

THE NETHERLANDS				
QUESTION	ANSWER	SOURCE OF LAW\INFORMATION	ADDITIONAL INFORMATION/DEFINITION	COURT RULINGS
<i>Where is online hate speech established as a criminal offence?</i>	<p>Making an insulting statement, inciting hatred or discrimination, distribution of insulting information is punished in accordance with the Penal Code of Netherlands.</p> <p>The expression “publicly” in the Penal Code includes hate crimes committed through the internet. It is public when a broader circle of arbitrary third parties may see it.</p>	Sections 137c, 137d, 137e of the Penal Code ^A		
<i>What is the punishment for online hate speech?</i>	<p>The punishment is a term of imprisonment not exceeding one year or a fine of the third category (8100 euro).</p> <p>If the act is committed by a person who makes a profession or habit of it or by two or more persons in concert, then a term of imprisonment not exceeding one year or a fine of the third category.</p>	Section 137c, 137d, 137e of the Penal Code ^A		<p>In 2012 the Supreme Court rejected an appeal against the conviction of the owner and administrator of a website regarding publications in which Muslims, Turks and immigrants were compared with ‘berber-monkeys, cockroaches, rats and rapists’. His conviction was based upon, among other things, the fact that he had been the administrator of the website, and had posted his own articles there and edited others' articles as well. (Dutch Supreme Court, crim. Ch., 26 June 2012, Netherlands Jurisprudence 2012, 415.)</p> <p>In 2012, the Supreme Court upheld the Arabic European League's conviction pertaining to the publication of an ‘Auschwitz cartoon’ on its website. (Dutch Supreme Court, crim. Ch.27 March 2012, Netherlands Jurisprudence</p>

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				2012, 220.) <i>See also Geert Wilders case summary in the appendix.</i>
<i>Is there a law-based obligation for intermediaries to filter or monitor hate speech?</i>	There is no obligation of the Internet Service Providers to monitor the information they transmit or store. They have no duty to report illegal activity. The Article does not contain a general obligation for ISPs to monitor the data they transmit or store, or to actively seek facts or circumstances indicating illegal activity. The ISPs have no duty to report alleged illegal activities undertaken or data provided via their services. ISPs have the immunity only if they are involved only by providing the technical means to facilitate the communication.			
<i>Who is responsible to remove /block access to hate speech?</i>	An information service provider shall act to remove or disable access to this information. A request is first sent to remove the content to the author (user or the website owner). The author and the website owners are considered to be primarily responsible for the hate speech.	Telecommunications Act ^G Section 6:196c, 3d of the Civil Code	“Service provider” - an intermediary that provides a telecommunication service of transferring or storage of data from a third party.	
<i>What is the required time frame, if any, for removing hate speech?</i>	The Internet Service Provider is not liable for the information if it acts	Section 6:196c, 3d of the Civil Code ^E	An Internet (Information Society) Service Provider is defined in the	

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	"expeditiously" to remove or to disable access upon being made aware or that a court or an administrative authority has ordered such removal.		Article 3.15d of the Civil Code.	
<i>Is the intermediary liable for hate speech posted on a website?</i>	<p>The Information Society Service Provider is not liable for the content if it complies with the order to remove or disable access to the information, but may be liable if it does not comply with the prosecutor's order.</p> <p>The National Discrimination Prosecutor's policy is to prosecute the author of the expression (a user or the owner of the website, the administrator or moderator of the website), not the service provider, which has immunity if they only provide the technical means to facilitate the communication.</p>	Section 54a of the Penal Code ^A and Section 6:196c of Civil Code	Information Society Service as defined in the Dutch Civil Code Article 3.15d - any service which is usually performed in exchange for a financial consideration, at or from a distance by electronic transmission, at the individual request of the consumer of the service without parties having been simultaneously present at the same place. A service is performed electronically if it is sent out, transmitted and received exclusively by wire, by radio or by means of optical or other electromagnetic resources, using electronic equipment for the processing, including digital compression, and the storage of data.	

