



ISPA comments on the Draft Recommendations for Public Private Cooperation to Counter the Dissemination of Illegal Content within the European Union

ISPA

The Internet Services Providers' Association (ISPA) is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

ISPA membership includes small, medium and large Internet service providers (ISPs), cable companies, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA. EuroISPA is the voice of the EU Internet industry and the largest umbrella organisation of ISPs globally.

Overview

ISPA welcomes the fact that the Commission seeks to improve the cooperation between Internet Service Providers, law enforcement agencies, complaint hotlines and other relevant stakeholders to address the fight against the dissemination of online illegal content more efficient. However, ISPA is of the opinion that current Draft Recommendations for Public Private Cooperation to Counter the Dissemination of Illegal Content within the EU will not achieve this in their current form. ISPA calls on the Commission to take the necessary time to reconsider its initiative and to engage comprehensively with all relevant stakeholders.

ISPA's response complements that of EuroISPA and gives a UK perspective on the proposals. ISPA has identified some issues and concerns with the draft recommendations which are detailed below.

- Draft Recommendations are based a number of questionable assumptions which would not have been surfaced had the starting point been an open and collaborative engagement.
- Each of the three content areas covered by the draft recommendations pose a different set of problems and the Commission should not tackle them with a one-size-fits-all approach.
- There is a lack of clarity of the overarching policy objectives for various Commission proposals and how they will operate together in practice. The Draft Recommendation fail to address the issue of jurisdiction.
- An assessment of the impact that the Draft Recommendations will have on the Internet industry is lacking.

Evidence base

ISPA is a proponent of self-regulation and voluntary measures and considers them a cost-efficient and effective means to deal with many of the issues that face the Internet industry. However, it is ISPA's experience that these kinds of voluntary systems only become effective if they are developed in conjunction with industry and designed to address specific goals that are shared by all parties involved. The Draft Recommendations seek to set up a voluntary framework for notice and takedown procedures yet it is based on a number of questionable assumptions which would have been surfaced had the starting point been an open and collaborative engagement with the Internet Industry and other relevant stakeholders. This becomes apparent in the partially flawed recommendations that the Commission has produced which will not secure the widespread support of the internet ecosystem from stakeholders.

UK context and one-size-fits-all approach

Self-regulation can be an effective tool to deal with illegal online content but only under specific circumstances and where specific issues are comprehensively addressed. In the UK for, example, this is demonstrated by the Internet Watch Foundation (IWF) of which ISPA is a founder member. The IWF was founded by the online industry in 1996 to work in partnership with industry, law enforcement agencies, Government and the public to minimise the availability of certain types of illegal online content, particularly child abuse content. The IWF has established an effective and voluntary notice and takedown system for child abuse images in the UK which has resulted in the amount of child abuse content hosted in the UK falling from 18% to less than 1% since 2003. The IWF's remit was extended by Government to include online incitement to religious and racial hatred as it became an offence in the UK under the Religious and Racial Hatred Act. The success of the IWF centres on the strong legal framework that underpins the criminalisation of possession and publication of child abuse images, the endorsement of this approach by government and other stakeholders, the good governance of the IWF and the transparency in which the public has confidence. The IWF model is not mirrored across Europe and any recommendations made by the Commission must take into account that not all hotlines or even law enforcement authorities enjoy this level of expertise, public confidence and authority to issue notices in this way.

The recommendations identify online content related to terrorist activities as an example of content it wishes to address. ISPs in the UK cooperate directly with UK law enforcement authorities but this takes place within a clearly defined legal structure, where roles and responsibilities are clearly defined. The UK recently launched an online reporting tool for illegal radicalisation content

on the Internet. The tool was set up by the Home Office and law enforcement and is used to serve notices on ISPs. Crucially, the system is backed up with legislation – the Terrorism Act 2006 – to give clarity of what is being asked of an ISP and so that they do not have to make judgment calls in a sensitive policy area.

The illegality of content is not always straightforward to identify. It is relatively easy to identify child abuse content but content which incites religious and racial hatred is less well understood and definitions are not tested in the courts. Such complex legal definitions are more appropriately settled by legal experts and in some cases the courts. Overall each of the three content areas covered by the draft recommendations pose a different set of problems and ISPA would thus urge the Commission to take into account each of these content areas and their respective complexities and challenges rather than tackling them with a one-size-fits-all approach.

