

Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

Fields marked with * are mandatory.

Objectives and General Information

The views expressed in this public consultation document may not be interpreted as stating an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to differing definitions the Commission may use under current or future EU law, including any revision of the definitions by the Commission concerning the same subject matters.

You are invited to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

Please complete this section of the public consultation before moving to other sections.

- Respondents living with disabilities can request the questionnaire in .docx format and send their replies in email to the following address: CNECT-PLATFORMS-CONSULTATION@ec.europa.eu.
- If you are an association representing several other organisations and intend to gather the views of your members by circulating the questionnaire to them, please send us a request in email and we will send you the questionnaire in .docx format. However, we ask you to introduce the aggregated answers into EU Survey. In such cases we will not consider answers submitted in other channels than EU Survey.
- If you want to submit position papers or other information in addition to the information you share with the Commission in EU Survey, please send them to CNECT-PLATFORMS-CONSULTATION@ec.europa.eu and make reference to the "Case Id" displayed after you have concluded the online questionnaire. This helps the Commission to properly identify your contribution.
- Given the volume of this consultation, you may wish to download a PDF version before responding to the survey online. The PDF version includes all possible questions. When you fill the survey in online, you will not see all of the questions; only those applicable to your chosen respondent category and to other choices made when you answer previous questions.

* Please indicate your role for the purpose of this consultation

- An individual citizen
- An association or trade organization representing consumers
- An association or trade organization representing businesses
- An association or trade organization representing civil society
- An online platform
- A business, including suppliers using an online platform to provide services
- A public authority
- A research institution or Think tank

X Other

* Please specify

100 character(s) maximum (59 characters left)

European association of public authorities (film funds/cinema centres)

* Please indicate your country of residence

* Please specify the Non-EU country

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

EFADs – European Association of Film Agencies - 44 Bd Léopold II - B-1080 Bruxelles

www.efads.eu

edith.pirlot@cfwb.be

* Please indicate your country of residence

- Austria
- X Belgium**
- Bulgaria
- Czech Republic
- Croatia
- Cyprus
- Germany
- Denmark
- Estonia
- Greece
- Spain
- Finland
- France
- Hungary
- Ireland
- Italy
- Lithuania
- Luxembourg
- Latvia
- Malta
- The Netherlands

- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Sweden
- United Kingdom
- Non-EU country

* Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

Note: If you are not answering this questionnaire as an individual, please register in the Transparency Register. If your organisation/institution responds without being registered, the Commission will consider its input as that of an individual and will publish it as such.

X Yes

- No
- Non-applicable

* Please indicate your organisation's registration number in the Transparency Register

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* I object the publication of my personal data

Yes

X No

Online platforms

SOCIAL AND ECONOMIC ROLE OF ONLINE PLATFORMS

Do you agree with the definition of "Online platform" as provided below?

"Online platform" refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers.

Typical examples include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp.), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audio-visual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video sharing platforms (e.g. YouTube, Dailymotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, LinkedIn, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. AirBnB, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition.

Yes

No

* Please explain how you would change the definition
1000 character(s) maximum

The proposed definition of "online platform" is extremely large and covers different types of sectors and business models. It would be necessary to make a distinction between:

- the different subsets of "online platforms" e.g. a search engine, social media and an app store
- platforms that lawfully operate and the platforms that distribute or facilitate the distribution of illegal content.

Any regulatory intervention related to platforms must aim to strengthen the internal market by disadvantaging, dissuading and sanctioning those who operate illegally.

For platforms active in the audiovisual sector, the articulation and consistency between a general framework related to platforms and the sectorial legal instruments should be carefully thought through.

The revision of the AVMS Directive raises the issue of the scope of the text and a reflection should be made on the need to also include services that distribute professionally made audiovisual content.

What do you consider to be the key advantages of using online platforms?

Online platforms...

- make information more accessible
- make communication and interaction easier
- increase choice of products and services
- create more transparent prices and the possibility to compare offers
- increase trust between peers

by providing trust mechanisms (i.e. ratings, reviews, etc.)

lower prices for products and services
lower the cost of reaching customers for suppliers

help with matching supply and demand

create new markets or business opportunities

help in complying with obligations in cross-border sales

help to share resources and improve resource-allocation

others:

*

Please specify:

100 character(s) maximum (100 characters left)

fast and enjoy audiovisual works

Have you encountered, or are you aware of problems faced by consumers or suppliers when dealing with online platforms?

"Consumer" is any natural person using an online platform for purposes outside the person's trade, business, craft or profession.

"Supplier" is any trader or non-professional individual that uses online platforms to provide services to third parties both under their own brand (name) and under the platform's brand.

Yes

No

I don't know

Please list the problems you encountered, or you are aware of, in the order of importance and provide additional explanation where possible.

