might determine how it takes a measure or whether it might be held to a higher standard in providing a measure than other services.⁶ For example, one would presumably expect a larger service with more resources to operate a more sophisticated content moderation infrastructure under Article 28b.3 (a) and (b) than a smaller service.

3. Impact of Approach to Transposition on Assessing the Appropriateness of the Measures

Article 28b.5 of the Directive requires Member States to establish mechanisms to assess the appropriateness of the measures adopted by VSPs. Member States are required to entrust the assessment of those measures to NRAs.

Before discussing specific means by which the measures might be assessed by NRAs, it's important to recognise that different approaches to transposition will likely necessitate different approaches to this task. For example, in approaches to transposition that provide VSPs with flexibility about the measures they adopt, greater reliance will likely be placed on information provided in reports, self-assessments and audits by VSPs. In approaches to transposition grounded more strongly in legislation, assessing the appropriateness of the measures taken by platforms may have more of a legal character i.e. "Is the service clearly complying with this provision of national law intended to transpose the Directive?"

Despite differences in national approaches to transposition, every NRA involved in the implementation of Article 28b is likely to experience common issues in ensuring VSPs adopt measures appropriately. For example, all NRAs may experience similar difficulties in ensuring VSPs implement appropriate age-verification systems. This could involve resolving challenges in balancing minors' right to protection with their other rights and the impacts such systems have on general users' privacy rights.

It would be premature to analyse particular measures in depth in this report at this stage. The results of the survey circulated to Subgroup Members indicate that best practice on the implementation of particular measures will likely evolve over time as NRAs gain and share more experience regulating VSPs. At this stage, it would appear more beneficial to look for common problems that all NRAs may experience in the early stages of thinking about how to assess the appropriateness of the measures VSPs adopt. One of the issues respondents identified in the survey circulated to Subgroup Members

⁶ See Case C-378/17 above.



is that the Article 28b.3 measures could benefit from being organised more thematically.⁷ This provides a helpful starting point to think about the measures in more detail.

4. Thinking about the Article 28b.3 Measures in More Detail

To assess the appropriateness of the measures adopted by VSPs each NRA will have to analyse the Article 28b.3 measures in greater depth. Every Article 28b.3 measure is likely to raise specific issues for NRAs in assessing whether a platform has implemented it appropriately.

For example, Article 23b.3(a) requires Member States to ensure that VSPs “[include] and [apply] in the terms and conditions of the video-sharing platform services the requirements referred to in paragraph 1 [i.e. the provisions on minor protection, incitement to hatred and violence, and terrorism].”

At a surface level this seems quite straightforward. However, further analysis gives rise to several questions. At some point all NRAs will likely need to consider:

- What should the requirements relating to paragraph 1 be in the national approach to transposition and how should they be communicated to VSPs? Can VSPs determine the requirements in paragraph 1 themselves?
- How should VSPs demonstrate that their terms and conditions are aligned with the requirements in paragraph 1?
- What indicators of effectiveness should be used to determine whether VSPs are making content moderation decisions on the basis of their T&Cs correctly - Accuracy? Speed?
- How should the ex-ante elements of how VSP Providers make content moderation decisions change to reflect the requirements of the Directive? e.g. to ensure greater fairness?
- How do you differentiate between content moderation incidents that fall within the scope of the AVMS Directive from those that don't?
- How do you ensure VSP Providers create, retain and provide accurate records of the content moderation decisions they make to allow for scrutiny of the information they provide?
- What's an acceptable margin of error for a VSP Provider making content moderation decisions? How many content moderation decisions can it get “wrong” before it's no longer regarded as taking “appropriate” measures? What factors should influence this decision?
- What should happen where a VSP provider doesn't have the information to make content moderation decisions correctly, and where it may be unreasonable to expect it to seek out this information to make a decision correctly?
- How can the scale of information created about content moderation decisions by platforms be processed by NRAs? How can this information be created and supplied to NRAs in a way that facilitates meaningful scrutiny by NRAs while upholding users' right to privacy?
- What impact does language have on how well a service should be expected to make a decision on an issue?
- How should automatically made content moderation decisions be treated?

Article 28b.3(b) and Article 28b.3(i) raise similar issues given they both relate to how platforms make content moderation decisions.

⁷ Portugal.



Even the Article 28b.3 (d) flagging mechanism raises complex issues after further analysis:

- How should a platform demonstrate that the flagging mechanism allows users to flag all relevant content they should be able to flag?
- How can the transparency and user-friendliness of the mechanism be measured?
- How should a platform demonstrate that its flagging mechanism is being made available consistently to all users?
- Does there need to be a separate flagging mechanism for issues that fall under the AVMS Directive vs. issues that don't?
- Does the flagging mechanism need to be made available to users who aren't in the EU?

