

NOTICE-AND-TAKE-DOWN CODE OF CONDUCT



Version 1, October 2008

Please note that this English translation of the Dutch original has been made for the purpose of courtesy only. The Dutch version shall be leading.

NOTICE-AND-TAKE-DOWN CODE OF CONDUCT

1. Scope

- a. This code establishes a procedure for intermediaries to deal with reports of unlawful content on the Internet.
- b. The code is provided for intermediaries that provide a public (telecommunications) service on the Internet in the Netherlands.
- c. This code is not applicable to situations in which other statutory obligations or liabilities apply for intermediaries on the basis of legislation and jurisprudence.

2. Definitions

- a. A report concerns the reporting by a notifier of (alleged) unlawful content on the Internet to an intermediary with the objective of having this content removed from the Internet.
- b. The notifier is a person or organization that makes a report.
- c. The content provider is the person (or organization) that has placed (contested) content on the Internet.
- d. An intermediary is the provider of a (telecommunications) service on the Internet.
- e. An inspection or investigation service is a legally appointed governmental service that has general or particular powers of investigation.

3. Intermediary's own Notice-and-Take-Down policy

Intermediaries have their own Notice-and-Take-Down procedure that the public must be able to consult and that is consistent with this code. This procedure describes how intermediaries deal with reports of unlawful content on the Internet. By means of this procedure, intermediaries wish to

ensure that a report is always dealt with and that unlawful content is removed from the Internet.

- a. An intermediary publishes a procedure in which the manner and within which time limits reports are dealt with by the intermediary. Distinctions can be made between various different forms of service provision within this procedure.
- b. An intermediary can publish conditions of use within its service provision agreement in which criteria state what constitutes undesirable content in the view of the intermediary.

4. Reports

It is preferable that a report is only made once it is likely that the notifier and the content provider will be unable to reach an agreement. The notifier is responsible for ensuring reports are correct and complete.

- a. The intermediary must be able to verify that reports as part of an investigation regarding a criminal offence have originated from an inspection or investigation service, or – in the case of a formal legal order – from the Public Prosecutor's Office.
- b. For reports other than those stated in Article 4a, the notifier in any case provides the following information:
 - the contact details of the notifier;
 - the information that the intermediary needs to be able to evaluate the content, at least including the location (URL);
 - a description of why the content is unlawful according to the notifier, or why it is in conflict with the criteria published by the intermediary governing undesirable content;
 - a statement of the reason why this intermediary is being approached as the most appropriate intermediary to deal with the matter.

- c. A notifier can request that the intermediary deals with the report as a matter of urgency. The reasons for this should be fully explained by the notifier. The intermediary determines whether the report is dealt with as a matter of urgency on the basis of the explanation of the reasons.
- d. An intermediary can request an explicit indemnity from a notifier against claims from the content provider as a result of taking measures in the context of dealing with the report.

5. Evaluation

On receipt of a report it is dealt with by the intermediary according to the intermediary's own procedure.

- a. Reports as referred to in Article 4a concern punishable content.
- b. An intermediary evaluates reports as referred to in Article 4b to determine whether they are unequivocally unlawful and/or punishable.

6. Measures to be taken

The intermediary takes action on the basis of the results of the evaluation process.

- a. In the event that the intermediary determines that the content concerned is not unequivocally unlawful, the intermediary informs the notifier accordingly, together with the reasons for this.
- b. In the event that the intermediary determines that the content concerned is unequivocally unlawful, the intermediary ensures that the content concerned is immediately removed.
- c. In the event that it has not been possible to come to an unequivocal judgement as to whether the content concerned is unlawful, the intermediary informs the content provider about the report with the request to remove the content or to contact the

notifier. If the notifier and the content provider are unable to reach an agreement, the notifier can choose to make an official report to the police if in his or her opinion it concerns a criminal offence. If it concerns content that is alleged to be unlawful under civil law, it is preferable that the notifier is able to bring his or her dispute with the content provider before the courts. Should the content provider be unwilling to make him or herself known to the notifier, the intermediary can decide to provide the notifier with the content provider's name and contact details or to remove the content concerned.

