PUBLIC CONSULTATION ON PROCEDURES FOR NOTIFYING AND ACTING ON ILLEGAL CONTENT HOSTED BY ONLINE INTERMEDIARIES

SUMMARY OF RESPONSES
1. Introduction

The public consultation on “procedures for notifying and acting on illegal content hosted by online intermediaries” was held between 4 July 2012 and 12 September 2012. The public consultation could be filled in on the Commission’s website and was available in the Commission’s working languages (English, French and German).

In total, 1060 responses were submitted. These originated from individuals (766), civil society associations (38), hosting service providers (82), internet access providers (40), private companies other than online intermediaries (89), hotlines (14), public authorities (16), intellectual property rights holders (165), business federations (67), research institutions (18) and ‘other’ stakeholders (67)\(^1\). 110 respondents indicated that they were registered in the Interest Representative Register (10.4%).

Responses were received from all Member States at the time of the consultation (that excluded Croatia). However, most of the respondents resided in or were established in France (205), Germany (204), United Kingdom (150), Belgium (73), Poland (58), the Netherlands (41), Sweden (37) and Italy (36). 26 responses originated from outside the EU.

This summary report provides a general overview of the responses to the public consultation.

2. Notice-and-action procedures in general

Types of illegal content

In response to Question 5, stakeholders indicated that the following categories of illegal content were of greatest relevance to them in the context of notice-and-action (N&A) procedures (stakeholders could choose several categories): privacy infringements (43.6%), child abuse content (41.4%), infringements of copyright and related rights (41.1%), illegal goods and services (e.g. illegal arms, fake medicines, unauthorised gambling services etc., 34.7%), content facilitating phishing, pharming or hacking (34.6%), infringement of consumer protection rules (34.6%), incitement to hatred or violence (31%), infringements of trademarks (24.8%), terrorism related content (24.3%), illegal promotion of goods and services (23.3%), defamation (19.7%) and ‘other’ illegal content (7.5%).

Satisfaction with notice-and-action procedures

Question 6 asked respondents to indicate to what extent they agreed with a number of statements:

- “Action against illegal content is often ineffective”.

51.7% of all respondents agree to this statement and 39% disagrees. In contrast to other groups of respondents, a majority of hosting service providers (59.7%),

\(^{1}\) These numbers are based on how respondents to the public consultation classified themselves. Some respondents have indicated that they should be categorised in more than one stakeholder group.
internet access providers (52.5%) and hotlines (71.4%) disagreed with this statement.

- “Action against illegal content is often too slow”.

30.4% of all respondents agreed to this statement and 54.3% disagreed. This was reflected within all categories of respondents.

- “Hosting service providers often take action against legal content”.

64.7% of all respondents agreed to this statement and 22.6% disagreed. 57.4% of hosting providers agreed that companies within their sector often take action against legal content. Only 7.2% of hotlines indicated that they agreed to this statement (57.1% of hotlines indicated that they had no opinion).

- “There is too much legal fragmentation and uncertainty for hosting service providers and notice providers”.

57.9% of all respondents agreed to this statement and 27.3% disagreed. This was also reflected within all categories of respondents.

Article 14 of the E-commerce Directive

Question 7 asked respondents to indicate to what extent they agreed to the following statements:

- “The exact scope of ‘hosting’ is sufficiently clear”.

40.7% of all respondents agreed to this statement and 48.2% disagreed. Among those respondents that considered themselves to be ‘hosting’ providers, 46.3% agreed to the statement and 50% disagreed. Only among internet access providers and hotlines a majority agreed to the statement (of respectively 60% and 64.3%).

- “The terms “actual knowledge” and “awareness” are sufficiently clear”.

31.5% of all respondents agreed to this statement and 57.9% disagreed. This general disagreement existed among all groups of stakeholders, except for hotlines (64.3 of them agreed to the statement).

- “The term “expeditious” is sufficiently clear”.

31% of all respondents agree to this statement and 55.4% disagrees. Among internet access providers 62.5% agreed to the statement and among hotlines 42.9% agreed.

Question 8 asked respondents for their opinion about what activities should be considered as ‘hosting’. Respondents supported the inclusion within the scope of hosting of several services: social networks (44.7%), video-sharing sites (52.1%), e-commerce platforms (44.9%), search engines (22.3%), cyberlockers (35.4%), blogs and interactive dictionaries (42.8%) and cloud-based services (41.3%). Similar responses could be found for all categories of respondents, although the support for considering different services as ‘hosting’ services was relatively high among hosting service providers.

