

A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries

I. Background information

1. Please indicate your role for the purpose of this consultation: -multiple choices reply-(compulsory)	Civil society association
2. Please indicate your place of residence or establishment: -single choice reply-(compulsory)	Belgium
3. Please provide your contact information (name, address and e-mail address): -open reply-(compulsory)	
European Digital Rights (EDRi) 39/9 Rue Montoyer 1000 Bruxelles Belgium Tel: +32 2 550 4112 Email: brussels (at) edri (dot) org Transparency Register: 16311905144-06	
4. Is your organisation registered in the Interest Representative Register? -single choice reply-(compulsory)	Yes
5. What is /are the category /ies of illegal content of greatest relevance to you in the context of N&A procedures? -multiple choices reply-(compulsory)	Illegal offer of goods and services (e.g. illegal arms, fake medicines, unauthorised gambling services etc.). - Illegal promotion of goods and services. - Content facilitating phishing, pharming or hacking. - Infringements of copyright and related rights - Infringements of trademarks - Infringement of consumer protection rules. - Incitement to hatred or violence (on the basis of race, religion, gender, sexual orientation etc.) - Child abuse content - Terrorism related content (e.g. content inciting the commitment of terrorist offences and training material) - Defamation - Privacy infringements

II Notice and Action procedures in Europe

Action against illegal content is often ineffective -single choice reply-(compulsory)	I agree
Action against illegal content is often too slow -single choice reply-(compulsory)	No opinion
Hosting service providers often take action against <i>legal</i> content -single choice reply-(compulsory)	I completely agree
There is too much legal fragmentation and uncertainty for hosting service providers and notice providers -single choice reply-(compulsory)	I completely agree

The exact scope of 'hosting' is sufficiently clear -single choice reply-(compulsory)	I disagree
The terms “actual knowledge” and “awareness” are sufficiently clear -single choice reply-(compulsory)	I disagree
The term “expeditiously” is sufficiently clear -single choice reply-(compulsory)	I disagree
The public consultation on e-commerce of 2010 has demonstrated that most stakeholders consider hosting <i>of websites</i> to be hosting, but that there is less unanimity on other services that could be hosting. The CJEU has stated that hosting may in principle be the services of online market places, referencing services and social networks. 8. In your opinion, what activities should be considered as 'hosting'? -multiple choices reply-(compulsory)	Social networks - Blogs and interactive dictionaries - Video-sharing sites - Cloud based services - E-commerce platforms - Search engines - Cyberlockers
<i>Please specify</i> -open reply-(optional)	

III. Notifying illegal content to hosting service providers

It is easy to find pages or tools to notify illegal content -single choice reply-(compulsory)	I disagree
It is easy to use pages or tools to notify illegal content -single choice reply-(compulsory)	I disagree
10. Should all hosting service providers have a procedure in place which allows them to be easily notified of illegal content that they may be hosting? -single choice reply-(compulsory)	Yes
Some hosting service providers have voluntarily put in place mechanisms to receive notifications of illegal content. Some of these providers have complained that their mechanisms are not always used and that concerns about content are not notified in a manner that would be easy to process (e.g. by fax, without sufficient information to assess the alleged illegal character of content etc.). Providers also claim that this creates delays in taking action against illegal content, because the hosting service provider would for instance have to contact the notice provider to ask for additional information.	No

<p>11. If a hosting service provider has a procedure for notifying illegal content (such as a web form designed for that purpose) that is easy to find and easy to use, should illegal content exclusively be notified by means of that procedure? -single choice reply-(compulsory)</p>	
<p>Please explain -open reply-(optional)</p>	<p>Whenever possible, the online procedure should be preferred. However, alternative means should be made available, for ex. email in addition to a web form, with courts taking due account of inevitable delays if the reporting is done in a manner which makes processing of the report slower. Barrier-free solutions should also be made available to make it possible to access and use procedures for persons with disabilities. The introduction of one single web form should be avoided.</p>
<p>A notice should be submitted by electronic means -single choice reply-(compulsory)</p>	<p>Yes.</p>
<p>A notice should contain contact details of the sender -single choice reply-(compulsory)</p>	<p>Yes.</p>
<p>A notice should make it easy to identify the alleged illegal content (for instance by providing a URL) -single choice reply-(compulsory)</p>	<p>Yes.</p>
<p>A notice should contain a detailed description of the alleged illegal nature of the content -single choice reply-(compulsory)</p>	<p>Yes.</p>
<p>A notice should contain evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act -single choice reply-(compulsory)</p>	<p>Yes.</p>
<p>Both civil rights organisations and hosting service providers have complained about a significant proportion of unjustified or even abusive notices. Some stakeholders have proposed more effective sanctions and remedies for this purpose.</p> <p>13. Should there be rules to avoid unjustified notifications? -single choice reply-(compulsory)</p>	<p>Yes</p>
<p>Please explain -open reply-(optional)</p>	<p>Hosting providers must stop re-prohibiting illegal activity through their terms of service - notice & action with regard to alleged illegal activity should be a separate process from an alleged breach of terms of service. Providers who ban content that appears to breach the law place both themselves and their customers in an impossible legal environment. Once legal clarity is established the entities responsible for abusive notices must be subject to dissuasive and effective sanctions. Sanction</p>
<p>14. How can unjustified notifications be best prevented? -multiple choices reply-(compulsory)</p>	<p>By requiring notice providers to give their contact details - By publishing (statistics on) notices - By providing for sanctions</p>