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<i>Are there any online mechanisms for anyone to report about hate speech content?</i>	<p>The Platform of Information Society and the Complaint Bureau for Discrimination on the Internet provide reporting platforms.</p> <p>A provider who is notified of alleged illegal content must, among other things, evaluate whether the content is unlawful and determine a balance between the harm posed by the unlawful content and the freedom of expression or, conversely, if the content appears to be legal but should be removed nonetheless. In lieu of case law to provide guidance, the service providers must determine this in each individual case.</p>			
<i>When is the offence considered to have been committed within the territory\under country's jurisdiction?</i>	<p>The Penal Code is applicable upon any person who commits a criminal offence in the Netherlands. A notice and a take-down order may be only issued by the public prosecutor if the host of the website is located or represented in the Netherlands.</p> <p>An order may be given by the public prosecutor to a service provider to prevent dissemination of the information in the country or to make it unavailable within the Dutch territory. If the ISP does not comply it can be held criminally liable.</p> <p>The order cannot be issued if the</p>	Sections 2, 3, 5 of the Penal Code ^A		

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	data is stored on the computer outside the country. They can only alert and provide information to the authorities of another state.			
<i>Is there an obligation to disclose data of hate speech offenders?</i>	The provider of communication service as defined by the Dutch Law is obliged to the identity of the offenders based in the prosecutor's warrant.	Chapter 7 of the Criminal Procedure Code ^H	“Provider of communication service” - the natural person or legal person who/which in the practice of a profession or conduct of a business provides the users of his/its service with the possibility of communicating by means of a computerized device or system, or processes or stores data for such a service or for the users of that service.	

NETHERLANDS APPENDIX

A. Criminal Code of 1881, as amended up to 2016⁷⁴

Section 2

“The criminal law of the Netherlands shall apply to any person who commits a criminal offence in the Netherlands.”

Section 3

“The criminal law of the Netherlands shall apply to any person who commits a criminal offence on board a Dutch vessel or aircraft outside the territory of the Netherlands. Section 5 1. The criminal law of the Netherlands shall apply to any Dutch national who commits outside the territory of the Netherlands:

1.– 3. (...).

4. any of the serious offences defined in sections 138ab, 138b, 139c, 139d, 161sexies, 225, 226, 227, 240a, 240b, 326, 326c, 350, 350a and 351, insofar as the offence falls within the definition of sections 2 to 10 inclusive of the International Convention on Cybercrime concluded in Budapest on 23 November 2001 (Treaty Series 2002, 18, and 2004, 290), and any of the serious offences defined in sections 137c to 137e inclusive, 261, 262, 266, 284 and 285, insofar as the offence falls within the definition of articles 3 to 6 inclusive of the Additional Protocol to the Convention on Cybercrime concluded in Strasbourg on 28 January 2003, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems;

5. (...)

⁷⁴ Act of 3 March 1881, as amended up to 2016. English text is available at http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf, in Dutch: http://wetten.overheid.nl/BWBR0001854/2015-01-01#BoekTweede_TiteldeelV_Artikel137d.

Section 54a

“An intermediary which provides a telecommunication service that consists of the transfer or storage of data from a third party, shall not be prosecuted in its capacity as intermediary telecommunication provider if it complies with an order from the public prosecutor to take all measures that may be reasonably required of it in order to disable this data, which order shall be issued by the public prosecutor after he has applied for and received a written authorization from the examining magistrate.”

Section 137c

“1. Any person who in public, either verbally or in writing or through images, intentionally makes an insulting statement about a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.
2. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding two years or a fine of the fourth category shall be imposed.”

Sections 137d

“Any person who publicly, either verbally or in writing or through images, incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine of the third category.
2. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding two years or a fine of the fourth category shall be imposed.”

Section 137e

“Any person who, for any reason other than the provision of factual information:

1. makes public a statement which he knows or should reasonably suspect to be insulting to a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, or incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability;

2. sends or distributes, without request, an object which he knows or should reasonably suspect to contain such a statement to another person, or has such object in store for public disclosure or distribution;

shall be liable to a term of imprisonment not exceeding six months or a fine of the third category.

3. If the offence is committed by a person who makes a profession or habit of it or by two or more persons in concert, a term of imprisonment not exceeding one year or a fine of the fourth category shall be imposed.”