3. Notifying illegal content
Ease of notifying

**Question 9** asked respondents about the ease with which illegal content can be notified. Among all respondents, 48.3% agreed with the statement that “it is easy to find pages or tools to notify illegal content” and 35.2% agreed with the statement that “it is easy to use pages or tools to notify illegal content”. Among hosting service providers (that possibly have such pages or tools in place), the support for both statements was higher: respectively 58.5% and 56.1%. Most notice providers also agreed to both statements: among intellectual property rights holders the support for the statements was respectively 51% and 48.5% and among hotlines support was even respectively 71.4% and 64.3%. However, public authorities tended to disagree with both statements (respectively 50% and 43.7% of disagreement).

**Question 10** asked whether all hosting service providers should have a procedure in place which allows them to be easily notified of illegal content that they may be hosting. Among all respondents, 50.5% agreed and 38.2% disagreed. This general agreement existed among all stakeholder groups except for internet access providers: 35% of them agreed to the statement, whereas 50% disagreed. Among respondents that disagreed, the main arguments put forward were that such a procedure could i) lead to excessive and abusive notifications possibly leading to censorship and ii) represent a significant burden for hosting service providers if they have to make adjustments to their websites.

**Question 11** asked whether in cases where “a hosting provider has a procedure for notifying illegal content that is easy to find and easy to use”, illegal content should exclusively be notified by means of that procedure. 45.8% of all respondents agreed and 39.2% disagreed. Support was particularly high among hosting service providers (61%) and internet access providers (57.5%). However, also among hotlines and intellectual property rights holders, most respondents agreed to the question (respectively 64.3% and 49.1%). The main argument put forward by respondents that disagreed, was that it would be too prescriptive to impose a single format on notice providers. If faxes or letters could be refused this could jeopardise the fight against illegal content.

Requirements for notices

**Question 12** asked respondents whether they agreed with a number of statements.

- “A notice should be submitted by electronic means”.

Of all respondents, 66.2% agreed and 17.8% disagreed. This agreement existed among all stakeholder groups. Among those that disagreed, some pointed out that in some jurisdictions an electronic notification cannot serve as evidence of notification.

- “A notice should contain contact details of the sender”.

Of all respondents, 77.2% agreed and 15.4% disagreed. Such agreement also existed within all groups of respondent. Some respondents that disagreed with the statement argued that there should a “right of anonymity” on the internet. Without such a right, internet users could apply self-censorship.

- “A notice should make it easy to identify the alleged illegal content”
Of all respondents 87.4% agrees and 6.4% disagrees. Such agreement existed within all categories of respondents.

- “A notice should contain a detailed description of the alleged illegal nature of the content”.

Of all respondents, 83.4% agreed and 10.3% disagreed. The agreement was shared within each category of respondents. The main argument of those that disagreed was that such a requirement could represent a burden to no notifying.

- “A notice should contain evidence that the content provider could not be contacted before contacting the hosting provider or that the content provider was contacted first but did not act”.

64.8% of all respondents agreed and 23.5% disagreed. 35.7% of hotlines, 33.3% of intellectual property rights holders disagreed to this statement. Respondents that disagreed mostly did so because they did not agree with the very principle that the content provider should be contacted (first), because they considered that there would be substantial difficulties in identifying the content providers and/or because it could slow down action against illegal content.

Unjustified notices

Article 13 asked whether there should be rules to avoid unjustified notifications. 79.7% of respondents agreed to that. This agreement existed within all groups of respondents. Respondents that agreed pointed at a high percentage of abusive notifications leading to censorship and a variety of measures to address this (see next question). Those that disagreed argued, for instance, that the E-commerce Directive already provides a sufficient framework for addressing this issue.

Article 14 asked respondents how unjustified notifications could best be prevented. Respondents could choose one, none, or several of the following options:

- Requiring notice providers to give their contact details.

67% of all respondents supported this option and such support existed within all groups of respondents.

- Publishing (statistics) on notices.

45.8% of all respondents supported this option. Only 21.4% of hotlines and 6.2% of public authorities supported this option. Among civil rights groups and individuals the support was respectively 65.8% and 49.5%.

- Providing for sanctions against abusive notices.

68% of all respondents supported this option. Only 28.6% of hotlines supported this option, but civil rights associations and individuals were particularly supportive of this option (respectively 73.7% and 73.8% supported this option).

- Other.

30.8% indicated to support other ways to avoid unjustified notifications. Several of these respondents indicated to be in favour of a form of judicial review of any
decision to act on illegal content. This option was in particular defended by civil rights groups and individuals.

