

Position Paper

Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries

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The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 1,350 companies in Germany. Its 1,000 direct members generate a sales volume of 135 billion Euros annually and employ 700,000 people. They include providers of software and IT services, telecommunications and Internet services, manufacturers of hardware and consumer electronics, and digital media businesses. BITKOM campaigns in particular for a modernization of the education system, for an economic policy oriented to innovation and a modern Internet policy.

BITKOM welcomes the opportunity to express its views on the Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries.

1 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
- Action against illegal content is often too slow
- Hosting service providers often take action against legal content
- There is too much legal fragmentation and uncertainty for hosting service providers and notice providers

2 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 – **disagree**
- The terms "actual knowledge" and "awareness" are sufficiently clear – **disagree**
- The term "expeditiously" is sufficiently clear – **agree**

Comments: The variety and lack of clarity in the case law of Member States makes it quite difficult to gain legal certainty. For example the German Federal Court of Justice sticks to the concept of "Breach of Duty of Care" ("Störerhaftung") resulting in broad injunctions, instead of adopting recent decisions (Sabam, Netlog, L'Oreal), that narrowed the scope of injunctive relief. There is also uncertainty regarding the conditions under which a hosting provider may be exempted from liability following the ECJ L'Oreal decision due to the lack of clarity in the wording of that decision regarding 'active role' and 'awareness'. Clarification should be attempted through non-binding guidance instead of legislative instruments.

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

- Social networks – **yes, depending on the service**
- Video-sharing sites – **yes**
- E-commerce platforms – **yes**
- Search engines – **no**
- Cyberlockers – **yes**
- Blogs and interactive dictionaries – **yes**
- Cloud based services – **yes, depending on the services**

Comments: the question if a service is considered as “hosting” should be answered in a qualitative way depending on the specific functionalities of the service. Online-services are heterogeneous as they offer a wide spectrum of functionalities. Hence not every service that e.g. meets the term “social network” or “cloud based service” does simultaneously qualify as a “hosting” service.

As search engines with regards to “conduit” and “making available” are in the same position as access providers they should be treated likewise. They are not in the position to erase allegedly infringing content and therefore cannot be treated like hosting providers.

4 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 – **agree**
- It is easy to use pages or tools to notify illegal content – **agree**

5 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?

Comments: Hosting service providers cover a wide range of service categories and have different functionalities. To react appropriately and efficiently different hosting services should be able to respond in a way which is appropriate to their specific type of service.

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6 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. 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. Such an obligation will act as an incentive for hosting service providers to develop simple procedures and sophisticated reporting tools. Simultaneously companies will be able to dedicate their efforts and resources to developing these tools, rather than wasting time with diversified notices sent by other means. That is in the interest of as well service providers as noticing party.

7 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. Do you agree with the following statements? (Yes, No, No opinion)

- 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 – **see below**

Comments: To ensure legal certainty, the hosting provider must know the full scope of the infringement and the allegedly illegal content. The notice must be drafted as detailed as possible in order for the hosting provider to be able to decide on the steps that need to be taken. In so far, the notice should contain information on a failed or successful attempt to contact the content provider (a requirement to wait for feedback from the content provider should not, however, be required), information on the legal interest of the notice provider and the legal basis due to which the content is considered to be illegal. Furthermore, it is essential that the illegal content is outlined in detail.

In some cases it is unrealistic to try to contact the content provider and wait for a reaction. Where content appears to infringe copyright, one can neither wait for, nor indeed expect, feedback from the potential infringer. Furthermore, the requirement to wait for feedback is utterly unfeasible in the case of live streams (such as TV programmes, e.g., the Bundesliga), as by the time there is a reaction from the potential infringer, the stream is no longer “on air”.

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Therefore a notice procedure should be put in place which could be based on successful notice procedures currently operated. A comparable procedure would considerably simplify the handling for all parties involved and can be implemented in a very user-friendly manner:

- legal and procedural certainty for the hosting service provider should be ensured through the establishment of “trusted partners”, to whom a full substantiation of the notified infringement would not have to be provided;
- “trusted partners” could register in advance with the host provider by means of an extensive procedure;
- stricter conditions could be attached to notifications made by uncertified/unregistered “partners”, which would fulfil the requirements for legal certainty on the part of the hosting service provider, as set out above.

8 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. Should there be rules to avoid unjustified notifications?