- d. The intermediary exercises due caution in the execution of the measures that have to be taken to ensure that the removal of any more content than that to which the report refers is avoided.

7. Final provisions

- a. Those who subscribe to and make use of this code make this known.
- b. Those who make use of an alternative NTD procedure make this known.
- c. Notifiers and intermediaries can come to a mutually acceptable agreement to make use of (shortened) procedures that differ from or that are supplementary to this code of conduct.
- d. Amendments to this code are made on the instigation of the initiators of this code.

EXPLANATORY STATEMENT

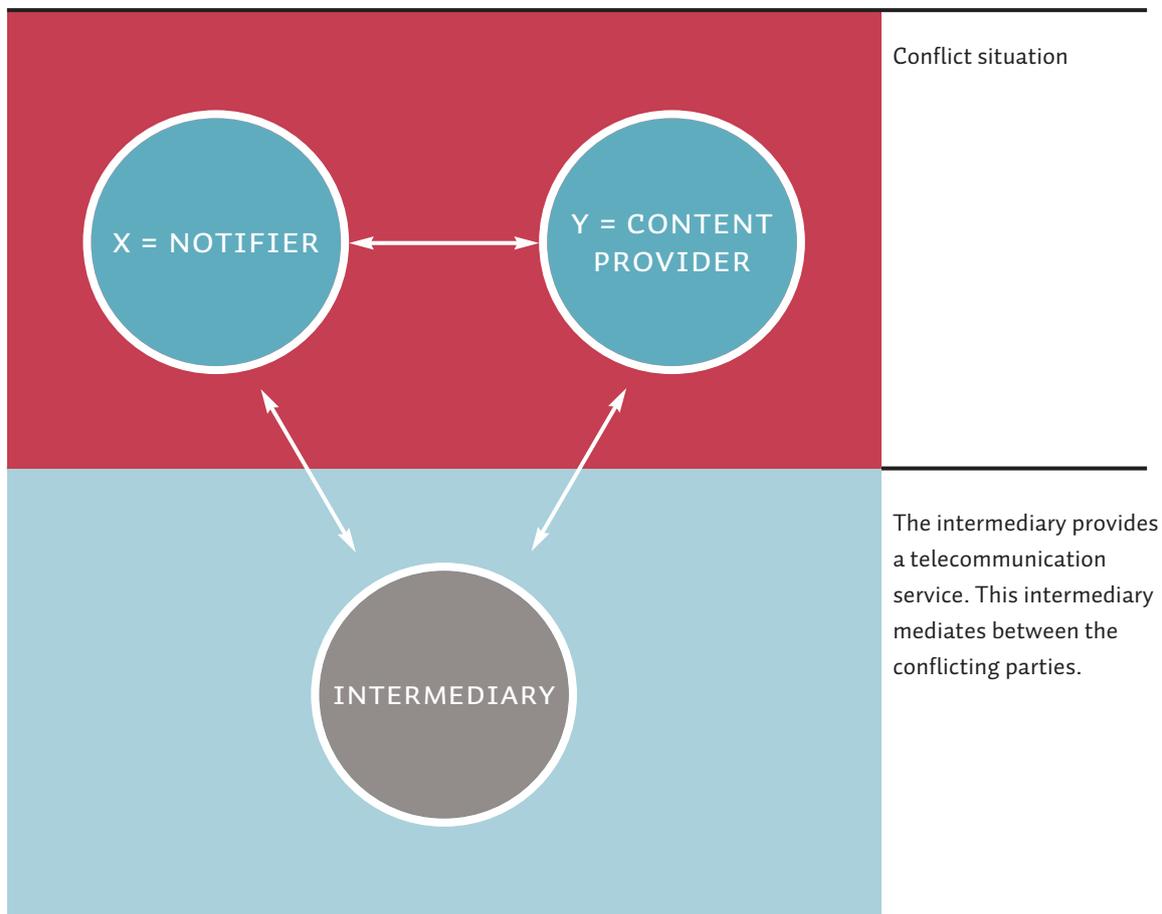
Introduction

This NTD code is one of the items of an initiative of organizations that are doing their best to combat the presence of unlawful information ('content') on (the Dutch component of) the Internet. The initiative has originated from the desire of governmental and private sector organizations to establish agreements in the field of Notice-and-Take-Down (NTD).

