



The Consumer Voice in Europe

# NOTICE-AND-ACTION ON ILLEGAL CONTENT

Public consultation  
BEUC response

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## Summary

The European Consumer Organisation (BEUC) is **strongly opposed to a horizontal approach** with regards to notice and action procedures for all types of illegal content, including child abuse, defamation, health, gambling and Intellectual Property Rights. Treating child abuse and user-created content in the same way is not appropriate.

BEUC has identified a number of principles that notice and action procedures must comply with:

- **Privatization of enforcement a threat to democracy:** Procedures for notice and action can be used to limit EU consumers' and citizens' fundamental rights to freedom of expression and information. The European Commission must not leave it to companies to decide how these rights will be limited. Any limitation should have a legal basis, be necessary to protect the rights of others and be proportionate to the legitimate aim pursued.
- **Validity of notices:** every notice shall as a minimum clearly identify the specific content concerned, provide evidence that the notice provider is entitled to act and that the content is illegal.
- **Actual knowledge:** Only a court can confirm the illegal nature of content. Notification by third parties shall not suffice to rule on the illegal nature of the content. to establish actual knowledge of the host provider.
- **Expeditious action:** action timeframe should be established for different types of content in order to provide hosts, notice and content providers with legal certainty.
- **Safeguards against abuses:** when the content has been taken down on the basis of a non-valid notice or false information provided by the notice provider, the latter shall be liable for damages both to the host provider and the user or content provider.
- **Notice-and-Notice:** Upon receipt of a valid and substantiated notice, the host provider shall inform the content provider, who will be able to submit a counter-notice before any further action is undertaken. The notice-and-notice procedure should be used in cases which involve complex legal assessment, such as IPR related issues.
- **Targeted action:** notice-and-action requests should target specific content rather than resulting in bans on the operation of whole sites or systems and in general monitoring.

### **Online consultations and questionnaires must respect good governance rules**

The European Consumer Organisation (BEUC) is concerned with the format of the online questionnaire on notice-and-action which leaves no room for argumentation to be developed. It is difficult to respond to questions regarding the need for EU horizontal approach or the conflicting issues related to notice-and-actions request by a simple yes or no, or within the space of few lines.

Issues related to responsibility of intermediaries including providers, providers who simply host websites for third parties, website owners and publishers and other, are complex and require a thorough consideration of the views of all stakeholders. We regret that the European Commission has provided host service providers and right holders with a separate opportunity to provide their views within the framework of bilateral consultations.

To the contrary, the views of consumers and citizens were not sought despite the significant impact on them. The provisions on liability of host service providers and on notice-and-action have a direct impact on freedom of expression, as well as on the fundamental rights of presumption of innocence and due process. BEUC would therefore like to submit additional comments to be considered as part of the online consultation.

### **Content specific approach**

BEUC is concerned with the announcement of a horizontal initiative on notice-and-action to be undertaken by the European Commission<sup>1</sup> that will cover all types of online services, including entertainment, adult, health, gambling etc. Treating child pornography and user-created content in the same way is not appropriate.

The starting point should be that host service providers should not be expected to replace judicial authorities in enforcing the law. For specific types of content, the illegality of which is straightforward and there is an overriding public interest, such as child pornography, host providers could take action upon notification and actual knowledge.

Nevertheless, the same does not apply to Intellectual Property Rights or defamation related cases, which raise complex legal questions. A simple notice by a rights holders or other complainants (for example defamation complainants) will not suffice to evidence whether, in the case of intellectual property rights, an infringement has taken place, who is the owner of the content, whether a copyright exception applies, whether the infringement has been carried out on a commercial basis, whether registration has taken place if required. In the case of other causes of action (for example defamation), a simple notice will not evidence whether the material is defamatory or otherwise 'unlawful'. Host service providers should not be expected to assess the legal nature of the content in question and nor can they do so without evidence. Notices are only allegations of the relevant causes of action and should remain just that until a decision by a court.

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<sup>1</sup> Commission Staff Working document "Online services, including e-commerce, in the Single Market, accompanying the Communication on "A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services"

BEUC therefore calls upon the European Commission to revise its approach and distinguish between different types of content. Rules which are justified as a result of certain aggravated forms of violations should not be declared applicable to all kinds of infringements.

## **Principles for notice-and-action**

### **Granting enforcement enforcement to private companies is a threat to fundamental rights**

Procedures for notice and action can be used to limit EU consumers' and citizens' fundamental rights to freedom of expression and information. The European Commission must not leave it to companies to decide how these rights will be limited. Any limitation should have a legal basis, be necessary to protect the rights of others and be proportionate to the legitimate aim pursued.

BEUC is strongly opposed to the promotion of any self-regulatory initiative in the field of notice-and-action. The impact on fundamental rights and freedoms is significant to be left to private stakeholders. Governments cannot discharge their duty to protect citizens' rights by delegating decisions that limit the free flow of information and freedom of expression to non-judicial or industry bodies.

The shift of enforcement from courts to the hands of intermediaries and right holders cannot be accepted. Whereas a court proceeding provides safeguards of due process and careful analysis of legal questions, enforcement by ISPs deprives the user of a number of fundamental rights, including the right to a presumption of innocence, the right to be heard, the right to due process, the right to privacy and confidentiality of communications.

It is surprising to see that the promotion of voluntary codes of conduct in the field of ISPs liability and notice-and-action by DGN Internal Market contradicts the overall policy objectives of the European Commission. In its White Paper on European Governance, the European Commission, although it recognises the merits of self and co-regulation in specific areas, concludes that such an approach is not suited to cases where fundamental rights are called into question<sup>2</sup>.