4. Action against illegal content by hosting providers

Feedback and consultation

**Question 15** asked whether hosting service providers should provide feedback to notice providers about the status of their notice. Among all respondents 59.2% agreed to this statement, in particular because they considered that this could lead to accountability of hosting providers and, hence, faster action against illegal content. 26.2% disagreed, mainly because they considered it to be burdensome for hosting providers. Among hosting service providers disagreement was highest: 32.9%

**Question 16** asked whether hosting providers should consult the providers of alleged illegal content. Overall, 71.3% of respondents agreed (because it would introduce “checks and balances”, avoid censorship and reduce instances of abusive action against legal content) and 20.5% disagreed. A high level of support existed within all groups of respondents except for hotlines of which only 28.6% agreed and 64.3% disagreed. The main reasons for disagreement were the principle that the content provider should not become aware of a notification (in particular in the context of criminal content such as child abuse content) and that such consultation could slow down action against illegal content.

Removing and disabling access

**Question 17** asked respondents to indicate how a hosting service provider should act assuming that content is illegal.

According to the option that was most chosen by all respondents (41.5%), hosting service providers should first disable access to the illegal content. This option had particular high support from individuals (46.2%). Among hosting service providers themselves, 36.6% supported this option.

Among all respondents, 15 % supported that the hosting service provider should either remove or disable access, 7.7% supported that the hosting service provider should remove the illegal content and 30.6 considered that there should be another option.

Among the respondents that supported another way of proceeding, many did so because they considered that the content provider should first be invited to remove the content or that a consultation of a judicial or other body should take place.

**Question 18** asked which hosting provider should act against illegal content if the same item of illegal content is hosted by multiple providers. The vast majority of all respondents (61.9%) considered that this should be “the hosting provider that is aware of the illegal content and is technically in a position to remove exclusively the notified content.

Other options were “The HSP 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” (3% of support) and “Other” (24.3% of support). Similar levels of support existed within all groups of respondents.

Among those respondents that indicated that there should be another solution, some considered that the proportionality of action should be assessed on a case-by-case basis, in particular in view of the nature of the illegal content, and others considered that action against illegal content should be something between the content provider and the notice provider.

**Question 19** asked how fast a hosting service provider should act once it becomes aware of illegal content. 45.4% of all respondents considered that it should act “as fast as possible depending on the concrete circumstances of the case”, 24.3% considered that it should act “within a predefined time period” and 30.3% supported another solution. This was reflected within all groups of respondents.

Among those respondents that favoured another solution, some argued that there should be a pre-defined time period, with exceptions if justified. Others argued that it should depend on the type of content and that immediate action should take place for child abuse content.

**Question 20** asked whether hosting service providers should act expeditiously on illegal content, even when there is a request from law enforcement authorities not to do so. 57.6% of all respondents considered that hosting providers should not act expeditiously in such a situation and 19.4% considered that they should nevertheless act expeditiously. This was reflected within all categories of respondent. One of the main arguments in favour of expeditious action, even when law enforcement bodies advised against it, was that there should be a judicial request to deviate from the main rule.

**Unjustified actions and pro-active measures**

**Question 21** asked how unjustified action against legal content can best be addressed or prevented. Respondents could choose (several options) among the following responses:

- *By requiring detailed notices* (71.6% of general support)

- *By consulting the content provider before any action is taken* (66.9% of support).

- *By providing easy and accessible appeal procedures* (61.9%)

- *By publishing (statistics on) notices* (46.1%)

- *By providing for sanctions against abusive notices* (67.8%)

- *No action required* (3.1%)

- *Other* (25.2%). Among other options judicial assessment was mentioned most often.

Similar levels of support could be found within different categories of respondents. Respondents that were against one or many of these measures often argued that they would form a barrier to notifying illegal content and hence lead to less effective action against illegal content.
**Question 22** asked whether hosting providers should be protected against liability that could result from taking pro-active measures. 48.8% of all respondents agreed to it and 36.9% disagreed. Among hosting service providers support was particularly high (70.7%). Among civil rights associations a significant part of respondents (47.4%) was against this (as opposed to an identical percentage, 47.4, that was in favour of it).

Among respondents that agreed, most argued that this would allow hosting providers to develop pro-active monitoring further (without fear of liability) and hence contribute substantially to fighting illegal content online. Opponents also thought that pro-active monitoring would increase as a result of such a measure and would hence lead to filtering, privacy infringements and censorship.

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

**Question 23** asked whether the EU should play a role in contributing to the functioning of N&A procedures. 56% of all respondents agreed, 32.4% disagreed and 11.6% had no opinion. Among respondents in favour of an EU role, different options were supported: encouraging self-regulation (30.5%), providing non-binding guidelines (36%), providing some binding minimum rules (40.4%), providing bidding detailed rules (25.6%) or a combination of these options (20.7%). The level of support for different options differed between categories of respondents. Among civil rights groups and public authorities there was relatively high support for binding policy options whereas among hotlines there was a low level of support for binding options and a relatively high degree of support for self-regulation.

**Question 24** asked whether different categories of illegal content required different policy approaches as regards notice-and-action procedures. 65% of all respondents answered affirmatively and 34.2% disagreed. This was reflected within all categories of respondents.