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# 11. Access to digital justice: In search of an effective remedy for removing unlawful online content

**Naomi Appelman, Joanna van Duin, Ronan Fahy, Joris van Hoboken, Natali Helberger and Brahim Zarouali**

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## 11.1 INTRODUCING THE PROBLEM: INADEQUATE REMEDIES FOR REMOVING UNLAWFUL ONLINE CONTENT

### 11.1.1 A New Challenge to the Civil Justice System

Engaging in online communication has become a prerequisite for participation in modern cultural, social, and professional life.<sup>1</sup> Inevitably, this also means people are more likely to be confronted with content that is harmful to them or to others and, insofar as it can be qualified as unlawful, should not be allowed to remain online. The publication and dissemination of unlawful online content, and especially the lack of effective remedies to stop this, has proven to be a persistent policy problem in the European Union (EU), for which a solution is both urgently needed and hard to find.<sup>2</sup> Unlawful online content poses a new challenge to the civil justice system at the crossroads with online speech

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<sup>1</sup> José van Dijck, Thomas Poell, and Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford University Press 2018); Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019).

<sup>2</sup> Commission Recommendation on measures to effectively tackle illegal content online C(2018) 1177 final (March 1, 2018); European Commission, Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services, Ref. Ares(2020)287768, (4 June 2020); Council of Europe Committee of Experts of freedom of Expression and Digital Technologies, Guidance note on best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory mechanisms of content moderation, MSI-DIG(2021)04 (18 March 2021).

regulation. More often than not, injured individuals fail to find an avenue to get unlawful content removed and are effectively denied access to justice.<sup>3</sup> For example, the content might have been posted anonymously, the platform is unwilling to take it down or the content has already spread to a larger audience.

This chapter focuses on the removal of unlawful content that causes personal harm and, as such, falls within the scope of Article 8 of the European Convention on Human Rights (ECHR). Article 8 ECHR protects the fundamental right to respect for private and family life. Importantly, this includes one's reputation, privacy and personal data.<sup>4</sup> The protection of Article 8 ECHR only extends to attacks on personal honour and reputation that 'attain a certain level of seriousness' and that hampers one's enjoyment of the right to a private life.<sup>5</sup> Consequently, in the context of this chapter unlawful content refers to content that interferes with an individual's right to a private life (Art 8 ECHR) to such an extent that the right to the freedom of expression (Art 10 ECHR) of the perpetrator should be restricted and the content should be removed. Examples include cyberbullying, the publication of credit card details or other privacy-sensitive information, and the dissemination of sexual images without consent. Crucially, unlawful content should be distinguished from harmful content; the former violates a legal norm (such as slander), where the latter is considered to be socially undesirable yet not necessarily in violation of a legal norm (such as disinformation).

The type of unlawful content that is central to this chapter may affect the people involved deeply and personally, which stresses the importance of enabling them to get it offline as soon as possible. The opportunity to do so directly touches on the fundamental right to a fair trial and an effective remedy, i.e. a means of recourse to address a rights violation (Arts 6 and 13 ECHR and Art 47 of the EU Charter of Fundamental Rights). Despite the high stakes, there is a general consensus that within the legal framework of the EU citizens are insufficiently protected against unlawful online content; more specifically, the available remedies and procedures for quickly getting it removed are inadequate.

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<sup>3</sup> For examples from the Dutch context see: Jan-Dirk Verhey, 'Vrouw daagt Facebook om seksvideo' *AD* (Rotterdam, 1 June 2015); Juliët Boogaard, 'De vrouw die jou haar naaktfoto's wil verkopen, die is nep' *NRC Handelsblad* (Amsterdam, 14 June 2021); Rosa Oosterhoff, 'Privéadressen zzp'ers openbaar: "Lijkt alsof eerst je leven op het spel moet staan voordat er iets gebeurt"' *NH Nieuws* (Amsterdam, 12 June 2021).

<sup>4</sup> *Springer v Germany* App 39954/08 (ECHR, 7 February 2012) [83].

<sup>5</sup> *Pihl v Sweden* App 74742/14 (ECHR, 7 February 2017) [24].

quate.<sup>6</sup> Many European countries have struggled with the search for solutions,<sup>7</sup> and the regulation of unlawful online content has been a priority on the EU regulatory agenda for years.<sup>8</sup> Offering effective remedies that reconcile sufficient procedural safeguards and protection of the freedom of expression with the speed and vast spread of online communication as well as the mediating role of internet services has proven to be exceedingly difficult.

### 11.1.2 Combining Two Perspectives

The central problem this chapter addresses is the lack of effective remedies for individuals who are confronted with allegedly unlawful online content. It explores two questions. First, in what respect existing procedural routes fail to provide a solution, and second, by what means the gap in legal protection could be addressed? To answer these questions the chapter will take the Netherlands as a concrete example to understand how the obstacles that people face play out in practice. After all, the available procedural options in a concrete case are dependent on the specific national context as EU competencies only reach so far.<sup>9</sup> To analyse *why* it is so difficult to offer adequate remedies, the chapter combines the perspectives of access to justice and online speech regulation. In doing so, the chapter will place the challenges identified in the Dutch context in the broader EU legal framework and discuss relevant developments such as the proposed EU Digital Services Act (DSA).<sup>10</sup>

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<sup>6</sup> See, Proposal for a regulation COM(2020) 825 final on a Single Market For Digital Services (Digital Services Act and amending Directive 2000/31/EC [2020]; MSI-DIG(2021)04 *supra* n 2; Ref. Ares(2020)287768 *supra* n 2.

<sup>7</sup> See UK Draft Online Safety Bill (May 2021); Germany Netzwerkdurchsetzungsgesetz vom 1 September 2017 (BGBl. I S. 3352); France LOI n° 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet.

