[BE] Belgian case regarding payment of damages for shadowbanning a politician by META

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The case concerns the payment of damages by META to a politician following a shadowban on his Facebook page. META found that the politician's posts violated Facebook's Terms of Service and Community Standards, with META citing hate speech, endorsing dangerous individuals and hate organisations, and bullying and intimidation as reasons. For that, in early 2021, temporary restrictions were imposed on the politician's personal and advertising Facebook pages. Among other measures, a shadowban was implemented, reducing the page's organic reach and resulting in fewer people seeing the posts. META claimed these measures were lifted by the end of 2021. However, the appellant disputed this, presenting figures that indicated the shadowban persisted beyond 2021 and continued to impact the average page reach.

The appellant requested the Court to rule that META breached its contract with him by failing to respect his right to freedom of expression, unlawfully discriminating based on his political beliefs, failing to perform the contract in ‘good faith’, and using unfair terms. Furthermore, the appellant also cites that META subjected him to unlawful profiling within the meaning of the General Data Protection Regulation (GDPR) and on the basis of his political beliefs.

Although the Court of First Instance ruled that the Belgian courts lacked international jurisdiction, the Court of Appeal determined that it did have jurisdiction and proceeded with the case.

The interim order: Penalty Payment

Pending a final decision by the Court of Appeal, the appellant obtained an interim order requiring META to lift the shadowban under penalty payment of a fine of EUR 1,000 per hour.

Final judgement: The Terms of Service and Use

The Court first notes that the appellant agreed to the Terms of Service and Terms of Use, which are clear and understandable. It does not grant META the right to unilaterally interpret its contractual terms, thus making them legally valid.

Final judgement: Freedom of Expression and Discrimination

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The Court states that the appellant cannot directly invoke the fundamental right of freedom of expression, as enshrined, *inter alia*, in Article 10 of the ECHR against META, since it has no horizontal effect. However, this provision can have an indirect impact through the interpretation of open standards in private law, such as the requirement of 'good faith' that META must adhere to when performing contracts. Furthermore, the Court did not find it necessary to rule on the appellant's claim that the shadowban violates Belgian anti-discrimination laws.

Final judgement: Automated decision-making and profiling under the GDPR

Regarding the issue of whether there has been unlawful profiling under the GDPR, the Court observes the following. Under Article 22(1) GDPR, a decision based solely on automated decision-making is not allowed when it involves decisions that may have legal effects for data subjects or other similarly significant effects. Apart from one imposed sanction, META does not demonstrate that there was any human intervention. For its analysis, the Court distinguishes between (1) deleting the posts and putting warnings on the Facebook page, and (2) the shadowban. Only the latter entails legal or similarly significant effects for the appellant, given his position as a politician and the impact of the decreased organic reach limiting his ability to spread (political) messages.

While Article 22 GDPR allows for some exceptions, including the performance of a contract (Article 22(2)(a) GDPR; in this case, enabling the enforcement of terms and standards to ensure the safety of all users), the Court notes that the shadowban does not constitute an appropriate protective measure, as the decision to implement such a ban happened without human intervention and the appellant could not contest this particular sanction (art. 22(3) GDPR).

Additionally, META needs to demonstrate that it has provided useful information on the underlying logic of the automated decision-making, as well as the significance and expected consequences of such processing (art. 13(2)(f) GDPR). Moreover, the privacy policy does not adequately inform users about the existence of any form of automated decision-making (art. 13(2)(f) GDPR). Simply mentioning 'automated processing' in the privacy statement is not sufficient if automated decision-making is taking place.

As such, the use of automated decision-making for both the shadowban and the other sanctions imposed is deemed unlawful for the reasons previously discussed.

Final judgement: Alleged violations by the appellant and sanctions applied by META

The Court notes that it only examined those sanctions to which the appellant attached a concrete legal consequence, such as reparation (e.g. reinstatement of

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deleted messages) or damages.

