ENGLISH TRANSLATION FACEBOOK ADS DECISION

Summary:
The District Court of Amsterdam ruled on November 11, 2019 that Facebook cease fake bitcoin ads using the name and image of John de Mol, a leading European media entrepreneur. Judge R.A. Dudok van Heel said Facebook must take responsibility for its platforms and measures to prevent these fake ads appearing regardless of cost or effort. Facebook cannot invoke the safe harbour provision of the EU E-Commerce Directive for its advertising platform. Allowing the bitcoin ads and not removing them is unlawful towards the victims of these ads and John de Mol. Further, the judge ruled that Facebook must furnish the identifying data of the providers of the ads.

John de Mol was represented by Jacqueline Schaap and Patty de Leeuwe of Visser Schaap & Kreijger

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2019:8415 [decision in Dutch]

In the name of the King

judgment

AMSTERDAM DISTRICT COURT

Private law division, interim relief court for civil law cases

Case number / Cause list number: C/13/665397 / KG ZA 19-455 MDvH/MB

Judgment in interim relief proceedings

in the matter of

JOHANNES HENDRIKUS HUBERT DE MOL,
residing in Blaricum (the Netherlands),
claimant in the summons of 30 April 2019,
lawyers J.A. Schaap and P. de Leeuwe practising in Amsterdam

v

1. **FACEBOOK IRELAND LIMITED**,
a company incorporated under foreign law with its registered office in Dublin (Ireland),
2. **FACEBOOK NETHERLANDS B.V.,**
a private limited company with its registered office in Amsterdam,
defendants,
lawyers J.P. van den Brink, S.C. van Loon and J.R. Spauwen practising in Amsterdam.

1. The proceedings

1.1. At the court hearing of 5 June 2019, following a reduction and increase of claim, the claimant, hereinafter also: "De Mol", submitted and claimed in accordance with the summons and the statement submitting a change of claim which are appended to this judgment, on the understanding that after some debate at the hearing of 5 June 2019, that part of the change of claim which the defendants objected to was left out of consideration, because the defendants had been unable to sufficiently prepare their defence against it on account of the late date of submission. The defendants, hereinafter jointly (as well as the platform operated by the defendants) called Facebook and separately Facebook Ireland and Facebook Netherlands, put forward a defence on the basis of a statement of defence which was sent in advance, concluding (largely) that the relief sought be refused. Both parties filed exhibits and a memorandum of their oral arguments into the proceedings.

1.2. The case was subsequently stayed pro forma several times in order to give the parties an opportunity to reach an amicable solution, most recently until 9 September 2019.

1.3. In an email of 9 September 2019, De Mol's lawyers stated that this had been unsuccessful and requested judgment.

1.4. In an email of 10 September 2019, Facebook's lawyers requested, inter alia, that, before delivery of the judgment, a report be drawn up of the hearing of 5 June 2019, on account of the passage of time and further developments after the hearing.

1.5. In an email dated 11 September 2019, De Mol's lawyers informed the interim relief court that in their opinion, a report was not necessary, but that on this point they deferred to the court's opinion, provided this would not delay the judgment. They raised objections to reopening the debate. In relation to the claim and to changes thereto, the email states as follows:

"The changes to the claim were discussed at length and clarified during the hearing. There is no reason to conduct this discussion again. (...)
*During the oral hearing, we limited the claim under I to advertisements with the name and/or portrait of John de Mol for advertisements for Bitcoin or other cryptocurrencies. In contrast to what lawyer Van den Brink submits, we did not accept the alternative text proffered by Facebook for the claim under II, but we did indicate that the details requested in claim II could be limited to the user and payment details as indicated by Facebook. We did not agree to a limitation of claim II to Facebook Ireland [*which ultimately took place after all at the hearing on 28 October 2019, president of the court*] and to other changes. The accepted limitation of the data naturally applies to claim III as well.*
With regard to claim II, we explained it before the oral hearing so that it was clear that this also pertained to advertisements announced for the future. Facebook filed an objection to this change of claim, after which you ultimately decided not to allow the change of claim. This means that the old text of claim II was "resurrected."

