

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



► Questionnaire on multiple pages

Introduction

The E-commerce Directive provides a framework for the cross-border provision of online services in Europe. It includes so-called exemptions from liability for online "intermediary service providers". In particular, it provides that online service providers may not be held liable for illegal content that they "host" on condition that:

- the provider does not have 'actual knowledge' of illegal content and is not 'aware' of facts or circumstances from which the illegal content is apparent; or
- the provider, upon obtaining such knowledge or awareness acts 'expeditiously' to remove or disable access to the content (Article 14 E-commerce Directive).

This rule forms the basis for so-called "notice-and-action" (N&A) procedures. These procedures start whenever someone "notifies" a hosting service provider about illegal content on the internet. The procedures are concluded when an online intermediary acts against the alleged illegal content. Acting may take the form of removing or disabling access to the illegal content.

In 2010 the Commission held a public consultation on the future of e-commerce and the implementation of the E-commerce Directive. The vast majority of the 420 respondents considered that the principles contained in the E-commerce Directive are still valid and asked the Commission not to propose a revision of the Directive. However, many respondents asked for clarifications of certain articles in the Directive, notably Article 14 and the functioning of N&A procedures. The consultation made clear that respondents consider that there are three main problems with the functioning of N&A procedures:

- online intermediaries face high compliance costs and legal uncertainty because they typically have operations across Europe, but the basic rules of Article 14 are interpreted in different ways by different national courts (sometimes even within the same Member State). In particular the terms "actual knowledge", "awareness" and "expeditiously" have led to diverging national case-law. Notice providers and hosting providers have to adapt their practices in accordance with these interpretations.
- illegal content stays online too long. This is partly due to what is perceived as a lack of sufficiently clear rules and easily identifiable procedures.
- fundamental rights are not always respected. In particular, there are instances where legal content is taken down, which can amount to a restriction of the right to freedom of expression and information. This arises partly as a result of liability fears on the part of

hosting providers and the fact that the providers of alleged illegal content are in general not consulted before a hosting service provider takes action.

In order to address these challenges, the Commission announced an initiative on N&A procedures in the Communication on e-commerce and other online services. The Staff Working Paper accompanying the Communication presents an overview of the implementation of Article 14 and the functioning of N&A procedures in the EU. Subsequently, the Commission engaged in a fact-finding exercise on notice-and-action procedures which included targeted stakeholder consultations. The Commission now wishes to obtain the view of all stakeholders on specific issues related to the functioning of N&A procedures in Europe in the context of Article 14 of the E-commerce Directive. The responses will assist the Commission in shaping the N&A initiative.

The public consultation is available in English, French and German. Responses can be in any of the 23 official languages of the EU, but replying in English, French or German would enable Commission services to process them more quickly. Answers to the questions must be sent by using the electronic application 'IPM' (Interactive Policy Making). The electronic version of the public consultation is available [here](#). The views expressed in this public consultation may not be interpreted as stating an official position of the European Commission.

Glossary

- "(Online) intermediary service providers" provide online services (1) that consist of transmitting or storing content that has been provided by a third party. The E-commerce Directive distinguishes three types of intermediary services: mere conduit (transmitting of data by an internet access provider), caching (i.e. automatically making temporary copies of web data to speed up technical processes) and hosting (see below).
- "Illegal content" corresponds to the term "illegal activity or information" used in Article 14 of the E-commerce Directive. This 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, illegal online gambling, child abuse content, misleading advertisements or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation etc.
- "Hosting", according to Article 14 of the E-commerce Directive, 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.
- A "notice provider" is 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.
- A "notice" is any communication to a hosting service provider that could give the latter knowledge of a particular item of illegal content that it hosts. It could therefore create an obligation for it to act expeditiously by removing the illegal content or

disabling/blocking access to it if the provider wishes to be exempted from liability under Article 14 of the E-commerce Directive. Such an obligation only arises if the notice provides the hosting service provider with actual knowledge of illegal content.

