**Stichting Smart Exit, Stichting Viruswaarheid and Plaintiff sub 3 v. Facebook**

**Summary and Outcome**

In the case of Stichting Smart Exit, Stichting Viruswaarheid and Plaintiff sub 3 v. Facebook, the District Court of Amsterdam (‘the Court’) held that Facebook was under no obligation to reupload content it had removed for violating the platform’s Covid-19 misinformation policy. Referring to the case law of the European Court of Human Rights (ECtHR), the Court affirmed that the right to freedom of expression does not imply a right to a forum of one’s choice, nor does it oblige a private party to allow another private party to express its opinions using the first party’s property. The Court further found that Facebook’s Covid-19 policy was in line with the European Commission’s call to tackle Covid-19 misinformation ([Joint Communication](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008) on Tackling COVID-19 disinformation, June 2020). Facebook could therefore not be said to have acted ‘unreasonably’ or ‘unlawfully’ while implementing its policy.

**Facts**

The Plaintiffs, a foundation called *Stichting Smart Exit,* a foundation called *Stichting Viruswaarheid* (Virus Truth) and an individual affiliated with the second foundation (‘Plaintiff sub 3’), had been the administrators of some Facebook profiles, groups and pages, including the page “*Nee tegen 1,5 meter”* (No against 1.5 meter) and the page “*Viruswaanzin”* (Virus Madness). The Defendants, Facebook Ireland Limited and Facebook Netherlands B.V., operate the global social media platform Facebook in the Netherlands and worldwide. In July and August 2020, Facebook had removed certain content produced by the Plaintiffs for violating its Covid-19 misinformation policy. Facebook does not allow content related to Covid-19 that contributes to the risk of real-world harm. Soon after the removal, the Plaintiffs lodged summary proceedings with the Amsterdam District Court against Facebook, seeking a judicial order to reinstate two Facebook pages and to de-activate the Covid-19 policy.

**Decision Overview**

The main issue before the Court was whether Facebook, by removing the content from its platform, had committed a breach of contract and/or had acted unlawfully against the Plaintiffs (within the meaning of article 6:162 of the Dutch Civil Code) and was therefore under an obligation to reinstate the content.

Importantly, the two foundations did not have their own Facebook accounts. The director of *Smart Exit* and Plaintiff sub 3 had created accounts, but not in their capacities as directors of the foundations. Although the foundations had been using the accounts, they could not be considered contracting parties. The Court thus decided to only assess the legal claims as submitted by Plaintiff sub 3.

Furthermore, it had not become fully clear from the court documents nor the court hearing which content had actually been removed. The writ of summons referred to two Facebook *pages*, but the attorney’s pleading notes (also) mentioned a Facebook *group* and a Facebook *profile.* The Court left open the issue of which exact content had been removed and instead focused on the general question of whether Facebook is allowed to remove content it deems contradictory to its Covid-19 policy.

Plaintiff sub 3 claimed that Facebook’s Covid-19 policy infringes on his right to freedom of expression. As a critic of the Dutch government’s response to the pandemic, Plaintiff sub 3 wants to bring his views to the attention of the public. By removing content contrary to the prevailing opinion as communicated by the government and the World Health Organization (WHO), Facebook obstructs substantive public debate. Moreover, by not offering a platform for people to express their views, Facebook – according to Plaintiff sub 3 – committed a breach of contract.

Facebook, on the other hand, argued that it could not be held liable for an alleged violation of the right to freedom of expression as enjoyed by the foundations and/or Plaintiff sub 3, because the European Convention on Human Rights (ECHR) does not impose direct obligations on private parties such as Facebook.

The Court explicitly considered that there is no (legal) consensus for attributing *direct* horizontal effect to fundamental rights in private relationships: private parties can therefore not directly invoke the provisions of the ECHR against another private party. According to the Court, “this means that the right to freedom of expression does not directly oblige private parties to safeguard the effective exercise of this right”. More specifically, “the right to freedom of expression does not impose an obligation on a private party to allow another private party to express its opinions using the first party’s property”.

Referring to the *Appleby*-judgment of the ECtHR, the Court affirmed that Article 10 ECHR “does not imply a forum of one’s choice”. The mere fact that Plaintiff sub 3 prefers to use Facebook to disseminate his views because of the platform’s huge audiences, is “insufficient to force Facebook without a legal basis to tolerate each and every expression made by users on its platform”.

Referring to literature and case law, the Court highlighted that when freedom of expression is hindered in a way that “any effective exercise” thereof is impossible, or when it could be said that “the essence of the right has been destroyed”, a positive obligation could arise for the *State* – not for private parties – to intervene and guarantee that the right to freedom of expression can be exercised properly. Although the summary proceedings did not deal with the need for such State intervention, the Court provisionally considered State intervention unnecessary in this regard. It noted that Plaintiff sub 3 can bring his views to the attention of the public through other channels, for example through the press or his own website. The fact that these channels do not reach the same audiences as Facebook is, in the words of the Court, “not a decisive factor” given the high bar set by the ECtHR for State intervention.