1.6. In an email of 11 September 2019, the registrar of the court then informed the parties and their lawyers, on behalf of the interim relief judge, that she was of the opinion that a brief continuation of the oral hearing would be appropriate, on account of the passage of time since the first hearing and the content of the further correspondence. This email states as follows:

"During the continuation, the interim relief judge said that she wanted further information on the following:

- *the current state of affairs, particularly in relation to the advertisements which may have turned up only recently;*
- *the precise content of the claims after the changes of claim (increase and decrease) were discussed at the hearing in relation to which there are currently discussions between the parties; although at the session of 5 June 2019, the interim relief judge ruled that the change of claim under II, starting from the words 'as well as' ('*alsmede'*), will not be allowed, this change of claim may also be discussed during the continuation and may possibly (having heard the parties) be allowed;*
- *any developments (technical or otherwise) since 5 June 2019 that may be relevant to the assessment."*

1.7. Facebook subsequently submitted some further exhibits. De Mol did not submit any further documents.

1.8. The continued hearing took place on 28 October 2019. At the beginning of the hearing, debate arose as to the change of claim under II, which was not allowed at the hearing of 5 June 2019. Facebook commented in this regard that it had took the claim as formulated in the email of De Mol's lawyers of 11 September 2019 as its starting point "whereby the old text of claim II is "resurrected" ", because De Mol had not submitted any further amendments or further explanations after that. De Mol asked that the altered claim be dealt with after all, to which Facebook then objected. In view of the formulation in De Mol's email of 11 September 2019 and the email from the interim relief judge, which states "*this change of claim **may** also be discussed during the continuation and may possibly (having heard the parties) be allowed"*, after a brief stay, the interim relief judge ruled that - since during the hearing of 5 June 2019 she had ruled that the change of claim would (in part) not be allowed - Facebook could indeed (only) have understood the email to mean that this change of claim would only be up for discussion if De Mol withdrew what was stated in his email of 11 September 2019, and he submitted a new change of claim prior to the continuation. Since that did not happen, and Facebook put forward that it had not prepared for the change of claim, the importance of due process of law forms an obstacle to this being dealt with. The discussion will therefore start from the same claims as those discussed on 5 June 2019, with a few adjustments mentioned at the session. The claims ultimately read as stated below under 3.1.

1.9. During the hearing on 28 October 2019, Facebook offered to give a further explanation of the measures it takes to counter fraudulent practices on its platform - which is the subject of these interim relief proceedings - but on the condition that this took place behind closed doors. De Mol objected to this, after which it was decided to have the entire session take place in public. After all, public access to court rulings must take precedence and Facebook made it insufficiently clear that it cannot conduct its defence in such a way that in doing so, no information will be made public that it does not wish to make public.

1.10. The following persons were present at the oral hearing of 5 June 2019, to the extent of importance here:
- on the part of De Mol: M. van Urk, head of legal affairs, J. Hekkers, press spokesperson, the lawyers Schaap and De Leeuwe;
- on behalf of Facebook: the lawyers Van den Brink, Van Loon and Spauwen.

1.11. During the continued oral hearing on 28 October 2019, the same persons were present, as well as De Mol. The lawyer Van Loon was not present.

2. The facts

2.1. De Mol is a well-known media entrepreneur and television producer. Through his company Talpa Network, De Mol is the owner of SBS (now called Talpa TV).

2.2. Facebook is an internet platform that is part of the social media, and is meant for users to post messages, photos and short films (content). Facebook also operates Instagram, which is primarily used for posting images.

2.3. Facebook's earnings model is primarily based on income from advertisements. For a fee, advertisers can place advertisements on Facebook and Instagram. An advertisement is always linked to a Facebook account. Via the website www.facebook.com/business/help, (potential) advertisers are instructed on the steps they need to take if they wish to place an advertisement. One part of the website bears the heading 'advertising policy'; it can be found via the following link: https://www.facebook.com/policies/ads#.
Facebook's 'Terms and conditions for self-service advertisements' states (inter alia):

"*2. Your ads must comply with all applicable laws, regulations as well as our Advertising Policies. Failure to comply may result in a variety of consequences, including the cancellation of ads that you have placed and termination of your account."*

2.4. Facebook's Advertising Policy as published on the internet states - or stated at the time of the summons - inter alia:

Under the heading "The advert review process":

Before adverts appear on Facebook or Instagram, they're reviewed to make sure that they meet our advertising guidelines. Typically, most adverts are reviewed within 24 hours. In some cases, however, it may take a bit longer.
What we consider
During the advert review process, we'll check the images, text, target group and positioning of your advert, and at the content of your advert's landing page. Your advert may not be approved if the content of the landing page is not fully functional, does not match the product or service promoted in your advert, or does not fully comply with our advertising guidelines.
What happens after an advertisement has been reviewed?
After your advert has been reviewed, you'll receive a notification letting you know whether your advert has been approved. If it's approved, we'll start running your advert and you will be able to see your results in Adverts Manager.