3000 character(s) maximum (2767 characters left)

According to the EFADs, the 3 main issues related to the emergence of online platforms active in the audiovisual sector are the following:

1. Hosting, promoting and referencing illegal content

One of the EFAD's main concerns relates to the number of and visibility of illegal platforms:

- Platforms that host or facilitate the distribution of illegal content (or do not respect other legal requirements related, for example to, consumer protection, taxation, and data privacy) manage to set up commercial scale structures which offer copyright-protected content to users without clearing the rights. They make a profit out of advertisements, paid subscriptions and donations among other things. They also often expose consumers to malware or risk to their computer systems.
- Search engines enable easy access to and often high visibility to these operators distributing illegal content.

The fight against the distribution of illegal content should be strengthened. It is about ensuring a fair balance among all the market operators involved –right holders, creators, Internet services and provide the legal security necessary to the development of innovative private initiatives. There should also be a reflection at EU level on how to address the role and functioning of search engines in respect of both fighting piracy but also promotion of the European cultural diversity.

The e-commerce directive (ECD) offers a liability exemption that is subject of abuse by copyright infringers. This exemption should be limited to providers that are only passively hosting and transmitting information. Where platforms act to directly and voluntarily address the public (for example by distributing copyright related content) they do not act as neutral technical providers and should not benefit from this liability exception. The Commission should explore how to implement this principle without opening the ECD: interpretative communication, revision of the Copyright Directive and/or IPRED. In addition, the cooperation between rights holders and platforms should be encouraged (voluntary agreements) at EU level for ensuring the “rapid and reliable procedures for removing and disabling access to illegal information”.

As for mere technical intermediaries the “duty of care” comprising a minimum set of commitments make sure that online intermediaries act as diligent operators should be reinforced in compliance with the prohibition to impose an obligation to monitor :

- Use of tools such as digital recognition and fingerprinting of works to identify copyright protected works
- notice and stay down procedures so that infringed content that was identified and removed does not reappear, posted by another user
- website-blocking of structurally infringing sites
- suspension/termination of domains, of customer accounts making illegal content available
- Identification of systematic infringers upon request by “notice giver”. This would be possible if we eliminate the immunity that anonymity provides to infringers by extrapolating from the offline world the principle of “know your customer” through an information obligation targeting users. The said obligation must be the least intrusive possible and in compliance with the personal data protection rules.

Other measures to prevent illegal content online should be developed at European level:

- o follow the money initiatives in the fields of online payments and advertising
- o Improving the cooperation between Member States and avoiding regulatory distortions in the area of IPR enforcement in order to prevent illegal platforms to locate in Member States that are laxist in this respect or to facilitate the court procedures against infringers.

2. Lack of transparency

- In contradiction with the obligation set out in article 5 of the ECD, online platforms often lack the operative contact details necessary for users and right holders to identify them. The European Commission should ensure a more efficient implementation of this provision.
- Online intermediaries are also required to put in place procedures to validate the identity of their counterparties but this provision is neither implemented rendering sending any notices to website operators and exercising the right of information, as foreseen in Article 8 IPRED which is therefore ineffective.
- Online platforms active in the audiovisual sector, namely SVoD platforms such as Netflix, do not share information on the performance of content (views, revenues) of the content that they license. Due to the asymmetrical market power they benefit from, this practice hampers a fair licensing of content, because audiovisual producers cannot correctly assess the value of their content. Therefore, the price of licenses does not necessarily match their market value. We would like to see a public policy which addresses this.
- More transparency as regards the functioning of referencing algorithms and rating systems would also be

welcomed.

3. Lack of promotion or visibility for European works

The reflection on the appropriate legal framework for platforms should explore the best way to promote the European cultural diversity, the access and visibility of European works.

For the time being, the most successful platforms active in the audiovisual sector are non-European companies. Quantitatively and qualitatively, the way they expose European works is not satisfactory: according to the latest data from the EOA, American works (feature films and series) are the main component of their catalogues which also benefit from the best promotion, prominence and marketing. This issue should be tackled in the context of the revision of the AVMS Directive.

Search engines also that play a significant role in selecting, ranking and promoting content and there should be a reflection at EU level on how to involve them more actively in the promotion of the European cultural diversity.

How could these problems be best addressed?

- market dynamics
- regulatory measures
- self-regulatory measures
- a combination of the above

TRANSPARENCY OF ONLINE PLATFORMS

Are you a holder of rights in digital content protected by copyright, which is used on an online platform?

Yes

No

As a holder of rights in digital content protected by copyright have you faced any of the following circumstances:

An online platform such as a video sharing website or an online content aggregator uses my protected works online without having asked for my authorisation.

Yes

No

As you answered YES to some of the above questions, please explain your situation in more detail.

