

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)	Research institution / Think tank
2. Please indicate your place of residence or establishment: -single choice reply-(compulsory)	Slovakia
3. Please provide your contact information (name, address and e-mail address): -open reply-(compulsory)	
European Information Society Institute, o.z., Dobrianskeho 1580, 093 01 Vranov nad Topľou, Slovakia, ID(IČO): 42 227 950, eisi (at) eisionline (dot) org	
4. Is your organisation registered in the Interest Representative Register? -single choice reply-(compulsory)	No
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)	I disagree
Hosting service providers often take action against <i>legal</i> content -single choice reply-(compulsory)	I agree
There is too much legal fragmentation and uncertainty for hosting service providers and notice providers -single choice reply-(compulsory)	I 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 - 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.	Yes

<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>A notice should be submitted by electronic means -single choice reply-(compulsory)</p>	No
<p>A notice should contain contact details of the sender -single choice reply-(compulsory)</p>	Yes.
<p>A notice should make it easy to identify the alleged illegal content (for instance by providing a URL) -single choice reply-(compulsory)</p>	Yes.
<p>A notice should contain a detailed description of the alleged illegal nature of the content -single choice reply-(compulsory)</p>	Yes.
<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>	Yes.
<p>Can you please specify why you do not agree with the statement: "A notice should be submitted by electronic means" -open reply-(optional)</p>	We are in favour of designating electronic means as the only means for notice and takedown, but de lege lata, notice can be submitted also by non-electronic means.
<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>	Yes
<p>Please explain -open reply-(optional)</p>	Abuse of notice and takedowns is one of the prominent problems. The new system has to treat different infringements differently. Personality rights breach allegations or copyright infringements require different treatment than child pornography (criminal issues). New law should also anticipate counter-notice system for infringements that leave more room for doubts. There should be also sanctions for false notices and transparency reports
<p>14. How can unjustified notifications be best prevented? -multiple choices reply-(compulsory)</p>	By requiring notice providers to give their contact details - By publishing (statistics on) notices - By providing for sanctions against abusive notices - Other
<p>Please specify: -open reply-(optional)</p>	By allowing for due process. By providing for sanctions in case of false notices. By providing for damages in case of wrongful takedowns. By prohibiting

automatic notices. By allowing for counter-notices before disabling or removing certain content. By the publication of transparency reports on the number of notices received & by whom, the number of takedowns executed, the number of counter-notices received, the number of false takedown notices, information on policy of the provider.

IV. Action against illegal content by hosting service providers

<p>15. Should hosting service providers provide feedback to notice providers about the status of their notice? -single choice reply-(compulsory)</p>	<p>Yes</p>
<p><i>Multiple choice</i> -multiple choices reply-(compulsory)</p>	<p>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</p>
<p>Please specify -open reply-(optional)</p>	<p>The content owner should be informed about the details of the procedure. Generally, the content owner should also have a right to information about respective user. The law should however clarify, in which cases this right to information would be disproportionate, so notice and takedown wouldn't be eventually abused for getting personal information from intermediaries.</p>
<p>16. Should hosting service providers consult the providers of alleged illegal content? -single choice reply-(compulsory)</p>	<p>Yes</p>
<p><i>Multiple choice</i> -multiple choices reply-(optional)</p>	<p>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. - Once any action against the content is taken. If it appears that the content was actually legal, it should be re-uploaded. - Other</p>
<p>Please specify -open reply-(optional)</p>	<p>The system of notifications should differentiate between different types of infringements, or at least provide "if possible and reasonable" clause, which would preclude burdensome notifications in cases, where they make no real sense.</p>
<p>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</p>	<p>Other</p>

<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>If the provider receives notification, he should first forward it to the user who uploaded content, if possible and reasonable (e.g. seriously obvious infringements would not require forwarding). When the user files counter-notice, the content should stay on the service, but the person making notification should receive the personal details of the user from provider. When no counter-notice was filed in prescribed period, the provider should rely on sufficiently precise and adequate notice.</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>The hosting service provider that is aware of the illegal content and is technically in a position to remove exclusively the notified illegal content</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 "<i>expeditiously</i>". 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 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</p>	<p>Other</p>

<p>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).</p> <p>19. Once a hosting service provider becomes aware of illegal content, how fast should it act? -single choice reply-(compulsory)</p>	
<p>Please specify -open reply-(optional)</p>	<p>As fast as possible depending on the concrete circumstances of the case. The circumstances to take into account should be at least non-exhaustively listed in the law. In our opinion following facts should be listed: type of service (commercial scale, service as hobby, non-profit run project, etc.) and nature of illegal activity.</p>
<p>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.</p> <p>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)</p>	<p>No</p>
<p>Please explain: -open reply-(optional)</p>	<p>This situation is as any other, where the authorities ask for co-operation. Law should shield providers from liability in this cases.</p>
<p>Civil rights organisations complain that hosting service providers sometimes take down or disable access to <i>legal</i> 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.</p> <p>21. How can unjustified action against legal content be best addressed/prevented? -multiple choices reply-(compulsory)</p>	<p>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</p>
<p>Please specify -open reply-(optional)</p>	<p>As an addition, users who provided the content should have a (actionable) possibility to ask the provider to re-include their content on the service. Also after filing the counter notice, the provider should be shielded from liability. Otherwise the providers would remove every notified entry.</p>

<p>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).</p> <p>22. In your opinion, should hosting service providers be protected against liability that could result from taking pro-active measures? -single choice reply-(compulsory)</p>	<p>No</p>
<p>Please explain -open reply-(optional)</p>	<p>We are of the opinion that pro-active measures taken as part of the general duty of care, can not be invoked against the provider if undertaken seriously and reasonably.</p>

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

<p>23. Should the EU play a role in contributing to the functioning of N&A procedures? -single choice reply-(compulsory)</p>	<p>Yes</p>
<p>Please specify: -multiple choices reply-(compulsory)</p>	<p>By providing non-binding guidelines - By providing some binding minimum rules - Other</p>
<p><i>Please specify</i> -open reply-(optional)</p>	<p>Some additional rules and clarification as outlined above should be made to e-Commerce directive, however the law should not create to rigid framework. EU could then issue non-binding recommendations.</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</p>	<p>Yes</p>

procedures? -single choice reply-(compulsory)	
Please clarify giving concrete examples relating to the question above -open reply-(optional)	Uniform rules for different breaches wouldn't be proportionate. Infringements under art. 14 are of different nature and seriousness. E.g. to clear infringement of civil rights, usually lot of additional information is needed (e.g. if the information is true), and sometimes after having all this information it might be still difficult to resolve it (free speech vs. personality rights). In case of other group - usually criminal issues, no additional information is often needed (hate speech).

VII. Additional comments

25. Do you wish to upload a document with additional comments? -single choice reply-(optional)	No
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