Some of these questions might be resolved by the approach to transposition adopted in the Member State. For example, it might specify very clearly what steps a platform needs to take to comply with a measure, or an NRA might enjoy a discretion when interpreting how the law applies to a service. Other jurisdictions might get around this problem by affording more flexibility to the platform. In other cases, it may naturally take time to develop best practice on the issue. Alternatively, best practice on these issues could evolve from horizontal rules to be introduced by the DSA. Each NRA will have to develop its own process for assessing the appropriateness of the measures taken by platforms that best suits the services and approach to transposition in its jurisdiction.

To do this NRAs will need to deconstruct and analyse the measures in further detail. This can be done from different perspectives. For example, one way of analysing the measures might be to think about them in terms of the areas coordinated by the Directive that they relate to (the protection of minors, incitement to violence and hatred, terrorism, ACCs). However, this might be unhelpful given that some of the measures span all or multiple fields covered by the Directive (e.g. the flagging mechanism).

Another way of thinking about the measures that could be more helpful when carrying out an appropriateness assessment is to think about them in terms of their thematic similarities and what corresponding actions will be required by VSPs to comply with them.

One clear category of measures that emerges from analysing them in this way is that a number of measures require platforms to engage in content moderation. This includes Article 28b.3(a), Article 28b.3(b) and Article 28b.3(i). In essence, these measures require platforms to improve how they make content moderation decisions for matters that fall within the scope of the Directive. Common indicators and processes could likely be developed to determine whether platforms are making content moderation decisions effectively and whether they're following appropriate procedures in doing so irrespective of whether a matter falls under Article 28b.3(a) or Article 28b.3(b). The Article 28b.3(i) complaints mechanism in this context appears essentially to require platforms to have a review process of the original decision it has made pursuant to Article 28b.3(a) or Article 28b.3(b) after an issue has been flagged.

The second category of measure that emerges from analysing them in this way is measures that require platforms to introduce features for users of the service. This includes the Audiovisual Commercial Communications Declaration mechanism (Article 28b.3(c)), the flagging mechanism (Article 28b.3(d)), the flagging explanation mechanism (Article 28b.3(e)), the age-verification system (Article 28b.3(f)), the content rating system (Article 28b.3(g)), the parental control system (Article 28b.3(h)) and media literacy measures and tools (Article 28b.3(j)). The Article 28b.3(i) complaints mechanism in this context essentially appears to require platforms to introduce a system that allows



users to complain to VSPs about how they have implemented measures (d) to (h) and to assess whether the features have been implemented effectively. Measures that require platforms to introduce a feature of their service will likely need to be informed by content moderation policies introduced pursuant to measures 28b.3(a) and 28b.3(b), for example to determine what content or parts of a service access might be restricted to make age-verification mechanisms effective.

This distinction between measures relating to content moderation and measures relating to service features could create one starting point for regulators to further explore how to assess the appropriateness of the measures. Similar indicators (For example: Accuracy, Speed, Consistency) could be developed for content moderations decisions made by platforms under Article 28b.3(a), Article 28b.3(b) and Article 28b.3(i). Indicators such as effectiveness, usability, transparency etc ... could be developed for all measures that require platforms to introduce features on their service.

However, this approach to analysing the measures might not make sense depending on how the Directive has been transposed within a jurisdiction. For example, this could be the case where measures relating to audiovisual commercial communications are dealt with in a different way to measures relating to the protection of minors. Or, it could make sense to develop a single approach to underpin how platforms implement all measures relating to the protection of minors (e.g. age-verification features, parental control features, content rating features, Article 28b.3(a)) or audiovisual commercial communications. Some measures might also be dealt with by criminal law. Alternatively, a Member State might have such a strong and clear law in relation to a measure that the question of whether platforms are adhering to the minimum standard of appropriateness required by the Directive becomes a moot point – if they're very evidently complying with the law then the minimum standard of appropriateness would naturally be guaranteed in each case.

5. Suggestions on How to Assess the Appropriateness of the Measures

This report has discussed how to interpret the Article 28b.3 measures at a high level and has explored how each measure is likely to raise specific issues for NRAs. It has also explored how there are thematic similarities between the measures, as well as the impacts that different approaches to transposition may have on how to assess the appropriateness of the measures.

In a survey circulated to members of Subgroup 1 NRAs were asked to share their views on how they anticipate they'll assess the appropriateness of the measures adopted by VSPs within their jurisdiction. A broad range of views came back, most of which indicated that NRAs were still in the theoretical stages of this process.

Based on the responses given in the survey, the wider work of the Subgroup during the year (including the workshop) and the text of the Directive, the following general observations can be made:

- Best practice in the implementation of Article 28b.5 where there are large VSPs within a jurisdiction would appear to require NRAs to engage with VSP providers in a structured, ongoing way about the measures they adopt. It does not appear intended that NRAs assessments in such cases would only happen reactively where an issue arises. Conversely, if there are very few VSPs or only small VSPs within a jurisdiction, NRAs might reasonably be expected to take a more reactive approach to the assessment of the measures. The concept of “appropriateness” within these jurisdictions could also be expected to evolve in response to enforcement actions taken by NRAs.