D. In the case against Dutch politician Geert Wilders, who was prosecuted for hate speech with regard to his statements on Islam and Muslims, the Amsterdam District Court, for the first time, explicitly applied the method of contextual review by means of a three-step test to 137d of the Criminal Code with regard to incitement to discrimination. The politician was prosecuted for group insult and incitement to hatred and discrimination, for several statements he made concerning Islam, Islamization and Muslims, in interviews and writings in the media and his film *Fitna*, which was published on the Internet. The first step of the test examines whether the expression taken in isolation and its direct textual context, thus according to its nature and purport, is insulting. The second step examines whether the broader context – that being to enter into a public debate by proclaiming a religious conviction – can remove the punishable insulting character of the expression. The third step examines whether the expression, notwithstanding its broader context of proclaiming a religious conviction in a public debate, is gratuitously offensive and therefore punishable.

The District Court set strict requirements for the elements of 137d of the Criminal Code, and required that the expression must manifestly concern a group based on its religion, and thus strictly distinguished criticism of Islam from criticism of Muslims.

E. Civil Code, as Amended up to 2015⁷⁵

Article 3:15d - Accessibility of data and information

⁷⁵ Available at <http://www.dutchcivillaw.com/civilcodebook066.htm>.

- "1. Someone who provides a service of the information society makes the following data easily, directly and permanently accessible for those who use this service, in particular for the purpose of obtaining the following information or of making this information accessible:
- a. his identity and the geographic address where he is seated or located;
 - b. data which makes it possible to contact him rapidly and to communicate with him in a direct and effective way, including his electronic mail address;
 - c. as far as he is registered in the commercial register or a similar public register: the register where he is registered and his registration number or the equivalent means of identification in that register;
 - d. as far as an activity is subject to a license or permit of a government institution: the data concerning the competent supervising authority;
 - e. as far as he practices a regulated profession:
 - the professional body or similar institution with which the service provider is registered;
 - the professional title and the Member State or the State which is a party to the Agreement on the European Economic Area where this title has been granted; a reference to the applicable professional rules in the Netherlands and the means to access these rules; where the service provider undertakes an activity that is subject to VAT: the VAT identification number referred to in Article 2a, first paragraph, under g, of the VAT Act 1968.
2. Where services of the information society refer to prices, these are to be indicated clearly and unambiguously and must indicate in particular whether they are inclusive tax and delivery costs and, if so, which tax and delivery costs are charged and to what amount.
3. A 'service of the information society' is understood as any service which is usually performed in exchange for a financial consideration, at or from a distance by electronic transmission, at the individual request of the consumer of the service without parties having been simultaneously present at the same place. A service is performed electronically if it is sent out, transmitted and received exclusively by wire, by radio or by means of optical or other electromagnetic resources, using electronic equipment for the processing, including digital compression, and the storage of data.

Article 6:196c - Liability for services of the information society

- "1. A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the transmission in a communication network of information provided by a recipient of the service or providing access to a communication network, is not liable for the information transmitted, on condition that the provider:
- a. does not initiate the transmission;
 - b. is not the one who decides to whom the information will be transmitted; and
 - c. has not selected or modified the information contained in the transmission.
2. For the purpose of paragraph 1 the acts of transmission and of merely providing access to a communication network include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.
3. A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, is not liable for the automatic, intermediate and temporary storage of that information, on condition that the provider:
- a. does not modify the information; b. complies with conditions on access to the information; c. complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry; d. does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and;
 - e. acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.
4. A person who provides a service of the information society as meant in Article 3:15d, paragraph 3, of the Civil Code, consisting of the storage of information provided by a recipient of the service, is not liable for the information that is stored at the request of a recipient of the service, on condition that the provider:
- a. does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or;
 - b. upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
5. The above mentioned paragraphs do not affect the possibility to get a court order to terminate or prevent an infringement or an injunction for the removal or disabling of access to information."

F. Criminal Procedure Code⁷⁶

Chapter Seven - *Investigation of Communications by means of Computerized Devices or Systems*

Section 126la

"For the purpose of this Chapter the following terms shall be understood to mean:

- a. "provider of a communication service": the natural person or legal person who/which in the practice of a profession or conduct of a business provides the users of his/its service with the possibility of communicating by means of a computerized device or system, or processes or stores data for such a service or for the users of that service;
- b. "user of a communication service": the natural person or legal person who/which has concluded with the provider of a communication service an agreement relating to the use of that service or who/which actually makes use of such a service."

