[NL] Judgment on removal of political party's video and 7-day YouTube ban

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On 15 September 2021, the Amsterdam District Court (*Rechtbank Amsterdam*) delivered a significant judgment on the removal of a Dutch political party's videos from YouTube, and the party's subsequent seven-day prohibition on uploading, posting or livestreaming via YouTube. Notably, building upon earlier case law from the Dutch courts (see IRIS 2020-10/16), the Court applied the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), but ultimately concluded that YouTube's removal of the videos and imposition of a seven-day upload ban, was not unlawful.

The case involved the Dutch political party *Forum voor Democratie*, and began on 17 March 2021, the final polling day of Dutch parliamentary elections in 2021, when the party posted a campaign video featuring a speech by the party's leader on the party's YouTube channel. A second video was posted by the party on 3 June 2021, featuring a speech by the party's leader in the House of Representatives (*Tweede Kamer*), during a debate on the government's Covid-19 measures. The videos included statements by the party leader which were critical of the Covid-19 measures, including criticising "locking up the whole country, half the world for a year and a half, because of a flu variation is insane", that "we walk around with those silly non-working mouth caps, that we stick to those completely nonsensical distance rules", and "blocking excellent first-line drugs, such as ivermectin". Notably, in mid-June, YouTube removed both videos for violating its terms of services and Covid-19 misinformation rules, and issued a "strike" against the party's account, meaning it was prohibited from uploading, posting or livestreaming via YouTube for seven days.

Following the video removals and seven-day ban, the party initiated legal proceedings against Google, seeking a court order for the videos to be reinstated on YouTube; and also sought an order requiring Google to give notice in advance of any proposed removal and an opportunity to object. The Court first held that Google was entitled to find that the videos violated YouTube's terms of service, in particular the party leader's statements criticising mouth caps, comparing Covid-19 to the flu, and claiming ivermectin was an effective treatment for Covid-19; which were statements all prohibited under YouTube's Covid-19 misinformation policy.

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However, the Court then held that there may be grounds for deeming removal of the videos “unlawful”, according to standards of “reasonableness and fairness”, and in this regard, the party had invoked its right to freedom of expression under Article 10 ECHR. First, the Court reiterated that under Dutch law, the right to freedom of expression under Article 10 ECHR may apply in “private law relations”. Notably, however, the right to freedom of expression is “not unlimited”, and “does not mean” that Google is obliged to tolerate the political party’s statements which are contrary to its Covid-19 rules. Crucially, the Court held that on the basis of its property rights, Google “may in principle set its own rules that apply to its YouTube platform, including the rule that content that violates its Covid-19 policy is removed”.

Further, the Court held that the right to freedom of expression does not imply a right to the “forum” of one’s choice. The Court admitted that “being able to use a channel such as YouTube is of great importance in today's society in order to be able to propagate a message”. However, this does not mean that YouTube has a social “must-carry” obligation for critical voices/political expressions. In addition, under Article 10 ECHR, the “bar for intervention by the government, or the courts, in the freedom of internet platforms to moderate the content published by them is high”. Only if the measure prevents “any effective exercise” of freedom of expression, or if the “essence of the right has been destroyed”, is the government (judge) obliged to intervene. Crucially, however, the Court held that the high bar had not been reached, as the claimants could bring their opinions to the attention of the public “through a variety of other channels”, including the party’s website, app, Facebook, Twitter, and Instagram. As such, the removal of the video was not a violation of the politician’s freedom of expression and not unlawful.

Finally, the Court ruled there was no legal ground to prohibit YouTube from imposing restrictions on the political party’s channel in the future without prior notice.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:5117, 15 september 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:5117

District Court of Amsterdam, ECLI:NL:RBAMS:2021:5117, 15 September 2021

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