<sup>8</sup> European Commission Communication on Tackling Illegal Content Online COM(2017) 555 final (September 28, 2017); EU Code of Conduct on Countering Illegal Hate Speech Online (30 June 2016); European Commission Communication on Shaping Europe's Digital Future COM/2020/67 final (19 February 2020); C(2018) 1177 *supra* n 3; Ares(2020)287768 *supra* n 2; MSI-DIG(2021)04 *supra* n 2.

<sup>9</sup> On the concept of national procedural autonomy of the EU Member States, see e.g., W. van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *CMLRev* 501; J.T. Nowak, 'Considerations on the Impact of EU Law on National Civil Procedure', in V. Lazic and S. Stuij, *International Dispute Resolution*, (TMC Asser Press 2018) 1–41; J.M.L. van Duin, 'Effective Judicial Protection in Consumer Litigation. Article 47 of the EU Charter in Practice' (Intersentia 2021, forthcoming).

<sup>10</sup> 2020/0361(COD) *supra* n 6.

The chapter is based on a study conducted for the Dutch government into the need for a legal remedy to quickly take down unlawful online content.<sup>11</sup> The aim of the study was to identify bottlenecks in current procedures and to gauge the societal need for procedural innovation. As we will argue in this chapter, however, the underlying premise that there could be a uniform (procedural) solution is flawed. The problem cannot be solved (only) by simplifying or speeding up the process or by regulating dominant social media companies with extended due diligence obligations. Instead, the problem must be reframed and recognised for what it is, i.e., multi-faceted and heterogeneous. A systemic outlook is required that accounts for the conflicting fundamental rights at stake, as well as the tension between different institutional and procedural safeguards. In particular, strengthening the protection of internet users' Article 8 ECHR rights will inevitably have an impact upon other users' rights to freedom of expression (Art 10 ECHR) as well as, possibly, their rights of defence (Art 6 ECHR).

First, we will focus on the specific Dutch context and briefly outline the scope, methodology and outcomes of our study (section 11.2). Then, we will analyse our findings against the background of the broader debates on online speech (and platform) regulation as well as access to (civil) justice (sections 11.3 and 11.4). We will discuss the wider EU regulatory context to gain better insight into the problem, in light of the open and decentralised structure of the internet and the increasingly dominant position of a few social media platforms (section 11.3). We will also connect our findings to the broader debate on access to justice, to show in what way the problem stands out (section 11.4). When these two perspectives are combined, a trade-off emerges between various safeguards on the one hand and accessibility, scalability and speed on the other (section 11.5). As our analysis reveals, there is no single procedure that can properly balance all the divergent rights and interests concerned with content moderation in the online environment. Therefore, we conclude with a call for a problem-oriented approach, where the removal of unlawful online content is seen as a collection of related specific issues that require a tailored solution.

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<sup>11</sup> Joris van Hoboken, Naomi Appelman, Anna van Duin, Tom Blom, Brahim Zarouali, Michelle Seel, Elisabetta Stringhi, Natali Helberger, Ronan O Fathaigh, 'Voorziening voor verzoeken tot snelle verwijdering van onrechtmatige online content' (A report for the Wetenschappelijk Onderzoek- en Documentatiecentrum, 2020). The full report – including the annexes referred to in this chapter – can be consulted via <https://www.rijksoverheid.nl/documenten/rapporten/2020/11/30/tk-bijlage-aanbieding-wodc-onderzoek-voorziening-voor-verzoeken-tot-snelle-verwijdering-van-onrechtmatige-online-content> accessed 2 April 2022.

## 11.2 MAPPING THE PROBLEM IN THE DUTCH CONTEXT

### 11.2.1 Survey and Expert Interviews

In the Netherlands, the difficulty of removing unlawful content was placed on the political agenda after a petition was signed by 135,000 citizens to act against cyberbullying.<sup>12</sup> A call was made for the introduction of a simple, quick and cheap procedure for the removal of unlawful content, which led to the abovementioned study we conducted for the Dutch government.<sup>13</sup> This section will briefly outline the scope, methodology and outcomes of this study. As indicated, the specific focus of the study, as well as this chapter, is on Article 8 ECHR and all unlawful content that falls within its range.

To map the problem in the Dutch context, our study consisted of a representative survey, a series of expert interviews, and a legal analysis. In February 2020 the survey was conducted with a representative sample of the Dutch population.<sup>14</sup> The survey had three parts. The first part aimed to identify people's experience with various forms of harmful content and the type of internet service used. The second part focused on Notice and Takedown and complaint procedures offered by internet services themselves. The third part dealt with people's considerations whether to take legal action or not. In May and June 2020 semi-structured interviews were held with experts from different fields. An expert workshop was organised to validate the findings and discuss potential solutions.<sup>15</sup> Parallel, a legal analysis of the different (extra)legal routes available to deal with unlawful online content was conducted in civil, administrative, and criminal law. This chapter will be limited to the findings in respect of civil justice.

Both the survey and the expert interviews confirmed that the difficulty of getting unlawful online content removed is widely seen as a societal problem which warrants government intervention.<sup>16</sup> Not only is it considered important

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<sup>12</sup> *Kamerstukken II* 2018/19, 34602, 2.

<sup>13</sup> Van Hoboken et al 2020 *supra* n 11.

<sup>14</sup> The survey was conducted at CentERdata's LISS panel (n=1576). For survey questions and full research results see van Hoboken et al. 2020 Annex V and Annex VI *supra* n 11.

<sup>15</sup> Including experts from civil society, the judiciary, lawyers, academics and the government. For a full list of names and affiliations see: van Hoboken et al 2020 Annex IV *supra* n 11.