A description of the form and substance that these organizations have given to these agreements is presented in this code. Use has been made of both expertise in the field and best practices in the drawing up of the NTD code.

The code establishes no new statutory obligations, but is intended to help organizations to operate with care within the existing legislative framework in the removal of information from the Internet at the request of third parties. A procedure is described for this. Complying with the code is voluntary, and there can be no formal enforcement in the case of non-compliance. The benefits of complying with the code lie in the achievement of more efficient procedures and in the reduction of liability risks. The organizations that endorse the code operate according to the procedures described here. It is therefore a code of conduct that lays down the conditions for the interactions between the parties involved.

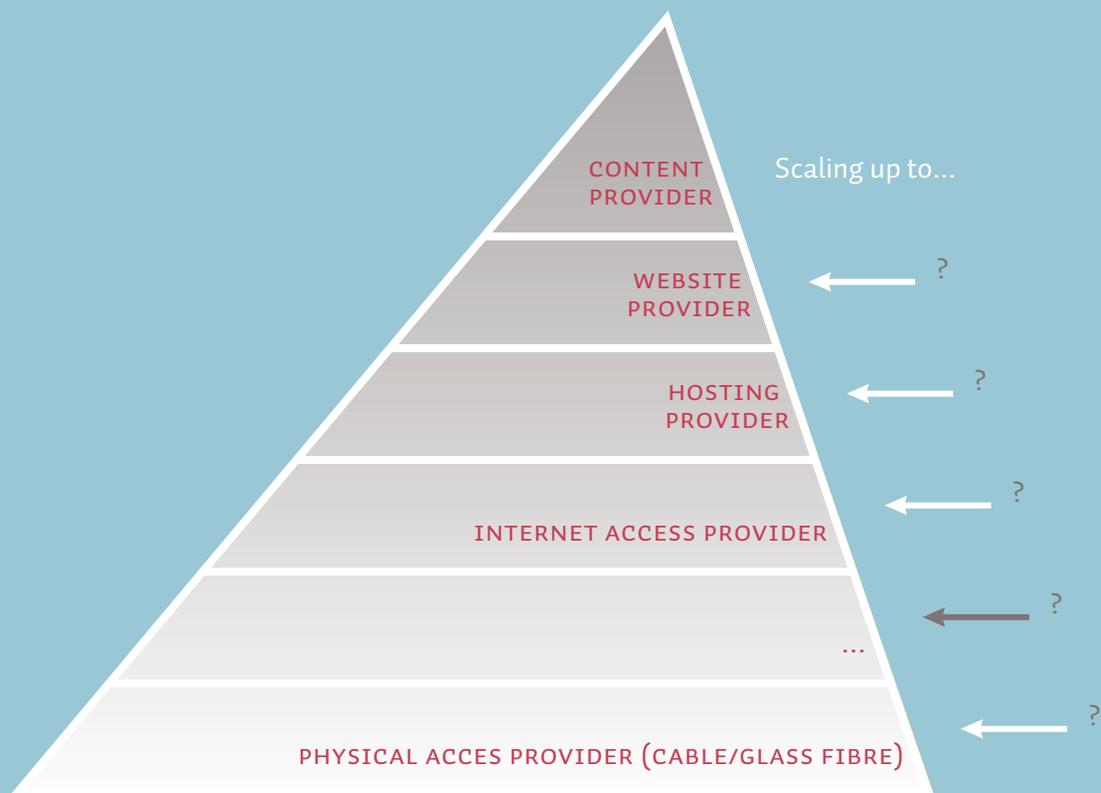
The NTD code addresses the way reports concerning (alleged) unlawful content on the Internet are dealt with. In addition, the code can also be employed with respect to content that intermediaries consider to be undesirable or damaging. The code should contribute to the ability of private individuals and organizations to deal effectively with these types of reports between themselves as far as possible. The possibility always remains for them to bring the matter before the courts or to make an official report to the police.



