

I. Background information

This consultation is addressed to the public in general/broadest public possible, as it is important to get the views and input from all the interested parties and stakeholders. In order to best analyse the responses received after the consultation, and to maximise their usefulness, we need to have a limited amount of background about you as a respondent.

1. Please indicate your role for the purpose of this consultation: *

Civil society association

2. Please indicate your place of residence or establishment: *

France

3. Please provide your contact information (name, address and e-mail address): *

La Quadrature du Net
19 rue Richard Lenoir
75011 Paris
Transparency Register: 78427782470-42

4. Is your organisation registered in the Interest Representative Register? *

Yes

5. What is /are the category /ies of illegal content of greatest relevance to you in the context of N&A procedures? *

- 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

6. To what extent do you agree with the following statements on notice-and-action procedures?

- a: I completely agree
- b: I agree
- c: I disagree

d: I completely disagree
e: No opinion

Action against illegal content is often ineffective *

e

Action against illegal content is often too slow *

e

Hosting service providers often take action against legal content *

a

There is too much legal fragmentation and uncertainty for hosting service providers and notice providers *

a

7. To what extent do you agree with the following statements on Article 14 of the E-commerce Directive?

The exact scope of 'hosting' is sufficiently clear *

b

The terms "actual knowledge" and "awareness" are sufficiently clear *

c

The term "expeditiously" is sufficiently clear *

c

8. In your opinion, what activities should be considered as 'hosting'? *

X Social networks

X Blogs and interactive dictionaries

X Video-sharing sites

X Cloud based services

X E-commerce platforms

X Search engines

X Cyberlockers

- Other

- None of the above

- No opinion

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Please explain (maximum 500 characters)

The directive could make explicit that the liability exemptions for hosting services apply to all situations when there is no editorial control over the content published, so as to create a framework that can accommodate new and still unknown services.

III. Notifying illegal content to hosting service

providers

9. To what extent do you agree with the following statements?

- a: I completely agree
- b: I agree
- c: I disagree
- d: I completely disagree
- e: No opinion

It is easy to find pages or tools to notify illegal content *

e

It is easy to use pages or tools to notify illegal content *

e

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? *

- Yes
- No
- X No opinion

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.

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? *

- Yes
- X No
- No opinion

Although the CJEU indicated that a notice should be sufficiently precise and adequately substantiated to have effect, it has not indicated how these requirements should be met for this purpose. Nor has this been specified in the E-commerce Directive.

12. Do you agree with the following statements?

A notice should be submitted by electronic means *

Yes.

A notice should contain contact details of the sender *

Yes.

A notice should make it easy to identify the alleged illegal content (for instance by providing a URL) *

Yes.

A notice should contain a detailed description of the alleged illegal nature of the content *

Yes.

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 *

Yes.

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.

13. Should there be rules to avoid unjustified notifications? *

Yes

No

No opinion

Please explain:

EU law must provide scalable sanctions for abusive takedown notices, as well as for wrongful takedowns on the part of the provider (also, to avoid wrongful takedowns, terms of service must not prohibit “apparent” or “alleged” infringements). It is the only way to avoid that these procedures be used on a cost-effective logic as a deterrent to competition, or as an illegitimate means to restrict freedom of expression.

14. How can unjustified notifications be best prevented? *

By requiring notice providers to give their contact details

By publishing (statistics on) notices

By providing for sanctions against abusive notices

Other

- No action required.

- No opinion

Please specify: (maximum 500 characters)

In the absence of court order, ISPs should be obliged to give content provider a reasonable time to respond (counter-notice, see below). Sanctions can also help alleviate abusive notices that are used to chill free expression online. Transparency on notices would also be useful to give a clearer idea of the extent of the phenomenon (see US initiative www.chillingeffects.org), and, in certain case inflict reputational damages (if it is possible to disclose the identity of the notifier).

IV. Action against illegal content by hosting service providers

Hosting service providers, across Europe, react differently when they receive notice about content. For instance, some ensure a quick feedback to notice providers by sending a confirmation of receipt when they receive a notice and informing the notice provider when the requested action has been taken. Others do not. Similarly, some online intermediaries consult the provider of alleged illegal content whenever they receive a notice and offer the content providers the opportunity to give their views on the allegation of illegality concerning the content (the so-called “counter-notice”). Other providers do not consult the content provider.

15. Should hosting service providers provide feedback to notice providers about the status of their notice? *

- X Yes
- No
- No opinion

Multiple choice *

- X The hosting service provider should send a confirmation of receipt.
- X The hosting service provider should inform the notice provider of any action that is taken.
- Other

16. Should hosting service providers consult the providers of alleged illegal content? *

- X Yes
- No
- No opinion

Multiple choice

X 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.

X Other

Please specify (maximum 500 characters)

In the absence of court order, ISPs should be obliged to give the content provider a reasonable time to respond. While waiting for the answer, content should not be removed, except in case of information likely to cause immediate danger or immediate and significant financial damages. In case of counter-notice on the part of the content provider or if the latter fails to respond, the ISP should notify the notifier and propose that the case be referred to a court (see accompanying note).