<sup>16</sup> States have a positive obligation to guarantee the effective enjoyment of the right to privacy and to provide effective remedies to address rights violations: see e.g., *K.U. v Finland* App 41288/15 (ECHR, 2 December 2008) [79]; *Mosley/United Kingdom* App

and urgent to find a solution, it is also an epitome of regulatory challenges in the digital age. Notably, due to the specific focus on Article 8 ECHR, i.e., unlawful content that affects people in their personal capacity, the type of harm this unlawful content creates can be immensely damaging for one's private life. Our survey results reveal that people consider the publication of privacy-sensitive information as well as private images without consent as the most problematic. Moreover, it turns out that 15 per cent of the Dutch population, a significant minority, has personal experience with online content they experience as harmful. However, strikingly, the available means of recourse are often not utilized. Only 1.4 per cent of the population have considered taking legal action. This appears to be partly due to the perceived length, complexity, and costs of a legal procedure, as well as a lack of knowledge of the applicable rules. Another major obstacle concerns the (im)possibility for injured individuals to find the appropriate actor to address.<sup>17</sup> We will take a closer look at these obstacles in the next subsection and get back to them in sections 11.3 and 11.4. The survey results, in particular, will be revisited in respect of access to justice (section 11.4).

### 11.2.2 Obstacles for Removing Unlawful Online Content

The expert interviews together with the survey gave considerable insight into why it is so difficult to get unlawful content offline. The obstacles people may encounter can be brought down to seven main categories:<sup>18</sup> the type of internet service, recurring content, an unknown or unreachable counterparty, the type of content, a lack of specialised knowledge, personal circumstances, and (other) barriers to access to court, which encompass length, complexity, and costs.

First, the type of internet service through which the content is made available can be decisive for the way in which, or even whether, unlawful content can be removed. For example, and as will be discussed in detail in section 11.3, certain services, such as hosting providers, are liable if they do not remove unlawful content whereas electronic communication services are often technically not able to do so.<sup>19</sup> Second, the category of recurring content refers to the notion that when a specific platform or hosting provider removes unlawful content, there is no guarantee it will not resurface on another platform. This

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48009/08 (ECHT, 10 May 2011) [71]; *Khadija Ismayilova/Azerbaijan* App 30778/15 (ECHR, 10 October 2019) ECLI:CE:ECHR:2019:0110JUD006528613[115].

<sup>17</sup> Van Hoboken et al 2020 figure 3 p 31 *supra* n 11.

<sup>18</sup> *Ibid.*, para 2E p 34.

<sup>19</sup> Art 14 e-Commerce Directive [2000] OJ L178, 17 July 2000, 1–16; European Electronic Communication Code [2018] *OJ L* 321/36.

obstacle is directly related to the decentral and at the same time international nature of online communication. Third, getting the content removed can also be hampered greatly by the fact that the party who has posted it is unknown or unreachable, e.g., because they are anonymous or in another jurisdiction (outside the EU). As will be discussed in section 11.3, these three obstacles are directly connected to debates in EU speech regulation.

Fourth, some content is more easily removed than others. There is a wide variety of content that can be qualified as unlawful. Different types of content fall under different legal regimes and entail a different burden of proof or level of scrutiny. For example, the unlawfulness of an insulting comment is usually more difficult to establish than a case of image-based sexual abuse. Fifth, the rules governing the removal of unlawful content are particularly complex on different levels; the type of internet service, the grounds for unlawfulness and the legal and factual position of the counterparty can all differ, not to mention the potential applicability of foreign laws. Navigating this complex landscape requires specialised knowledge usually reserved to media or privacy lawyers. But even they are not always able to retrieve the necessary data to use as evidence or to identify the counterparty. This creates a considerable obstacle for injured individuals, namely, to determine how and where to seek help. A sixth significant obstacle can be found in an individual's personal environment. Examples include shame and fear of social repercussions, gender-related insults, or underage children needing assistance from their guardians. These factors are individual- or group-specific and are therefore mentioned separately from other obstacles generally associated with access to court, the seventh and final category (see further section 11.4).

It diverges per case and per person which obstacles may arise. This demonstrates that getting unlawful content removed is a heterogeneous problem. It becomes even more complex when a systemic view is adopted and other factors come into play, in particular scalability of procedural routes for removal (see section 11.3.3). As we will see in the following section, the first three categories of obstacles are related to online speech regulation at large and stem from the decentral and open structure of the internet. Any solution will have to directly engage with this broader context to offer an effective remedy. The last four obstacles are related to the debate on access to justice in a broad sense. Sections 11.3 and 11.4 will engage with these broader debates. The results of our empirical study of the Netherlands are placed in the context of online speech regulation at EU level (section 11.3), and subsequently connected to access to justice and the specific procedural landscape of the Netherlands (section 11.4).

## 11.3 THE PROBLEM SEEN FROM THE PERSPECTIVE OF ONLINE SPEECH REGULATION

### 11.3.1 Policy Debates at EU Level

The question why it is so hard for people to quickly have unlawful content taken offline must primarily be understood in the specific context of online communication. As will be discussed, the options people have and the obstacles they face are directly informed by issues related to the very structure of internet-based communication, as well as the legal and policy debate on online speech regulation and intermediary liability. Indeed, the European Court of Human Rights (ECtHR) has recognised the ‘dangers’ that arise from online communication, including that illegal content can be disseminated ‘like never before’, ‘worldwide, in a matter of seconds’ and ‘remain persistently available online’.<sup>20</sup> The policy debate and the associated scholarship on online speech regulation can thus help to explain where the obstacles people face stem from and why these obstacles are so difficult to tackle.

The emergence of dominant social media companies, the role of digital platforms in facilitating abusive speech, and their unilateral power over content moderation online, have placed them at the centre of scholarly and regulatory discussion at EU level. In this debate, the focus is on holding platforms responsible for combating harmful content<sup>21</sup> or curbing their power over online speech.<sup>22</sup> The European Commission (EC) has been actively making policy on illegal content, while ensuring the protection of fundamental rights – in particular the freedom of expression and the right to a private life – in the online environment.<sup>23</sup> In both its 2017 Communication on Tackling Illegal Content Online and the 2018 Recommendation on Measures to Effectively Tackle Illegal Content Online, the EC recognised the serious harm illegal content can do and called upon online platforms to improve their policies and active enforcement without resorting to over-removals which, on the flip side,

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<sup>20</sup> *Delfi AS v Estonia* App no 64569/09 (ECHR, 16 June 2015) [110].

