

Panoptykon Foundation's response to the public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries

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 organisation

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

Poland

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

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POLAND
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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 *

b

Action against illegal content is often too slow*

b

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 *

c

In particular, it should be clarified to what extent search engine providers come with the definition of "hosting" when they use caching mechanisms and deliver results, which have already been deleted from their original web locations (i.e. the content is stored on search engine providers' servers). In our opinion it should be the case.

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

c

In particular, it should be clarified whether preventive actions taken by the service provider (intermediary) automatically lead to "actual knowledge" or "awareness" (in our opinion it shouldn't be the case).

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 (but only under certain conditions – see point 7 above)

- Cyberlockers

- Other

- None of the above

- No opinion

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 *

c

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

c

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
- 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
- No
- No opinion
- Please explain (maximum 500 characters)

Whenever possible, the online procedure should be preferred. However, alternative means should be made available, for example e-mail and even fax or snail mail (for people without easy access to the Internet), with courts taking due account of inevitable delays if the reporting is done in a manner which makes processing of the report slower. Barrier-free solutions should also be made available to make it possible to access and use procedures for persons with disabilities.

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 – but not only by them (sending a notice via fax or post should also be allowed if the service provider can be reached this way)

A notice should contain contact details of the sender *

Yes – but it doesn't have to be the contact details of the notice provider since the notice provider can also act

via an attorney or other intermediary.

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 ^{*}

No.

It is very difficult to prove – in the sense of providing convincing evidence – that an attempt was made to contact an anonymous content provider or somebody hiding behind a nickname, which is a standard situation. It is not clear how much effort would be required. In our opinion providing evidence of an attempt to contact should not be required as it creates a serious barrier for the notice provider.

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? ^{*}

X Yes

No

No opinion

Please explain:

Currently, in Poland there is no legal procedure, on the basis of which a content provider wrongly accused of a violation could seek redress. What is more, service providers do not have an obligation to inform content providers about the fact that their content was blocked. In our opinion this legal situation should be changed in the first place. In addition, abusive notices must be subject to dissuasive and effective sanctions. The sanctions must be scalable.

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

X By requiring notice providers to give their contact details

X By publishing (statistics on) notices

X By providing for sanctions against abusive notices

X Other

- No action required.

- No opinion

Please specify: (maximum 500 characters)

Also: by ensuring that sanctions against abusive notices are dissuasive for all sizes and types of senders; by providing for damages (including reputational) in cases of unjustified notices; through transparency reports; by requiring the possibility of counter-notice except in extremely urgent cases; by prohibiting automatic notice generation. Notices should contain contact details of the notice provider, however, this data should never be published (only publishing of statistical data should be allowed). In addition, contact details of the notice provider should not be disclosed to the content provider (or vice versa) where the legal or physical security of the reporting person could be compromised.

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? *

- Yes
- No
- No opinion

Multiple choice *

- 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 (maximum 500 characters)

Please specify (maximum 500 characters)

The hosting provider should always inform the content provider of any action that is taken unless the provider received an official request not to do so for the sake of criminal investigation (see answer to question 24).

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

- Yes
- No
- No opinion

Multiple choice

- 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

Please specify (maximum 500 characters)

An immediate reaction is allowed on the condition that: (i) content is blocked temporarily, never deleted or removed permanently; (ii) the owner of the content is notified immediately after and offered the opportunity to send a counter-notice. It should also be noted that the US approach of "delete first, ask questions later," is contrary to the ECHR and Charter and therefore must be avoided.

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? *

- 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 specify (maximum 500 characters)

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

X 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 (maximum 500 characters)

In its baseline for proposals on Notice & Takedown, the CoE holds that "attempts to make entire websites inaccessible should be judged against international standards designed to secure the protection of freedom of expression and the right to impart and receive information, in particular the provisions of Article 10 of the Convention and the related case law of the EU Court of Human Rights".

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)

If a hosting service provider becomes aware of illegal content as a result of a notice sent by the person, whose rights are being violated, the hosting provider should be obliged to act within a predefined time period, e.g. 2 working days. The situation may become different if the content in question violates criminal law. If content *appears* unequivocally illegal and if it appears to present an imminent threat, the service provider should be permitted or expected to take (temporary) action to mitigate any damage that might be caused, even without a notice. If, subsequently, law enforcement do not contact the alleged perpetrator and choose not to take action could be put back online, at the responsibility of law enforcement. On the other hand, some flexibility in concrete cases should be allowed. Acting too quickly could alert perpetrators of the existence of a criminal investigation.

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)

It is essential that hosting service providers cooperate with law enforcement and refrain from taking arbitrary action that may cause damage to criminal proceedings.

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? *

- X By requiring detailed notices
- By consulting the content provider before any action is taken
- X By providing easy and accessible appeal procedures
- X By publishing (statistics on) notices
- X By providing for sanctions against abusive notices
- No action required
- X Other
- No opinion

Please specify (maximum 500 characters)

Also: by providing for damages (incl. reputational) in cases of unjustified take-down against the hosting service provider. Please also note that while notices should contain contact details of the notice provider, this data should never be published (only publishing of statistical data should be allowed). In addition, contact details of the notice provider should not be disclosed to the content provider (or v.v.) where the legal or physical security of the reporting person could be compromised.

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
- X No
- No opinion

Please explain (maximum 500 characters)

Please explain (maximum 500 characters)

Pro-active measures are likely to include general monitoring of citizens' behaviour. The CJEU has ruled in 2 cases (Scarlet/ Sabam, Netlog/Sabam) that such measures breach the right to privacy, freedom of communication & freedom of information. These restrictions do not become less important simply because they have been imposed "voluntarily". If ISPs wish to give themselves the power to become police, judge, jury and executioner, it is not for policy-makers to absolve them of the responsibilities that this implies. Facilitating this activity would appear to be in

breach of Art 52 of the Charter. On the other hand, the mere fact of taking pro-active measures should not be treated automatically as leading to "actual knowledge" or "awareness" of all violations of the law. It has to be taken into account that the hosting service provider may introduce a targeted monitoring system e.g. against hate speech, which by no means leads to "actual knowledge" about other infringements, e.g. IP law.

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)

The Commission should make it clear that "self-regulation" can only cover hosting service providers' internal processes (e.g. how to communicate with notice providers or content providers, terms of service etc), while it should not attempt to regulate rights and obligations of third parties, such as content or notice providers. Guidelines can improve efficiency of communication processes or data handling without descending into privatised law enforcement, which is contrary to the ECHR and the EU Charter of Fundamental Rights.

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):

There should be different policy approaches, because the nature of illegal content varies enormously. As we suggested above, exemptions from a standard notice & action procedure should be allowed when the content in question violates criminal law and/or poses an imminent danger to other users and/or needs to be left on-line for the sake of pending investigation etc. For example, the making available of child abuse images is one part of a series of crimes while the unauthorised making available of copyrighted material is not a crime. Treating both in the same way will inevitably lead to one or other (or both) being handled in a disproportionately heavy-handed or lenient way.

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?