- As discussed above, NRAs will need to develop ways to assess VSPs' compliance with the Article 28b measures that reflects the specificities of how the Directive has been transposed in their jurisdiction. One would expect that standard forms, reports and compliance procedures would be developed in many cases. For example, platforms could report annually on the measures they have taken and whether they have been successful. Platforms might commit to implementing measures to a certain standard and then report to NRAs on their progress. An approach like this was advocated previously by ERGA in Annex II of Report of TF2 SG3 in 2019.⁸
- Determining whether any measure taken by a VSP is appropriate requires an analysis of the reason the measure was included in the Directive (i.e. what its objective is) and the specificities of how it has been reflected in the national approach to transposition. This is illustrated above. Once this has been ascertained, indicators can be developed by NRAs to determine how it considers a measure to have been implemented by VSPs effectively. Alternatively, VSPs could be provided with an opportunity to draw up their own indicators provided they can demonstrate they are robust (perhaps after an external audit). For example, for content moderation decisions made pursuant to Article 28b.3(a) and Article 28b.3(b), NRAs could ask:
 - Is the platform making content moderation decisions quickly enough to limit harms? (Speed)
 - Is it making the right decisions? (Accuracy) i.e. is it
 - Reaching the correct conclusion on the issue based on the requirements of Article 28b(1) and (2) and how it's been reflected in the service's Terms and Conditions?
 - Taking the correct action on foot of this conclusion?
 - Is it doing both of these things often enough, having regard to the service's resources etc ...? (Consistency)
- A "macro" approach to assessing VSPs' compliance with the Article 28b.3 measures that relate to content moderation will likely be required given the scale of content moderation decisions made by platforms. This is obviously without prejudice to any NRAs determination that it may be appropriate to intervene in certain cases, particularly where a matter may be of public interest or a platform is making manifestly poor decisions. Whether an NRA can intervene directly in specific content moderation decisions would also depend on the approach to transposition within a jurisdiction.
- There is unlikely to be any "one right answer" to determining whether an Article 28b.3 measure that's been taken by a VSP is appropriate. NRAs may expectedly enjoy some discretion in this matter based on the nature of the VSP and its past conduct. Discussions at the Subgroup 1 workshop explored how there are likely to be diverging interpretations and

⁸ https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report_Annex-II_TF2-Paper.pdf



expectations about requirements to be placed on VSPs. There are likely to be clear cases and less clear cases. Some measures adopted by a platform may be *more* effective than measures adopted by another platform and differences between the technical features made available by platforms may require taking different approaches. It does not appear anticipated in the Directive that the measures would be implemented by VSPs in a uniform way across the EU.

- The burden of proof to demonstrate that measures taken are appropriate should rest firmly with VSPs. NRAs should have clear visibility over the measures adopted by VSPs. It should not be the responsibility of regulators to “chase” VSPs for information about their service or to somehow demonstrate for them whether the measures they’ve taken are or are not appropriate. Ideally, approaches to transposition will ensure that VSPs are required to create, retain and supply all relevant information about their compliance with the measures to allow NRAs to meaningfully carry out their assessment under Article 28b.5. This should include providing country specific data where appropriate. It should be as much a cause of concern for a regulator that a VSP is unwilling or unable to provide information about the steps it has taken to comply with a measure as a failure to take a measure itself. This is obviously without prejudice to any genuine restrictions that VSPs might be under regarding data protection.
- While not strictly related to the implementation of the AVMS Directive, ERGA’s experience monitoring the application of the Code of Practice on Disinformation has provided a wealth of practical experience that can reliably be used to inform national approaches to the implementation of Article 28b and the regulation of platforms in a wider context. The recommendations from the recent CovidCheck report bear consideration.⁹
- Special consideration needs to be given to the role of automated decision-making by platforms for matters falling within the scope of the Directive. If the subject matter of the decision falls within the scope of the fields coordinated by the Directive European audiences, should, in principle, be able to benefit from minimum standards of protection and fairness in decision-making by platforms envisioned by the first two sub-paragraphs of Article 28b.3. Similarly, the indicators of whether a decision has been made effectively (e.g. speed, accuracy, consistency - or other indicators as determined by an NRA) are likely to be the same irrespective of whether a decision was made automatically or by a human moderator.
- Content in different languages and national specificities will present challenges for any NRA responsible for regulating VSPs with a large pan-European audience. Ongoing cooperation and engagement between NRAs when assessing the appropriateness of the measures taken by VSPs is likely to be highly beneficial when regulating these services, particularly where country specific data is at issue or where country specific issues have arisen. The country of origin principle does not necessarily require a “one size fits all” approach to every content moderation issue, particularly where differences in treatment between jurisdictions can be justified through reference to general principles and the factual circumstances of particular cases or issues. ERGA’s MoU specifically envisions a high degree of cooperation between

⁹ <https://www.bai.ie/en/download/136478/>



regulators on Article 28b in respect of large Pan-European VSPs and has created a framework to support cooperation between NRAs which could be built on and /or adapted to tackle future challenges in the online space.¹⁰