<sup>21</sup> Philip M. Napoli, *Social Media and the Public Interest: Media Regulation in the Disinformation Age* (Columbia University Press, 2019); Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press, 2018).

<sup>22</sup> Nicolas P. Suzor, *Lawless: The Secret Rules that Govern Our Digital Lives* (Cambridge University Press, 2019); Jack Balkin, ‘Free Speech is a Triangle’ (2018) 188 *Columbia Law Review*.

<sup>23</sup> 2020/0361(COD) *supra* n 6; COM(2017) 555 final *supra* n 8; COM/2020/67 final *supra* n 8; C(2018) 1177 *supra* n 2; Ares(2020)287768 *supra* n 2; EU Code of Conduct on Countering Illegal Hate Speech Online.

can seriously impair the freedom of expression.<sup>24</sup> Further, the EC implemented legislation delineating the responsibilities of platforms with regard to specific unlawful content such as of a terrorist nature or constituting an IP infringement.<sup>25</sup> Finally, and as will be discussed below in section 11.4.3, the DSA proposal both codifies and sets out new norms that directly impact people's ability to get unlawful content removed.<sup>26</sup> Additionally, in 2021 the Committee of Ministers of the Council of Europe issued a Recommendation focusing on the role of internet intermediaries in combating unlawful online content.<sup>27</sup> More specifically, the Recommendation sets out how fundamental rights protected in the ECHR are implicated in content moderation practices and outlines co- and self-regulatory approaches to combating unlawful content online.

### 11.3.2 Open and Decentralised Structure of the Internet

The first three categories of obstacles identified through our survey and the expert interviews – the type of internet service, recurring content, and an unreachable counterparty – can be apprehended by looking at online speech regulation debates. Specifically, the open and decentralised structure of the internet and online communication is a material factor in the difficulty of removing content.<sup>28</sup> This makes it hard for injured individuals to find the appropriate actor to address, let alone to achieve take-down and stay-down.<sup>29</sup> Even if content is taken down from one website, it may reappear elsewhere. With information stored on servers around the globe, content can be transferred easily from website to website. Traditionally, this structure is celebrated as democratising public debate and beneficial to the freedom of speech, as it creates relatively low barriers to entry and there is often no editorial control

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<sup>24</sup> COM(2017) 555 final *supra* n 8; C(2018) 1177 final *supra* n 2.

<sup>25</sup> Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online [2020] OJ L172/79; Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92; Directive (EU) 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2018] OJ L303/69.

<sup>26</sup> DSA COM(2020) 825 final *supra* n 6.

<sup>27</sup> MSI-DIG(2021)04 *supra* n 2.

<sup>28</sup> Christina Angelopoulos and Stijn Smet 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) *Journal of Media Law* 283; Van Hoboken et al. (2020) *supra* n 11 p 37.

<sup>29</sup> Here, 'take-down' refers to taking specific content offline and 'stay-down' refers to ensuring that specific content does not reappear and, rather, permanently stays offline. See further: Angelopoulos and Smet (n 28).

over online publication.<sup>30</sup> However, for a person trying to remove a specific piece of content it poses considerable challenges. Not only do they need to track all the places where the content pops up, it is possible that legal steps have to be taken against every platform or website separately.

Moreover, the procedural options available to an individual can be limited when the counterparty (i.e., the person posting the unlawful content) is located in another jurisdiction or is wholly unknown. This makes access to justice all the more complicated as well (see further section 11.4). A degree of anonymity is seen as crucial for the effective exercise of freedom of expression online and instrumental in protecting privacy.<sup>31</sup> Yet, it is also one of the reasons that the legal process of tracing someone's identity through hosting providers or internet service intermediaries is very laborious and time intensive.<sup>32</sup> When the counterparty is unknown or unreachable, injured individuals have no other option than addressing the hosting provider involved. As a consequence, they are either dependent on the cooperation of this hosting provider or they have to sue them. In either case, the risk of recurring content is significant as the original party that posted the content is not directly addressed in the process.

Perhaps most crucial for the speed of removal is the type of internet service on which the content is placed. As mentioned, the EU regulatory debate regarding online speech regulation has focused mainly on the role of the large social media platforms. However, a pivotal factor to take into consideration is the broad spectrum of different types of intermediaries of which social media platforms are only one.<sup>33</sup> They can fall under very different legal regimes where the responsibilities and possibilities with respect to removing unlawful content differ considerably. For example, online communication services such as WhatsApp or Signal may not be able to remove unlawful content from their private messaging services due to telecommunications regulation or

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<sup>30</sup> Elettra Bietti, *A Genealogy of Digital Platform Regulation* [2021] forthcoming; Jonathan Zittrain, 'A History of Online Gatekeeping' (2006) 19 *Harvard Journal of Law & Technology* 253–467.

<sup>31</sup> See Wolfgang Benedek and Matthias C. Kettman 'Freedom of Expression and the Internet' [2013] study for the Council of Europe; Cf. La Rue F. (16 May 2011), Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/17/27, para 84.

<sup>32</sup> Case C-582/14 *Breyer v Germany* [2016] ECLI:EU:C:2016:779; for the Dutch context see: HR 25 november 2005, ECLI:NL:HR:2005:AU4019, NJ 2009/550, m.nt. P.B. Hugenholtz onder NJ 2009/551 (Lycos/ [...]).

<sup>33</sup> Joris van Hoboken, João Pedro Quintais, Joost Poort and Nico van Eijk, 'Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in light of developments in the online service landscape' [2018] *Content & Technology* (Study for the European Commission DG Communications Networks).

encryption methods.<sup>34</sup> By contrast, other intermediaries that qualify as hosting providers are subject to a conditional liability and can be held liable if they do not remove unlawful content promptly once they become aware of it.<sup>35</sup> This category of hosting providers will be the focus of this chapter.