	against abusive notices - Other
Please specify: -open reply-(optional)	By: encouraging providers to have discrete rules on illegal&legal content banned on their services; ensuring dissuasive sanctions against abusive notices for all sizes&types of senders; damages in cases of unjustified notices; requiring the possibility of counter-notices; prohibiting automatic notice generation; requiring contact details of notifier when the injury is directly to the notifier, unless if the legal, reputational or physical security could be compromised; transparency reports

IV. Action against illegal content by hosting service providers

15. Should hosting service providers provide feedback to notice providers about the status of their notice? -single choice reply-(compulsory)	Yes
<i>Multiple choice</i> -multiple choices reply-(compulsory)	The hosting service provider should send a confirmation of receipt. - The hosting service provider should inform the notice provider of any action that is taken. - Other
Please specify -open reply-(optional)	In addition, the hosting provider should immediately inform the content provider of any action that is taken.
16. Should hosting service providers consult the providers of alleged illegal content? -single choice reply-(compulsory)	Yes
<i>Multiple choice</i> -multiple choices reply-(optional)	Upon reception of a notice, but before any action on the alleged illegal content is taken. This would avoid the disabling of legal content or it been taken down. - Other
Please specify -open reply-(optional)	Where possible, the owner of the content should be consulted and the ISP should have a system in place that allows for a counter-notice. It must be made clear if the user is being accused of illegal activity or a breach of terms of service that is not actually illegal. The US approach of "delete first, ask questions later," is contrary to the ECHR and Charter and therefore must be avoided.
According to the E-commerce Directive, the hosting provider should act "to remove or to disable access to the information" - One may interpret "removing" as permanently taking down or deleting content. - "Disabling access" can be understood as any technique that ensures that a user does not have access to the content. Some hosting service providers for instance use geo-software to impede access exclusively to users with an IP address from a country where the content is question is considered illegal. Similarly, some	Other

<p>hosting service providers firstly impede access to all users without permanently deleting it. This can for instance allow law enforcement authorities to further analyse the alleged illegal content in the context of criminal investigations. If deleting would not any longer hinder the investigation, the hosting service provider may still remove the content.</p> <p>17. Assuming that certain content is illegal, how should a hosting service provider act? -single choice reply-(compulsory)</p>	
<p>Please specify -open reply-(optional)</p>	<p>It is not clear what "first" means in this question. Assuming that "first" means "after a due process of law identifying an infringement, the "first" action should never be to delete content as the public policy objective can be achieved by disabling content - all stakeholders can have a legitimate interest in the content not being deleted.</p>
<p>Several providers may host the same content on a particular website. For instance, a particular 'wall post' on the site of a social network may be hosted by the social network and by the hosting service provider that leases server capacity to the social network. It may be that this hosting service provider that leases server capacity is in a position to act against the alleged illegal content, but not without acting against other (legal) content.</p> <p>18. When the same item of illegal content is hosted by several providers, which hosting service provider should act against it? -single choice reply-(compulsory)</p>	<p>Other</p>
<p>Please specify -open reply-(optional)</p>	<p>The ISP that has actual knowledge of the illegal content & is technically in a position to remove exclusively the notified content. In its baseline for proposals on Notice&Takedown, the CoE holds that "attempts to make entire websites inaccessible should be judged against international standards designed to secure the protection of freedom of expression & the right to impart and receive information, in particular the provisions of Art 10 of the Convention & the related case law of the ECHR".</p>
<p>As soon as the illegal nature of certain content has been confirmed, the E-commerce Directive requires the hosting service provider to act "<i>expeditiously</i>" if the provider is to be exempted from liability. However, the Directive does not further specify the concept of "expeditiously". Some stakeholders consider that a pre-defined timeframe for action should be established, whereas others consider that the required speed of action depends on the circumstances</p>	<p>Other</p>

of the specific case. In a specific case it may be difficult to assess the legality of content (for instance in a case of defamation) or it may be easy to do so (for instance in a manifest case of child abuse content). This may have an impact on the speed of action. Similarly, what is expeditious for a specific category of content may not be sufficiently expeditious for another. For instance, the taking down of content within 6 hours will generally be considered very fast, but may not be sufficiently fast for the live-streaming of sports events (that are not any longer relevant once a match is finished).

