

# EUROPEAN COMMISSION PUBLIC CONSULTATION

Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy



## THE EU'S CONSULTATION RAISES MORE QUESTIONS THAN ANSWERS - WE WONDER WHY THE REAL QUESTIONS ARE NOT BEING ASKED.



The big question to address regarding illegal content online is **how can a credible decision about the legality of the content be taken when an accusation is made**. What level of knowledge of the actual illegality of the content should trigger liability from the Internet Service Provider (ISP)? Does the quality of the notice matter - does it need to be specific about what content it is referring to or exactly where the content is located? Should there be automatic onward reporting to law enforcement in relation to notices of serious criminal content? These fundamental questions are not asked at all.



So, we won't question whether ANY communication should create an incentive for the platform to delete information? Where are the rights of the content uploader?

So, there is a pressure to remove content and no incentive to keep it online. Is this a fair balance? Is it a balance?



The previous paragraph explains that "any" communication is a notice. So, this paragraph adds no additional information at all!



There is a pressure to remove content and no incentive to keep it online. Is this a fair balance? Is it a balance?

It is not the role of a supposedly neutral consultation to tell the responder what they should have in mind.

Content distribution is not a passive activity and falls outside the Commission's own description of the issue (above).



Pure data storage is not a two-sided market and therefore falls outside the Commission's own infeasibly broad definition of a platform.

The Commission defined things that didn't need to be defined and then failed to define this very unclear notion.



The Commission is, amazingly, asking if notices about terrorist and unauthorised copies of films should be treated the same!



It is remarkable that the question is asked - if the content you upload is accused of being illegal - or even criminal - should you have a right to defend yourself?



The European Commission explained at the time the Directive was adopted that a recital cannot change the meaning of the Directive and it was meant to cover things like complaint systems and hotlines, not additional monitoring like general obligation duties.



The European Commission is well aware that there were no voluntary enforcement measures in place when the Directive was adopted and this is NOT what was meant at the time.

### Tackling illegal content online and the liability of online intermediaries

Please indicate your role in the context of this set of questions

Terms used for the purposes of this consultation:

"Illegal content"

Corresponds to the term "illegal activity or information" used in Article 14 of the E-commerce Directive. The directive does not further specify this term. It may be understood in a wide sense so as to include any infringement of applicable EU or national laws and regulations. This could for instance include defamation, terrorism related content, IPR infringements, child abuse content, consumer rights infringements, or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation, malware, illegal online gambling, selling illegal medicines, selling unsafe products.

"Hosting"

According to Article 14 of the E-commerce Directive, hosting is the "storage of (content) that has been provided by the user of an online service". It may for instance be storage of websites on servers. It may also include the services offered by online market places, referencing services and social networks.

"Notice"

Any communication to a hosting service provider that gives the latter knowledge of a particular item of illegal content that it transmits or stores and therefore creates an obligation for it to act expeditiously by removing the illegal content or disabling/blocking access to it. Such an obligation only arises if the notice provides the internet hosting service provider with actual awareness or knowledge of illegal content.

"Notice provider"

Anyone (a natural or legal person) that informs a hosting service provider about illegal content on the internet. It may for instance be an individual citizen, a hotline or a holder of intellectual property rights. In certain cases it may also include public authorities.

"Provider of content"

In the context of a hosting service the content is initially provided by the user of that service. A provider of content is for instance someone who posts a comment on a social network site or uploads a video on a video sharing site.

- individual user
- content provider
- notice provider
- intermediary
- none of the above

Have you encountered situations suggesting that the liability regime introduced in Section IV of the E-commerce Directive (art. 12-15) has proven not fit for purpose or has negatively affected market level playing field?

- Yes
- No

Do you think that the concept of a "mere technical, automatic and passive nature" of information transmission by information society service providers provided under recital 42 of the ECD is sufficiently clear to be interpreted and applied in a homogeneous way having in mind the growing involvement in content distribution by some online intermediaries, e.g.: video sharing websites?

- Yes
- No
- I don't know

Please explain your answer.

1500 character(s) maximum (1500 characters left)

Mere conduit/caching/hosting describe the activities that are undertaken by a service provider. However, new business models and services have appeared since the adopting of the E-commerce Directive. For instance, some cloud service providers might also be covered under hosting services e.g. pure data storage. Other cloud-based services, as processing, might fall under a different category or not fit correctly into any of the existing ones. The same can apply to linking services and search engines, where there has been some diverging case-law at national level. Do you think that further categories of intermediary services should be established, besides mere conduit/caching/hosting and/or should the existing categories be clarified?

- Yes
- No

**On the "notice"**

Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures, and in particular different requirements as regards the content of the notice?

- Yes
- No

**On the "action"**

Should the content providers be given the opportunity to give their views to the hosting service provider on the alleged illegality of the content?

- Yes
- No

If you consider that this should only apply for some kinds of illegal content, please indicate which one(s)

1500 character(s) maximum (1500 characters left)

Should action taken by hosting service providers remain effective over time ("take down and stay down" principle)?

- Yes
- No

**On duties of care for online intermediaries:**

Recital 48 of the Ecommerce Directive establishes that "[t]his Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities". Moreover, Article 16 of the same Directive calls on Member States and the Commission to encourage the "drawing up of codes of conduct at Community level by trade, professional and consumer associations or organisations designed to contribute to the proper implementation of Articles 5 to 15". At the same time, however, Article 15 sets out a prohibition to impose "a general obligation to monitor".

(For online intermediaries): Have you put in place voluntary or proactive measures to remove certain categories of illegal content from your system?

- Yes

### Background Documents

- [BG Въведение](#)
- [BG Декларация за верителност](#)
- [DA Introduktion](#)
- [DE Datenschutzerklärung](#)
- [DE Einleitung](#)
- [EL Δήλωση περί απορρήτου](#)
- [EL Εισαγωγή](#)
- [EN Background Information](#)
- [ES Introducción](#)
- [ET Privaatsusteave](#)
- [HU Bevezetés](#)
- [IT Informativa sulla privacy](#)
- [IT Introduzione](#)
- [LT Pareiškimas apie privatumą](#)



Following this logic, if I download a copy of Bambi, I then own illegal content? Has anyone told Bambi?



Who decided it was illegal?



This sentence appears to have no function at all beyond trying to appear as if it is a safeguard, which it is not.



The big question really is - does a valid notice need to provide knowledge of the illegality of the content, or knowledge of content which might subsequently be adjudged illegal? This is the key question and, unsurprisingly, it is not asked.



The objective of a Directive is to avoid barriers to the single market, NOT homogenous application. The Commission is redefining the purpose of the legislation to make it appear like it needs to be updated. It then fails to explain WHY homogenous application (based on diverse rules of what is illegal) is even possible, let alone necessary.



Search engines existed in 2001, when the Directive was adopted. Also, if the Commission really cared about a balanced approach, it would ask if it is appropriate that Google (and Facebook and Twitter) impose US copyright law on Europe.

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