In the EU, the term ‘hosting provider’ is a legal category that refers to a type of internet service that allows people to upload information which it will store (‘host’) for them. Examples include big transnational social media such as Facebook, Twitter or TikTok, which enable people to post their own content on the platform. Importantly, however, it also includes smaller or independent websites with comment sections or bulletin boards that have a much smaller user base and less means. The ECtHR has summarised the legal position of this diffuse category of hosting providers by stating that they ‘should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality’.<sup>36</sup> This conditional liability for unlawful content has resulted in many hosting providers implementing a so-called Notice and Takedown procedure, where they remove (‘take down’) content after a user has notified them of the unlawful nature of that content (‘notice’).<sup>37</sup>

### 11.3.3 Notice and Takedown and the Central Role of Hosting Providers

At first sight, Notice and Takedown might sound like a suitable solution to the challenges posed by unlawful content. There are nevertheless concerns from the perspective of access to justice, particularly due to a lack of procedural safeguards – as will become apparent in section 11.4.

The central mediating role played by hosting providers also brings out a tension between getting unlawful content offline as fast and efficiently as possible and protecting the freedom of expression. As hosting providers are the ones storing the content and making it available to others, they are in a prime position to check and control this content, thereby preventing the dissemination of unlawful content. The EU is increasingly using this central position by transferring responsibility to hosting providers for combatting specific forms

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<sup>34</sup> Directive (EC) 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37; Directive (EC) 2018/1972 of 11 December 2018 establishing the European Electronic Communication Code [2018] OJ L321/36.

<sup>35</sup> Art 14 Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000].

<sup>36</sup> *Tamiz v the United Kingdom* App 3877/14 (ECHR, 19 September 2017) [84].

<sup>37</sup> Aleksandra Kuczerawy, ‘Private Enforcement of Public Policy: Freedom of Expression in the Era of Online Gatekeeping’ (PhD Thesis, University of Gent 2018).

of unlawful content, such as IP infringements or terrorist content, to hosting providers.<sup>38</sup> However, this also means hosting providers are in a position to remove *lawful* content and limit people's freedom of expression. As such, the regulatory challenge is to both incentivise hosting providers to swiftly remove unlawful content and not stimulate them from unduly limiting people's freedom of expression online. The ECtHR is acutely concerned with avoiding a 'chilling effect' on freedom of expression online, and has found that imposing too-strict forms of liability over online publications will have 'foreseeable negative consequences on the flow of information on the Internet'.<sup>39</sup> Indeed, the Council of Europe's Committee of Ministers has also warned against States imposing 'disproportionate' regulatory frameworks on platforms which are 'likely to lead to the restriction of lawful content and to have a chilling effect on the right to freedom of expression'.<sup>40</sup>

Additionally, within the category of hosting providers there is still a large variety that greatly impacts the effectiveness of Notice and Takedown procedures in enabling an individual to get unlawful content removed quickly. For example, the scale and reach as well as the cooperativeness of the hosting provider can be determining factors in the speed and efficiency with which content can be removed. Large social media platforms such as Facebook and Twitter have established elaborate Notice and Takedown procedures for people to request the removal of specific content.<sup>41</sup> Even though these procedures can still be criticised from a freedom of expression perspective,<sup>42</sup> getting

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<sup>38</sup> See n 25.

<sup>39</sup> *Magyar Jeti Zrt v Hungary* App 11257/16 (ECHR, 4 December 2018) [83]. See also, Ronan O Fathaigh, 'The Chilling Effect of Liability for Online Reader Comments' (2017) 22 *European Human Rights Law Review* 387.

<sup>40</sup> Recommendation of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries, CM/Rec (2018) 2 (March 7, 2018) para 1.3.6.

<sup>41</sup> For a discussion see: Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129 *Yale Law Journal*; Evelyn Douek, 'Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility' (2019) 21 *North Carolina Journal of Law & Technology*; Robyn Caplan, 'The Artisan and the Decision Factory: The organizational Dynamics of Private Speech Governance' in Lucy Bernholz, H el ene Landemore and Rob Reich (eds) *Digital Technology and Democratic Theory* (University of Chicago Press, 2021).

<sup>42</sup> Content is often removed based on the terms and conditions offered by the platforms themselves that do not necessarily conform to freedom of expression standards. For a discussion see: Molly K. Land, 'Regulating Private Harms Online: Content Regulation Under Human Rights Law', in Rikke Frank J orgensen (ed), *Human Rights in the Age of Platforms* (MIT Press 2019) 285; Suzor (2019) *supra* n 22; Aleksandra Kuczerawy, 'Intermediary Liability and Freedom of Expression: Recent Developments in the EU Notice and Action Initiative' (2015) 31 *Computer Law & Security Review*.

content removed from smaller independently hosted websites can be much more challenging. This is especially the case when a hosting provider is not willing to cooperate or even has the hosting of unlawful content as its business model, such as websites where involuntarily nude images are shared.<sup>43</sup> When the hosting provider refuses to comply or actively tries to obstruct an attempt to get content removed, the only remaining option is to turn to the courts. Simultaneously, however, content on the large social media platforms can potentially spread much faster and wider. As such, the hosting provider can be a decisive factor in the ease and speed of removal and the extent of the harm caused by the unlawful content.

Further, a more systemic challenge is posed by the vast quantity of content shared online. For example, YouTube claims more than 500 hours of content are uploaded to its platform every minute.<sup>44</sup> Any procedure designed to offer adequate access to justice for people confronted by unlawful online content needs to accommodate this enormous scale. Operating at such scale clearly causes tension with due process demands on a procedure to remove unlawful content. As such, unlawful online content poses a large challenge to the capacity of the traditional civil justice system.