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 considered illegal. Similarly, some 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.

17. Assuming that certain content is illegal, how should a hosting service provider act? *

- The hosting service provider should remove the illegal content
- The hosting service provider should first disable access to the illegal content
- The hosting service provider should either remove or disable access. The sequence is not important.

X Other

- No opinion.

Please specify (maximum 500 characters)

Except for when there is a court order explicitly requiring deletion, disabling access should, in most cases, suffice for the hosting provider to fulfill its obligations under the eCommerce directive. Many parties (content provider, notice-provider, law enforcement) can have a legitimate interest in preserving content (the hosting provider should preserve the content for a sufficient period of time before being able to delete it).

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.

18. When the same item of illegal content is hosted by several providers, which hosting service provider should act against it? *

- The hosting service provider that is aware of the illegal content, but is not technically in a position to remove or disable only that illegal content and would for instance have to take down an entire site
- The hosting service provider that is aware of the illegal content and is technically in a position to remove exclusively the notified illegal content

X Other

- No opinion

Please specify (maximum 500 characters)

The hosting service provider that should act is that which has actual knowledge of the illegality of the content and is technically in a position to remove exclusively the notified content. In its baseline for proposals on technical intermediaries and freedom of expression of December 7th, 2011,, the CoE warns that "attempts to make entire websites inaccessible should be judged against international standards designed to secure the protection of freedom of expression (...)".

As soon as the illegal nature of certain content has been confirmed, the E-commerce Directive requires the hosting service provider to act "expeditiously" 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 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? *

- As fast as possible depending on the concrete circumstances of the case
- Within a predefined time period

X Other

Please specify (maximum 500 characters)

Sometime, the "concrete circumstances" of the case might not allow for an "expeditious action" and require that takedown action be suspended for some time, for instance in case of "manifestly illegal content" that is subject to a criminal investigation and requires discreet action. It should be up to the competent authority to decide.

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.

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

- Yes
- X No
- No opinion

Please explain: (maximum 500 characters)

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.

21. How can unjustified action against legal content be best addressed/prevented? *

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

No action required

Other

No opinion

Please specify (maximum 500 characters)

The whole "notice-and-action" regime must be carefully designed to ensure that hosting providers are not placed in a position of legal uncertainty. This means requiring a decision by a legally competent authority before removing or disabling access to content; providing sanctions in cases of unjustified notices or against abusive take-downs (when the procedure is not respected by ISPs); giving content providers the possibility to consent to the takedown through a counter-notice procedure.

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? *

- Yes

No

- No opinion

Please explain (maximum 500 characters)

Please explain (maximum 500 characters)

Pro-active measures by ISP's to detect contentious content are likely to rely on surveillance and censorship tools that violate the right to privacy and freedom of expression. Policy-makers must not only ensure that self-imposed "general monitoring" is not encouraged by "liability protections", they must also establish appropriate safeguards to protect users against such privatised censorship adopted under the guise of "self-regulation".

VI. The role of the EU in notice-and-action procedur/es

The E-commerce Directive encourages voluntary agreements on "rapid and reliable procedures for removing and disabling access" to illegal content. It also obliges the Commission to analyse the need for proposals concerning "notice-and-takedown" procedures.

23. Should the EU play a role in contributing to the functioning of N&A procedures? *

Yes

Please specify: *

- By encouraging self-regulation
- X By providing non-binding guidelines
- X By providing some binding minimum rules
- By providing binding detailed rules
- A combination of these options
- Other

Please explain (maximum 500 characters)

Please specify (maximum 500 characters)

In practice, the "self-regulation" encouraged by the EU has given rise to automated systems for monitoring the activity of Internet users and disabling access to allegedly infringing content. The EU must review the existing framework to make sure that "self-regulation" is not used to bypass the legal provisions protecting fundamental rights. To that effect and to establish legal certainty for ISPs and users, clear minimum rules protecting users against abusive restrictions are necessary.

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.

24. Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures? *

Yes

Please clarify giving concrete examples relating to the question above (maximum 500 characters):

From the posting of child abuse images to copyright infringements, online content can relate to very different types of offenses. There should therefore be different types of procedures. For very serious criminal offenses (i.g. child abuse) and in the absence of a court order, the administrative authority should be the only party competent to order the disabling of access to "manifestly illegal" content to prevent the continuation of the alleged infringement, prior to a judiciary ruling.

VII. Additional comments

If you have additional comments, you have the possibility to upload these in a separate document here. We would ask you to only use this option for comments you have not already expressed when answering the questions above.

25. Do you wish to upload a document with additional comments?

La Quadrature wishes to remind the Commission that there is no such thing as "illegal content". There may be "illegal" reproduction and communications of illegal content, i.e the activity is infringing, not the content.

Also, please find attached the answer of La Quadrature to the eCommerce consultation from 2010 (<http://www.laquadrature.net/en/la-quadrature-answers-eu-consultation-on-online-services-directive>), as well as a summary of the procedure we now recommend for "notice and action" (http://www.laquadrature.net/files/LQDN_Procedure_Notice_&_Action.pdf).