3000 character(s) maximum

The EFADs does not itself hold rights, but some of its members do. Fighting copyright infringement and theft should be a priority as a way to protect creation but also ensure fairer competition among the different actors and a better consumer protection in the online world.

Tackling illegal content online and the liability of online intermediaries

Please indicate your role in the context of this set of questions

Terms used for the purposes of this consultation:

"Illegal content"

Corresponds to the term "illegal activity or information" used in Article 14 of the E-commerce Directive. The 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, child abuse content, consumer rights infringements, or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation, malware, illegal online gambling, selling illegal medicines, selling unsafe products.

"Hosting"

According to Article 14 of the E-commerce Directive, hosting 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.

"Notice"

Any communication to a hosting service provider that gives the latter knowledge of a particular item of illegal content that it transmits or stores and therefore creates an obligation for it to act expeditiously by removing the illegal content or disabling/blocking access to it.. Such an obligation only arises if the notice provides the internet hosting service provider with actual awareness or knowledge of illegal content.

"Notice provider"

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.

"Provider of content"

In the context of a hosting service the content is initially provided by 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.

- individual user
- content provider
- notice provider
- intermediary

none of the above

Association of public authorities - funding & regulating bodies in the audiovisual sector. Active since 2001 as a network, the EFADs - European Film Agency Directors become in December 2014 an Association (aisbl), based in Brussels under Belgian law. The EFADs Association brings together the Directors of the European Film Agencies from 31 countries in Europe (EU, Iceland, Norway and Switzerland). The President of the EFADs is Peter Dinges, CEO of the German Federal Film Board (FFA) and the Vice-President is Guy Daleiden, Director of the Film Fund Luxembourg.

We represent government, or government associated bodies, in charge of national funding for the audiovisual sector and with the responsibility to advise on all aspects of national and European audiovisual policies. Our aim is to help nurture the creation of high quality works to the benefit of European and global audiences reflecting the diversity of European heritage, cultural identities and artistic outlook within the audiovisual field in line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

In total, the EFADs members and their Governments distribute an estimated 3 billion euros every year with a view to fostering the creation, production, promotion, distribution and exhibition of European audio-visual and cinematographic works.

The EFADs have already expressed views in relation with the DSM, namely in Position papers, respectively on:

the potential reform of copyright (March 2015): <http://www.efads.eu/pdf/EFADs-resolution-copyright-032015.pdf> and on the creation of a Digital Single Market for the audiovisual industry in Europe (May 2015): <http://www.efads.eu/pdf/efads-pp-dsm-may2015.pdf>, as well as on the consultation on the AVMSD (September 2015): <http://www.efads.eu/pdf/EFADs-30092015.pdf>, on the consultation on the Satellite and Cable Directive (November 2015): <http://www.efads.eu/pdf/EFADs-16112015.pdf> and issued a Press release on the EC Communication on copyright and the EC proposal on portability (December 2015): <http://www.efads.eu/pdf/EFADs-15122015.pdf> , all consultable at: www.efads.eu More information about the EFADs at: www.efads.eu

Have you encountered situations suggesting that the liability regime introduced in Section IV of the E-commerce Directive (art. 12-15) has proven not fit for purpose or has negatively affected market level playing field?

Yes

No

* Please describe the situation.
3000 character(s) maximum

The e-commerce directive (ECD) offers a liability exemption that is subject of abuse by copyright infringers. This exemption should be limited to providers that are only passively hosting and transmitting information. Where platforms act to directly and voluntarily address the public (for example by distributing copyright related content) they do not act as neutral technical providers and should not benefit from this liability exception. The Commission should explore how to implement this principle without opening the ECD: interpretative communication, revision of the Copyright Directive and/or IPRED. In addition, the cooperation between rights holders and platforms should be encouraged (voluntary agreements) at EU level for ensuring the "rapid and reliable procedures for removing and disabling access to illegal information".

Do you think that the concept of a "mere technical, automatic and passive nature" of information transmission by information society service providers provided under recital 42 of the ECD is sufficiently clear to be interpreted and applied in a homogeneous way, having in mind the growing involvement in content distribution by some online intermediaries, e.g.: video sharing websites?

- Yes
 No
 I don't know

Please explain your answer.

1500 character(s) maximum

The problem lies in its abuse by online intermediaries involved in the distribution of copyright protected content who deny responsibility in the transmission of illegal content. However, where the business model of a platform is based on the communication of copyright protected content, this platform must be held responsible for the content.

This view is in line with the EFADS suggestion to clarify the scope of the AVMSD. While keeping the existing definition of audiovisual services the need for a more comprehensive definition of the scope of the AVMSD should be explored and would potentially include all services to the extent that they create or distribute professionally made audiovisual content.