2.5. Chapter 4 of the Advertising Policy contains a summary of what may not be shown in an advertisement. This includes (at the time of the summons) the following passages (inter alia):

"4. Prohibited content
1. Community Standards
Adverts must not violate our Community Standards. Adverts on Instagram must not violate the Instagram Community Guidelines.
2. Illegal products or services
Adverts must not constitute, facilitate or promote illegal products, services or activities. Adverts targeted to minors must not promote products, services or content that are inappropriate, illegal or unsafe, or that exploit, mislead or exert undue pressure on the age groups targeted. ***(...)***
10. Third-party infringements *Ads must not contain content that infringes upon or violates the rights of any third party, including copyright, trademark, privacy, publicity or other personal or proprietary rights. To report content that you feel may infringe upon or violate your rights, please visit our Intellectual Property Help Centre.*
(...)
13. Misinformation
Advertisements must not promote any misleading or incorrect content, including misleading claims, offers or business practices.

(...)
29. ***Prohibited Financial Products and Services***
Advertisements must not promote financial products and services that are frequently associated with misleading or deceptive promotional practices, such as binary options, ICOs (Initial Coin Offering or cryptocurrency)."

2.6. Facebook also has 'Community Standards' on the internet. Chapter IV includes (inter alia) the following sections:

"17. Spam
We work hard to limit the spread of commercial spam to prevent false advertising, fraud and security breaches, all of which detract from people's ability to share and connect. We do not allow people to use misleading or inaccurate information to collect likes, followers or shares.
(...)
18.Misrepresentation
Authenticity is the cornerstone of our community. We believe that people are more accountable for their statements and actions when they use their authentic identities. That's why we require people to connect on Facebook using the name that they go by in everyday life. Our Authenticity Policies are intended to create a safe environment where people can trust and hold one another accountable.

2.7. Since October 2018 up to, in any event, the second half of March 2019, advertisements appeared on Facebook and Instagram in which Dutch celebrities, including De Mol, were linked to Bitcoin and Bitcoin investments. In the advertisements, De Mol was presented as a successful Bitcoin investor and his photograph and his name were used. De Mol did not give his permission for this. Users who responded to the advertisements and paid sums of money did not receive any Bitcoins in exchange for this and lost their money. De Mol has submitted examples of such advertisements in Exhibits 1A and 1B. People generally only end up at the passages about 'Bitcoin investments' after clicking on the first message they see ('learn more').

2.8. According to the central government's Fraud Helpdesk, at the time of the summons an amount of € 1.7 million in damage had been reported by victims as a result of the advertisements referred to in para. 2.7 (hereinafter also: "Fake Ads"). Various media called attention to the issue.

2.9. On 31 October 2018, De Mol issued a press release in which he (together with his son Johnny de Mol) declared (inter alia) that his name and his portrait were being misused in these (Bitcoin) advertisements, that the content of the advertisements and the articles to which they led were false and misleading and that he firmly distanced himself from them.

2.10. De Mol, or actually one of his staff members (T. Loudon), reported the Fake Ads to Facebook and was in touch about this, in February and March 2019, with L. van Aalten, who was the communication manager of Facebook Netherlands at the time. Via Van Aalten, the Fake Ads that were reported were removed.

2.11. De Mol wrote to the holders/'registrars' of the sites on which the Fake Ads had been placed, his object being to have them remove the ads and to ascertain the advertisers' data, but without any result.

2.12. In a registered letter of 5 April 2019, De Mol demanded, put briefly, that Facebook take all necessary measures to prevent ads from being published with his name and/or portrait and in which he was linked to Bitcoin or Bitcoin investments. He also demanded that Facebook furnish the identifying data of the advertisers to him. Facebook said that it was willing to do the latter if so ordered by the court. For the rest, Facebook made no promises in relation to the demands.

