

Op weg naar evenwicht

Een onderzoek naar zorgplichten op het internet
(Towards a Balance: Duties of Care on the Internet)



Institute for Information Law (IViR)



Leibniz Center for Law

Prof. Dr. N.A.N.M. van Eijk
Prof. Dr. T.M. van Engers

Mr. C. Wiersma
Mr. C.A. Jasserand
Mr. W. Abel

University of Amsterdam
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Summary

Commissioned by the WODC (Wetenschappelijk Onderzoek- en Documentatiecentrum), research has been conducted on duties of care on the internet, more specifically from the perspective of Internet Service Providers. Internet Service Providers currently find themselves in the spotlight, both in a national and international context, with regard to their relationship both with governments and other private parties, on for example questions of (civil) liability. This research focuses on duties of care as concerns the relationship between government and Internet Service Providers. When such a duty of care does not exist, whether or not duties of care have been developed for others along the value-chain between providers of information services and end-users, including Internet Service Providers, was examined.

The situation in four countries – the Netherlands, UK, Germany and France – was researched. The (self-) regulation in respect to five separate themes (internet security and safety, child pornography, copyright, identity fraud and the trade in stolen goods through internet platforms) was identified. In addition to this, a significant number of interviews with stakeholders were conducted.

The research presents divergent results, which indicates that the related issues are still in a developing stage. Internet security and safety, more specifically the relationship between the Internet Service Provider and the end-user, has only been dealt with in a preliminary manner. This does not mean that in practice nothing happens, but there is a lack of formal embedding in regulation or self-regulation. In respect to child pornography, an almost identical regime exists in the examined countries. Stakeholders offer far-reaching cooperation in the fight against child pornography. All countries have established a system of hotlines for the notification of child pornography, based on self-regulation or a duty of care defined by legislation. A reappearing subject for debate surrounding the fight against the dissemination of child pornography is the applicability of filtering and blocking measures. Copyright attracts a lot of attention causing more stringent regulation of copyright issues in two of the examined countries, which provides the possibility of cutting or limiting the access of end-users to the internet. There is a lot of negative critique on these more stringent regulations and, through the conducted interviews, stakeholders have raised clear concerns on the effective enforceability of the new rules. When dealing with identity fraud, the measures are focused on its consequences. There is not a lot of support for criminalizing identity fraud as such (in addition to already existing possibilities to counter identity fraud through other public laws). The sale of stolen goods through platform providers (i.e. auction and trading websites) is considered to be the responsibility of these providers.

The divergent results, which are proof of an ongoing dynamic in these fields and an ongoing search to find a right balance, imply that it is not possible to present proven best

practices. This also implies that on the one hand there is still a lot of insecurity, while on the other a clear challenge is presented for further policy-making. Nevertheless, the collected research results provide interesting information.

The authors present the following conclusions based on the conducted research:

1. Towards a value-chain approach

The examined duties of care cannot be related to one specific party in the value-chain between information service providers and end-users. They should be considered as a shared – and balanced – responsibility of all involved stakeholders in the value-chain of which, in addition to Internet Service Providers, providers of information services, platforms, search engines and hosting services are part.

2. Ex ante examination of effectiveness and enforceability

Examination in advance of the effectiveness and enforceability of (planned) legal intervention can contribute to the prevention of symbolic legislation and undesired effects.

3. Usability of ‘notice and take down’ procedures

‘Notice and take down’ procedures are a widely accepted and applied mechanism. Not only do Internet Service Providers apply these or similar procedures (when acting as a provider of hosting or caching services), but other parties in the value-chain, such as platform-providers, do the same. In most of the examined countries, a specific legal ground for this practice is missing. Self and co-regulatory initiatives exist however. It is recommended to further embed ‘notice and take down’ procedures, for example by implementing a specific legal framework.

4. Clarification of internet security, safety and privacy

The new provisions on internet security, safety and privacy (more specifically, article 4 of the European Directive on privacy and electronic communications) are unclear and demand further clarification on their meaning and impact. Clarification at the European level is desirable to prevent excessive divergences at the national level.

5. Elevation of the knowledge level

The inclination to develop and apply further regulation is partly caused by a lack of sufficient technical and practical knowledge. This lack of knowledge appears to be widespread. It is to be expected that the inclination to regulate will decrease when end-users, regulatory authorities, enforcement authorities and legislators increase their knowledge level. The importance of education is widely emphasised.