Mere conduit/caching/hosting describe the activities that are undertaken by a service provider. However, new business models and services have appeared since the adopting of the E-commerce Directive. For instance, some cloud service providers might also be covered under hosting services e.g. pure data storage. Other cloud-based services, as processing, might fall under a different category or not fit correctly into any of the existing ones. The same can apply to linking services and search engines, where there has been some diverging case-law at national level. Do you think that further categories of intermediary services should be established, besides mere conduit/caching/hosting and/or should the existing categories be clarified?

- Yes
 No

Please provide examples

1500 character(s) maximum

Where platforms act to directly and voluntarily address the public (for example by distributing copyright related content) they do not act as neutral technical providers and should not benefit from this liability exception.

On the "notice"

Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures, and in particular different requirements as regards the content

of the notice?

Yes

No

Do you think that any of the following categories of illegal content requires a specific approach:

- Illegal offer of goods and services (e.g. illegal arms, fake medicines, dangerous products, unauthorised gambling services etc.)
- Illegal promotion of goods and services
- Content facilitating phishing, pharming or hacking
- Infringements of intellectual property rights (e.g. copyright and related rights, trademarks)
- Infringement of consumer protection rules, such as fraudulent or misleading offers
- Infringement of safety and security requirements
- Racist and xenophobic speech
- Homophobic and other kinds of hate speech
- Child abuse content
- Terrorism-related content (e.g. content inciting the commitment of terrorist offences and training material)
- Defamation
- Other:

On the "action"

Should the content providers be given the opportunity to give their views to the hosting service provider on the alleged illegality of the content?

Yes

No

* Please explain your answer

1500 character(s) maximum

There should be rapid, machine-to-machine mechanisms available via the platform so that content providers can notify the platform issues (counter-notice mechanisms).

If you consider that this should only apply for some kinds of illegal content, please indicate which one(s)

1500 character(s) maximum

Should action taken by hosting service providers remain effective over time ("take down and stay down" principle)?

Yes

No

Please explain

Such an action is important so that content which is identified as infringing or stolen and is taken down does not reappear in another guise (file renamed, multiple accounts...). The notice and take down procedure should not be limited to removing links or illegal content but make sure the effect is effective and permanent (take down and stay down). Search engines also need to set up structures that de-rank sites subject to multiple justified notifications.

On duties of care for online intermediaries:

Recital 48 of the Ecommerce Directive establishes that "[t]his Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities". Moreover, Article 16 of the same Directive calls on Member States and the Commission to encourage the "drawing up of codes of conduct at Community level by trade, professional and consumer associations or organisations designed to contribute to the proper implementation of Articles 5 to 15". At the same time, however, Article 15 sets out a prohibition to impose "a general obligation to monitor".

Do you see a need to impose specific duties of care for certain categories of illegal content?

- Yes
- No
- I don't know

Please specify for which categories of content you would establish such an obligation.

1500 character(s) maximum

Please specify for which categories of intermediary you would establish such an obligation

As for mere technical intermediaries the "duty of care" comprising a minimum set of commitments make sure that online intermediaries act as diligent operators should be reinforced in compliance with the prohibition to impose an obligation to monitor :

- Use of tools such as digital recognition and fingerprinting of works to identify copyright protected works
- notice and stay down procedures so that infringed content that was identified and removed does not reappear, posted by another user
- website-blocking of structurally infringing sites
- suspension/termination of domains, of customer accounts making illegal content available
- Identification of systematic infringers upon request by "notice giver". This would be possible if we eliminate the immunity that anonymity provides to infringers by extrapolating from the offline world the principle of "know your customer" through an information obligation targeting users. The said obligation must be the least intrusive possible and in compliance with the personal data protection rules.

Other measures to prevent illegal content online should be developed at European level:

- o follow the money initiatives in the fields of online payments and advertising
- o Improving the cooperation between Member States and avoiding regulatory distortions in the area of IPR enforcement in order to prevent illegal platforms to locate in Member States that are laxist in this respect or to facilitate the court procedures against infringers.

Please specify what types of actions could be covered by such an obligation

1500 character(s) maximum

Do you see a need for more transparency on the intermediaries' content restriction policies and

practices (including the number of notices received as well as their main content and the results of the actions taken following the notices)?

Yes

No

Should this obligation be limited to those hosting service providers, which receive a sizeable amount of notices per year (e.g. more than 1000)?

Yes

No

Do you think a minimum size threshold would be appropriate if there was such an obligation?

Yes

No

Please share your general comments or ideas regarding the liability of online intermediaries and the topics addressed in this section of the questionnaire.

5000 character(s) maximum

Although some online intermediaries have made some progress - at the request of rights holders - in implementing voluntary measures to tackle stolen or infringing content much more needs to be done, and the reinforcement of duty of care commitments would be helpful in this regard.