- Cooperation and consultation with VSPs to develop compliance processes, indicators etc ... may be beneficial, particularly on more novel aspects of VSP regulation. This could be particularly useful to develop indicators to determine the effectiveness of features VSPs have introduced to comply with Article 28b.3. The development of standards and practices for VSP regulation will undoubtedly evolve over time in response to developments in the market and evolutions in technology.¹¹
- It might be reasonable for NRAs to expect incremental rather than radical or sudden changes by platforms to comply with the Directive. In some cases, particularly where a platform may be smaller or have fewer resources, it could be practical and proportionate to expect them to achieve the standards of protection required by the Directive over time.
- The results of the survey of Subgroup members indicates support for VSPs being encouraged to make available technical tools to illustrate how they have complied with the measures. For example, they could illustrate how their service architecture works to demonstrate how parental oversight or age-gating mechanisms function. Or, they could provide live information about content moderation issues. This could streamline how NRAs assess the measures adopted by VSPs.

6. Implementation of the Out of Court Redress Mechanism

Article 28b.7 of the Directive requires Member States to ensure: -

“...that out-of-court redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers relating to the application of paragraphs 1 and 3. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law.”

This aspect of the Directive has been previously discussed by ERGA, specifically in the Context of Subgroup 3 in 2019. The report highlighted several key questions to be considered. Namely, what is the process for the NRAs (or other responsible bodies) concerned to cooperate and ensure that redress mechanisms are effective in cross-border cases? What is the scope and possible scale of that cooperation, in particular with due respect for the country-of-origin principle? What does ‘impartial settlement of the dispute’ exactly cover?

¹⁰ [ERGA Memorandum of Understanding adopted 03-12-2020 I.pdf \(erga-online.eu\)](#)

¹¹ At the ERGA workshop, Professor Fabio Bassan explored his theory of “Regulatory Cycles”. A key element of his theory is that the development of standards in content moderation evolve from the market, which then evolve into best practice over time in consultation with public institutions.



Cooperation among ERGA colleagues has evolved significantly through the ERGA Memorandum of Understanding. This has been operating throughout 2021 and its operation has been a focus of Action Group 1 2021.

To begin to address some of the other questions, ERGA members were invited to provide their views on the implementation of the Article 28b.7 and the requirement for Out of Court redress mechanisms in the survey.

The survey invited views on the following question –

“What does it mean, in your understanding, that ‘Member States shall ensure that out-of-court redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers’? Is your NRA charged (or will likely be in case of a yet incomplete national transposition) to settle such disputes?”

At the time that the survey responses were received, eight NRAs stated that they are or expect to be directly involved in out of court redress (OOC Redress) procedures under Article 28b.¹² 11 NRAs indicated that they do not anticipate they will be directly involved in OOC Redress disputes. The survey indicated that, in many Member States, external bodies will be used to resolve disputes on platforms. Some NRAs responded by suggesting that this could be successfully accomplished through co-regulation or self-regulation e.g., by the adoption of a code of conduct by VSPs. Many NRA respondents highlighted that the purpose of OOC Redress is to provide a genuinely effective alternate way of addressing issues relating to content (e.g., cheaper, more convenient) and measures put in place must ensure this genuine effectiveness.

In some Member States, the Article 28b.7 provision has been transposed via pre-existing alternative dispute resolution mechanisms available under the law. In at least one approach to transposition, OOC Redress will be implemented in respect of the *measures* platforms take rather than content moderation decisions. Interestingly, one respondent outlined that potential conflicts could arise if an NRA is both responsible for settling disputes and assessing the appropriateness of measures platforms take. One Member State described how users will be able to challenge decisions made by platforms about content in a court within its jurisdiction, and how an amicable settlement of disputes will be provided through mediation proceedings that has to be accepted by both parties. A panel of mediators will be established and people with legal knowledge and knowledge of the media will be able to apply to be a mediator. Finally, in one instance, an arbitration board will be established for the settlement of disputes between the complainants, or users and providers of video sharing services affected by the complaint about measures that the providers of video sharing services have implemented or omitted.

The Subgroup workshop held in September provided a case study of one approach being proposed by Article 19. This entails the establishment of independent multi-stakeholder Social Media Councils which would both consider complaints and also provide guidance to video sharing platforms.¹³

As noted earlier in this report, Article 28b has only recently been transposed or is yet to be transposed in most Member States. There is a wide range of approaches being taken to the implementation of

¹² This includes Austria, Finland, Germany, Italy, Lithuania, Malta, Poland, Slovenia.

¹³ <https://www.article19.org/social-media-councils/>



the requirement on Member States to provide OOC Redress and some of these are quite evolved or draw on already established mechanisms. In this context, it may be worth reviewing this aspect of the Directive once these systems of out-of-court redress have had time to operate in practice. The issuing of guidance and recommendations could then be explored.



PART II: Implementation - Practical Examples

1. Introduction

Part I of this report explored several issues relating to Article 28 and Article 28b.3 in the abstract. This Part of the report outlines four different approaches to the transposition of Article 28b that have been or will be taken within Member States based on information gathered in the survey circulated to Subgroup members. These practical examples have been selected because they illustrate a variety of different approaches to the transposition of the Directive. They will be compared in Part III.

