

Fundamentals of the Online Responsibility Framework

Introduction of Necessary Safeguards

Executive summary

In a landmark publication in January 2020, DOT Europe (formerly 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 third paper in the series focuses on the importance of introducing safeguards for both service providers and users in order to balance the need to tackle illegal content and activity online with that of protecting users rights and freedoms, while supporting innovation in Europe.

Such safeguards will ensure better quality content moderation, in part by incentivising and permitting service providers to take reasonable, proportionate and feasible steps to tackle illegal content and activity on their services.

This service provider safeguard should be a European-centric principle, based on EU law, and subject to European oversight. It should seek to achieve a similar purpose to the US 'Good Samaritan' principle but should be distinct in its basis in EU law and respect of European values and fundamental rights. This should be balanced with minimum information levels in notices and a human review of removal appeals, and should be overseen by a governance structure. We are calling for these safeguards to be part of the Digital Services Act.

What is the situation at present?

The limited liability regime established by the e-Commerce Directive continues to be instrumental in enabling innovation and protecting users' fundamental rights. Most online services rely on this regime to operate today.

Under existing rules, online service providers are obliged to remove illegal content when they have actual knowledge of its presence. This is to ensure that companies are not obliged to police all content uploaded by users to find illegalities, which would inevitably infringe on the fundamental rights to speech and privacy (while creating insurmountable operational barriers for many – especially smaller – service providers). This approach helps to avoid the over-removal of legitimate content, as online service providers are not incentivised to block more content than is necessary.

Why is a new Framework needed?

Online service providers want to do more to voluntarily and proactively remove illegal content from their services, and society wants the same. However, there are important barriers under the current regime which prevent them from doing so.

How does the Online Responsibility Framework address the issue?

DOT Europe's Online Responsibility Framework aims to find a balance between these various needs and expectations by:

- Preserving the current liability regime and the prohibition on general monitoring, thereby protecting the rule of law, the open Internet, and the rights of users and businesses online.
- Introducing a safeguard for service providers, to incentivise them to act voluntarily against illegal content and activities on their services, without the threat of losing their limited liability.
- Introducing more robust safeguards for users, to balance any new measures against fundamental rights.

What safeguard is needed for online service providers?

The Responsibility Framework needs to provide some assurances to service providers that they will not lose their limited liability when they take proactive action to ensure that illegal content does not appear on their services.

If a service provider is deemed to have ‘actual knowledge’ of illegal activity/content on their service that they fail to remove, they cannot benefit from the limited liability provisions of the e-Commerce Directive. One way that actual knowledge can be acquired is via the notice and action regime a service provider has put in place – this will depend on the validity of the notice and the details provided. If a service provider has also put in place a measure intended to reduce or remove illegal activity/content on their service, for example an algorithm to detect infringements, it is not entirely clear if these measures confer ‘actual knowledge’ on the service provider¹. The possibility that a service provider might be considered to have ‘actual knowledge’ due to the introduction of good faith measures acts as a disincentive to introduce any such measures. A safeguard which clarifies that these actions do not confer ‘actual knowledge’ is needed to encourage further voluntary action from service providers.

In the US, this safeguard has been provided via the Good Samaritan Principle, under Section 230(c) of the Communications Decency Act². It states that actions taken by a service provider to reduce illegal activity online do not impact on the limited liability of the service provider. However, this principle is broad in scope, in that it gives a greater discretion to online service providers to remove not only illegal content but also “not-illegal-but-harmful” content. It is framed more as a matter of the freedom of speech of the service provider than as a tool to protect them from liability for illegal content.

This has raised concerns that the US Good Samaritan Principle potentially creates a difficult hurdle to overcome when someone wishes to question a service provider’s moderation decision on content that is not illegal. For these reasons and others, Europe needs to take a different approach.

In the EU, the legal basis to act and the concept of actual knowledge are central pillars of content moderation policy. This allows us to develop a uniquely European approach founded in European law: one which creates a legal safeguard clarifying when ‘actual knowledge’ arises and when it does not, rather than one which grants a blanket freedom for the removal of all types of content.

We propose that the Online Responsibility Framework would introduce a legal safeguard for service providers based on European values, comprising two elements:

1) A legal presumption, that is limited in scope and which takes account of EU rights and values:

This presumption would state that any proactive actions – technological or otherwise – taken by an online service provider would not attribute actual knowledge of a specific illegality on their service to them, such that they could lose their limited liability protection under the e-Commerce Directive. Actual knowledge would continue to be assessed on a case by case basis in accordance with CJEU case law and the nature of the notice submitted.

