

2015 - European Commission consultation on on-line platforms

As its title suggests, the Commission's public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy ^[1] covers a lot of different areas. One of these is the rules for on-line intermediaries (at present networks, caches and hosts that carry third party content). Our intended answers to the consultation are as follows - the Commission's online submission form required some of them to be edited to meet word limits:

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

Jisc is the operator of the UK's National Research and Education Network, Janet, which connects UK universities and colleges to each other, to other NRENs across the globe, and to the public internet. Our customers may both act as online intermediaries themselves, by hosting third party content, and rely on other intermediaries in the provision of their education and research activities.

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

Please describe the situation

In order to promote the open discussion of ideas, UK universities and colleges are required by law to "ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers" (Education (No.2) Act 1986 s.43(1)). We are aware of occasions where controversial opinions have been expressed in online postings and those offended by them have claimed that the university was publishing defamatory or otherwise unlawful material. This places the university in a conflict of laws: liable as a host if it continues to publish material that is later judged unlawful, in breach of its statutory duty if it removes material that would have been found lawful. A wrong decision either way will harm protected human rights. The correct way to resolve such conflicts would be through a court, where the necessary facts and legal expertise can be available. However the current Section IV does not permit an appeal to a court: the hosting organisation is compelled itself to make an expeditious choice between them.

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?

Both linking and search play important roles in research and education. The current

inconsistency of treatment between member states may hinder this, both by creating situations where linking and search activities lawful in one country are unlawful in another, and by increasing the plausibility of unsubstantiated claims that a particular action is unlawful in a relevant jurisdiction. Since education and research are international activities, not limited to a single country, organisations may have to limit their activities to those that are unchallenged in all EU jurisdictions. Harmonisation of liability laws for these services would therefore be valuable.

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. The categories listed range from those (such as phishing and child abuse content) where there is international consensus on illegality and a definition that a hosting provider can reasonably be expected to apply, to those where the law is not harmonised (e.g. gambling services) or where legality depends on facts of which the host cannot be aware (e.g. defamation, copyright). Both the form of notice and the action process must take account of these differences. Attempting to fit all of these categories into a single notice-and-action process will result in harmful content not being removed and lawful speech being suppressed.

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

Please explain your answer

As above, for types of material where there are valid defences in law (for example that an apparently defamatory comment is true) the content provider should be given an opportunity to respond to an allegation. Where this results in the allegation being contested, as well as where laws are not harmonised and questions of jurisdiction arise, the intermediary should have an opportunity to seek a ruling from a court while remaining within the liability shield. For an example of these processes, see section 5 of the UK's Defamation Act 2013, where Jisc worked with universities and the Ministry of Justice to develop a process that addresses the conflict, noted earlier, between liability and free speech duties.

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

No

Please explain

This is both legally and technically unenforceable and would merely create further uncertainty for intermediaries, increasing the risk that lawful speech will be suppressed while having very little effect on unlawful material. While it might, in some circumstances, be possible for an intermediary to configure its systems to detect and prevent re-publication of identical material, this could only be done by monitoring all use of systems: contrary to Article 15 of the eCommerce Directive and having a disproportionate effect on privacy and the intermediary's freedom to conduct business according to SABAM v Netlog (Case C-360/10). Such a system could easily be avoided by modifying the material so that it appeared different to the automated check but would carry the same meaning to a human reader. Attempting to order

blocking of "similar" re-publications would create huge uncertainties for intermediaries as to what systems they were expected to deploy. With a risk of liability if they permit a posting later found to be unlawfully "similar" it is likely that many would take a precautionary approach and limit lawful free expression on line.

Source URL: <https://community-stg.jisc.ac.uk/library/consultations/2015-european-commission-consultation-line-platforms>

Links

[1] <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>