In writing this report it is important to note that the approaches to transposition that are being explored have been simplified somewhat. The descriptions don't aim to provide a fully comprehensive description of the approach to transposition within a jurisdiction. Rather, they aim to set out key elements of the different approaches that are relevant for making comparisons with other jurisdictions.

2. Approaches to Implementation

Approach 1: A "Civil Law" Approach (Germany)¹⁴

Germany transposed Article 28b of the revised AVMSD through a variety of pieces of legislation. This includes:

- The Network Enforcement Act (Netzwerkdurchsetzungsgesetz – NetzDG)
- Youth Protection Act (Jugendschutzgesetz - JuSchG)
- Telemedia Act (Telemediengesetz - TMG)
- Interstate Treaty on the Protection of Minors (Jugendmedienschutzstaatsvertrag – JMStV)
- Interstate Media Treaty (Medienstaatsvertrag – MStV)¹⁵

Video-sharing platforms are therefore under a very clear responsibility in primarily legislation to take appropriate measures to protect their users. While firm, the legislation is not highly prescriptive and affords platforms a degree of flexibility in terms of how they implement the measures on the service. The responsibility for enforcement of Article 28b is devolved to several regulators within the German federal system based on the issue in question. Cooperation between competent authorities is ensured through regular exchange mechanisms ensuring cooperative enforcement, clear competencies and consistent implementation. An official body is established to manage out-of-court redress disputes between users and VSPs.

Germany, like all other countries in continental Europe, is a "civil law" jurisdiction. Regulators will generally be expected to take a robust and active approach to the enforcement of the law. Letters

¹⁴ In this report the term "Civil Law Approach" is used to contrast this approach with the "Common Law Approach" (discussed further below). The term "Civil Law" may of course have different legal meanings depending on the context.

¹⁵ An English language copy of this law is available here: https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf



and, where necessary, fines – including administrative fines – where non-compliance by regulated entities is evident are a common feature of the regulatory landscape.

German regulators will not determine what laws apply to VSPs, although they will of course inform developments in the law and the development of best practice. No standardized procedure for assessing the appropriateness of the Article 28b.3 measures has been proposed yet in Germany. Measures are analysed on a case-by-case basis and by means of an overall view of the measures taken.

Approach 2: A “Common Law” Approach (Ireland)¹⁶

Article 28b of the revised AVMSD will be transposed in Ireland through a single law – the Online Safety and Media Regulation Bill.¹⁷ The existing regulator in Ireland – the Broadcasting Authority of Ireland – will be replaced by a Media Commission that is responsible for regulating all kinds of services under the revised Directive including VSPs.¹⁸

The Media Commission will be able to draft and enforce statutory codes that VSPs established in Ireland will be required to follow. A statutory code is an instrument of Irish law where the Irish Parliament empowers a regulator with the ability to draft and enforce binding codes of conduct on regulated entities, subject to certain parameters and safeguards. The Irish regulator will therefore be expected to act as both the drafter *and* enforcer of rules relating to Article 28b, unlike in a traditional civil law approach. The regulator will also be able to encourage self- and/or co- regulation as well (if appropriate).

Ireland is a “Common Law” jurisdiction. In common law jurisdictions, regulators must exercise their investigation and enforcement powers carefully in line with principles of administrative law, which incorporates a number of elements, including the requirement to afford natural justice to an entity impacted by the regulatory body, the requirement for procedural fairness, and the requirement to take actions and decisions that are legal, reasonable and proportionate. Government-appointed bodies (such as regulatory bodies) who exercise quasi-judicial functions may have their actions and decisions reviewed in the Irish courts on the grounds that natural justice principles or fair procedures were not afforded the party who was the subject of an action or decision, or on the basis that the body acted illegally, unreasonably, or disproportionately. This impacts the approach taken by regulators to undertaking enforcement actions in Irish law. Further, under Irish Constitutional rules, financial penalties shall be imposed only by the Irish Courts. Because of this constitutional rule, limited powers only have been devolved to regulatory bodies to impose fines. Where such powers exist, the party that is subject to the financial penalty typically has a right of appeal to the Irish courts regarding the level of the fine.

The combination of the role an Irish regulator can play as a *drafter* of rules for services together with Ireland’s procedural rules for investigation and enforcement actions means that Irish regulators often

¹⁶ The term “Common Law Approach” is used to contrast this approach with the Civil Law approach. A common law jurisdiction could take a different approach to the transposition of the Directive, although media regulation within Ireland and the UK has always relied on using Statutory Codes as the main instruments for regulating services.