A notifier wishes that certain content be removed from the Internet. In the first case the notifier should communicate this to the content provider.

The content provider is the person, body or organization that has placed certain content on the Internet or that is responsible for the space on the Internet of which a third party is able to make use (a forum, for example). In practice, however, the content provider is often unknown to the notifier. In such cases the notifier can turn to an intermediary.

The NTD code provides preconditions for the procedure that the intermediary follows in order to facilitate the resolution of the conflict. In this respect it is important that the notifier finds the appropriate intermediary: the content provider uses a facility provided by the intermediary on the Internet. Who the most appropriate intermediary is can vary from case to case. It is also possible that an intermediary does not respond or is also unknown. In these cases it is possible to 'scale up' to the next intermediary.



Example:

There is a website on which third parties (private citizens) can post short films they have made themselves. A short film has been placed on this site that contains discriminatory content. The content provider is the individual who posted the film. If this person is unknown (if the film was posted anonymously), the first intermediary who can be contacted about this is the owner of the website on which the film has been posted. If the website owner is also unknown or does not respond, the next intermediary is the company that provides the space for the site to its owner (hosting service). Scaling up to the next level could involve contacting the company that provides access to the hosting provider (access provider / 'mere conduit').

The objective of the NTD code is to ensure that a report is always dealt with. This does not mean that the content must always be removed. It may well be that a report is made with respect to a site that eventually is found not to be in conflict with the law. If the content is found to be in conflict with the law, an intermediary must facilitate or assist in the removal of the unacceptable content, or in bringing the notifier into contact with the content provider.

EXPLANATORY NOTES TO THE ARTICLES

Note to Article 1a:

The code applies to information that conflicts with the laws of the Netherlands. A distinction must be made between information that constitutes a criminal offence and information that is conflict with civil law (unlawful). The parties involved are also free to decide for themselves which information is considered as 'undesirable', irrespective of the question of it being in conflict with the law. They can deal with this undesirable information in the same way as information that is in conflict with the law.

Note to Article 1b:

An intermediary is a person or organization offering services in any manner relating to the storage, transmission or provision of information on the Internet. It concerns situations in which the laws of the Netherlands are applicable, and on the public part (in a physical sense) of the Internet.

Amongst others, examples encompass:

- » hosting
- » mere conduit
- » space on the Internet where third parties can place content.

Examples: bit torrent sites, a forum, auction and shopping sites, sites with space for (links to) (self-made) films, music etc.

Internal corporate networks, for example, are not 'public', and therefore do not fall under the scope of this code.

Note to Article 1c:

For specific application areas, different rules may apply that go further than what is laid down in this code. The rules laid down in the law and jurisprudence will always take precedence of course.

An example in practice would be the (illegal) distribution of copyright protected content on the Internet, for which liabilities would apply to intermediaries that would take precedence over those described in this code of conduct. This code of conduct also provides no barrier to a legal injunction or a formal legal order.

Note to Articles 2c and 2d:

The code makes a distinction between 'content provider' (Article 2b) and 'intermediary' (Article 2c). In practice it can occur that the intermediary facilitates the content of third parties in such a way that the service provided by the intermediary may also be considered to be unlawful. This can be the case for example where a website refers to illegal material in a structural way. In these cases, the 'intermediary' can be treated as the 'content provider'.

A 'notifier' can be a private citizen or a governmental organization, but also a body that has been established to, and is specialized in, reporting instances with respect to specific subjects.

Note to Article 2e:

In addition to the police, this can also refer to particular or special investigatory services and inspectorates.

Note to Article 3a:

A reasonable time limit by which an evaluation can be completed is for example 5 working days, in cases where it can be disputed whether the content is wrongful or unlawful.

The reasonableness of the time limit is related to the severity of the alleged infringement and the social upheaval that may become paired with this. In cases where it is clearly indisputable a judgement can be arrived at very quickly.

