

## Summary

# WODC Research: Legal routes for the speedy removal of unlawful online content

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This study was set up in the context of the Dutch Minister for Legal Protection's agenda to improve the position of victims of unlawful online content. The motivation behind this study is that, often, people find it too difficult to get unlawful content removed from the Internet quickly.<sup>1</sup> The report provides insight into the legal and practical feasibility of a new procedure for the removal of unlawful online content that affects people personally. Unlawful content online is information, posted by people on the internet, that is unlawful because of its harmful effects and/or because it seriously affects the interests of others. One can think of examples such as online threats, privacy infringements or revenge pornography. The aim of the research is to investigate whether there could be a suitable procedure in the Netherlands that enables people to remove this unlawful online content as quickly as possible. The research focuses on unlawful online content that falls within the scope of the right to private life under Article 8 of the European Convention on Human Rights ("ECHR"). The research was carried out through a combination of legal and qualitative approaches. This included analyses of academic literature, case law, legislation, other relevant documentation, as well as a representative survey in the Netherlands, a series of expert interviews, and two expert group workshops.

The challenges of removing unlawful online content are complex and heterogeneous. In the survey findings, it can be deduced that 15 per cent of the Dutch population has direct or indirect experience with the type of harmful, and possibly unlawful, content. Both the survey and expert interviews have also show that the difficulty of getting unlawful online content removed is widely seen as a societal problem. The heterogeneity of the problem is due to the wide variety of types of unlawful content, the diversity of internet services involved, and the different types of damage that the content may cause. Further, the problems surrounding the fast removal of unlawful online content lies at the intersection of the broader issues of access to justice and internet regulation.

<sup>1</sup> See the government's response to the citizens' initiative "Internetpesters aangepakt", Lower House, session year 2018-2019, 34 602, no. 2.

The problems that an individual may encounter when seeking to remove unlawful content are summarised in seven obstacles, shown in the table (Figure i). In order to gain insights into the societal need for a new procedure, various existing possibilities have been analysed as to the extent to which they can remove these obstacles.

Individual obstacles
Can the internet service be reached
Type of unlawful content
Type of internet service
Need for expert knowledge
Returning content
Personal circumstances
Access to justice

Figure i

The following specific procedures have been examined. Firstly, four distinct types of civil proceedings were considered in which the court can be asked for an order to remove unlawful content. In practice, the length of ordinary civil proceedings is 6 to 9 months on average. In urgent cases, an injunction can be obtained in a relatively short period of time in summary proceedings. Both situations require a mandatory legal representation by a lawyer. In contrast, no lawyer is required in the application proceedings that are open to the exercise of data subject rights under the General Data Protection Regulation (“GDPR”). These proceedings are seen as more flexible and informal because the court is responsible for summoning the parties concerned. Finally, the ex parte procedure under Article 1019e of the Dutch Code of Civil Procedure (“RV”), currently restricted to intellectual property cases, was examined. The ex parte procedure can only be used in very urgent situations and creates the possibility for obtaining an interim injunction from the civil court without first hearing from the other party. None of these proceedings remove all obstacles, but the possibility for targeted experimentation to (partly) reduce specific barriers for litigation does exist.

In addition to the private law route, the administrative law route through the Dutch Data Protection Authority (“AP”) has been discussed. In the event of a breach of the GDPR, an individual can submit a complaint to the AP. It lies within the AP’s discretionary power to decide whether the complaint will be dealt with. In order to have specific unlawful content removed, the AP has the possibility to impose fines or periodic penalty payments. Further, the GDPR also grants individuals rights that can be exercised against someone who infringes their rights. An individual must first turn to the infringing party (the processor) and if they refuse to cooperate, there is a second possibility to enforce this through a civil application procedure.

Aside from assessing formal legal routes, the analysis of the Notice and Takedown procedure offered by relevant internet services is also central to the research. Although it is strictly speaking not a formal legal route, it has significant importance in practice due to its accessible, low-threshold nature. An individual can follow the complaints procedure offered by an internet service where the internet service itself also decides whether the content will be removed. If a Notice and Takedown procedure does not result in removal, an individual can, as a last resort, turn to the court. Finally, the report pays attention to the value of the crime reports and how the criminal justice system can play a role in the removal of unlawful content online.

These seven different procedures included in the analysis have subsequently been assessed against a number of criteria derived from a discussion on access to justice, the fundamental rights framework of Articles 6, 8 and 10 of the ECHR and the experiences and interests of people who are confronted with unlawful content online. These criteria include the duration of the proceedings, the barriers to litigation (broken down into costs and complexity), procedural guarantees, safeguards for freedom of expression, effectiveness, and capacity/scalability.