¹⁷ A copy of the draft “Heads” of the Bill and other documents explaining the regulatory approach is available here: <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>

¹⁸ Other forms of information society services may also be subject to statutory codes.



focus on minimising the likelihood of non-compliance by regulated entities in the first instance. This is accomplished through developing strong relationships with stakeholders and engaging in significant consultation, among other things. Because of the ability of a party that is the subject of a decision or action by a regulatory body to review that regulatory action or decision before the Irish Courts, before imposing a financial penalty, Irish regulators are expected to have implemented fair procedures in terms of investigating any breach, and, in addition, is expected to have afforded the regulated entity a right to respond to the charges being levelled against that entity.

The Irish Media Commission has not been established yet so it is not possible to explore definitively how the Article 28b measures will be assessed in Ireland. The BAI has given this some degree of consideration however and has proposed an approach based on a “compliance framework”.

This is a system that platforms would be required to follow to report on how they have implemented the measures required in a statutory code (or codes). Annual or Biennial compliance reporting cycles and reports could be envisioned as well as various compliance tools and processes to ensure the regulator has the information it needs to make its determinations. A key element of the approach is that platforms would draft commitments on how they plan to implement the Article 28b measures and take steps to comply with those commitments during compliance cycles. How the Article 28b measures are assessed in Ireland will ultimately be determined by the Media Commission. The Irish legislation will also provide the Media Commission with the flexibility to specify how out-of-court redress should be implemented.

Approach 3: A “Self/Co-regulatory approach” (Netherlands)

Like Germany, the Netherlands is a civil law jurisdiction. In the Netherlands Article 28b of the Directive has been transposed through the Media Act 2008. This requires video-sharing platform services to adopt common codes of conduct for most of the issues that fall within the scope of Article 28b, including audiovisual commercial communications, the protection of minors, the protection of the general public from incitement to violence and hatred as well as public provocations to commit terrorist offences.

Content that constitutes incitement to hatred and violence or a provocation to commit a terrorist offence is regulated under criminal law as well.

Article 3a.2 of the Dutch Media Act requires a video-sharing platform provider to make available at least the following information to the public in a manner that is readily, directly and permanently available: its name, registered office, contact details, including e-mail address or Internet address, and the name of the Media Authority as the body charged with monitoring compliance of the relevant provisions. The Dutch NRA (the CvdM) will monitor the establishment, the content and the application of codes of conduct adopted by VSPs, but not define the actions to be taken by the VSPs directly. It will assess whether all relevant elements of Article 28b are reflected in the Code of Conduct. It will also evaluate whether there are effective compliance measures and whether the Code of Conduct has sufficient support amongst all relevant stakeholders. As far as the measures implemented by VSPs which are dealing with transparency are concerned there is also a role for the Advertising Code Authority. That authority, which is grounded on self-regulation, upholds the Dutch Advertising Codes that contain rules for the content of advertisements. The Netherlands has a strong history of implementing schemes of self-regulation in combination with co-regulation elements, consisting of statutory obligations and oversight by public authorities, which informed this approach.



Existing alternative dispute resolution mechanisms will be utilised in the Dutch approach to satisfy the obligation to provide Out of Court Redress.

Approach 4: A Flexible Approach (Other Member States)

The results of the survey indicate that many Member States opted to transpose Article 28b by closely referencing the text of the Directive in their legislation. In this approach, the text of the Directive is relied on to place an obligation on video-sharing platform providers to adopt appropriate measures, in varying degrees of detail.

This approach emphasises the flexibility inherent to Article 28b of the Directive. In particular, it will allow VSP regulation within a jurisdiction to evolve over time in response to concrete issues that arise. NRAs within jurisdictions where a flexible approach has been taken will of course remain responsible for identifying VSPs and assessing the appropriateness of the measures they adopt. A flexible approach could be taken in either a common law or civil law jurisdiction – the key ingredient differentiating these approaches is the level of detail and reliance on the text of the Directive.



PART III: Learning from different approaches to Transposition

1. Introduction

This Part of the report will focus on comparing the key elements of the approaches to transposition explored in Part II from a regulator's perspective. This is a somewhat hypothetical exercise given that in most Member States Article 28b of the Directive has not been in force for long or is yet to be transposed. Nevertheless, based on requirements inherent to any approach to the transposition of Article 28b - as explored in Part I of this paper - it is possible to explore and compare different approaches.

This exercise is not intended to be a "Pros" and "Cons" comparison of the four different approaches to transposition that are explored. It is presumed that Member States chose the most optimal approach to transposition for their jurisdiction. This might be the result of the characteristics of the law within that jurisdiction, regulatory tradition or for any other valid reason - for example, the number or nature of VSPs within the jurisdiction.

The Four approaches to transposition that have been explored in Part II are:

1. Germany (A civil law approach)
2. Ireland (A common law approach)
3. Netherlands (A self/co-regulatory approach)
4. A Flexible Approach (Other Member States)

The different approaches to transposition are considered in light of three criteria: (1) Clarity of Obligations, (2) Responsiveness of Enforcement and (3) Managing Complexity. These factors, explained in further detail below, have been selected because they are likely to be important from a regulator's perspective. It would be premature at this stage to assess the merits of specific aspects of approaches to transposition (e.g. comparing approaches to out-of-court redress) given VSP regulation across the EU is still in its early stages.