Section 126m

"1. In the case of suspicion of a serious offence as defined in section 67(1), which serious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required by the investigation, order an investigating officer to record by means of a technical device non-public communications which are conducted by use of the services of a provider of a communication service.

2. The warrant shall be in writing and shall state:

a. the serious offence and if known, the name or otherwise the most precise description possible of the suspect; b. the facts or circumstances which show that the conditions, referred to in subsection (1), have been met; c. where possible, the number or another indication by means of which the individual user of the communication service is identified as well as, insofar as is known, the name and the address of the user; d. the term of validity of the warrant; e. a description of the nature of the technical device or the technical devices by means of which the communications are recorded.

3. If the warrant relates to communications which are conducted through a public telecommunication network or by use of a public telecommunication service within the meaning of the Telecommunications Act, the warrant shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be executed with the assistance of the provider of the public telecommunication network or the public telecommunication service and the warrant shall be accompanied by the request for assistance from the public prosecutor to the provider.

4. If the warrant relates to communications other than the communications referred to in subsection (3), the provider shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be given the opportunity to assist in the execution of the warrant.

5. The warrant, referred to in subsection (1), may only be issued following written authorisation to be granted by the examining magistrate on application of the public prosecutor. Section 126l(5) to (8) inclusive shall apply mutatis mutandis.

6. Insofar as is specifically required in the interest of the investigation, the person, who may be reasonably presumed to have knowledge of the manner of encryption of the communications, may be requested, if subsection (1) is applied, to assist in decrypting the data by either providing this knowledge, or undoing the encryption.

7. The request referred to in subsection (6) shall not be directed to the suspect.

8. Section 96a(3) and section 126l(4), (6) and (7) shall apply mutatis mutandis to the request referred to in subsection (6).

9. Rules pertaining to the manner in which the order referred to in subsection (1) and the requests referred to in subsections (3) and (6) may be given and the manner of compliance with such requests shall be set by Governmental Decree. "

Section 126ma

"1. If on issuance of a warrant as referred to in section 126m(3), the user of the number, referred to section 126m(2)(c), is known to be located in the territory of another state, that other state shall be informed of the intention to record telecommunications and the permission of that state shall be obtained before the warrant is executed, insofar as is prescribed under a treaty and in application of that treaty.

2. If after the start of the recording of telecommunications on the basis of the warrant it becomes known that the user is located in the territory of another state, that other state shall be informed of the intention to record telecommunications and the permission of that state shall be obtained, insofar as is prescribed under a treaty and in application of that treaty.

3. The public prosecutor may also issue a warrant as referred to in section 126m(3), if the existence of the warrant is necessary in order to be able to request another state to record telecommunications by means of a technical device or to intercept telecommunications and directly transmit them to the Netherlands for the purpose of recording by means of a technical device in the Netherlands."

⁷⁶ available at http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf.

Section 126n

"1. In the case of suspicion of a serious offence as defined in section 67(1), the public prosecutor may, in the interest of the investigation, request the provision of data on a user of a communication service and the communication traffic data pertaining to that user. The request may only relate to data designated by Governmental Decree and may involve data which:

- a. was processed at the time of the request, or
- b. is processed after the time of the request.

2. The request, referred to in subsection (1), may be directed to any provider of a communication service. Section 96a(3) shall apply *mutatis mutandis*.

3. If the request relates to data as referred to in subsection (1, second sentence)(b), the request shall be made for a period of maximum three months.

4. The public prosecutor shall have an official record of the request prepared, which shall state:

- a. the serious offence and if known, the name or otherwise the most precise description possible of the suspect; b. the facts or circumstances which show that the conditions, referred to in subsection (1), have been met; c. if known, the name or otherwise the most precise description possible of the person about whom data is requested; d. the data requested; e. if the request relates to data as referred to in subsection (1, second sentence)(b), the period to which the request relates.

5. If the request relates to data referred to in subsection (1, second sentence)(b), the request shall be terminated as soon as the conditions, referred to in subsection (1, first sentence), are no longer met. The public prosecutor shall have an official record made of amendment, supplementation, extension or cancellation of the request.