This analysis is summarised in the figure below (Figure ii). When considering the figure as a whole, it becomes clear where certain trade-offs need to be made. There are, on the one hand, procedural routes that are fast, accessible and scalable and, on the other hand, procedures that offer optimal rule of law and fundamental rights safeguards. A combination of all these qualities in one procedure seems unattainable.

	Scalability	Duration	Costs	Complexity	Procedural Safeguards	FoE Safeguards	Effectiveness
<b>Civil law</b>							
Main proceedings	Red	Red	Red	Red	Green	Green	Green
Application procedure	Red	Orange	Orange	Orange	Green	Green	Green
Summary proceedings	Red	Orange	Orange	Orange	Green	Green	Green
Ex parte	Orange	Green	Red	Orange	Green	Orange	Orange
<b>Administrative law</b>							
Complaint AP	Orange	Red	Green	Green	Orange	Orange	Red
Rights GDPR	Green	Green	Green	Green	Red	Orange	Red
<b>Non formal</b>							
Notice & Takedown	Green	Green	Green	Green	Red	Red	Orange

**Red:** the procedure does not score well on the criterion.  
**Orange:** the procedure scores moderately on the criterion.  
**Green:** the procedure scores well on the criterion.

Figure ii

Due to the heterogeneity of the problem and the different trade-offs that need to be made in designing a procedure, there appears not to be one comprehensive solution for the investigated problem in the sense of one specific legal procedure. However, various scenarios are conceivable for adapting and improving the applicable legal frameworks and procedures that apply. These scenarios are not mutually exclusive but can reinforce each other as they are aimed at removing the obstacles and bottlenecks on various fronts. There are five promising directions for potential solutions:

**1. Further standardisation and codification of the Notice and Takedown procedure, at national or EU level.**

A number of other European countries have already taken these steps in their national legislation and something similar is currently being prepared at EU level by means of the Digital Services Act, which will bring additional regulation for e-commerce and internet services. In standardising Notice and Takedown procedures, attention must be paid to prevent the removal of lawful content and to provide procedural guarantees. The current use of Notice and Takedown procedures by police and judicial authorities should also be critically reviewed.

**2. Experimenting with civil procedures through the use of the Temporary Experiments Act for the administration of justice.**

This act allows for temporary changes in civil procedures in order to see how these function in practice. Experimenting with the subdistrict court procedure, the application procedure that is already available for the exercise of GDPR rights, and/or the ex parte procedure, the advantages of the subdistrict court procedure are that it is tailored to urgent cases, there is no mandatory legal representation and it has a wider scope than the application procedure, although the latter may be more accessible to injured parties. An ex parte procedure can provide a solution in very urgent cases which are relatively easy to deal with, but the exception to the adversarial procedure deserves special justification and clear demarcation.

**3. Improving the complaints procedure at the AP and expanding the scope of the AP's responsibilities.**

The AP could play a broader coordinating role in tackling illegal online content that affects people personally. After all, this is in line with the tasks it already performs, which touches on issues of privacy, honour, and reputation. Expanding the tasks of the AP should, however, be considered in light of the broader discussion on the lack of capacity and resources.

**4. Giving more civil or administrative significance to the report of a crime is neither legally desirable nor realistic.**

However, there is a possibility to develop (further) guidelines for the detection and prosecution of offences related to illegal online content. Such guidelines could provide more clues for interested parties. For example, victims can decide whether it makes sense to report it, and for the police, to know how to approach and prioritise the type of cases covered by this study.

**5. Improving the provision of information to victims of unlawful online content, in particular with regard to the route they can follow for the removal of unlawful online content (or having it removed).**

This can be done, firstly, through an obligation for relevant internet services to provide uniform information on available removal procedures. It could, secondly, also build on existing initiatives - private and public - to provide information to victims of unlawful online content about their rights on the Internet and ways in which they can exercise those rights.

The report concludes that much can be gained by setting up a central knowledge centre or hotline to which stakeholders can turn to for an integrated roadmap. A layered supply of information - both to those seeking justice themselves and to lawyers who provide them with help and assistance - is crucial in this respect. The independence of such a hotline or knowledge centre and the involvement of already existing independent supervisors with tasks in the field of unlawful online content are important points of attention.

In general, as a first step, unlawful online content is best dealt with via well-functioning complaint and Notice and Takedown procedures provided by the internet services concerned. Subsequently, public authorities have a clear and important role to play in ensuring fundamental rights and the rule of law by ensuring that individual rights can be enforced through judicial intervention. The responsibility for the protection of fundamental rights, both the protection of the right to private life and freedom of expression, requires an active role for public authorities in tackling unlawful online content. The importance of protecting these fundamental rights is also the main argument for considering special provisions to deal with illegal content. However, this study concludes that, due to the heterogeneity of the problem, there is no uniform solution. It offers the above recommendations to remove existing obstacles and to match the various problems as closely as possible to existing societal needs.

