

# 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)	Civil society association
2. Please indicate your place of residence or establishment: -single choice reply-(compulsory)	Non-EU country
Please specify: -open reply-(optional)	The Center for Democracy & Technology is based in the United States, with offices in Washington, DC, and San Francisco, CA. CDT is in the process of opening an office in Brussels.
3. Please provide your contact information (name, address and e-mail address): -open reply-(compulsory)	
Andrew McDiarmid Senior Policy Analyst 1634 I St., NW, Suite 1100 Washington, DC 20009 USA CDT is a not-for-profit, non-governmental public policy organization working to promote democratic values and human rights in the digital age. CDT's mission is to conceptualize, develop, and implement public policies that will keep the Internet open, innovative, and free. We previously filed preliminary comments on notice-and-action, which are available at <a href="https://www.cdt.org/comments/comments-european-commission-notice-and-action">https://www.cdt.org/comments/comments-european-commission-notice-and-action</a> .	
4. Is your organisation registered in the Interest Representative Register? -single choice reply-(compulsory)	Yes
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)	Not applicable

## II Notice and Action procedures in Europe

Action against illegal content is often ineffective -single choice reply-(compulsory)	No opinion
Action against illegal content is often too slow -single choice reply-(compulsory)	No opinion
Hosting service providers often take action against legal 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-( <b>compulsory</b> )	I agree
<p>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.</p> <p>8. In your opinion, what activities should be considered as 'hosting'? -multiple choices reply-(<b>compulsory</b>)</p>	<p>Social networks - Blogs and interactive dictionaries - Video-sharing sites - Cloud based services - E-commerce platforms - Other - Search engines - Cyberlockers</p>
<i>Please specify</i> -open reply-( <b>optional</b> )	<p>Hosting should be construed broadly, making liability protection available to the wide range of services that enable the storage and dissemination of third-party content. Denying protection to platforms that go beyond basic hosting would undermine the economic and social benefits of the ECD's safe harbor by strongly discouraging innovation in tools and platforms that empower users to create content and communicate.</p>
<i>Please specify</i> -open reply-( <b>optional</b> )	<p>We note with concern that some courts have denied protection to services characterized as "active hosts," including video-hosting sites that organize and display users' videos and combine them with advertising. The L'Oréal v. EBay opinion added to uncertainty around active hosting. Guidance should clarify that notice-and-action and the associated liability protections of the ECD are applicable to the full range of services that host third-party content and thus enable users' exercise of rights.</p>

### III. Notifying illegal content to hosting service providers

It is easy to find pages or tools to notify illegal content -single choice reply-( <b>compulsory</b> )	No opinion
It is easy to use pages or tools to notify illegal content -single choice reply-( <b>compulsory</b> )	No opinion
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-( <b>compulsory</b> )	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	Yes

<p>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.</p> <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>	No
<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>	Submitting notices electronically should not be a requirement. Electronic submission can streamline the process and is a good practice to encourage. Online content hosts, however, are a diverse group. The guidance should require them to have a process for accepting notices, but hosts should have the flexibility to develop a process well-suited to their individual circumstances.
<p>Can you please specify why you do not agree with the statement: "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" -open reply-(optional)</p>	Notice senders cannot make prior contact with content providers in all cases. The sender often will not know the identity or contact information of the content provider. Moreover, N&A is intended to provide a fast, lightweight way to address unlawful content. Direct contact may be unwieldy and should be encouraged where possible but not required. Hosts should be required to alert content providers of notices received to allow the content provider to assert her rights and file a counter-notice.
<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

Please explain -open reply-(optional)	Because intermediaries often comply with notices automatically and without scrutiny, safeguards are necessary to discourage wrongful notices and provide recourse in the case of mistakes or abuse. Safeguards should include: requiring detailed notices; effective appeal and counter-notice mechanisms; penalties for unjustified notices; and transparency. More detail on each recommendation can be found in CDT's earlier comments ( <a href="https://www.cdt.org/ZZJ">https://www.cdt.org/ZZJ</a> ) and in the attached document.
14. How can unjustified notifications be best prevented? -multiple choices reply-(compulsory)	By requiring notice providers to give their contact details - By publishing (statistics on) notices - By providing for sanctions against abusive notices - Other
Please specify: -open reply-(optional)	Notices should be required to be highly specific, and include: the precise location of the alleged illegal content; specific reference to the law allegedly being violated; a statement that the sender is or is authorized to act on behalf of the harmed party; certification that limitations, exceptions, and defenses have been considered in good faith; and a sworn statement that the notice is accurate. In addition, there must be an effective system for counter-notices and appeals. See attached.