First, the Court reviewed several deletions of posts by META, including:

1. Posts showing 'Zwarte Piet' in blackface.

2. A post related to a terrorist attack showing the victim.

3. Posts about Nazi book burnings.

4. A post of a person appearing to urinate or defecate in public.

The Court ruled that only the post about the attack had been wrongly removed, noting that Facebook's Community Standards should be interpreted as prohibiting the endorsement of violent events or the depiction of such events without context, and not when these events are condemned in the post. In contrast, the removal of the other posts was found to be in line with those Standards. However, due to the aforementioned violation of Article 13(2)(f) of the GDPR, the removal of these posts was also deemed unlawful.

Second, the Court examined the implementation of the shadowban. META argues that the shadowban was imposed because of a combination of factors, including the history of infringements with the Community Standards, the number of measures or ‘strikes’ against the appellant's page and the severity of these infringements. The ban was lifted at the end of 2021, according to META. However, the appelant argues that the imposition of the shadowban violates the principle of ‘good faith’ when performing contracts.

To this end, the Court considered several factors: the time frame between the posts and the imposition of the shadowban, the time frame and severity of the shadowban, and the lack of sufficient procedural safeguards, including the impossibility of contesting the shadowban. Moreover, the Court noted that while META notifies users when they violate its terms and conditions, it does not inform them of the specific consequences of each violation. Moreover, the shadowban was only applied to personal accounts and not the paid advertising accounts. Thus, by this course of action, META gave the impression that it only imposes sanctions from which it does not suffer any financial harm (and even benefits).

Given the specific circumstances under which META imposed a shadowban in this case, it acted in breach of good faith. In addition to the previously cited violations of Article 13(2)(f) and Article 22(3) GDPR, this further renders META's shadowban unlawful.

For clarity, the Court specified that this judgment does not automatically apply to other instances of violations of Facebook Community Standards.

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Final judgement: Alert on the appellant's Facebook page

The Court found that the imposition of a label was not contractually stipulated by Facebook. Moreover, the breach of information and transparency obligations (Art. 13(2)(f) GDPR) is again relevant here, making this sanction unlawful.

Final judgement: Damages

The appellant argued that due to the sanctions imposed by META, additional advertising costs had to be incurred, specifically investments in advertisements targeted at his followers (in addition to those targeted at non-followers). The Court agreed that the need to pay for ads aimed at his followers was a result of the shadowban, and noted that the politician could have spent those resources on other professional expenses.

However, the Court held that the appellant could not prove that the shadowban continued beyond 2021. It therefore only calculated the costs of those ads targeting his followers for the period from the beginning to the end of 2021. Moreover, the Court recognised that the warnings on the appellant's page and advertisements were likely to have caused reputational damage, notwithstanding the fact that there had been an increase in the number of followers since then.

Regarding the alleged continuation of the shadowban after 2021, the following remarks are made. The appellant provided figures to support the claim that the shadowban was still in effect, noting that although organic reach increased after 2021, it remained significantly below the 2020 levels prior to the shadowban. In contrast, META presented evidence that the restriction was no longer in place and noted that organic reach is influenced by a message's ranking, which in turn is influenced by a combination of dynamic, complex and nuanced factors. META argued that organic reach depends on various elements, including the type of content shared, posting frequency, and follower interaction. Additionally, META implemented a ‘platform-wide change’ in 2021 that reduced the distribution of social content. The Court found META's reasoning persuasive. After thoroughly analysing the arguments and documents presented, the Court concluded that the appellant did not sufficiently prove that META continued to apply a shadowban on the appellant's page after 2021, thus differing from the initial judgment in the interim ruling.

Extract judgment d.d. 03.06.2024 court of appeal Ghent - seventh chamber

Extract of interlocutory judgment dated 24.10.2022 court of appeal Ghent - K 7

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META moet schadevergoeding betalen aan politicus wegens een schaduwban op zijn Facebookpagina, Hof van beroep Gent, Persbericht

https://www.tribunaux-rechtbanken.be/sites/default/files/media/hbca/gent/files/20240603-persbericht-meta-moet-schadevergoeding-betalen-aan-politicus.pdf

META must pay damages to politician because of a shadow ban on his Facebook page, Ghent Court of Appeal, Press release

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