2. Three Criteria

Criteria 1: Clarity of Obligations Placed on VSPs

Ideally, every approach to transposition will ensure that very clear obligations are placed on VSPs to comply with measures transposing Article 28b.

- In the German Approach legislation is used to create a very clear requirement on VSPs to adopt appropriate measures to protect their users. This can be robustly enforced by regulators straight away. Any ambiguities in the law would mainly be resolved at the legislative level. However, regulators can decide the law based on a generally valid discretionary decision i.e. they can specify the law by interpretation. Moreover, on some occasions, the law specifically asks regulators to specify certain provisions by adopting a statute. In the case of Article 28b this happened concerning provisions on the official body to manage out-of-court-redress mechanisms.



- The Irish Approach places obligations on VSPs in a different way to the civil law approach. The Irish legislation transposing the Directive will not expressly specify the measures VSPs must take. Instead, the regulator is given the power to draft codes for video-sharing platform services for matters that fall within the scope of Article 28b. The structure and/or level of detail in any codes will be a matter to be considered by the regulator. Codes can be updated by the regulator to resolve ambiguities.
- The Dutch Approach is likely to accomplish this effectively as well through a self-regulatory approach. Like in the Common Law approach, codes can be developed for issues falling within the scope of Article 28b in varying levels of detail and can be improved incrementally over time.
- The Flexible Approach may (depending on individual Member State approaches) accomplish this task less effectively than other approaches. While a firm obligation is likely to be placed on VSPs to adopt appropriate measures, it may not be quite as effective as other approaches if further detail on how VSPs should adopt the measures isn't specified clearly. The specific regulatory measures taken in a Member State is therefore of particular importance for the effective implementation of the provisions of the Directive. Further, self-regulatory initiatives are not precluded in this approach.

Criteria 2: Responsiveness of Enforcement

Ideally, every approach to the transposition of Article 28b will ensure that regulators can respond swiftly and effectively to non-compliance by VSPs.

- In Germany regulators responsible for enforcing Article 28b will be able to investigate and take enforcement actions against non-compliant VSPs swiftly. Legislation provides a clear basis for enforcement. Fines and administrative sanctions are a regular feature of the regulatory environment. Enforcement is feasible even in smaller cases of non-compliance and regulators can process large volumes of cases well. However, because the German approach is based mainly in primary legislation, regulators' formal powers are limited to those that the legislator has specifically and expressly provided them with. As outlined above, regulators are nevertheless able to shape regulatory practice by taking decisions based on their own discretion as well as by issuing sub-legislative acts if provided for.
- In Ireland, a common law jurisdiction, investigation and enforcement actions can take a longer amount of time to conduct than in the civil law countries because of requirements arising from natural justice and fair procedures (discussed above). This generally means that regulators within common law jurisdictions like Ireland take a risk-based approach to enforcement i.e. an approach which focuses mainly on the most significant cases of non-compliance. Administrative sanctions are not a regular feature of the regulatory environment. However, the fact that the regulator will have the power to set rules for VSPs should mean, in principle, that they can design and tailor regulation in a way that minimises the potential for non-compliance (for example, they can specify how VSPs should retain information about issues). In common law legal systems regulators tend to focus on tackling issues from a systemic / macro perspective because of their strong involvement in the design of regulation.



If a dispute can be fully resolved in a way that effectively addresses the interests of citizen without recourse to court action, this can be considered a positive outcome. At the same time, recourse to court action can always be considered as an option.

- The Netherlands has a robust tradition of self- and co-regulation, especially where the protection of minors (with an important role of NICAM - Netherlands Institute for the Classification of Audiovisual Media), and the regulation of content of advertisements (laid down in the Dutch Advertising Codes) are concerned. One of the main benefits of a well-functioning system of self-regulation or co-regulation is that it allows cases of non-compliance to be resolved swiftly.

Further, self-regulatory and co-regulatory schemes can often evolve and respond to developments in the market quickly. The self- and co-regulatory approach in the context of the Netherlands is therefore very likely to ensure an effective response on enforcement issues.

- In Member States where a Flexible Approach has been taken, the responsiveness of enforcement procedures may vary depending on national constitutional traditions, the powers of the regulator and the level of specificity in regulation. If a very flexible approach has been taken, it may be difficult in practice to take enforcement measures against VSPs due to potential uncertainty about regulatory standards. That being said, in Member States where a flexible approach has been taken, there are unlikely significant concerns about VSPs within the jurisdiction in the first place.

Criteria 3: Managing Complexity

Ideally, every approach to the transposition of Article 28b will be able to manage the complexity of dealing the different kinds of issues that are likely to arise when regulating VSPs. This might include ensuring NRAs have all the tools they need to assess the appropriateness of the measures adopted by VSPs (e.g. to compel them to provide information in a certain format), having tailored approaches to regulating services or different issues, having effective tools to *encourage* compliance etc ...