## IV. Action against illegal content by hosting service providers

15. Should hosting service providers provide feedback to notice providers about the status of their notice? -single choice reply-(compulsory)	No
Please explain -open reply-(optional)	Providing feedback to senders is good practice, but any requirements should be kept to a high level of generality. Hosts' resources, capacity, and procedures vary widely, so detailed rules regarding feedback to notice providers would be unworkable and unwise.
16. Should hosting service providers consult the providers of alleged illegal content? -single choice reply-(compulsory)	Yes
Multiple choice -multiple choices reply-(optional)	Other
Please specify -open reply-(optional)	Notice should be provided to the content provider either before action is taken or concurrent with action being taken. This will ensure that the content provider has a prompt opportunity to respond and contest the action, without introducing delay into the process while the host awaits a response.
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	Other

<p>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.</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>Hosts should avoid taking permanent actions that cannot be reversed in the case of errors or successful counter-notices or other appeals by content providers. Whether this means disabling access to content or removing it while retaining the ability to restore it may not make a difference, as long as there is some recourse available to content providers whose content has been acted upon wrongly. See the attached document for additional comments.</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</p>	<p>As fast as possible depending on the concrete circumstances of the case</p>

<p>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).</p> <p>19. Once a hosting service provider becomes aware of illegal content, how fast should it act?</p> <p>-single choice reply-(<b>compulsory</b>)</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-(<b>compulsory</b>)</p>	No
<p>Please explain: -open reply-(<b>optional</b>)</p>	<p>A major justification for a notice-and-action system is that it would be impossible for law enforcement authorities to take action against all illegal online content; notice-and action helps address illegal content when authorities are unable to act. When authorities are already involved in a particular case, the needs of those authorities should take precedence over private action.</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-(<b>compulsory</b>)</p>	<p>By requiring detailed notices - 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-(<b>optional</b>)</p>	<p>See answers to questions 13 and 14, above. See also CDT's prior comments (<a href="https://www.cdt.org/ZZJ">https://www.cdt.org/ZZJ</a>) and the attached document for more detail.</p>
<p>Some hosting service providers are hesitant to</p>	Yes

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? -single choice reply-(**compulsory**)

Please explain -open reply-(**optional**)

Limiting hosts' liability for pro-active measures can play a role in an effective system for addressing illegal content. In the US, 47 USC sec. 230 has helped spur a growing, competitive market in which platforms can establish content policies and address illegal content without liability—a model preferable to government content regulation. But pro-active measures are not risk-free, particularly if a sector develops common standards that amount to a less accountable stand-in for government.

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

23. Should the EU play a role in contributing to the functioning of N&A procedures? -single choice reply-(**compulsory**)

Yes

Please specify: -multiple choices reply-(**compulsory**)

By providing non-binding guidelines - By providing some binding minimum rules - A combination of these options

*Please explain* -open reply-(**optional**)

At a minimum, the Commission should issue guidelines to clarify hosts' obligations and establish a baseline for protecting the rights of Internet users as notice-and-action is adopted. In some areas, binding rules would be preferable: Notices must be detailed and specific (see attached); Counter-notice and appeal processes must be available; and Art. 15 precludes the establishment of "notice-and-stay-down" obligations. These rules could likely be established under existing Directives and EU law.

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

Yes

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? -single choice reply-(**compulsory**)

Please clarify giving concrete examples relating to the question above -open reply-(**optional**)

Uniform notice-and-action procedures should not apply horizontally to all types of illegal content. In particular, CDT believes notice-and-takedown is appropriate for few if any areas of law beyond straightforward copyright infringement. Defamation and other areas of law require complex legal and factual determinations that make private notices especially subject to abuse. See CDT's prior comments (<https://www.cdt.org/ZZJ>) and the attached for more detail.

## VII. Additional comments

25. Do you wish to upload a document with additional comments? -single choice reply-(**optional**)

Yes