- A "provider of content" in the context of a hosting service is 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.
- "Action", for the purpose of this consultation, means removing (taking down) or disabling access to illegal content. According to Article 14 of the E-commerce Directive, if the provider wishes to be exempted from liability, a hosting service provider should act "to remove or disable access" to illegal content once the provider becomes aware of it.

(1) The E-commerce Directive uses the term "information society service".

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: ^{*} (compulsory)

- | | |
|-----------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|
| <input type="checkbox"/> Individual | <input checked="" type="checkbox"/> Public authority / Law enforcement |
| <input type="checkbox"/> Civil society association | <input type="checkbox"/> Intellectual property rights holder |
| <input type="checkbox"/> Hosting service provider | <input type="checkbox"/> Business federation |
| <input type="checkbox"/> Internet access provider | <input type="checkbox"/> Research institution / Think tank |
| <input type="checkbox"/> Private company (not hosting service provider or internet access provider) | <input type="checkbox"/> Other |
| <input type="checkbox"/> Hotline | |

Ministry of Business and Growth Slotsholmsgade 10-12 1216 Copenhagen K Denmark	
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2. Please indicate your place of residence or establishment: * (compulsory)

Denmark

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

Danish Business Authority
Langelinie Alle 17
2100 Copenhagen Ø
Denmark
Att.: Jesper Fejerskov

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

- Yes
- No
- Not relevant

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

- Other:
- Not applicable

II Notice and Action procedures in Europe

In 2010 the Commission consulted the public on the future of e-commerce and the implementation of the E-commerce Directive. The public consultation included questions on the liability exemptions for online intermediaries, the interpretation of Article 14 of the E-commerce Directive and notice-and-action procedures. These responses have been reflected in a [Staff Working Paper](#) accompanying the E-commerce Communication.

Many of these responses indicated that there are difficulties with the interpretation of Article 14 of the E-commerce Directive. Article 14 defines hosting as "an information society service (...) that consists of the storage of information provided by a recipient of the service". It provides that a provider shall not be liable for hosted illegal content on condition that:

"a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information" The Commission would now like to have an updated vision of stakeholders regarding notice-and-action procedures".

The Commission now would like to obtain an updated vision of stakeholders regarding notice-and-action procedures in the context of Article 14 of the E-commerce Directive.

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

	I completely agree	I agree	I disagree	I completely disagree	No opinion
Action against illegal content is often ineffective					X
Action against illegal content is often too slow					X
Hosting service providers often take action against					X

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

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

	I completely agree	I agree	I disagree	I completely disagree	No opinion
The exact scope of 'hosting' is sufficiently clear			X		
The terms "actual knowledge" and "awareness" are sufficiently clear			X		
The term "expeditiously" is sufficiently clear			X		

The public consultation on e-commerce of 2010 has demonstrated that most stakeholders consider hosting of websites 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'? ^{*} (compulsory)

- | | |
|-----------------------------------------------|-------------------------------------------------------------|
| <input type="checkbox"/> Social networks | <input type="checkbox"/> Blogs and interactive dictionaries |
| <input type="checkbox"/> Video-sharing sites | <input type="checkbox"/> Cloud based services |
| <input type="checkbox"/> E-commerce platforms | <input checked="" type="checkbox"/> Other |
| <input type="checkbox"/> Search engines | <input type="checkbox"/> None of the above |
| <input type="checkbox"/> Cyberlockers | <input checked="" type="checkbox"/> No opinion |

Please specify:

Some of the mentioned activities may very well be considered to be "hosting" or to include elements hereof, whereas others may not. Unfortunately, the possible "hosting"-aspects of the mentioned services are unclear and the question cannot be answered satisfactorily. The ECJ has to some extent specified the definition. The Danish Government supports the development of a clear, generic concept of "hosting" and a definition of which services are considered to be "hosting" and welcomes the Commission's guidance on the subject.

III. Notifying illegal content to hosting service providers

The E-commerce Directive does not use the terms "notifying" or "notice". The CJEU has clarified that one possible way to become aware of illegal content is that a hosting service provider is "notified" of such content. However, the CJEU has held that a notice cannot automatically lead to awareness of illegal content. If the notice is "insufficiently precise or inadequately substantiated" the notice does not make the hosting service provider aware of illegal content².

