[NL] Court upholds fine imposed on website for failing to prevent minors from viewing violent erotic content

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On 13 March 2018, the District Court of Gelderland upheld a fine imposed on a website by the Dutch Media Authority (Commissariaat voor de Media) (CvdM) for failing to take (technical) measures that would prevent minors below the age of 16 from viewing violent erotic content. The fine was reduced by the court for the reason that the reasonable term for adjudication had been exceeded, thereby violating the fundamental right to a fair trial.

The claimant makes and operates websites which provide erotic content, including videos, pictures and written stories. The claimant also concluded agreements with suppliers for the provision of content. The CvdM found violent erotic material on the claimant's website – namely, two videos entitled "Teenager raped by four men" and "Tied up and shockingly raped". These videos had been accessible without any (technical) age verification measure and had immediately started playing upon the webpage being opened. According to the CvdM, these videos could seriously harm the physical, mental and moral development of minors below the age of 16. As such, the claimant had breached the Media Act, for which the Commissioner imposed a fine of EUR 75,000.

The claimant contested the categorisation of "on demand commercial media service" under the Media Act. According to the claimant, her website only functioned as a platform, for which she had no editorial responsibility. The agreements concluded with the suppliers of content left no room for the claimant to refuse to allow content on the website. According to the court, the agreements did not obligate the claimant to place the content offered by the suppliers. Moreover, it had been demonstrated that the claimant viewed the content for reasons of classification before placing it on the website. For these reasons, the court found that the claimant exercised effective control over the offering of media content for the website, for which she bore editorial responsibility.

The claimant furthermore argued that the principle of lex certa (foreseeability) had been violated, arguing that the legal provision applied did not clearly describe the prohibited conduct. The court found that the conduct of the claimant had clearly violated the rule of Article 4.6(2) of the Media Act. It did not fall within a grey area of application. Moreover, the fact that a rule had such a grey area did not indidated a violation of the lex certa principle Other arguments advanced by

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claimant also failed.

The court reduced the fine for the reason that the reasonable term for adjudication had been exceeded, thereby violating the fundamental right to a fair trial under Article 6 of the Convention of for the Protection of Human Rights and Fundamental Freedoms (ECHR). Under ECHR case law, in the case of a punitive sanction, the reasonable term is exceeded where a court of first instance has not given judgment within two years of the claimant being notified of the fine. In this case, the term was exceeded by more than twelve months. Therefore, the court reduced the fine to EUR 65,000.

Rechtbank Gelderland 13 maart 2018, ECLI:NL:RBGEL:2018:1112

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2018:1112

District Court of Gelderland 13 March 2018, ECLI:NL:RBGEL:2018:1112

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