This overview of the EU context already reveals the complexity of removing unlawful online content. Our findings on the Netherlands discussed in section 11.2 cannot be viewed in isolation; they must be seen from the broader perspective of online speech regulation. Still, to understand the specific challenges and obstacles an individual might face when confronted with unlawful content online, another perspective is needed. The problem must be connected to access to justice debates as well, where the procedural landscape and its limitations can be taken into account. We have identified various procedures that are available under Dutch law, including the Notice and Takedown procedures offered by online platforms (currently on the basis of self-regulation).<sup>45</sup> As will be discussed in the following section, none of these procedures can fully address all seven obstacles identified in our study and at the same time reconcile sufficient safeguards with the need for speed, scalability and accessibility.

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<sup>43</sup> For example [www.vagina.nl](http://www.vagina.nl), a website that is currently being sued in a collective action in the Netherlands by Stichting Stop Online Shaming: <https://stoponlineshaming.org> accessed 2 April 2022. See also van Hoboken et al. (2020) *supra* note 11 p 61.

<sup>44</sup> See <https://blog.youtube/press/> for more information see the YouTube transparency reports at: <https://transparencyreport.google.com/youtube-policy/removals?hl=en> accessed 2 April 2022.

<sup>45</sup> The seven procedures examined in the report are the ordinary civil procedure, summary civil proceedings, application procedure, ex parte procedure, complaint at DPA, exercising individual GDPR rights and the Notice and Takedown procedure.

## 11.4 THE PROBLEM SEEN FROM THE PERSPECTIVE OF ACCESS TO JUSTICE

### 11.4.1 Need for Speed

The question of what constitutes an effective procedure to quickly remove unlawful online content is inextricably linked to the broader debate on access to justice. Our study affirms that a lack of knowledge or (financial) means, as well as other personal circumstances, may prevent or deter people from taking legal action. These issues are well-known in the context of access to justice and certainly not unique for the removal of unlawful online content. However, what makes the problem particularly pressing is the need for speed as well as the sheer volume of cases, which, combined with issues arising in the context of online speech regulation (see section 11.3), make it particularly difficult to find a solution.

Earlier research that has been done in the Netherlands showed that people's needs and motives for (not) going to court may differ according to different target groups and the type of legal problems they encounter. The availability of economic and socio-psychological resources also plays a role. People always make a cost-benefit trade-off to some extent: the seriousness of the problem, the (financial) interest involved and the expected outcome influence the decision whether or not to take further steps.<sup>46</sup> Research by the European Parliament shows that in general EU citizens consider costs, (lack of) access to legal assistance, the length of proceedings and the enforcement of court decisions as major obstacles.<sup>47</sup> Furthermore, the complexity of legislation can form a barrier.<sup>48</sup> This is all the more true in cross-border cases, where citizens may have to deal with the law of another jurisdiction. There are also considerable differences between people in terms of their ability to act independently, which can lead to inequality.<sup>49</sup> In a study from 2004, the Dutch Council for Social

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<sup>46</sup> M.J. ter Voert and M.S. Hoekstra, *Geschiedbeslechtingdelta 2019. Over verloop en afloop van (potentieel) juridische problemen van burgers*, 15–16.

<sup>47</sup> European Parliament, 'Effective Access to Justice' (2017), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2017\)596818](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)596818), accessed 2 April 2022, pp 10–11.

<sup>48</sup> FRA (European Union Agency for Fundamental Rights), *Access to justice in Europe: an overview of challenges and opportunities* (Publications Office of the European Union 2011), <http://fra.europa.eu> accessed 2 April 2022, 38.

<sup>49</sup> For example, elderly people with a lower level of education may not possess the digital skills to find legal information online; see n 87 and 88 of van Hoboken et al. 2020 (n 11). E. Bauw et al., *Naar een nabijheid rechter? Een onderzoek naar de inpasbaarheid van de vrederechter in België en Frankrijk in het Nederlandse Rechtsbestel* (Utrecht: Universiteit Utrecht-Montaigne Centrum voor Rechtsstaat en Rechtspleging

Development noted that the problem is not so much the supply of information, but a lack of knowledge or skills to be able to make effective use of it at an early stage. The inaccessibility experienced by people thus becomes a real obstacle.<sup>50</sup> This requires a comprehensive and proactive approach to access to information, help and advice, whereby people are helped at an early stage.<sup>51</sup>

The four remaining categories of obstacles identified in our study – the type of content at issue, a lack of specialised knowledge, personal circumstances, and (other) barriers to access to court – all relate to access to justice in a broad sense. Expert interviews confirm that a lack of access to legal information and advice is one of the prime hurdles. This is not only the case with the removal of illegal online content, but with all kinds of legal problems that people face. With online content, however, the time factor weighs extra heavily. The longer harmful content stays online, the greater the personal and or social impact because it can spread very quickly.

#### 11.4.2 The Dutch Procedural Landscape

There are various types of court proceedings available under Dutch law that, in theory, suffice for the purposes of obtaining a decision that certain content is unlawful and must be removed. However, only a fraction of cases concerning the removal of unlawful online content are brought before the courts. As mentioned in section 11.2, the main deterring factors appear to be the length, complexity, and costs of court proceedings. Ordinary court proceedings (in first instance) last between six to nine months on average and are therefore not suitable if time is of the essence. Summary proceedings could provide a way to obtain an injunction more rapidly, but it is still a matter of weeks rather than days – unless the claimant can convince the court that the situation is not only urgent but must be resolved urgently. Both types of proceedings require that the counterparty is known and summoned to appear in order to be heard before the court.

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2019) 57; Wetenschappelijke Raad voor het Regeringsbeleid, *Weten is nog geen doen: een realistisch perspectief op zelfredzaamheid* (Den Haag: WRR 2017); College voor de Rechten van de Mens, *Jaarlijkse rapportage mensenrechten in Nederland*. (Toegang tot het recht 2018) 47.