Yes, this should be done through non-binding guidelines. There is currently no obligation of the notifying party to ensure that notices are valid, and no provisions to allow the other party to defend itself through, for instance, a counter-notice. Direct communication should be encouraged. With regard to providing for sanctions for wrongful notice, guidance issued by the Commission should encourage Member States to introduce such measures. Only when such guidance proves ineffective, should a legislative response be considered.

9 How can unjustified notifications be best prevented?

- By requiring notice providers to give their contact details
- By providing for sanctions against abusive notices
- Other

Comments: In order to prevent unjustified notifications and minimize the burden for hosting providers, the notice provider must be obliged to first contact the provider of allegedly illegal content. For the sake of legal certainty and clarity, it is necessary to grant legal review in the course of civil proceedings.

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

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Yes. The hosting service provider should inform the notice provider of any action that is taken.

11 Should hosting service providers consult the providers of alleged illegal content?

Yes, once any action against the content is taken. The other party should be informed that the content has been taken down, and it should be informed about the reason. In addition, communication between the two parties should be encouraged in order to resolve the issue directly. By this means the provider of the allegedly illegal content should be given the opportunity to defend his interests. However, the hosting provider should not be obliged to consult the provider of the content. A hosting provider cannot have the necessary expertise to arbitrate a dispute. Instead, provisions should be made to allow the other party to defend itself, e.g. through a counter-notice or by implementing a system of civil proceedings guaranteeing that all parties are heard and have access to legal remedies.

12 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.

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

- The hosting service provider should either remove or disable access. The sequence is not important.

Comments: The specific proceeding should be decided on a case by case basis in cooperation with the stakeholders involved. The usual approach should be to remove the illegal content. However, it should be brought to mind, that it is almost impossible to ensure that a specific illegal content never returns onto a platform. Requiring this would essentially entail a general monitoring obligation.

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13 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.

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 and is technically in a position to remove exclusively the notified illegal content

14 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).

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

Comments: Provided a notice meets the necessary criteria, hosting service provider act as quickly as possible, depending on the exact circumstances. However, the removal of illegal content must be based on a reliable legal position.

15 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.

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

No. It is not appropriate to put providers in the difficult position of denying a request from a law enforcement authority to withhold action. On the one hand

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such an obligation could put providers in a legally precarious position and undermine efforts to deal with the infringer in the most effective way possible on the other. A far better approach would be notice provider and law enforcement authority directly dealing with one another to determine whether action should be taken.

16 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.

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

- By requiring detailed notices
- By providing easy and accessible appeal procedures
- By providing for sanctions against abusive notices

Comments: Platforms are often in a position of being not able to determine if a notice is valid. Given that, the platform has either to risk acting on a non-existing infringement or not relieving an actual infringement. Preventing unjustified action requires measures which ensure that notices are legitimate and which enable the alleged infringer to appeal. Therefore a counter-notice procedure would be helpful. This should first be encouraged through non-binding guidance. Only when that approach has proven ineffective, should a legislative approach be considered.

As set out above at No. 7, any notice procedure requiring prior feedback from a potential copyright infringer is unrealistic – where a potential infringement of copyright is at issue, one can neither wait for, nor indeed expect, feedback from the infringer. To demonstrate our point, we gave the example of live streams and explained that live streams will most likely be off air by the time feedback is received from a potential infringer. Furthermore, in terms of the type of electronic notice procedure that should be implemented, a user-friendly notice procedure as described above could be implemented. Such a procedure would simplify the notice procedure for all parties involved. Please see further comments set out above at No. 7.

17

In your opinion, should hosting service providers be protected against liability that could result from taking pro-active measures?

Yes. Hosting service providers should be free to develop proactive measures to attempt to identify and combat infringements without fearing penalties when such measures are not 100% effective. Maybe the creation of a “good Samaritan provision” legislation like it exists in the US, may be helpful.

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

Yes, by providing non-binding guidelines. The EU should provide guidelines to provide greater consistency regarding the interpretation of the current liability regime across the EU. However, the Commission should at this point refrain from revising existing legislation or introducing new legislation. If guidance proves ineffective, any future legislative response should include sanctions for wrongful notices and provisions for alleged infringers to appeal.

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

Yes. Policy approaches should be tailored according to different types of content. It does not make sense for manifestly illegal content, such as child pornography, to be treated in the same way as trademark infringements.

20 Additional Comments