

## Tackling illegal content online: principles for efficient and restorative solutions

The European Network Against Racism ([ENAR](#)) is the only pan-European anti-racism network that combines advocacy for racial equality and facilitating cooperation among civil society anti-racism actors in Europe.

European Digital Rights ([EDRi](#)) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment.

Our organisations welcome this opportunity to express our shared concerns and recommendations regarding illegal content online and associated policy challenges. We do acknowledge the devastating effects that criminal content can have on victims and on society at large.

Holistic human rights-based policies to tackle illegal content guarantee a higher level of protection for all, including children, women, people of colour and vulnerable groups. Consistency is key to prevent arbitrariness and discrimination and to fight rule of law and fundamental rights breaches that could eventually be used against victims of racism and their defenders.

In the context of a proportionate, comprehensive and accountable approach to illegal content, intermediaries such as internet companies unquestionably have a role to play. In the case of illegal racist speech (incitement to racial hatred and violence), timely, proportionate and accountable removal can be a part, among others, of the broad means of redress for victims. However, beyond hasty and patchy solutions, efficient and sustainable strategies must be developed to address deep societal challenges such as racism. All actors, not only companies, have a role to play. These strategies must ensure comprehensive, efficient and adequate answers to victims and groups in need of protection, and be grounded in fundamental rights.

Our organisations strive to ensure that fundamental rights are respected across the board. The fight against racism must only encompass limited infringements to freedom of expression or privacy, which must be necessary and proportionate, provided by law and offer a meaningful possibility of redress. Such a holistic, accountable approach to online content will lead to a more effective approach against systemic spreading of illegal racist or violent content.

Our organisations have collaborated over the past few years to bring the digital rights community and the anti-racist movement together. In our view, for any policy to be acceptable, it needs to comply with the following principles:

**Principle 1: No place for arbitrary restrictions - Any measure that is implemented must be predictable and subject to real accountability.**

Measures which are taken on the basis of "voluntary" (so-called "self-regulatory") measures by internet companies generally fail to comply with human rights principles of predictability and proportionality and therefore run risks of arbitrariness.

Restrictions on fundamental rights and freedoms, including the rights to non-discrimination and equality, privacy or freedom of expression online and offline must be provided for by law.

It is important that any restriction is predictable, necessary, proportionate and have accessible redress mechanisms.

Therefore terms of service or any other measure chosen by an internet company on the basis of "voluntary" (so-called "self-regulatory") restrictions would not meet the standards of predictability and proportionality and therefore run risks of arbitrariness. Internet companies exist for profit and it is rational to expect them to be biased in the "self-regulatory" "solutions" they choose on the basis of cost, liability, public relations, or (anti-)competitive concerns.

**Principle 2: Diligent review processes - Any measure must be implemented on the basis of neutral assessment, rather than being left entirely to private parties, particularly as they may have significant conflicts of interest.**

Encouraging or coercing "voluntary" industry measures to distinguish what is legal from what is not, and regulating online speech without being based on clear criteria, is not a satisfactory solution.

Measures should be based on a neutral, democratic set of rules, agreed upon by societies and States.

**Principle 3: Learning lessons - Any measure implemented must be subject to thorough evidence-gathering and review processes.**

Monitoring, evaluation and oversight methods include having a problem definition, key performance indicators, a substantive fundamental rights impact assessment, a risk assessment related to the public policy objective at stake, review mechanisms and exit strategies in case of failure.

We must be cognisant of the fact that the internet is not a static resource. Every measure leads to counter-measures and, being a network of networks, each intervention in one place has ripple effects in others. It is reckless in the extreme to launch restrictive policies in very important policy areas, as has often been done in the past, and then never re-assess them to see whether the laudable public interest aims, such as the fight against online racism, is being achieved at all, risking unidentified counter-productive impacts.

Such approaches compound victims' frustrations that damage being inflicted is not getting redressed. Some other counter-productive effects have also be noted in the European Commission's own inception impact assessment, such as over-cautiousness of online platforms or erroneous take down. There are reports, for instance, of anti-racism activists whose content or profile was taken down without explanation or ways to challenge that action.

A comprehensive review by the European Commission of national and EU-level measures for dealing with illegal online content should be a pre-requisite for proposing further measures.

**Principle 4: Different solutions for different problems - No superficial measure in relation to incitement to violence or hatred should be implemented without clear obligations on all relevant stakeholders to play their role in dealing with the content in a comprehensive manner.**

It makes sense that there is a horizontal approach to intermediary liability - a diligent, expeditious approach to illegal content is required regardless of the nature of the content in question. However, this should not be mistaken for meaning that all illegal content should be treated in the same way. Some types of illegal content online raise concern due only to their availability.

However, other types of content, such as incitement to hatred or violence are part of a deep problem which require appropriate broader responses. Illegal content removal can only be part of the solution. It does not address the root causes of the deep-seated prejudice and is incapable of providing full redress or justice for the victims of racism. Illegal racist content inciting to violence or discrimination should be referred to competent and properly resourced law enforcement authorities for adequate sanctions if they meet the criminal threshold. States must also ensure that laws on racism and incitement to violence are based on solid evidence and respect international human rights law. Article 20 (2) ICCPR and related recommendations, in particular the Rabat Plan of Action (which includes the “incitement test” to assess the level of severity of expression) provides a framework for achieving this objective. Framework Decision 2008/913/JHA on combating racism and xenophobia aims to transpose these principles into EU law.

Beyond criminal sanctions, other measures should include educational programmes for all, awareness-raising campaigns, counter-narratives, internet literacy programmes, improved designs and feedback for online platforms users and adequate political reactions to reiterate the unacceptable character of racist speech and its impact on real-life violence and discrimination. Victims and victims support services should also receive adequate support to overcome fear and exercise their right to redress.

ENAR and EDRi remain committed to ensure fundamental rights for all.

We are looking forward to continuing to engage with the European Commission and other stakeholders.