

A. Context, Problem definition and Subsidiarity Check

Context

EDiMA, recognises the importance of tackling illegal content online as is evident by the commitment the sector has made in taking action to address pressing concerns. EDiMA believes that a much broader view is needed to address this complex issue. A balanced approach is needed to ensure that action is taken responsibly, effectively, and proportionately. While further progress is desirable, EDiMA believes that the strides taken to tackle so many different types of illegal content online are considerable and should be acknowledged as such.

Different types of content require different action

The discussion at the high-level CEO roundtable with Commissioners on 9 January confirmed that different types of illegal content require different takedown approaches. While any intermediary liability initiatives should stay horizontal, we believe the Commission should further pursue sectorial takedown initiatives, aiming to identify and quantify the problem, map a solution, and facilitate multi-stakeholder projects to roll-out the solution.

The eCommerce Directive

The e-commerce Directive (eCD) has provided a strong and flexible legal framework that has been indispensable to the growth of the European digital economy. Within this framework, we have seen the development of industry codes of conduct, self and co-regulation and industry best practices; ensuring a stable, well-regulated market. Recognising the importance of this framework in providing guidance on how to tackle all kinds of illegal content while respecting fundamental rights is crucial to ensuring effective measures are taken to fight illegal content. Current legislative proposals such as the Copyright Directive, that undermine the eCD - introduce elements that could adversely affect the essential due diligence that has to be done to allow hosting providers to act responsibly and expeditiously while taking into account the limitations of the service providers' knowledge of the exact contents being uploaded on the platforms.

Paragraphs 36 and 37 of the Recommendations set a general monitoring obligation and a stay-down obligation, in direct breach of article 15 of the eCD.

Paragraph 11 of the Recommendations establishes a counter-notice regime without clarifying related platform liability. Once the platform has been notified of an alleged infringement, it is required to expeditiously remove the content, in line with the e-Commerce Directive. A counter-notice does not change that underlying liability rule. The Recommendation (para 12) also does not lay down a process for establishing whether content that is subject to a notification and counter-notification is illegal or not. It thus places the platform in the role of a judge without providing liability safeguards.

Intermediaries should be protected from liability when they undertake proactive voluntary measures to identify harmful content. To further encourage this practice, it must be beyond doubt that hosting services do not become liable for any of the information hosted simply because they take voluntary action in good faith, whether of an automated or a non-automated nature. It should also be clear that such actions do not imply that the service provider has knowledge of or control over the information

which it transmits or stores. This clarity is crucial to developing the most efficient and innovative ways to tackle illegal content.

- [The need for faster and more effective detection and removal of illegal content](#)

EDiMA members have shown their commitment to removing illegal content from their platforms very effectively. When it comes to terrorist content this is especially being done as expeditiously as possible. We do question the focused one hour turnaround time, with no evidence provided as to why this specific timeframe has any meaningful impact when considering actual patterns of content sharing. We believe that opting for a fixed turnaround time is disproportionate and ineffective.

The definition of terrorist content is very broad and seems to cover not only speech, video, and text but also products (e.g. a t-shirt with terrorist propaganda text sold on an online marketplace).

The one-hour content turnaround time for such content established in paragraph 35 of the Recommendations is often unworkable. Technically it may be impossible for most intermediaries to meet the deadlines outlined in the Commission Recommendations. The Recommendations do not address the difficulties in determining illegality in sensitive areas such as hate speech and terrorist propaganda. Courts and other competent authorities need to establish whether content is illegal or not. Paragraphs 19 and 20 of the Recommendations seem to shift the due process burden of establishing illegality on intermediaries, instead of authorities.

- [Need to avoid that legal content is erroneously taken down](#)

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The Recommendations ignore a fundamental problem with supporting technology; any content flagged by filters or other automated tools need to be reviewed manually to avoid false-positives, requiring wide substance-matter expertise from manual reviewers (considering all potential aspects of illegality, from terrorist propaganda to IP infringements and unsafe products). In fact, the Commission seems to suggest that all notified content is by default illegal, which in practice is not the case.

