[NL] Court refuses to grant injunction against broadcaster over insufficient opportunity to respond

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On 10 October 2022, the District Court of Midden-Nederland (*Rechtbank Midden-Nederland*) published a significant judgment on the obligations of broadcasters to provide a right to respond. Notably, the Court refused to prohibit a broadcast over an alleged insufficient opportunity to respond, holding that "rebuttal is not an absolute right", and the way in which a rebuttal is processed is part of "journalistic freedom".

The case concerned an episode of *BOOS*, an investigative journalism and consumer protection programme broadcast by the Dutch public broadcaster BNN-VARA. In the episode, the programme's presenter, editor and a cameraman paid an unannounced visit to a company's office. The purpose of the visit was to confront the company director about numerous complaints that had been made against it over a festival that was cancelled twice during the Covid-19 pandemic, after which the complainants did not receive their ticket money back. The presenter confronting the company director over the complaints was recorded, and was set to be included in a broadcast of *BOOS*. However, the company initiated legal proceedings against the broadcaster, seeking an order prohibiting the broadcast unless the company was given the "opportunity to respond substantively" during the broadcast to concrete complaints or accusations of named persons, submitted in advance in writing, and that the company was given an opportunity to respond on camera, which was to be included in full and unaltered.

In its judgment of 10 October 2022, the Court stated that the case concerned a clash of fundamental rights, namely the claimant's right to reputation under Article 8 of the European Convention on Human Rights (ECHR), and BNN-VARA's right to freedom of expression under Article 10 ECHR. The answer to the question of which of these two rights was more important in the specific case was to be found by weighing up all the relevant circumstances of the case. At the outset, the Court held that the plaintiff was seeking what "actually amounts to a prior broadcasting ban", where the broadcast can only be made when it "meets the conditions set by [claimant]" However, the Court noted that a broadcast ban can only be ordered where it is shown the broadcast is "unlawful", and will lead to "irreparable damage". In this regard, the Court held that it would not grant such an order, as the claimant had not demonstrated that the damage it fears "cannot

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be repaired by means of compensation and/or rectification".

Second, on the right to respond, the Court emphasised that a "rebuttal is not an absolute right", and it is a "journalistic starting point", while the way in which the rebuttal is processed belongs to "journalistic freedom": there is no obligation to include the rebuttal in full or uncritically. The Court then held that the broadcaster had given "sufficient opportunity" for a rebuttal, and that this will be incorporated in the broadcast. For example, it will be broadcast that the director promised that as far as possible everyone will be paid back by a certain date, and that the company is financially stable. In the balancing of interests, further weight was to be added to the fact that the broadcast has promised to make claimant's written responses accessible via its YouTube channel, and that a link to it would be mentioned in the broadcast. In light of the foregoing, the Court held that the rebuttal was sufficient, and it would reject the claimant's application for an order prohibiting the broadcast or for further opportunity to respond. In this case, BNN-VARA's right to freedom of expression outweighed the claimant's rights, especially given the that the programme fulfils an important role in society in informing about and assisting with a social problem, namely the difficulty of receiving refunds.

Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2022:2502, 10 oktober 2022

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2022:2502

District Court of Midden-Nederland, ECLI:NL:RBMNE:2022:2502, 10 October 2022

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