At the same time, the Court observed that ECHR provisions may have an *indirect* effect on private relationships, namely through the interpretation of open standards under national private law in conformity with fundamental rights.[[1]](#footnote-1) An important open standard under Dutch law is the duty to (in the performance of a contract) “act in accordance with standards of reasonableness and fairness” (article 6:2 Dutch Civil Code). Dutch law further prescribes that private parties must “act in accordance with unwritten law pertaining to proper social conduct” (article 6:162 Dutch Civil Code). In the assessment of Facebook’s behavior under these national standards, the right to freedom of expression is a factor to be taken into consideration, besides potential other factors.

As regards freedom of expression, the Court considered that expressions enjoy less protection when other legitimate interests are affected. Facebook’s *right to property*, for example, allows Facebook to set certain ‘house rules’ and can thus constitute a legitimate restriction on the right to freedom of expression. The interest of *protection of public health* may legitimize an interference as well. Facebook’s Covid-19 policy explicitly responds to governments’ calls on online platforms to combat Covid-19 misinformation that could create confusion and distrust and undermine an effective public health response (see the European Commission’s [Joint Communication](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008) on Tackling COVID-19 disinformation).

As regards the other factors to be taken into account, the Court held that having a Covid-19 policy in place does not seem to violate the open standard of ‘proper social conduct’, considering that platforms have a societal duty to comply with governmental guidelines “unless these are manifestly incorrect”. The Court did not think the European and Dutch governmental guidelines were manifestly incorrect, especially since the scientific and societal debate about adequate Covid-19 measures was still ongoing.

The Court also found that Facebook’s actual implementation of its Covid-19 policy – the removal of certain content – did not seem to violate any open standards. It is up to the Plaintiffs to argue why the removal of the specific content is unacceptable; the mere argument that it constitutes an infringement on freedom of expression (‘censorship’) is insufficient. Again, the Court stressed that it is primarily for the State to guarantee freedom of expression and not for the private sector, and that the bar for State intervention is set very high. Furthermore, it noted that Facebook’s right to property and the governmental guidelines regarding public health both limit the scope of protection.

According to the Court, Facebook could not be said to have acted ‘unreasonably’ by implementing its policy in line with the European Commission’s call to combat Covid-19 misinformation. If the Court were to hold otherwise, Facebook would be put in an “impossible position” of having to fulfil a societal duty to comply with the European Commission’s requests, on the one hand, and to respond to users’ demands for unlimited freedom of expression on the other.

Lastly, the Court considered that the fact that Facebook is a powerful company reaching huge audiences on a daily basis, is insufficient to deviate from the principle that it is not for the private sector but for the State to safeguard people’s right to freedom of expression. Under the given circumstances, the Court did not believe there to be any positive State obligations.

In conclusion, the Court held that Facebook was under no legal obligation to reupload the removed content to its platform.

**Mixed outcome**

The bottom line of this decision is that the State, including the judiciary, should only intervene in private relationships when the exercise of the right to freedom of expression has essentially become illusory (ECtHR, *Appleby*). Although an important factor in the Court’s reasoning for allowing the content removal was that big online platforms are expected to comply with governmental guidance (soft law), it seems to follow from the judgment that the Court would neither have intervened in cases where content removal is not in line with such guidelines, given the very high bar for State intervention. Some legal scholars may consider this reasoning an *expansion* of freedom of expression, as it adheres to established principles developed under ECtHR case law. Others may believe the decision rather *contracts* freedom of expression, as individual users are restricted in the sharing of information they deem relevant to others and to society.

**Global Perspective**

International/regional legislation, case law and standards

* ECtHR, Appleby, App. No. 44306/98 (2003).
* European Commission (2020). Joint Communication to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions: Tackling COVID-19 Disinformation – Getting the facts rights, JOIN(2020) 8 final.

National legislation, case law and standards

* Dutch Civil Code, article 6:2 (‘reasonableness and fairness in the performance of contract’).
* Dutch Civil Code, article 6:74 (‘breach of contract’).
* Dutch Civil Code, article 6:162 (‘unlawful/tortious act’).
* District Court of Amsterdam, Café Weltschmerz v. YouTube, ECLI:NL:RBAMS:2020:4435 (2020).
1. In this regard, the Court referred to an earlier decision of the District Court of Amsterdam of 9 September 2020, *Café Weltschmerz v. YouTube,* ECLI:NL:RBAMS:2020:4434. [↑](#footnote-ref-1)