[NL] Google not required to reinstate Dutch MP's YouTube video on COVID-19

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On 18 August 2021, the Amsterdam District Court (*Rechtbank Amsterdam*) delivered a notable judgment on YouTube's removal of a Member of Parliament's video in the run-up to the recent Dutch parliamentary elections. Crucially, the Court held that YouTube had not violated the politician's freedom of expression, and although YouTube has a "vast reach", it does not have an obligation to allow content that violates its COVID-19 misinformation policy.

The case involved Mr. Wybren van Haga, a Dutch politician and member of the House of Representatives (*Tweede Kamer*), who was critical of the Dutch government's COVID-19 measures. On 11 March 2021, Mr. van Haga uploaded a video to YouTube, entitled, "Is the [infection fatality rate] of Corona comparable to that of the flu? Yes!", and featured an interaction between the MP and the director of the National Institute for Public Health and the Environment's Centre for Infectious Decision Control, during a parliamentary committee hearing on the government's Covid-19 measures. During the hearing, the MP stated that "I still struggle a bit with those [infection fatality rates] (IFR), because I always say that the IFR of Covid is comparable to that of a severe flu". Two days later, YouTube removed the MP's video for violating YouTube's terms of service and Covid-19 misinformation policy, which prohibit "Content claiming that the symptoms, deaths, or contagiousness of COVID-19 are less severe than or as severe as those of a cold or the flu". On 17 March 2021, the final polling day of the Dutch parliamentary elections in 2021, the online news channel Blckbx.tv posted a video on its YouTube channel, of an interview with the MP, discussing YouTube's removal of the MP's video featuring the parliamentary committee clip. During the discussion, the MP stated that "With those mouth caps, it is of course the biggest farce we have experienced"; and "we have been saying for a long time that the IFR, the Infection Fatality Rate, is comparable to that of a severe flu". YouTube also removed this interview video on the same day for violating its Covid-19 misinformation policy.

Following the video removals, Mr. van Haga and Blckbx initiated legal proceedings against Google, seeking orders to have the videos reinstated on YouTube. At the outset, the Court examined the videos, and first held that Google was entitled to remove the videos on the basis of its terms of service, as the MP's statements comparing COVID-19 to the flu violated YouTube's Covid-19 misinformation policy.

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However, the Court then went on to examine whether this decision had been “unlawful” in light of the claimants’ right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR).

First, the Court reiterated that under certain circumstances, the state may have a “positive obligation” under Article 10 ECHR to actively protect freedom of expression in legal relationships between private parties. However, the right to freedom of expression does not imply a right to the “forum” of one’s choice. The Court admitted that it was “understandable” that the claimants prefer YouTube because of its “vast reach”, but this is not enough to “compel” Google to tolerate claims that violate its COVID-19 policy. The Court noted that Google’s Covid-19 misinformation policy is partly based on the EU Code of Practice on disinformation, and as such, was “responding to the call from governments to assist them in the fight against the spread of incorrect information about Covid-19”. Furthermore, the Court held that Google’s COVID-19 policy was also an elaboration of Google's right to property: in principle, it can set the rules that apply to its platform, including the rule that content that conflicts with its COVID-19 policy is deleted. As such, the right to property can also serve as a “legitimate restriction” on the freedom of expression of others.

Importantly, the Court emphasised that courts can only intervene when obstacles prevent “any effective exercise of freedom of expression”, or if the “essence of the right has been destroyed”. However, the Court held that this was not the case, as the claimants could also bring their opinions to the attention of the general public in other ways, with “many other channels” at their disposal. As such, YouTube does not have a social obligation to allow the statements of claimants, which are in violation of its COVID policy, nor to facilitate the claimants' contribution to the public debate. The Court concluded that there had been no violation of the claimants’ freedom of expression, and dismissed the application for an order against Google.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:4308, 18 augustus 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:4308

Amsterdam District Court, ECLI:NL:RBAMS:2021:4308, 18 August 2021

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