

A Legal Basis to Act

Executive Summary

In a landmark publication in January 2020, EDiMA called on the European Commission to introduce an Online Responsibility Framework to help internet companies in their efforts to do more to tackle illegal content online.

After extensive member and stakeholder consultation, we are now publishing a series of papers aimed at developing the fundamentals of this Framework, and exploring how it can fit into ongoing discussions on the Digital Services Act.

This second paper in the series focuses on the importance of having a clear “legal basis to act” in order to tackle illegal content and activity online.

It shows that our members welcome enhanced scrutiny, clearer rules and more accountability for their services, and where they are found to have failed to act expeditiously to remove properly notified illegal content.

As part of this Framework, EDiMA and our members set out that online service providers should have a responsibility to take reasonable, proportionate and feasible actions to mitigate the presence of illegal content or activity on their services.

In order to be able to take these actions consistently, effectively and in a balanced manner which pays due regard to fundamental rights, a clear legal basis to act is necessary.

Why is a legal basis to act required?

The legal basis for intervention by a service provider is clearer for illegal content/activity than it is for content/activity which may be considered “harmful” but is not illegal. However, service providers need to implement many different approaches across the EU in order to deal with specific Member States requirements, even on illegal content/activity. With content/activity that is “harmful” but not illegal, often a service provider will have to make determinations as to where to draw the line between free speech and the right to information versus the possible harm caused to users. Having a solid legal basis to act when it comes to certain types of content and activity can therefore help to streamline and clarify service providers’ proactive responses, especially where the service provider must remove the content in question.

Taking all of this into account, since the Online Responsibility Framework is intended to advance a foundational EU-wide approach to responsibility in the ecosystem, we propose that it should initially focus on content/activity that is already defined as illegal across the EU.

Why should the initial focus be illegal content?

Existing rules at EU-level have focused largely on illegal content/activity to date (with some exceptions, for example the Audiovisual Media Services Directive). The discussions and debates throughout the process of establishing the laws defining the activity/content as illegal have paid due regard to fundamental rights and redress. The legal basis to act is typically clearer on the part of the service provider when the content is illegal, so there is a basis for specific actions, and redress mechanisms to be put in place for users where content removal is mandated.

Additionally, as illegal content/activity are of the greatest concern, a clear and comprehensive approach in this area should be the priority. By starting with illegal content and then designing the appropriate actions to tackle it, service providers can more easily build a system with scaling action on the basis of potential risk.

Why is “harmful” activity/content more challenging?

There has been a growing push for online service providers to take further action against “harmful” content and activity – recent notable examples include the EU Code of Practice on Disinformation, the UK government’s Online Harms White Paper, and the EU Audiovisual Media Services Directive. The kind of content addressed in these proposals often falls into a grey zone when considered at EU level, where it may be illegal in some Member States, and “not-illegal-but-harmful” in others.

“Harmful” content poses serious problems online, but due to the fact that it is not always illegal, it cannot be acted upon in the same fashion as illegal content.

This scenario most often applies to content and activity concerning users’ speech, where the examination of context and nuance feature heavily in any service provider’s response. The complexity and fragmented nature of illegal vs “harmful” content is best explained with an example. In this case, blasphemy.

Taking the example of a statement posted by a user online against a particular religious belief, the rules as to whether this qualifies as illegal content or “not-illegal-but-harmful” content may vary across EU Member States and can also depend on the intention behind a user’s statement, as well as the words themselves.

Country	Legality	Details
Denmark	Not illegal	Public insult of religion not forbidden, speech and actions threatening people of certain religious beliefs still a criminal offence.
France	Not illegal	Blasphemy permitted, public condemnation against a person or group based on religious belief is not.
Germany	Illegal	Prohibits defamation of the religious or world view of others under penal law. Linked to the beliefs of the person rather than injury to the belief itself.
Ireland	Not illegal	Previously prohibited blasphemy under the Constitution, repealed following referendum and by law in January 2020.
Italy	Illegal	Considered an offence on the basis of the belief, no link to any form of personal injury necessary.
Poland	Illegal	Law does not explicitly refer to blasphemy, but refers to insulting the religious feelings of others, with notable fines administered.
Spain	Illegal	Current law prohibits vilification of a person’s religious beliefs, but law has come under review in recent years.