Fixed deadlines for removal of content could lead to errors in decision making and over-removal as a precautionary measure. If time becomes the active measurement of effective removal then hosting services will feel pressured to resolve cases quickly rather than with due diligence.

Furthermore, even when the extremely short turnaround time can be met this will mean that there will be no possibility for verification of content. Any timeframe-focused approach at least should be qualified to make it workable. Hosting providers can only act with such extreme speed where this is technically feasible, and should make sure removal of content does not compromise freedom of expression.

- [Need for transparency and sufficient reporting](#)

Overall, the Recommendations do not seem to be informed of the operational cooperation between platforms and authorities. In practice, Member State authorities have very good and functioning

cooperation relationships with online platforms. We encourage the Commission to consult national authorities dealing with these challenges on operational levels.

- In addition, the IA will analyse the evolving legal fragmentation in the field of notice-and-action procedures that risks harming the Digital Single Market and reducing the effectiveness of the fight against illegal content

An in-depth analysis on the legal fragmentation would indeed be welcome.

Furthermore, as additional obligations are placed on intermediaries to remove content, further guidance is needed on the required information for a notice to be valid, to prevent unusable notices, mistakes, and abuse. Such information should include reasonable information to contact the notifier, as is standard practice in many submission procedures used currently. Identifying information is critical to redress and anti-abuse mechanisms, and in some cases, is *necessary* to determine the legality of the content.

B. Objectives and Policy options

[Baseline option: Comprehensive actions supporting online platforms combined with monitoring of the effects given to the Recommendation by Member States and online platforms and of the results under voluntary dialogues.](#)

EDiMA recognises the importance of the work being done in this area and believes that further in-depth examination of the real situation coupled with a follow-up on the progress being made by means of co- and self-regulatory measures will be the most impactful way forward as this will allow for efficient and pragmatic options to be sought to tackle the matter directly.

The presented options 1 and 2 seem to stem from a starting point that legislation is needed - this in itself is a concept we strongly disagree with. We believe that at this stage there is a lack of evidence to prove that a legislative solution is needed and the proposals outlined in the provided guidance; the Communication and the Recommendations raise concerns at many levels.

C. Preliminary Assessment of Expected Impacts

[Likely economic impacts](#)

Additional reporting obligations would have an economic impact as it would require further cooperation between the national authorities and e.g. Europol.

[Likely impacts on fundamental rights](#)

A possible impact on fundamental rights and more specifically freedom of expression is the possible consequence of intermediaries having to comply to stringent turnaround times instead of being able to duly assess the action needed to take down content which could lead to unnecessary content being removed.

[Likely impacts on simplification and/or administrative burden](#)

Paragraphs 36 and 40 of the Recommendations would require online intermediaries to work with Europol. However, many are working directly with Member States Counter Terrorism Units - a requirement to work with Europol would create an unnecessary and inefficient additional administrative workload without any additional benefits.

D. Evidence Base, Data collection and Better Regulation Instruments

One further concern in the Inception Impact Assessment is that a reference is made to data being collected by means of an EU Barometer survey – whereas this kind of exercise could provide insight into public opinion on the issue - EDiMA would question the weight that should be given to any information gathered through this mechanism as it would predominantly be qualitative opinions instead of expertise on the subject matter.

Conclusion

While further progress is desirable, EDiMA believes that the strides taken to tackle so many different types of illegal content online are considerable and should be acknowledged as such. Therefore, both options 1 and 2 as outlined by the inception impact assessment seem to start from a baseline that legislation is needed - this in itself is a concept we strongly disagree with as the preceding guidance so far by means of the Communication or the Recommendations have been strongly politically tinged and arbitrarily overly prescriptive.

We believe the Commission should further pursue sectorial takedown initiatives, aiming to identify and quantify the problem, map a solution, and facilitate multi-stakeholder projects to roll-out the solution.