

FRAMING BRIEF: GEOGRAPHIC SCOPE OF CONTENT RESTRICTIONS*



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Every day, millions of online messages, posts, comments and other content items are restricted or deleted. Content restrictions decisions are based either on national laws or service providers' terms of service. This framing brief addresses the geographic scope of content restrictions related to the first dimension, i.e. illegality.

While by default online content is globally accessible, national laws of a jurisdiction determine, subject to international laws, principles, and standards on human rights and the rule of law, what can lawfully be posted or accessed inside the jurisdiction's territory.

Any assertion of extraterritorial jurisdiction is exceptional and must be subject to international laws, principles, and norms on sovereignty and comity. Accordingly, it is generally accepted that a state should not presume to dictate what content should not be accessible in other states. Still, some argue that, under such very exceptional circumstances, access to content determined illegal in one jurisdiction may be restricted by that jurisdiction beyond its territory. However, there is no settled global multi-stakeholder consensus on what could constitute such exceptional circumstances.

Nevertheless, some initiatives involving public authorities and private actors do aim to globally restrict or remove certain types of content (e.g. CSAM¹ or terrorism²). In parallel, some court decisions³ have imposed extraterritorial restrictions (partial or global), and the EU Digital Services Act (DSA) explicitly refers to the "territorial scope" of orders⁴.

The legal uncertainty triggered by such unilateral actions calls for a global concerted effort to address the question of appropriate geographic scope of content restrictions. The present framing brief does not seek to provide a prescriptive or normative position, but to document the discussions conducted within the I&JPN Content & Jurisdiction Contact Group regarding this topic. **It is structured around two pillars:**

- 1) Documenting the context of the discussion, and**
- 2) Identifying elements that may be helpful in further multi-stakeholder processes.**

¹ [INHOPE](#) "Our mission is to support and enable INHOPE hotlines in the rapid identification and removal of Child Sexual Abuse Material from the digital world."

² [GIFCT](#) "brings together the technology industry, government, civil society, and academia to foster collaboration and information-sharing to counter terrorist and violent extremist activity online"

³ See: [Google Inc v. Equustek Solutions Inc.](#); [Google LLC v. National Commission on Informatics and Liberty \(CNIL\)](#); [Glawischnig-Piesczek v. Facebook Ireland Limited](#); [Ramdev v. Facebook](#).

⁴ Article 8 of the draft EU Digital Services Act (DSA) - will require national bodies to define the territorial scope of the order "...on the basis of the applicable rules of Union and national law, including the Charter, and, where relevant, general principles of international law, does not exceed what is strictly necessary to achieve its objective."

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I - CONTEXT

Addressing the question of the geographic scope of content restrictions brings to the fore the context in which this discussion takes place and in particular the following questions:

- Will this potentially risk “normalizing” extraterritorial restrictions and encourage its inappropriate political or politicized use, that does not comply with international laws, principles, and standards on the rule of law and human rights?
- Is the situation different in public law and private law situations?
- To what extent is it appropriate to account for the burden on potential victims to obtain redress beyond their own jurisdiction?
- How are decisions technically implemented and enforced within an acceptable timeframe to prevent further harm?
- How to resolve conflicts of laws and/or conflicting decisions in different jurisdictions?

Discussions conducted over the course of two years highlighted the complexity of these issues.

1.1. STANDARDS OF DUE PROCESS

There is general consensus that extra-territorial restrictions, if any, can only be very exceptional measures rather than the norm. Still, some express legitimate concerns that the mere exploration of criteria under which such restrictions could exceptionally be justified may empower restrictive jurisdictions to abuse such procedures to limit freedom of expression and access to information, and more generally to impose their own insufficient, unacceptable and even objectionable legal standards onto other jurisdictions.

A strong prerequisite for considering the exceptional instrument of extraterritorial restrictions, is therefore that such measures must be consistent with international laws, principles, and standards on human rights and the rule of law, and be necessary and proportionate including in their geographic scope, in order to reconcile the minimization of harm and the maximum protection of civil and political rights, including freedom of expression and other human rights. The question of what geographical scope would be necessary and proportionate to achieve the desired aim could form part of the necessity and proportionality test.

However, and most importantly, this demands that the country ensures a high standard of due process in the determination of illegality under its national legislation that meets international principles on the rule of law.