Note to Article 3b:

Intermediaries can establish criteria for content that they find undesirable and for content whose availability on the Internet they wish to play no part in facilitating. Undesirable content goes further than unlawful content: the law determines what is unlawful content, while the intermediary determines what is undesirable content. The intermediary evaluates a report concerning undesirable content on the basis of the criteria the intermediary has established for undesirable content.

Note to Article 4:

On the grounds of effectiveness, the code states that the notifier and the content provider should first try to reach a mutually acceptable agreement. Should this prove to be impossible, the complaint is 'scaled up' to an intermediary. This can be the case if the content provider is anonymous or fails to respond. It is important that the intermediary is selected who is most able to intervene effectively. Distinguishing between 'hosting providers' and 'access providers' is also important. Access providers are often technically unable to remove information because their service consists solely of the provision of access to the Internet. There is no obligation on notifiers to first make contact with the content provider.

Note to Article 4a:

Reports from inspection or investigation services can be made in two ways. Formal legal reports are made by the Public Prosecutor's Office and have an imperative character. There is an obligation on intermediaries to comply with them.

An investigatory authority or inspectorate can also make an 'ordinary' report, just like any private individual. In this situation it is important that the investigatory authority or inspectorate makes it clear that the report is not a formal legal order. Where a formal legal order is involved, it should be verifiable that the report has been made by the Public Prosecutor's Office or the inspection or investigation service. Where an investigative officer makes a report that does not constitute a formal legal order, this must be explicit in the report.

Note to Article 4b:

The notifier is responsible for ensuring the correctness of the report and that the intermediary has sufficient information to be able to evaluate the content concerned. It is vital that the notifier indicates as precisely as possible where the content concerned is located, for example if only a specific section of a website is considered to be unlawful.

Note to Article 4c:

In practice it can happen that certain content that has been removed from the Internet later returns, perhaps in another location. In such cases it is possible that a notifier advises the intermediary of this (for example by appending examples from an earlier report or – if the same intermediary is involved – by referring to the salient features of the earlier report). This enables the intermediary to deal with the report more quickly, and may allow some steps in the procedure to be omitted. In this way the code not only facilitates a Take-Down, but also a Stay-Down. Moreover, given the nature of the contested content it is also possible to request that the report be dealt with as a matter of urgency.

Note to Article 4d:

The responsibility for a report lies with the notifier. The liability of the intermediaries is dependent on the type of service they provide (hosting, mere conduit and/or caching), and is described in Article 6:196c of the Civil Code. *(The relevant provisions of 'Directive 2000/31/EC of the European Parliament and the Council' of June 8, 2000 have been implemented into Dutch law by Article 6:196c of the Civil Code).* In addition to this, the intermediary and the notifier can agree that the intermediary is explicitly indemnified against claims from the content provider as a consequence of the measures taken in dealing with the report. This is associated with the practice of some intermediaries and 'professional' notifiers. The indemnity is especially important in cases where it is not possible to be unequivocal about whether the matter concerns unlawfulness or a criminal offence. In addition, it must not be possible to hold an intermediary liable for responding to a report that itself later proves to be unlawful.

Note to Article 5a:

Content that the Public Prosecutor's Office formally orders to be removed requires no (additional) evaluation by the intermediary. The evaluation has in these cases already been performed by an authorized body.

Note to Article 5b:

Reports that relate to conflict with civil law (cases of unlawfulness) are evaluated by the intermediary. This also applies to criminal offences that are reported by private individuals, or that are reported by a inspection or investigation service where a formal legal order is not involved. In parallel with the concept of 'unequivocal unlawfulness' in civil law,

the intermediary can make a judgement as to whether in his or her opinion a criminal offence may be involved. Early action can also be taken against these offences by notifiers and intermediaries without the intervention of a governmental body.

Criminal enforcement (tracing, prosecution, trial and punishment) will be particularly applicable where it serves the public interest or when private interests are involved that cannot be protected by the parties concerned themselves.

In cases where an intermediary cannot, or wishes not to, conduct the evaluation him or herself, a third party can be brought in to do so. The responsibility for the evaluation remains with the intermediary. The involvement of a third party should make the minimum impact possible on the 'reasonable time limit' as referred to in the note to Article 3a.