### **Conditions of validity of notices**

In order to minimize abusive notices and make sure that host providers are provided with legal certainty, the European Commission should clarify the conditions for a notice to be valid. In particular, every notice should as a minimum:

- Clearly identify the specific content concerned. Notices that require the removal or blocking of a website or broader categories of content are not proportionate and should not be considered valid;
- In the case of copyright protected material, the notice provider should prove that he is the holder of copyright or related rights, while in the case of trademark infringement that the rights have been registered and that they

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<sup>2</sup> European Commission, European Governance, COM (2001)428,21.

are the registered owner or exclusive licensee of that trade mark. In the case of alleged defamatory material, the notice provider should at least be required to identify the defamatory words in question, the date of publication, the meaning of the words that are alleged to be defamatory, and the reasons/basis those words are untrue including an explanation of why a defence would not apply;

- o Provide evidence that the content is indeed illegal, including proof that the allegedly infringing content does not fall within a copyright exception.

In case of invalid and non-substantiated notice, the host provider should not be obliged to consider it and its lack of consideration or action on an invalid notice should not impact on its ability to rely on the protection of the E-Commerce Directive if a valid notice is subsequently served

#### **Actual knowledge: need for clarification**

The e-commerce Directive does not provide for a definition of what constitutes “actual knowledge”, thus opening the door to considerable divergences in national legislations and court practices. A clarification would therefore be welcome in order to ensure legal certainty. BEUC considers that an allegation by a third party should not suffice to have the content removed or blocked. Unless there is an overriding reason of public interest, only a court order should be considered as actual knowledge. This should particularly be the case for alleged infringement of Intellectual Property Rights and for alleged defamatory content.

#### **Expeditious action: need for tailor-made time-limits**

BEUC would welcome the clarification of the “expeditious” action, as foreseen in Article 14 of the E-commerce Directive. However, we would be opposed to the establishment of a timeframe that would apply to all notices received. Different types of content require different action and within different time limits. There is otherwise the risk that host providers would react to notices before having the time to assess its validity and substance and deciding on further steps.

#### **Safeguards against abuses**

Notice-and-action policies must be carefully crafted to minimize mistakes or abuses that can impair the free flow of information and the freedom of expression. Given the amount of notices host providers receive and the absence of a standardized format to be used by notice providers, there is a risk that content will be taken down without a thorough legal assessment under the fear of further litigation. As a result, unjustified notices may be honored. The Electronic Frontier Foundation has created a “Takedown Hall of Shame” where cases of unfounded notice-and-action requests are made public<sup>3</sup>.

It is regrettable that the Memorandum of Understanding agreed between right holders and online commerce platforms on the initiative of the European Commission<sup>4</sup> has only included a duty of care for right holders, without any further consequences. We are concerned as regards the effectiveness of a similar duty in preventing abusive notifications.

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<sup>3</sup> <https://www.eff.org/takedowns>

<sup>4</sup> [http://ec.europa.eu/internal\\_market/iprenforcement/docs/memorandum\\_04052011\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf)

In cases the content has been taken down on the basis of non-valid notice or false information provided by the notice provider, the latter should be liable for damages both to the host service provider and the user or content provider. In cases where the notice can lead to the removal of the content, the affected user or content provider should be entitled to provide counter-notice and prove the legality of the content.

### **Notice and notice procedure for complex cases**

For specific types of content, BEUC supports a system of notice-and-notice, whereby upon receipt of a valid and substantiated notice concerning alleged illegal content the host provider will inform the user or content provider, who will be able to submit a counter-notice, before any action is undertaken. The notice-and-notice system should be used for IPR-related notices, which raise complex legal questions and therefore require an assessment by a court.

### **Type of action required**

Notice-and-action requests should target specific content rather than broader actions from the host providers. Targeted action should not result in the blocking of websites and other online locations and should not result in disproportionate actions that might lead to general monitoring of all data.

According to the United Nations Special Rapporteur, actions that have the potential to limit online expression, access to information and restrict citizens' fundamental rights must be prescribed by law, be necessary to achieve a legitimate aim, be proportionate and effective for achieving the purpose<sup>5</sup>.

BEUC is strongly opposed to filtering and other technical measures to be applied by host providers, including preventive measures that would examine all data. Such measures could only be accepted for types of illegality that go against the public order, but not in the context of IPR enforcement.

First, such measures are unable to distinguish between authorised and unauthorised copyright protected content, public domain works or content freely distributed by the author. Similarly, technical measures may result in bandwidth reduction and the slowing down of traffic, thus causing problems to the use of time sensitive applications and interfering with the neutrality of the network.

From an economic point of view, obliging ISPs to deploy such measures would require a complete reconfiguration of their networks and an increase of their operational costs, which would be passed on to consumers. As a result, ISPs and consumers will have to bear the cost of protecting private rights and business models of the content industry.

The use of specific technologies, such as Deep Packet Inspection, whereby ISPs inspect every bit of information passing over their networks, raises serious privacy concerns and runs contrary to the fundamental right to the confidentiality of communications.

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<sup>5</sup> United Nations, Report of the SR on the promotion and protection of the right to freedom of opinion and expression, A/HRC/14/23, 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>.

Lastly, the impact on innovation and freedom of expression will be significant. The Internet is an important vehicle for citizens to get access to knowledge, information and services, while enabling their participation in public debates. Blocking and filtering every piece of information will seriously undermine the character of the internet as a commons.

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