Key points for a successful consultation on internet platforms

It is very important for the future of EU digital policy that the upcoming platforms consultation be as credible, thorough and balanced as possible.

The European Commission's 2010-2012 consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC)[1] was one of the most professional, thoughtful examples we have seen and we hope that the upcoming consultation will live up to this high standard.

To this end, EDRi[2] has prepared the following ten criteria, to assist the European Commission to assess its consultation before the final version is adopted.

GENERAL:

1. Citizens' groups should have the option to address any point that is raised in the consultation. All questions should be visible for all participants, even if not all participants are expected to answer all questions.

2. Any consultation should take due account of the fundamental rights implications of the role of online platforms, in particular the impact on freedom of expression and association, privacy and data protection as well as general principles of predictability and the rule of law.

3. Questions should not confuse fundamentally different types of platform. There is, for example, a clear difference between collaborative platforms (where users upload content) and news aggregators (which gather content from online sources).

4. Subjective analysis should not be included in any narrative included by the Commission in the consultation.

INTERMEDIARY LIABILITY

5. Definitions need to be clear in order to elicit meaningful responses. "Illegal content" should refer only to *content* that is illegal. "Potentially harmful content" could refer to content which may be unsuitable for some audiences while "unauthorised content" could

1 http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm
2 This paper was produced in collaboration with EDRi member Access

refer to content that is legal, but whose dissemination may not be authorised.

6. Recent CJEU case law (such as Telekabel, C314/12)[3] raises serious concerns regarding the proportionality of existing takedown arrangements. The transparency, effectiveness, fairness, predictability and potential counter-productive effects of restrictive measures undertaken by platforms is therefore something that urgently needs to be addressed.

7. Any assertion that a particular problem currently exists should be backed up with independent evidence that this is the case.

8. Subjective reinterpretations of elements of the E-Commerce Directive (such as reinventing the "duty of care", that refers to measures that can be taken/imposed to respect the principles of the Directive[4]) should be avoided.

CONTRACTS

9. Questions should not be asked to just one party to a contractual arrangement and exclude the other parties to the same arrangement. For example, it would be inappropriate to ask a content provider about the fairness/balance of licences, if the same question was not asked of platforms and users.

10. The questions (and ensuing policy decisions) need to recognise that takedowns are rarely done on the basis that the intermediary formally considers the content to be "illegal".[5] Platforms have no incentive to go down this controversial route when they can instead simply claim that the takedown is on the basis of nebulous "terms of service". Questions on user experience of current takedown procedures should take this into account. The possible public policy and free speech impacts of terms of service that confuse illegal and unwelcome content should also be addressed.

3 http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d557d84de063794ff4af05f62fd50c33d4.e34KaxiLc3eQc40LaxqMbN4ObNiKe0?text=&docid=149924&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=199673

4 Cf. Recital 48 of the E-commerce Directive.

5 The 55 million URLs that were removed by Google search in the past month, for example, were not removed on the basis that they broke any European law, but simply the US DMCA notification procedures had been followed. Government requests for removal of content was approximately 0.06% of that total in the same period.