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)	The Netherlands
3. Please provide your contact information (name, address and e-mail address): -open reply-(compulsory)	
Janneke Sloëtjes Bits of Freedom PO Box 10746 1001ES Amsterdam Nederland janneke.sloetjes@bof.nl	
4. Is your organisation registered in the Interest Representative Register? -single choice reply-(compulsory)	No
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)	Other:
Please specify : -open reply-(optional)	Infringements of fundamental rights as a result of wrong or disproportionate takedowns are most relevant for Bits of Freedom.

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 completely agree
There is too much legal fragmentation and uncertainty for hosting service providers and notice providers -single choice reply-(compulsory)	I completely agree
The exact scope of 'hosting' is sufficiently clear -single choice reply-(compulsory)	I completely disagree
The terms “actual knowledge” and “awareness” are sufficiently clear -single choice reply-(compulsory)	I completely disagree
The term “expeditiously” is sufficiently clear -single choice reply-(compulsory)	I disagree

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. 8. In your opinion, what activities should be considered as 'hosting'? -multiple choices reply-(compulsory)	Social networks - Blogs and interactive dictionaries - Video-sharing sites - Cloud based services - E-commerce platforms - Other - Cyberlockers
Please specify -open reply-(optional)	Online storage space, for example.
Please specify -open reply-(optional)	Bits of Freedom is primarily concerned about protecting the right of speech including the right of access to information. This right cannot exist when intermediaries, regardless of the exact service they offer, run the risk of being liable for content that may be deemed unlawful. The 'hosting' criterium must therefore encompass a wide range of services and not be technology-specific. This will keep the 'safe harbor' framework relatively easy to understand and to apply.

III. Notifying illegal content to hosting service providers

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

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)	
A notice should be submitted by electronic means -single choice reply-(compulsory)	Yes.
A notice should contain contact details of the sender -single choice reply-(compulsory)	Yes.
A notice should make it easy to identify the alleged illegal content (for instance by providing a URL) -single choice reply-(compulsory)	Yes.
A notice should contain a detailed description of the alleged illegal nature of the content -single choice reply-(compulsory)	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 -single choice reply-(compulsory)	Yes.
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? -single choice reply-(compulsory)	Yes
Please explain -open reply-(optional)	Unjustified notices must be avoided in order to keep lawful information accessible and to prevent 'intimidating' notices, claiming high damages or threatening with other legal sanctions. This could be prevented by requiring the notice provider to adhere to provide contact details and deliver proof it tried to reach the content provider before filing a notice. Finally, a notice provider should sign a notice and accept full responsibility for the correctness of the notice prior to filing.
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)	As indicated under (13), notice providers should provide contact details, file a specific notice for specific content, indicate the legal grounds involved, warrant that all information is correct. If not, they may be liable. The use of transparency reports by hosting providers, indicating how many takedowns they process and from which parties these takedowns originate will also increase the reliability of notices.

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)	Yes
Multiple choice -multiple choices reply-(compulsory)	The hosting service provider should inform the notice provider of any action that is taken.
16. Should hosting service providers consult the providers of alleged illegal content? -single choice reply-(compulsory)	Yes
Multiple choice -multiple choices reply-(optional)	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. - Other
Please specify -open reply-(optional)	If information is unmistakably unlawful and there is a need to immediately disable access, the hosting provider can disable access rightaway. He will inform the content provider immediately about the disabling and include information regarding the content providers' rights of redress (in court). If the information is not unmistakably unlawful, the hosting provider will not delete or disable content, but inform the content provider and, ultimately, if necessary, refer the matter to a court.
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	The hosting service provider should first disable access to the illegal content

should a hosting service provider act? -single choice reply-(compulsory)	
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? -single choice reply-(compulsory)	The hosting service provider that is aware of the illegal content and is technically in a position to remove exclusively the notified illegal content
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? -single choice reply-(compulsory)	As fast as possible depending on the concrete circumstances of the case
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	No

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? -single choice reply-(compulsory)	
Please explain: -open reply-(optional)	Hosting providers may work together with law enforcement agencies provided that these agencies act on a legal ground and do not just 'ask' hosting providers to comply with their requests. Such requests should be made officially and in accordance with investigation procedures. Such exception should only apply in cases where notification would seriously hinder an investigation.
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? -multiple choices reply-(compulsory)	By requiring detailed notices - By consulting the content provider before any action is taken - By publishing (statistics on) notices - Other
Please specify -open reply-(optional)	As indicated, unjustified takedowns can be prevented by requiring detailed notice procedures, provided that hosting providers only disable content if the content is unmistakably unlawful. If not, the provider should contact the content provider while the content remains accessible and refer the matter to court if voluntary takedown does not happen. Also, statistics on takedowns can provide insightful information about possible chilling effects.
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).	Yes

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)	Hosting providers should be protected against liabilities resulting from pro-active measures. Such measures serve to protect the service rendered by for instance an online marketplace and are not meant to undermine the safe harbor provided by article 14 of the e-commerce Directive. Actual knowledge of content must be obtained through a notice provided by a notice provider and not through other means.

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 some binding minimum rules
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? -single choice reply-(compulsory)	Yes
Please clarify giving concrete examples relating to the question above -open reply-(optional)	A one-approach-fits-all will not work. As indicated under (5), content that is unmistakably lawful and depicting or describing criminal behavior, should be dealt with differently from content that is unlawful because it infringes a trademark, copyright or other rights of intellectual property. Such infringements must of course be terminated, but the unlawfulness will be harder to assess.

VII. Additional comments

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