By anchoring this safeguard to the e-Commerce Directive and clarifying the concept of actual knowledge vis-à-vis proactive measures, this presumption would act as a clarification that the actions taken by service providers to address illegal content do not adversely impact their limited liability protection, rather than simply rubber-stamping the nature of the actions taken. Service providers would remain accountable to the courts and to the governance structure (more below) as to the nature of the proactive measures, thereby avoiding some of the concerns raised in the US around the blanket moderation of “not-illegal-but-harmful” content.

With this EU-specific safeguard, service providers would have legal certainty that would allow them to proactively address concerns on illegal content and activity, while still being held accountable for inaction should they receive a substantiated notification of a specific illegality under the existing notice and action regime – again in keeping with the e-Commerce Directive.

1: E.g. see development between Case C-324/09 L'Oréal v eBay to Case C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland, to AG Saugmandsgaard Øe's recent opinion in joined cases C-682/18 and C-683/18 Peterson v Google and YouTube, and Elsevier Inc. v Cyando.

2: 47 U.S.C. § 230, a Provision of the Communication Decency Act

2) An accountability mechanism focusing on systemic efforts rather than specific illegalities:

The Online Responsibility Framework's legal safeguard for service providers would offer an additional level of integrated oversight for "overaction" by a service provider, in line with European values - something that is absent from the US Good Samaritan Principle).

Methods – technological and otherwise – to tackle illegalities online are evolving rapidly. Millions of assessments of content take place every day, and a close understanding of the workings and effectiveness of the systems put in place by service providers will be necessary in order to hold them accountable (outside of specific illegalities in a notice and action regime). While the judiciary will always have the final say on specific illegalities, we envisage that a Governance Structure will provide an additional layer of assurance by overseeing the good-faith systems that service providers put in place, and ensure that their actions are proportionate, transparent and effective.

What safeguards are needed for users?

So as to provide the crucial balance between allowing the service providers to act, and protecting users' fundamental rights and freedoms, it is essential that user safeguards are accounted for in this Framework as well. The Online Responsibility Framework would require service providers to balance the fundamental rights of users against the need to reduce and remove illegal activity and content online and would, crucially, continue to prohibit the imposition of a general monitoring obligation, as outlined in our 'Fundamentals of the eCommerce Directive' paper.

Users should have access to easy-to-use and transparent remedies to appeal against action taken by a given service provider by issuing a counter notice for content removed due to alleged illegality. This would balance their fundamental rights against potential abuses by bad actors exploiting notice procedures to censor content.

To guarantee a minimum standard for decisions made on notices, both the original poster of the content and the party having raised a valid and substantiated notice should be provided with a minimum level of information including why the decision was made and what redress and appeals mechanisms are available to them. In the event of a dispute over a removal, a service provider should also be free to reinstate the user's content until such time as the dispute is resolved.

To further ensure that users are protected under this Framework, the final decision on any internal appeal process should be provided by a human, with judicial redress remaining the ultimate authority on the legality of content and activity online. Moreover, the party that files the initial complaint, of course, remains free to pursue legal action against the original user who posted the infringing content should they wish.

These specific safeguards will ensure that users have a meaningful way to get an explanation as to why their content was removed and to contest removals should they wish to do so. They will also ensure that service providers have clear and proactive policies in place when it comes to which content is allowed on their services, while fostering transparent dialogue with their users.

- DOT Europe (previously called EDiMA) is the voice of the leading internet companies in Europe. DOT Europe's mission is to develop ideas and support policy initiatives that foster an innovative, open and safe internet for Europe's citizens and businesses. More information is available here: <https://doteurope.eu/>
- DOT Europe represents 19 of the leading internet companies. Its members produce and manage a variety of products, services and applications including browsers, entertainment platforms, social networks, marketplaces and review sites. More information is available here: <https://doteurope.eu/members>

In January, DOT Europe launched a new position paper calling for a new Framework for Responsibility Online in the context of the Digital Services Act. More information is available here: <https://doteurope.eu/policy-areas/online-responsibility-framework/>

DOT Europe's feedback on the Digital Services Act Roadmap Consultation can be found here: <https://doteurope.eu/wp-content/uploads/2020/09/EDiMA-response-to-Digital-Services-Act-public-consultation.pdf>