[NL] Dutch Code for Notice-and-Take-Down

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In the Netherlands a code of conduct on Notice-and-Take-Down (NTD) has been drawn up. The code establishes a procedure for intermediaries that have been notified about online content that is punishable or unlawful.

The code was presented to the secretary of Economic Affairs and announced in a press release on 9 October 2008. It was adopted in the context of a project undertaken by the *Nationale Infrastructuur Cyber Crime* (National Infrastructure against Cybercrime - NICC), a public private partnership that brings together stakeholders to collaborate in the fight against cybercrime. The partnership includes broadband providers, cable providers and Dutch government authorities. The code is based on an inventory of the existing NTD practices exercised by the stakeholders. Additionally, ministries, law enforcement agencies and organisations such as eBay and the *Bescherming Rechten Entertainment Industrie Nederland* (Protection Rights Entertainment Industry Netherlands - BREIN), the Dutch rightsholders representative, were involved in the drafting process. An official list of participants does not exist; participants are obliged to notify of their adherence to the code on their website. Compliance to the code is completely voluntary and cannot be formally enforced.

The code defines intermediaries as hosting and mere conduit providers and providers of space on the internet where third parties can publish content, e.g. BitTorrent sites, forums, online market places and music and video sites. The code applies to situations in which Dutch law is applicable and to information that is punishable or unlawful under Dutch law.

The code permits intermediaries to develop criteria for “undesirable” content and to treat notices of such content in the same way as notices of illegal content. The code defines “undesirable” content as content that the intermediaries themselves find undesirable and do not want to host.

The code makes a distinction between notifications made by a private party and those made by law enforcement officials. Intermediaries cannot question formal notifications of law enforcement officials that are part of criminal investigations relating to a criminal offence. However, on the initiative of the Dutch government, Cycris, the Centre for Cybercrime Studies, made a study of the Dutch law on NTD. Cycris concluded - amongst other things - that there are insufficient statutory

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grounds for a NTD order on the part of the public prosecutor. The code does not seem to take this conclusion into consideration.

Private parties, when making a notification, must include their contact address, a description of the content, the location where the content can be found (URL) and a clarification as to why the intermediary addressed is the most suitable to handle the notification. Intermediaries have to evaluate the notifications of unlawful or punishable content by private parties and the (non-formal) notifications by law enforcement officials within a reasonable time limit.

In the case of content that is “unequivocally” unlawful or punishable, the intermediary must remove the content immediately. No put-back rights are formulated in the code and no reference is made to freedom of expression. The code requires intermediaries to take precautions to ensure that no more content than requested in the notification is removed. To the contrary, when the content is not “unequivocally” unlawful or punishable, the intermediary is under no obligation to remove the content. When content cannot be clearly evaluated, the content provider and the notifier must come to an agreement or the notifier can choose to either make an official report to the police or start civil proceedings. However, the code stipulates that the law does not oblige intermediaries to cooperate with the notifier by handing over data identifying the content provider and that the provision of such data cannot be enforced in all circumstances.

“Notice-And-Take-Down Code of Content”, National Infrastructure against Cybercrime

http://www.samentegencybercrime.nl/UserFiles/File/NTD_Gedragscode_Opmaak_Engels.pdf

Wat niet weg is, is gezien. Een analyse van art. 54a Sr. in het licht van een Notice-and-Take-Down-regime, Cycris

http://www.cycris.nl/uploads/NTD-54a_rapport_--_30_november_2007.PDF

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