Under such preconditions, a conceptual framework based on human rights and the rule of law for these exceptional measures can help protect rights and strengthen due process.

1.2. PUBLIC LAW AND PRIVATE LAW SITUATIONS

Discussions in the Contact Group highlighted significant differences between content restrictions ordered at the initiative of public authorities on the basis of public law and those arising from disputes between individuals on the basis of civil/private law.

First, the balancing of rights and interests is different in both cases. As public law governs the relationship between public authorities and individuals, decisions aim to balance the rights of the poster and of the victims of harm with higher collective interests. Meanwhile, in civil/private law cases, the balance involves the rights of two parties: the claimant(s) and the defendant(s).

Second, in civil/private law, numerous existing frameworks and procedures exist regarding enforcement of judicial decisions across borders, through domestication or automatic recognition of judgements. Some rules of procedure defining court jurisdiction even allow for a case between two individuals in different jurisdictions to be adjudicated by a court in a third one. This, however, is not generally the case for public law.

Some therefore argue that extraterritorial restrictions are difficult to justify on the basis of national public law, given the principles of sovereignty and comity, as it is generally accepted that one state cannot govern matters in another state.

1.3 BURDEN OF RECOURSE

When an individual's rights are infringed online, the responsibility to seek or obtain redress rests squarely on the victim. Yet, there is a general paucity of legal remedies ensuring timely and accessible recourse, and existing procedures are burdensome. Achieving redress across borders can furthermore imply initiating multiple actions in different jurisdictions, which may apply different balances between competing human rights, and issue conflicting judgements.

In that context, and particularly for cases involving civil/private law, some argue that a broader geographic scope of restriction may be considered to alleviate an excessive burden on victim(s) who would have to pursue, in multiple jurisdictions, numerous parallel procedures that are almost certain to yield the same legal result.

The above prerequisite remains that the state that issues the legal orders must ensure a high standard of due process in the determination of illegality under its national legislation that meets international principles on the rule of law.

1.4 TECHNICAL DIMENSIONS

Two technically-related aspects deserve to be taken into account:

On one hand, many internet intermediaries do not have the technical capacity to implement granular geographic restrictions (e.g. through geo-IP filtering) and can only make the content available or not.

Conversely, social media platforms may have a broad range of technical solutions beyond merely making content inaccessible, thus creating the possibility of more directed responses including: reducing viral dissemination through algorithmic tools, disincentivizing or even preventing uploading or distribution⁵.

1.5 CONFLICTS OF LAWS AND CONFLICTING DECISIONS

Any decision imposing extraterritorial restriction increases the potential for conflict of laws and/or conflicting decisions in other jurisdictions, for instance by ordering the reinstatement of the content at stake according to local national law, or objecting to the imposition of extraterritorial scope as a matter of principle⁶.

II - POTENTIAL RELEVANT FACTORS

Under the strong prerequisites mentioned above, three main dimensions emerge when considering potential factors that may be relevant in the multi-factor analysis to determine the appropriate geographic scope of content restrictions.

2.1 LOCATION OF POSTER OR INTERMEDIARY

Physical location of relevant actors is an important element to determine illegality in the offline world. It becomes more complex online, in particular in relation to the location of individuals posting the content or the locus of incorporation of the hosting intermediary.

- **The location or citizenship of the poster.** The fact that the posting took place in a country, or was made by a citizen of a country where the content is illegal, should not be a sufficient factor in itself to justify a global restriction. A potential exception may be considered if the country ensures a high standard of due process in the determination of illegality under its national law that meets international laws, principles, and standards on the rule of law and human rights, and the content at stake is illegal in all jurisdictions, including jurisdictions with sufficiently similar high standards.
- **The location of incorporation of the intermediary.** As a practical matter, the location of the intermediary may facilitate the enforceability of national orders that would impose extra-territorial restrictions. However, as a matter of principle, the sole fact that an intermediary is established or

⁵ The Contact Group has previously identified a range of actions that may be implemented on infringing content [I&JPN REF 19-122](#).

⁶ Google Inc. v. Equustek Solutions Inc., 2017 SCC 34, [2017] 1 S.C.R. 824.

incorporated in a particular jurisdiction should not confer on the corresponding authorities the right to unilaterally impose their laws on lawful content posted outside of their territory.