<sup>50</sup> J.M. Barendrecht and Y.P. Kamminga, Toegang tot het recht: de lasten van een uitweg (RMO-advies; 32), Den Haag: RMO December 2004. See also OECD, Understanding effective access to justice, OECD Conference Centre, Paris 4 November 2016, OECD.org, 5.

<sup>51</sup> R. Macdonald, 'Access to Civil Justice', in *The Oxford Handbook of Empirical Research* (Oxford University Press 2012).

A complicating factor is that the legal landscape is scattered and therefore particularly difficult to navigate, as observed in section 11.2. As indicated, there is a wide variety of unlawful content that falls within the scope of Article 8 ECHR but it is governed under different regimes. For privacy infringements, for instance, the applicable legal framework is different than for defamation. Importantly, the associated harm and reasons for fast removal may differ, as well as the difficulty in establishing a specific type of unlawfulness. This can create a mismatch between the need of an individual to get content removed as fast as possible due to the harm caused or the risk that the content will spread, and the need for a thorough substantive assessment leading up to a judicial decision.

None of the types of civil proceedings we have analysed – ordinary court proceedings, summary proceedings, and a special *ex parte* procedure for violations of IP rights<sup>52</sup> – are fully adequate in terms of costs, length and complexity. Only the *ex parte* procedure could be considered fast enough, but at present it does not apply to the removal of online content and it is questionable whether it would address all other obstacles. For instance, it still requires specialist knowledge, and it is not possible in the Netherlands to bring proceedings against an anonymous party. It is unclear what role internet services should fulfil in this respect, e.g., whether they should disclose the personal details of the party that has posted the content (see section 11.2 above).

More importantly, the *ex parte* procedure does not fully account for the freedom of speech, because the counterparty is not heard before an order is given and the court's assessment is preliminary. In the context of defamatory statements related to elections, the ECtHR has held that 'as desirable as the expeditious examination of such disputes may be, it should not result in the undue curtailment of the procedural guarantees afforded to the parties', in particular the defendants.<sup>53</sup> Similarly, in cases concerning the removal of unlawful online content, the defendant should always have a possibility to contest the removal. Widening the scope of the *ex parte* procedure would not only require a special justification. It is also not immediately obvious whether it should be extended to cases where the unlawfulness cannot be established upfront and it requires a more elaborate assessment. Apart from this, scalability is an issue here as well, which brings us back to the promise of (out-of-court) Notice and Takedown procedures.

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<sup>52</sup> Arts 3:396 and 6:167 BW, 6:196c jo. 3:15d BW, 35 Uitvoeringswet AVG, 1019e Rv.

<sup>53</sup> *Kwiecién v Poland* App 51744/99 (ECHR 9 January 2007) [55].

### 11.4.3 Notice and Takedown, Accessibility and Procedural Safeguards

Notice and Takedown procedures are relatively accessible as there are no monetary costs tied to the procedure, there is no mandatory legal representation, and the procedure is relatively simple. Notably, the ECtHR has concluded that a notice-and-action mechanism which guarantees ‘effective procedures allowing for rapid response’ can be an ‘appropriate tool’ and ‘viable avenue’ for protecting Article 8 ECHR rights.<sup>54</sup> However, our survey showed that more than a third of the Dutch population is wholly unfamiliar or not very familiar with these Notice and Takedown procedures, indicating that many people might not be able to find them accessible. Further, the process and decision are left entirely up to the hosting provider in question and are currently very opaque.<sup>55</sup> This opacity is mainly due to the fact that the current regulatory framework does not mandate any transparency as to how these procedures work and on the actual decision-making process.<sup>56</sup> For example, it can be wholly unclear whether a notification is decided on by a human content moderator, an automated system or a combination of both.<sup>57</sup>

Whilst the Notice and Takedown procedures offered by the hosting providers themselves are clearly equipped to remove unlawful online content quickly and at scale, it is far from ideal for both the injured individual (whose request for takedown might unduly be denied) as well as the alleged wrongdoer (whose content might unduly be removed). As the process is entirely left to the hosting provider, there are neither institutional safeguards that ensure the application of the law, nor procedural safeguards that guarantee due process, including the right to be heard.<sup>58</sup> A truly ‘effective’ remedy also encompasses the latter, especially where conflicting fundamental rights – Articles 8 and 10

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<sup>54</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App 22947/13 (ECHR, 2 February 2016) [91].

<sup>55</sup> Aleksandra Kuczerawy, ‘Private Enforcement of Public Policy: Freedom of Expression in the Era of Online Gatekeeping’ (PhD Thesis, University of Gent 2018); Kate Klonick, ‘The New Governors: The People, Rules and Processes Governing Online Speech’ 131 *HarvLRev* 1598.

<sup>56</sup> The proposed Digital Services Act (*supra* n 3) tries to ameliorate this situation, see e.g., Arts 12, 13, 20(4), 23, 29.

<sup>57</sup> See e.g., Tarleton Gillespie, ‘Content Moderation, AI, and the Question of Scale’ (2020) 7 *Big Data and Society* 2.

<sup>58</sup> The proposed Digital Services Act (*supra* n 3) tries to ameliorate this situation with, e.g., codification of the notice and takedown procedure (Art 14), the requirement to inform and explain when a user’s content is taken down (Art 15) and an internal complaint procedure for online platforms (Art 17).