EU law does not contain rules on the availability and accessibility of means to notify as referred to above. Some notice providers, however, have complained that mechanisms for notifying illegal content are not always in place or not always easy to use or to find.

² 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

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

	I completely agree	I agree	I disagree	I completely disagree	No opinion
It is easy to find pages or tools to notify illegal content					X
It is easy to use pages or tools to notify illegal content					X

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? * (compulsory)

- Yes
- No
- No opinion

Please specify:

It is recognised that such procedures would improve the process of Notice and Action. Such an obligation should be flexible, balanced and proportionate to the infringements and the services in question.

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? * (compulsory)

- Yes
- 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?

	Yes	No	No opinion
A notice should be submitted by electronic means	X		
A notice should contain contact details of the sender	X		

A notice should make it easy to identify the alleged illegal content (for instance by providing a URL)	X		
A notice should contain a detailed description of the alleged illegal nature of the content	X		
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			X

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? ^{*} (compulsory)

- Yes
- No
- No opinion

Please specify:

Businesses should not be harassed or burdened with unjustified notifications. Unjustified notifications should be kept to a minimum. Such rules, guidelines, sanctions or remedies should be flexible, balanced and proportionate to the infringements and the services in question.

14. How can unjustified notifications be best prevented? ^{*} (compulsory)

- 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

Businesses should not be harassed or burdened with unjustified notifications. Unjustified notifications should be kept to a minimum. Such rules, guidelines, sanctions or remedies should be flexible, balanced and proportionate to the infringements and the services in question. A qualification of a given notice by means of requirements of a minimum degree of content, due process and/or prior action by the notifying party (as expressed in the answers to question 12) may impede unjustified notifications.

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? ^{*} (compulsory)

- Yes
- No
- No opinion

- 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 explain:

Any such requirements should be flexible, balanced and proportionate to the infringements and the services in question.

16. Should hosting service providers consult the providers of alleged illegal content? ^{*} (compulsory)

Yes

No

No opinion

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

The contention of the legality of content should be an issue between the notifying party and the provider of content. Hosting providers should not be held or made accountable for reaction or non-reaction in cases where the legality of content is contested.

Any such requirements should be flexible, balanced and proportionate to the infringements and the services in question.

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 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? ^{*} (compulsory)

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.

Other

- No opinion.

Please explain:

Any such requirements on action should be flexible, balanced and proportionate to the infringements and the services in question. It should be up to the hosting provider to act effectively. Actions should be specific and not in any way affect or impede the provision of access to legal or un-notified and therefore presumably legal content.

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? ^{*} (compulsory)

- 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
- Other
- No opinion

Please specify:

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?

^{*} (compulsory)

- As fast as possible depending on the concrete circumstances of the case

- Within a predefined time period
- Other

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? ^{*} (compulsory)

- Yes
- No
- No opinion

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? ^{*} (compulsory)

- 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:

The illegal nature of notified content should in all cases be unequivocally confirmed or proven. This obligation should be placed on the notifying party and/or the content provider. This test of legality should not burden a hosting provider. Hosting providers should not be held liable for unconfirmed or falsely confirmed notifications or errors in that regard. Actions should

be specific and not in any way affect or impede the provision of access to legal or uncontested and therefore presumably legal content.

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? ^{*} (compulsory)

- Yes
- No
- No opinion

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

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? ^{*} (compulsory)

- Yes
- No
- No opinion

- By encouraging self-regulation
- By providing non-binding guidelines

- By providing some binding minimum rules
- By providing binding detailed rules
- A combination of these options
- Other

Please specify:

Any such requirements should be flexible, balanced and proportionate to the infringements and the services in question.

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? * (compulsory)

- Yes
- No

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? (optional)

- Yes
- No

Here you can upload documents

Maximum file size is 1 MB. Please use the upload button to transfer a selected file before submitting.

Upload

Uploaded document(s):

SUBMIT

Clear existing answers