19. Once a hosting service provider becomes aware of illegal content, how fast should it act?

-single choice reply-(**compulsory**)

Please specify -open reply-(**optional**)

As fast as appropriate in each given case if the ISP has actual knowledge. If content *appears* unequivocally illegal & appears to present an imminent threat, the ISP should be permitted/expected to take (temporary) action to mitigate any damage. If, subsequently, law enforcement do not contact the alleged perpetrator & choose not to take action it could be put back online, at the responsibility of law enforcement. Content owners should be informed about any action & instructed on their rights

In individual cases, law enforcement authorities may ask hosting service providers not to act expeditiously on certain illegal content that are the subject of criminal investigations. Acting expeditiously could alert law infringers of the existence of a criminal investigation and would impede analysing the traffic on a particular site.

No

20. Should hosting service providers act expeditiously on illegal content, even when there is a request from law enforcement authorities not to do so? -single choice reply-

(**compulsory**)

Please explain: -open reply-(**optional**)

Civil rights organisations complain that hosting service providers sometimes take down or disable access to *legal* content. They claim that some hosting service providers automatically act on notices without assessing the validity of the notices. In this context, the CJEU has held that blocking of legal content could potentially undermine the freedom of expression and information.

By requiring detailed notices - By consulting the content provider before any action is taken - By providing easy and accessible appeal procedures - By publishing (statistics on) notices - By providing for sanctions against abusive notices - Other

21. How can unjustified action against legal

content be best addressed/prevented? -multiple choices reply-(compulsory)	
Please specify -open reply-(optional)	By: avoiding a system where ISPs are expected to judge whether content is in breach of criminal or civil law; requiring a decision by a legally competent authority before taking material down; prohibiting notice&stay-down; allowing for counter-notices before any action is taken; providing for damages (incl. reputational) in cases of unjustified takedown; liability for actions of false or fraudulent claims & for non-compliance with processes (for ex. ISPs not providing for counter-notices)
Some hosting service providers are hesitant to take pro-active measures to prevent illegal content. They claim that taking such measures could be interpreted by courts as automatically leading to "actual knowledge" or "awareness" of all the content that they host. This would accordingly lead to a loss of the liability exemption they enjoy under the respective national implementation of the E-commerce Directive. In at least one national ruling, a court has interpreted actual knowledge in this sense. At the same time, the CJEU has held that awareness can result from own initiative investigations (Judgment of the Court of Justice of the European Union of 12 July 2011 in case C-324/09 (L'Oréal – eBay), points 121-122). 22. In your opinion, should hosting service providers be protected against liability that could result from taking pro-active measures? -single choice reply-(compulsory)	No
Please explain -open reply-(optional)	Proactive measures are likely to include general monitoring of citizens. 2 ECJ cases (C-70/10 C-360/10) show that this breaches the right to privacy, freedom of communication & freedom of information. Such breaches do not become less important just because they've been imposed "voluntarily". If ISPs wish to become judge&jury, govts may not absolve them of the ensuing responsibilities as this would breach Art 52, Charter. Also actual knowledge should be redefined as actual knowledge of illegality

VI. The role of the EU in notice-and-action procedures

23. Should the EU play a role in contributing to the functioning of N&A procedures? -single choice reply-(compulsory)	Yes
Please specify: -multiple choices reply-(compulsory)	By providing non-binding guidelines - By providing some binding minimum rules - Other
Please specify -open reply-(optional)	The Commission should make it clear that "self-regulation" is regulation of ISPs' own internal processes (information to notice providers, information to content

	<p>providers, etc) and not regulation of third parties, such as content providers. Guidelines can improve efficiency of information provision and data handling without descending into privatised law enforcement, contrary to the ECHR and Charter.</p>
<p>Article 14 of the E-commerce Directive does not specify the illegal content to which it relates. Consequently, this article can be understood to apply horizontally to any kind of illegal content. In response to the public consultation on e-commerce of 2010, stakeholders indicated that they did not wish to make modifications in this regard.</p> <p>24. Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures? -single choice reply-(compulsory)</p>	<p>Yes</p>
<p>Please clarify giving concrete examples relating to the question above -open reply-(optional)</p>	<p>A clear distinction must be made between apparent breaches of criminal law & civil law. Also, there must be varying approaches as the nature of illegal content varies enormously. For ex, making available of child abuse images is one part of a series of crimes while the unauthorised making available of copyrighted material is not a crime & constitutes the entire infringement. Treating both in the same way inevitably leads to one or other (or both) being handled in a disproportionate way</p>
<h2>VII. Additional comments</h2>	
<p>25. Do you wish to upload a document with additional comments? -single choice reply-(optional)</p>	<p>Yes</p>