To mandate a direct action on the part of the online service provider at EU level, for instance removal of a blasphemous post, without a solid legal basis would fail to take account of the nuances of the post, which is why the basis to act differs so greatly between Member States.

In a broader sense, mandating that content deemed “not-illegal-but-harmful” be removed – particularly in a pan-European law covering many different legal systems and cultural contexts – may adversely impact on users’ freedom of speech and expression.

As the policy debate moves into discussions around what can be done to mitigate the negative consequences of content/activity that is “not-illegal-but-harmful”, nuanced responses will be all the more important to avoid the infringement of fundamental rights. As such, online service providers should not be obliged to remove or block content and activity which is regarded as “harmful” without a solid legal basis to underpin this action.

How would the Framework address illegal content/activity?

At EU level, different types of content/activity have already been classified as illegal and in some cases additional vertical instruments elaborate on the specific obligations that a service provider must observe to address these issues. For example, the Copyright Directive details additional obligations in relation to the illegal use of copyright-protected content. We envisage that responsibility can build on these specific obligations by establishing that service providers can do more proactively to address issues arising from all of the illegalities they have observed on their services.

The Framework would acknowledge that the service provider is best placed to determine how to adapt their systems quickly, incorporate the necessary safeguards for both users and service providers and meet their obligation of proportional responsibility. Service providers could still be found liable for failing to act expeditiously upon receiving a substantiated notice of an illegality on the service, or accountable where it is deemed that they have not taken sufficient systemic action as part of their responsibility to address broader issues with illegalities on the service.

What can be done about “harmful” content/activity?

Once this Framework is in place, further consideration of content and activity that is “harmful” but not illegal at EU level could be incorporated. This could include reference to metrics and methods of assessment for some of the common issues encountered by service providers when it comes to this kind of content. It could potentially also look at the design of approaches to address concerns based on the systems service providers have already deployed to tackle illegal content/activity without adversely impacting on users’ fundamental rights.

Our members will continue to develop best practices to tackle harmful content, including by ensuring that terms of service are clear and transparent regarding what is and is not permissible on a given service, and by optimising notice and action regimes, including robust appeals procedures for users. Ultimately, addressing the complexities and sensitivities of harmful content across the 27 jurisdictions of the EU requires open dialogue and information sharing among multiple stakeholders, and in particular close and increased cooperation with national authorities.

The distinction between illegal content and content that is “harmful” but not illegal is an important one, and a clear legal basis to act is necessary where specific measures are made mandatory. While the above paper discusses how this distinction can be balanced in the context of EDiMA’s proposal for an Online Responsibility Framework, it is also an essential consideration for the upcoming DSA, and we encourage policy-makers to consider the importance of the legal basis to act in this future initiative.

-
- EDiMA is the voice of the leading internet companies and the most popular internet products in Europe. EDiMA stands for an internet which enables companies to grow and allows customers to make the most of the opportunities it offers. More information is available here: <https://edima-eu.org/>
 - EDiMA’s members are modern internet companies that make the most popular internet products in Europe. EDiMA represents the leading online marketplaces, browsers, entertainment platforms, review sites and social networks that offer consumers some of the most popular internet products every single day. More information is available here: <https://edima-eu.org/members/>
-
- In January, EDiMA launched a new position paper calling for a new Framework for Responsibility Online in the context of the Digital Services Act. The paper is available here: <https://edima-eu.org/wp-content/uploads/2020/01/Responsibility-Online.pdf>
 - EDiMA’s feedback on the Digital Services Act Roadmap Consultation can be found here: <https://edima-eu.org/wp-content/uploads/2020/06/EDiMA-response-DSA-IIA-Roadmap-consultation-e-Commerce-Aspects.pdf>