- The German approach creates strong obligations on VSPs in legislation and provides for robust enforcement of those obligations. Although the approach to transposition is grounded mainly within primary legislation, which does not naturally lend itself towards a high amount of flexibility in terms of *how* to approach regulating services, regulators enjoy significant flexibility and discretion in how they exercise the powers they do have. Further, the legislation transposing the Directive is not prescriptive and regulators are afforded a degree of flexibility in how they approach assessing the measures adopted by VSPs. Similarly, self-regulatory measures adopted by VSPs are not precluded nor is informal engagement with VSPs.
- The Irish approach will provide the regulator with a lot of flexibility to determine how the Article 28b measures should be implemented by VSPs. Its power to draft statutory codes will essentially provide it with the discretion to determine how VSPs should be regulated within the jurisdiction (subject to certain parameters and safeguards, as well as other statutory and/or constitutional obligations). The regulatory approach taken can be tailored to different



issues and different kinds of services, and codes can be updated to deal with emerging issues. It will also be able to require services to engage in self- and/or co-regulation and with out of court redress bodies. It will also be able to specify to VSPs how they should create, retain and supply information to the regulator and ensure audits are carried out.

- The Dutch approach to the transposition of Article 28b is grounded primarily in self-regulation and self-regulatory codes, so it's fair to say that the system envisioned will be quite flexible and capable of managing the complexities associated with platform regulation. VSPs participating within the self-regulatory scheme will likely contribute to the development of codes and improve them over time. The role the Dutch regulator CvdM will play as the competent assessor of the appropriateness of the *codes* agreed by video-sharing platforms is unique in terms of approach to transposition adopted and adds an essential co-regulatory element to the system.
- A Flexible approach to the transposition of Article 28b is likely to provide platforms with the flexibility to determine the measures they take and for regulation of VSPs to evolve incrementally over time in response to concrete issues. The absence of more detailed provisions in the law about how platforms should adopt measures or the absence of express powers for regulators to demand compliance from VSPs in a particular way may potentially cause difficulties. Of course, the effectiveness of a flexible approach will also depend on the powers the NRA has within the jurisdiction as well as national constitutional and legal traditions.



PART IV: Conclusions

This report has explored a variety of issues relating to Article 28b. It has explored how to interpret Article 28b and the Article 28b.3 measures at a high level. It has explored how regulators might assess the appropriateness of measures adopted by VSPs and how this is likely to be impacted by the approach to transposition taken within a jurisdiction. It has also explored the different approaches to providing users of VSPs with out-of-court redress that are evolving at EU level. Finally, it has explored four different approaches to the transposition of Article 28b from a regulator's perspective and has examined how these approaches place obligations on VSPs, how regulation is likely to be enforced against VSPs in these approaches as well as how they can respond to the complexities associated with regulating platforms.

A consistent theme emerging from this report is that the regulation of platforms under Article 28b will not be straightforward. While at a surface level the text of Article 28b is quite simple, a deeper analysis raises a range of practical issues that regulators will have to consider when regulating VSPs - particularly when assessing the appropriateness of the measures they adopt.

Another theme that has emerged from this report is the benefit of cooperation amongst NRAs in regulating VSPs. This is likely to help at both the conceptual level (e.g. in the development of processes to regulate VSPs) as well as at the practical level (e.g. assessing how VSPs with pan-European audiences are complying with national rules transposing the Article 28b measures). NRAs could reflect further on the benefits of structured cooperation when regulating VSPs.

A further theme that has emerged from this report is how the roles that regulators play can vary within different jurisdictions. In the civil law tradition, the regulator can be expected to play a strong enforcement role. Both the means by which the Directive is transposed and the characteristics of the legal environment are likely to strongly support them in this task. Whereas, in the common law tradition, because the responsibility to devise rules for services is devolved to the regulator, and because of procedural requirements in investigations and enforcement actions, regulators tend to focus on minimising the likelihood of non-compliance by services in the first instance. The Dutch approach may ensure faster results than either of these two approaches, relying principally on self- and co- regulation where the regulator is "one step removed" from the activities of VSPs directly. Finally, the lighter touch present in a flexible approach could ultimately be the most appropriate for any jurisdiction, particular where concerns about non-compliant VSPs are minimal.

Looking to the future, it's likely that many of the issues explored in this paper will have relevance in the context of the DSA. The factors that have been used to analyse different approaches to transposition from a regulator's perspective— Clarity of Obligations, Responsiveness of Enforcement, Managing Complexity – will likely be the same. Article 28b ultimately provides each Member State with the flexibility it needs to regulate platforms in a manner that best suits its legal and cultural traditions. The DSA extensively codifies services' obligations and processes at the legislative level, making the responsibilities of bodies empowered to act as digital services coordinators more akin to the role of an enforcer.

For very good reasons, NRAs may seek to diverge from any of the reflections contained in this report. This might be because they are not appropriate because of how the Directive has been transposed within their jurisdiction or for some other (very) valid reason. Time will tell whether these reflections bear out in practice, as all NRAs within ERGA develop greater experience regulating VSPs.