

Comments on the Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries



Protecting and Advancing
Freedom of Expression and
Privacy in Information and
Communications Technologies

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The Global Network Initiative (GNI) welcomes the opportunity to provide comments to the European Commission on the “notice-and-action” (N&A) procedures of the E-commerce directive. In our efforts to protect and advance free expression and privacy rights around the world, GNI frequently cites the important protections for intermediaries in the E-commerce directive and considers it an important guarantee of the free flow of information.

GNI is a multi-stakeholder group of companies, civil society organizations (including human rights and press freedom groups), investors and academics, who have created a collaborative approach to protect and advance freedom of expression and privacy in the ICT sector.¹ GNI provides resources for ICT companies to help them address difficult issues related to freedom of expression and privacy that they may face anywhere in the world. GNI has created a framework of principles and a confidential, collaborative approach to working through challenges of corporate responsibility in the ICT sector.²

Given GNI’s unique multi-stakeholder membership and consensus-based approach, we are unable to provide specific responses to all of the questions in the online survey, and we would refer the Commission to submissions by individual GNI members, including companies and other stakeholders. In lieu of specific response we offer the following comments that sum up the consensus view of our participants.

GNI believes that freedom of opinion and expression is a human right and guarantor of human dignity. Policies creating liability for carriers on the basis of content sent or created by users threaten to chill freedom of expression by incentivizing carriers to restrict the use of their services for any content that could be considered controversial, or to restrict the pseudonymous use of these services. In contrast, where governments have sought to promote growth in the expressive (and commercial) capabilities of these technologies, they have enacted protections from liability when companies act as “mere conduits” for content, or simply cache or host content – as is the case with the E-Commerce Directive. The application and scope of such “safe harbor” provisions, however, can be controversial when a particular case comes before a court.³ Policies that impose liability on intermediaries also discourage innovation: ICT companies are left without certainty as to whether they will be held liable for the expression that new products and services enable.

Governments are appropriately concerned about the use of communications networks for illicit purposes or in ways that endanger national security or the well-being of children. Online privacy, child abuse images, hate speech and copyright infringement

¹ The current list of GNI participants is available at <http://globalnetworkinitiative.org/participants/index.php>.

² See GNI’s 2011 Annual Report for more information, available at http://globalnetworkinitiative.org/files/GNI_2011_Annual_Report.pdf.

³ See GNI, “Reflecting on Google in Italy (and Beyond): Implications for Online Privacy and Freedom of Expression in the Internet Age,” available at http://www.globalnetworkinitiative.org/newsandevents/Google_Italy.php.

are all examples of issues that are driving government policy in relation to intermediaries around the world. To address these concerns, governments have adopted a variety of approaches, which may include various forms of self-regulation, co-regulation and legislation. GNI encourages the Commission to pursue an inclusive and transparent approach as it considers measures to address these policy issues while upholding fundamental rights to free expression and privacy online.

There are also voluntary steps that intermediaries can, and do, take to help address these legitimate policy concerns including measures such as offering users tools and guidance for content management, responding promptly to notices of illegal content, and collaborating with law enforcement on child abuse content. GNI offers a platform for shared learning among companies and other concerned parties on how best to balance these concerns.

In 2010-2011, GNI held a learning series on account deactivation and content removal that brought together more than 30 ICT companies together with stakeholders from civil society organizations, investors, and academics to discuss the impact on user rights of the moderation, takedown, and abuse-prevention mechanisms adopted by platforms that host user-generated content.⁴

A report by the Berkman Center for Internet and Society at Harvard University and the Center for Democracy and Technology grew out of this series and its recommendations may prove useful to the Commission as it considers changes to the functioning of N&A procedures.⁵ N&A procedures are one of several contexts in which companies remove content, but they share with other Terms of Use violations a need for clear procedures and transparent communication with users in order to mitigate abuse. Whether notice is provided via electronic communications or other means, it should specifically identify the illegal content and provide the legal justification for action. Where relevant and under appropriate circumstances, it should also contain evidence that the content host could not be contacted before contacting more distant intermediaries. Hosting service providers should then inform the providers of alleged illegal content and provide opportunities for recourse through an appeals process that would guard against abuse and ensure that content that was wrongly removed can be restored.

The global implications of European action merit particular attention, as laws and policies developed in Brussels can serve as precedent or justification for those of other countries, with the potential to undermine the Internet's capacity as a tool for protecting and advancing fundamental freedoms. In Thailand, the troubling conviction of Chiranuch Premchaiporn, webmaster of the online forum Prachathai, for not moving quickly enough to remove content posted by users illustrates the serious harm that occurs when companies are held liable for content uploaded or sent by users. The N&A procedures under the E-commerce directive should provide a positive alternative to loosely defined laws that allow for the prosecution of intermediaries, and provide a regime worthy of imitation worldwide.⁶ With this in mind, we encourage the careful assessment of the global impact of proposed measures on human rights, especially freedom of expression and privacy.

⁴ Notes from the learning series are available at http://globalnetworkinitiative.org/newsandevents/Account_Deactivation_and_Content_Removal.php.

⁵ Erica Newland, Caroline Nolan, Cynthia Wong and Jillian York, "Account Deactivation and Content Removal: Guiding Principles and Practices for Companies and Users" September 2011, available at https://www.cdt.org/files/pdfs/Report_on_Account_Deactivation_and_Content_Removal.pdf.

⁶ Jermyn Brooks, "Thailand Stifles the Internet," Wall Street Journal Asia, 7 June 2012, available at http://professional.wsj.com/article/SB10001424052702303753904577450003790426984.html?mod=google_news_ws&mg=reno64-wsj.