Note to Article 6a:

It can happen that in the intermediary's judgement the content concerned is legitimate, while the notifier is of the opinion that it is (unequivocally) unlawful. In these cases the intermediary must give the notifier his or her supporting arguments.

Note to Article 6b:

As there is no doubt concerning the unlawfulness of the content concerned, the intermediary should immediately take measures that lead to the content being taken off-line. Where possible, the intermediary first contacts the content provider about this, for example where his or her cooperation may be expected in its immediate removal.

Note to Article 6c:

The intermediary is responsible for the evaluation of a report. It can be that the intermediary is unable to unequivocally determine whether the content is unlawful. This Article specifically concerns these cases, and has as its objective the achievement of a resolution of the conflict between notifier and content provider as often as possible. The first step is to inform the content provider about the report in order that he or she can remove the content him or herself. Should the content provider wish not to do this, he or she is requested to make contact with the notifier (if contact between them about this report has not already taken place). If the content provider does not comply with this request either, an impasse is created in cases of alleged unlawfulness (under civil law) that can only be resolved by the intermediary. This can be achieved on the one hand by taking the content offline, or on the other hand by providing the content provider's name and contact details to the notifier. Under Dutch law, intermediaries are not legally obligated to know and maintain a record of the names and contact details of their clients however, and making name and contact details available is not legally enforceable in all cases. Case law indicates that the making available of name and contact details from an intermediary to a notifier should take place if the published information (a) could be unlawful in respect of the notifier, (b) could lead to damage being caused to the notifier, and (c) if a less drastic way to obtain the name and contact details is unavailable to the notifier. Thereafter the intermediary shall weigh up the degree of seriousness of the privacy interests of the website holder against that of the interests of the 'victim' of the publication.

As can be understood from the above, situations may occur in practice where neither the information

is taken off-line nor the name and contact details are provided to the notifier. It is expected of intermediaries that they make every possible effort to prevent these situations from occurring. Under Dutch law, a content provider who 'renders a service relating to the information society' (Article 3:15d of the Civil Code) must, among other things, make his identity and address easily, directly and permanently accessible for those who make use of this service.

If it concerns a criminal offence (where no formal legal order has been issued by the Public Prosecutor's Office), and if the intermediary and the content provider cannot reach a mutually acceptable agreement, the intermediary may be unable to resolve this impasse. In this case, the notifier can choose to make an official report to the police, over which a judgement can then be made by the competent authorities.

Note to Article 6d:

The possibilities for an intermediary to intervene on the basis of having received a report can be technically restricted on the Internet. The intermediary may only be able to remove part of the content, or insodoing may remove other content to which the report does not refer. For these instances, the code explains that due caution must be taken to ensure that the wish to remove content is matched as closely as possible with the technical possibilities for doing so. What must be prevented as far as possible is that information that does not conflict with the law is removed. When cases such as this arise, further consultation between the notifier and the intermediary may be necessary in addition to the procedure described in this code. On the basis of these further consultations, the notifier may amend the report so that the intermediary can then deal more effectively with it.

Note to Article 7a:

It is important that parties that are complying with this code of conduct know who each other's participants are.

Note to Article 7b:

This provision is included to prevent conflict with other NTD procedures that already exist. Websites that are based on a very large amount of input from third parties for example (such as advertisement sites and sites to which photos and videos can be uploaded), have NTD systems that for reasons of practicability are not based on direct communication with the content providers.

Note to Article 7c:

This code is first and foremost intended for notifiers and intermediaries who do not know each other or where contact is being made between them for the first time. But this code must not stand in the way of further collaboration between them. Intermediaries are therefore free to omit the evaluation process in cases where they regard a notifier as a 'trusted party' for instance. There are already several examples of this in practice.

Note to Article 7d:

The intention is that the code will be continually amended over time so that it is adapted to allow for new insights and new technical developments. The maintenance and monitoring of this code is therefore under the stewardship of a number of organizations referred to here as its 'initiators'. To ensure its effective working in practice, it is also important that intermediaries, private individuals (notifiers) and governmental services give their support to the code.

www.samentegencybercrime.nl/ntd