

[NL] Facebook not required to reinstate posts by prominent public figure

IRIS 2022-1:1/11

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On 29 October 2021, the *Rechtbank Rotterdam* (District Court of Rotterdam - the Court) delivered a notable judgment on Facebook's removal of posts by a prominent activist, and whether Dutch courts may apply the right to freedom of expression under Article 10 of the European Convention on Human Rights to a platform's removal of such content.

The case involved Willem Engel, a well-known activist who campaigns against Covid-19 measures implemented by the Dutch government, and is director of a high-profile campaign group "*Stichting Viruswaarheid*" (Virus Truth Foundation). Engel maintains a Facebook account, and the case arose during May and July 2021, when Facebook removed a number of posts by Engel concerning Covid-19, for violating Facebook's terms of service on Covid-19 disinformation. The posts included the statements (a) that certain substances in the Pfizer vaccine are "very, very toxic", (b) in relation to the Ivermectin drug, "Make sure you bring it home", and (c) "I hope people read this and see that it is a nuanced story and certainly not a killer virus that threatens the population". In addition, Facebook also suspended Engel's access to his account for 30 days.

Following the removal of the posts and his account suspension, Engel initiated legal proceedings against Facebook, seeking reinstatement of the posts. Engle argued that Facebook acted "unlawfully" by violating his right to freedom of expression under Article 10 ECHR, as Facebook had a "duty of care" to protect users' freedom of expression due to its "enormous reach". At the outset, the Court first held that while Article 10 ECHR does not have a "direct horizontal effect", it does have "indirect effect" in the relationship between the parties, with the Court citing recent Dutch case law on the point (see, for example, IRIS 2021-9/28). In this regard, the Court noted that Engel's right to freedom of expression must be balanced against Facebook's right to property, which incorporates Facebook being "in principle" free to determine the rules for the use of its platform.

The Court then examined whether Facebook violated Engel's freedom of expression through the application of its Covid-19 disinformation policy. In this regard, the Court held that Facebook had legitimate reasons for restricting Engel's freedom of expression, especially as Facebook had issued its COVID-19 policies in

response to a call from the European Commission and international health organisations to combat disinformation about Covid-19, with the aim of protecting the safety and public health of the public. Further, Engel’s right to freedom of expression does not include a right to use the Facebook platform to express all his views on Covid-19, and the mere fact that Facebook has a “very large reach” is irrelevant. In particular, it is not the case that Engel has no other avenues to express his views on Covid-19 policy. Notably, the Court admitted that in “specific cases, application of the policy may lead to correct messages being deleted”, but nonetheless, Facebook may “reasonably rely” on the expertise of experts from various health organisations and governments in determining its Covid-19 disinformation policy.

Finally, the Court considered whether the deleted posts had been correctly removed by Facebook under its terms of service. The Court examined the posts, and held that Facebook was entitled to consider that Engel’s statements (a) about the Pfizer vaccine, violated Facebook’s rules on questioning the safety of vaccines; (b) recommending Ivermectin as a remedy for Covid, violated Facebook’s rules as it is not an approved remedy for Covid-19; and (c) that Covid-19 is “not a killer virus”, violated Facebook’s rule on downplaying the seriousness of Covid-19. Therefore, the Court concluded that Facebook had not acted unlawfully, was entitled to remove the posts, and that there had been no violation of Engel’s freedom of expression.

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