2.2 SCOPE OF HARM

The actual or potential harmful impact of illegal content is also a relevant factor and can be evaluated along at least two dimensions.

- **The geographic reach of the harm.** The potential harm associated with the accessibility of a particular post can be territorially circumscribed (a limited geographic zone, a specific country or even a sub-region/location in a country) or on the contrary, can impact a much broader geographic zone, for instance because of distributed communities or the activities of a person or entity directly targeted.
- **The audience and geographic prevalence of the poster's account.** The following factors may play a role in that regard: the number of followers of the account, their geographic distribution and the language used (given its geographic coverage), as well as the effects of the virality of the post. The status of the poster can also be taken into account, in particular if it is a public figure.

2.3 INTERNATIONAL NORMATIVE CONVERGENCE

Whether certain types of content are similarly considered across the world as illegal is a key element when discussing the appropriate geographic scope of content restrictions.

At the highest level, the set of internationally agreed human rights treaties and standards constitutes a primary basis for the appreciation of such legal convergence. The justified need for, and the effect of any extraterritorial restrictions must be evaluated with regards to international laws, principles, and standards on the rule of law and human rights.

Yet, the interpretations and implementations of such treaties and standards vary considerably as they are transposed in the various national legislations. The degree of normative convergence among countries spans a broad continuum, with situations as diverse as: content considered illegal in all jurisdictions, with very similar standards (e.g. child abuse material); content considered illegal in all or most jurisdictions, but with very different standards (e.g. defamation) which may also be misused; content justifiably considered illegal in some specific jurisdictions due to local circumstances, in particular history (e.g. denial of the Holocaust in certain European countries); or content made illegal in some countries on the basis of laws contested by a significant part of the international community (e.g. legislations discriminating on the basis of gender, religion, race or sexual orientation, or restrictions against content protected under international human rights laws, principles, and standards, such as news reporting, political and religious expressions, etc.).

There seems to be a general consensus to consider global restrictions as potentially justified in situations of demonstrably strong international normative convergence, in particular regarding the first category mentioned above (e.g. child abuse material). Likewise, the existence of formal harmonization among a group of countries, for instance in the context of regional frameworks (e.g. the European Union), or bilateral/plurilateral agreements between individual countries, may warrant restrictions to be extended to their combined territory, but not at the global level if it lacks such harmonization in the rest of the world (e.g. implementation of the right to be forgotten in the context of protection of privacy⁷).

Apart from such limited situations, defining on a case-by-case the degree of international normative convergence applicable to a specific content is a complex task, in the absence of any transnational process to produce a sufficient multi-stakeholder consensus in that regard.

CONCLUSION

The complex question of geographical scope of online content restrictions emphasizes the fundamental tension between the cross-border internet and territorial national laws. There are already several cases of extraterritorial court orders and the EU DSA includes a reference to the geographic scope of such decisions. As countries around the world increasingly regulate online content, this issue will arise more frequently.

This framing brief documents the discussions conducted during two years within the I&JPN Content & Jurisdiction Contact Group. It offers a starting point for further multistakeholder work that is dearly needed on this issue, in particular to more clearly appreciate the degree of normative convergence.

While the work of the Group focused on legal or regulatory content restrictions, it is important to note the need to also address the parallel issue of the geographical scope of decisions taken on the basis of internet companies' own rules. The vast majority of online content restrictions are based on such Terms of Service or Community Guidelines. In particular, oftentimes content subject to legal restrictions also contravenes the companies' own rules and is thus restricted on that basis. The geographic scope of such decisions requires a separate discussion and analysis, especially as the action of removing the content from a platform in application of its Terms of Service has a de facto global effect.

Clearly there is a need for further work on this topic in order to find solutions that will respect human rights of individuals, strengthen the rule of law and due process, safeguard the rights of States to determine what can be legally available on their territory, and prevent extraterritorial censorship.

NOTE: This Framing Brief is a joint contribution by some of the most engaged experts in this field to advance the ongoing debate on the complex issues of cross-border online content restrictions. **It should however not be understood as the result of a formal negotiation validated by these experts' organizations.**

⁷ In the case of [Google LLC v. National Commission on Informatics and Liberty \(CNIL\)](#), the Court of Justice of the European Union ruled that the measure to de-reference online content should not be extended beyond the EU as there is a level of standardization for privacy in the EU, while this is not the case across the globe.