6. Rules pertaining to the manner in which the public prosecutor requests data may be set by Governmental Decree."

Section 126na

"1. In the case of suspicion of a serious offence, the investigating officer may, in the interest of the investigation, request the provision of data pertaining to name, address, postal code, town, number and type of service of a user of a communication service. Section 126n(2) shall apply.

2. If the data, referred to in subsection (1), is not known to the provider and is necessary for the application of section 126m or section 126n, the public prosecutor may, in the interest of the investigation, request the provider to retrieve and provide the requested data in a manner to be determined by Governmental Decree.

3. In the case of a request, as referred to in subsection (1) or (2), section 126n(4)(a)(b)(c) and (d) shall apply *mutatis mutandis* and section 126bb shall not apply.

4. Rules pertaining to the manner in which the investigating officer or the public prosecutor will request the data may be set by or pursuant to Governmental Decree."

Section 126nb

"1. In order to be able to apply section 126m or section 126n, the public prosecutor may, subject to section 3.10(4) of the Telecommunications Act, order that the number by which the user of a communication service can be identified will be obtained by means of equipment referred to in that section.

2. The warrant shall be issued to a civil servant as referred to in section 3.10(4)(a) of the Telecommunications Act and shall be in writing. In the case of urgent necessity the warrant may be issued verbally. In that case the public prosecutor shall put the warrant in writing within three days.

3. The warrant shall be issued for a period of maximum one week and shall state:

- a. the facts or circumstances which show that the conditions for the application of section 126m or section 126n have been met and
- b. the name or the most precise description possible of the user of a communication service whose number has to be obtained.

4. The public prosecutor shall have others destroy, in his presence, the official records or other objects, from which information can be derived that was obtained through application of subsection (1), if that information is not used for the purpose of application of section 126m or section 126n."

G. Telecommunications Act⁷⁷

Article 7.6a

"The provider of an Internet access service to an end-user may only terminate or suspend delivery of that service

- a. at the request of the subscriber;
- b. in the event of the subscriber failing to comply with its payment obligation or of the subscriber becoming bankrupt;
- c. in a case of deception within the meaning of Article 3:44 of the Civil Code on the part of the subscriber;
- d. when the term of the agreement for a specific period of time for delivery of the Internet access service elapses and the agreement, with the consent of the subscriber, is not extended or renewed;

⁷⁷ Available at <https://www.government.nl/documents/policy-notes/2012/06/07/dutch-telecommunications-act>.

- e. to implement a legislative provision or court order; or
- f. in the event of *force majeure* or unforeseen circumstances within the meaning of Article 6:258 of the Civil Code."

The use of electronic messages for the purposes within the meaning of paragraph 1 shall be subject *mutatis mutandis* to the requirements of Article 15(e)(1)(a) to (c) of Book 3 of the Civil Code and said use shall not contain any encouragement to consult information on the Internet that is contrary to said article. The following data shall at all times be provided during said use: a. the true identity of the party on whose behalf the communication is made; and b. a valid correspondence address or number to which the recipient can direct a request for such communication to cease."

Article 13.2a

"1. (...).

- 2. Providers of public telecommunications networks or publicly available telecommunications services shall retain the data designated in the annex to the present Act in so far as said data are generated or processed in the context of the networks or services provided for the purpose of the investigation, tracing, and prosecution of serious offences.
- 3. The data within the meaning of paragraph 2 shall be retained by the providers for a period of a. twelve months in the case of data relating to telephony via a fixed or mobile network within the meaning of Section A of the Annex to the present Act; or b. six months in the case of data relating to Internet access, e-mail via the Internet, and Internet telephony network within the meaning of Section B of the Annex to the present Act, calculated from the date of the communication.
- 4. The obligation within the meaning of paragraph 2 shall relate to data regarding unsuccessful call attempts in so far as such data are generated, processed and stored, or logged by the providers in providing public telecommunications networks or publicly available telecommunications services."

Article 13.2b

"Providers of public telecommunications networks and publicly available telecommunications services shall comply with a demand pursuant to Articles 126hh, 126ii, 126nc to 126ni and 126uc to 126ui of the Code of Criminal Procedure."

Annex to Article 13.2a of the Telecommunications Act

"User identification: a unique identifier that is assigned to a person when such person subscribes to or registers with an Internet access service or Internet communications service."