ECHR – are at stake.<sup>59</sup> A focus on the position of the injured individual is too one-sided; the other party's right to freedom of expression and a fair trial must also be taken into account, especially where the unlawfulness of the content is contested and cannot be established upfront. This emphasises the importance of contestation and developing procedures which force hosting providers to consider all interests involved.<sup>60</sup>

The accessibility and scalability of Notice and Takedown procedures explain the focus of the policy debate on regulating the position of hosting providers. The most ambitious regulatory effort in this regard has been the proposed DSA. In taking a tiered approach, the DSA aims to codify the existing Notice and Takedown procedures for all hosting providers (Art 14), implement a complaints procedure for online platforms (Art 17) and mandate avenues for users to out-of-court dispute settlement procedures for disputes based on the complaints procedure (Art 18). Additionally, the DSA creates several transparency obligations for hosting providers (e.g., Art 12) and online platforms (e.g., Art 23). As such, the DSA can go some way in strengthening the procedural safeguards that currently lack in the Notice and Takedown procedures and offering a more reliable procedure for people to get unlawful content removed. For example, based on the DSA, users will have the right to be properly informed of a decision following their complaint or notice, and people will have the possibility to appeal a decision following a complaint. However, far from all obstacles are addressed in this piece of legislation. Depending on the effectiveness of the eventual implementation and enforcement, a user can still be very much dependent on the willingness of a particular hosting provider to cooperate. Additionally, the obstacles related to recurring content or perpetrators who are unreachable or unknown remain unresolved (see section 11.3 above).

Our survey further indicates that reporting possibilities (including Notice and Takedown) being easy to find are considered to be the most important feature.<sup>61</sup> Indeed, this underlines the importance of providing clear and accessible information to people who are confronted with unlawful online content, in particular as regards the parties to address and what steps to follow in order to gather evidence and substantiate a request for removal. Increased participation online may lead to new problems but can also contribute to a new solution. In

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<sup>59</sup> See *Mosley v United Kingdom* App 48009/08 (ECHR, 10 May 2011) [129]; *Lingens v Austria* App 9815/82 (ECHR, 8 July 1986) [46].

<sup>60</sup> Similarly see Caplan 2021 *supra* n 41; Jillian C. York, 'Silicon Values: The Future of Free Speech under Surveillance Capitalism' (Verso 2021); Susan J. Brison and Katharine Gelber (eds) *Free Speech in the Digital Age* (Oxford University Press 2019).

<sup>61</sup> Van Hoboken et al. 2020 figure 5a p 56 (n 11).

the Dutch context, there is already a wealth of information available on various websites, offering practical tips and tools. They are often specifically tailored to data protection issues or content that could also be labelled as a criminal offence.<sup>62</sup> However, people do not think in ‘legal categories’; therefore, we submit that, rather than procedural innovation, a ‘roadmap’ is needed that directs people towards Notice and Takedown first, with court proceedings as a last resort. We will elaborate in the final section of this chapter.

## 11.5 A LAYERED APPROACH TO REMOVING UNLAWFUL CONTENT ONLINE

When the problem of removing unlawful online content is connected to both the broader European discussions on online speech regulation and the ongoing debates on access to justice, the heterogeneity of the problem becomes clearly visible. The different tensions identified in this chapter explain why existing procedural routes fail to provide a solution. There is not a single (judicial or extrajudicial) procedure that reconciles sufficient safeguards with the need for speed, scalability and accessibility. Crucially, a trade-off will always have to be made between these different elements.

At present, the Dutch civil justice system does not seem to be sufficiently equipped to deal with this trade-off. Accessibility provides the main challenge, whilst ensuring due process and protecting the freedom of expression remain difficult to control when content moderation is left to internet services alone. Interestingly, this is where the perspectives of online speech regulation and access to justice come together: how can ‘digital justice’ be served in an effective way, with due regard for fundamental rights? The right to a fair trial and the freedom of expression demand that the position of all relevant actors is taken into account. But if the procedure is not fast enough, the harm done continues or increases and the content may spread elsewhere. This is also where a tension emerges between a pragmatic turn, seeing citizens primarily as ‘users’ of the civil justice system and pushing for extrajudicial solutions, and a view on courts as ‘keepers’ of procedural and substantive safeguards, in particular in light of the freedom of speech.

The obstacles related to access to court cannot be addressed in isolation, just as it is not possible to design one uniform procedure for all types and varieties

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<sup>62</sup> See e.g., Bits of Freedom, ‘Tips en Tools’, <https://www.bitsoffreedom.nl/tips-en-tools>; Autoriteit Persoonsgegevens, ‘Voorbeeldbrief Privacyrechten’, <https://autoriteitpersoonsgegevens.nl/nl/zelf-doen/voorbeeldbrieven-privacyrechten>; Politie.nl, ‘Naaktfoto’s gelekt’, <https://www.politie.nl/themas/naaktfotos-gelekt.html>; Vraag het de politie, ‘Pesten & Online’, <https://www.vraaghetdepolitie.nl/pesten-en-online>, all accessed 2 April 2022.

of unlawful online content that properly balances the divergent rights and interests involved. Therefore, procedural innovation is not the (only) answer. Some of the obstacles identified in our study are intrinsic to the structure of the internet, in particular the issues of recurring content and the counterparty being unreachable or unknown, i.e., anonymous. These can only partly be solved by imposing more responsibilities on hosting providers in respect of Notice and Takedown procedures. However, that there is no uniform solution does not mean there is nothing to be done. We propose to take a problem-oriented approach, where the removal of unlawful online content is seen not as a single problem but rather a collection of related specific issues that require a tailored solution. Most importantly, citizens who seek a remedy in their individual case need easy access to information and assistance on whom to address and which routes to follow, in- and out-of-court. As observed in section 11.4, this could be done in the form of an online ‘roadmap’ that includes a step-by-step plan with different modalities or an ‘escalation model’, according to, for instance, the type of content at issue and the actors involved. The bigger the impact on someone’s personal life, the higher the urgency. Another, more overarching solution is to improve and promote the use of a central contact point where injured parties can go for further advice, insofar as they are able to find their way and overcome personal obstacles to ask for help. Such contact points already exist in the Dutch context<sup>63</sup> but are scattered along the type of content at issue and may not be as easy to find. Our study provides a steppingstone for more empirical research into people’s needs and perceptions in respect of ‘access to digital justice’. Understanding the problem is an important first step; the search for an effective remedy continues.

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<sup>63</sup> See e.g., Meldknop.nl, veiliginternetten.nl, landelijk meldpunt internetoplichting or meldpunt internetdiscriminatie.