Clarity of purpose

The Commission wishes to look into a voluntary approach to notice and takedown of illegal content. To do so, there is a clear need to define what problems the Commission aims to address. The proposals talk in general terms about hotlines and public authorities being able to send notices, but providers need clarity on the more practical aspects of the proposed scheme.

The crucial details which merit very detailed discussion include:

- Clarity on which agencies and hotlines are authorised at national level to give notices and who has liability if the notice is challenged or proved to be wrongly given
- Who is responsible and publicly accountable for assessing the legality of content (it would not be appropriate for the ISPs to do this role, rather an appropriately qualified and expert agency)
- What safe harbours can be granted to providers who act in good faith
- What roles and responsibilities different players will have
- How site owners can appeal against wrongful notice
- How the overall process will be transparent to end users and secure public confidence

ISPs do not want to play judge and jury when deciding on the legality of the content reported to it. Therefore, any voluntary code needs to address legal issues in greater detail to give certainty to ISPs. We would welcome the legal certainty being placed on law enforcement so that if an ISP is served a notice, liability is not placed on an ISP. This is the case in the UK with IWF. Moreover, there need to be safeguards in place so that ISPs do not receive requests from self-appointed authorities or are asked to remove material that falls outside the scope of the proposed framework.

The recommendations imply that providers' terms of service could be used by authorised agencies and/or hotlines as a means of enforcing the law and treated as equivalent to a formal legal process. The effect of adopting these recommendations would be to endorse this as EU policy and encourage enforcement bodies to act in this way. This would bypass legal due process, which is both transparent and publicly accountable in line with European legal and social norms. To have terms of service routinely abused in this way as an alternative to legal due process is not appropriate and would not be acceptable to ISPA members.

There are currently several initiatives being undertaken in Europe on this issue: the draft recommendations, the Dutch Code of Conduct and the Draft Directive on sexual abuse, sexual exploitation of children and child pornography. ISPA members would welcome clarity of the overarching policy objectives for these proposals, how they will operate together in practice and reassurance that they amount to a coordinated effort within the Commission.

Jurisdiction

The recommendations and accompanying documentation is silent on the matter of jurisdiction. The UK operates a notice and takedown system in the UK. Any pan-European initiative must take into account the varied nature of the legal systems in Europe. For instance, legal definitions and thresholds vary between markets as do legal processes and the authorities who are responsible for them. This presents challenges for the development of a pan-EU voluntary approach and therefore uncertainties for ISPs. This initiative should consider whether these differences can be overcome in order to develop a coherent and clear EU framework.

As noted above, ISPA is aware that EU-level initiatives, e.g. the various framework decisions that are quoted in the Draft Recommendations, partially harmonise the relevant rules across the member states but ISPA still urges the Commission to look in to this matter in greater detail and to provide more clarity for the Internet Industry. For instance, if notices are received by a UK ISP from a European country, the legal defence for removing the material may be less clear compared to a request from a UK user.

Impact

The recommendations make no assessment of demand for this process or the volume of notices such a scheme may yield. An upsurge from notices from throughout Europe would impact upon existing processes. ISPs need to be prepared for an increase in the number of notices it may receive so that abuse and compliance teams are able to function as normal. This is particularly true given that ISPs are being asked to remove illegal content within two days. The draft recommen-

dations do not take this into account. Impacts such as these should be considered as part of a regulatory impact assessment which we invite the Commission to complete as part of the next phase of these discussions.

Conclusion

ISPA welcomes the Commission's initiative in this area as a means of bringing different stakeholders to discuss how to facilitate timely notice and take down of content. ISPA members experience shortcomings in the existing arrangements and these should be acknowledged and openly debated in a forum like the private-public dialogue. However, the recommendations as they stand are based on a number of assumptions and insufficient evidence about how current arrangements between providers and enforcement authorities work in practice and how different they are between authorities and between member states. It is critical that the Commission step back and take time to consult with the various stakeholders and build a more complete picture of the current situation before moving forward with draft recommendations.