3. The dispute

3.1. After changes of claim, De Mol claims an immediately enforceable judgment: I. ordering Facebook Ireland and Facebook Netherlands, each of them individually, within five days after service of the judgment to be delivered, to cease and desist from each and every unlawful act against De Mol as described in the summons - namely: on its fora Facebook and Instagram, allowing advertisements in which the John de Mol's name or portrait is linked to Bitcoin or other cryptocurrencies in the advertisement and/or the website to which clicking on the advertisement leads;
II. ordering Facebook Ireland, within seven days after service of the judgment to be delivered, to provide user data and payment data corresponding to the Payment Account IDs (to the extent that Facebook Ireland has them), as identified by Facebook Ireland on the basis of Exhibits 1A and 1B, to De Mol, or (as the court understands it) to his lawyer;
III. ordering Facebook Ireland and Facebook Netherlands, each of them individually, to deny access to its fora in the future to advertisers that place advertisements for Bitcoins or Bitcoin investments that make direct or indirect use of the name and/or the portrait of John De Mol, in particular by preventing the use of the same identifying data, that is, user data and payment data corresponding to the Payment Account IDs, as identified by Facebook Ireland on the basis of Exhibits 1A and 1B - to the extent that Facebook Ireland has them - and at the same time, to send written confirmation to De Mol's lawyers,
all this subject to payment of a penalty of € 10,000 per day (including part of a day) that Facebook Ireland and Facebook Netherlands do not comply with that claimed under I, II and/or III, and

holding Facebook Ireland and Facebook Netherlands jointly liable to pay the costs of the proceedings.

3.2. Put briefly, De Mol bases his claims on the fact that Facebook is acting unlawfully against De Mol by not promptly removing the Fake Ads and by not doing everything within its power to prevent such advertisements from popping up, even though they are advertisements that are obviously contrary to Facebook's own Advertising Policy. The claim "to cease and desist from ... within five days" must be understood to mean that this also means that, within this period, Facebook must take all measures that are reasonably available to it to ensure that the Fake Ads no longer appear on its platform.

3.3. Facebook put up a defence. Firstly, it argued that this court was not competent to hear the claims. It went on to submit that De Mol did not have an urgent interest in his claims, or no longer has any such interest, because no Fake Ads had appeared for quite some time in which the name and/or the portrait of De Mol was used. Moreover, the claims should be dismissed on substantive grounds as well. Facebook is already doing everything that can be required of it to prevent the practices of these advertisers, bad actors. Further action as claimed by De Mol under I:
1. is not necessary, because Facebook can rely on the so-called safe harbour provisions,
2. is not allowed, because placement of generic filters is not permitted;
3. cannot be done by Facebook on account of technical restrictions.
Facebook does not have objections to furnishing identifying data as claimed under II, provided this is based on a court order. Allowing the claim under III would be going too far.
The claims against Facebook Netherlands should in any case be dismissed, because (according to Facebook) only Facebook Ireland will be able to comply with any such orders.

3.4. The arguments of the parties, to the extent that they are relevant here, will be discussed in what follows.

4. The assessment

Introduction

4.1. This case turns on the advertisements appearing on Facebook and Instagram as described under 2.7. De Mol claims, in the first place, an injunction ordering Facebook to take measures, not only to remove such advertisements and ensure that they remain removed, but also to prevent their appearance on its platforms. Facebook is of the opinion that it already does enough in this regard, and has advanced a number of defences on the basis of which it claims it would not be possible to compel it to take such measures. These defences and De Mol's assertions will be discussed point by point in what follows.

Jurisdiction

4.2. Jurisdiction in relation to Facebook Netherlands is not disputed, since this company is based in Amsterdam. In principle, therefore, pursuant to Article 7(1) of the Dutch Code of Civil Procedure ("**DCCP**"), this court also has jurisdiction with regard to the other defendant, Facebook Ireland.

4.3. Apart from the foregoing, the following applies. The Dutch court has jurisdiction in cases concerning obligations arising from an unlawful act if the act causing damage took place in the Netherlands, or could occur there (Article 6, opening words and under the DCCP, and Article 7(2) of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)). Since the centre of De Mol's interests is in the Netherlands and moreover, the advertisements at issue are accessible in the Netherlands and are aimed at the Dutch public, the jurisdiction of this Court can be assumed on those grounds alone and therefore aside from Article 7(1) DCCP. The circumstance that Facebook Netherlands may perhaps not be able to comply with the requested relief pertains to the enforceability of the judgment, and not to the court's jurisdiction. Facebook's jurisdiction defence will therefore be disregarded,

Applicable law

4.4. The basis for De Mol's claims is an unlawful act on the part of Facebook. The damage claimed occurs, inter alia, in the Netherlands, since it is primarily about reputational damage, the centre of De Mol's interests is in the Netherlands and the advertisements are aimed at the Dutch public. On the grounds of Article 4(1) of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II), Dutch law is therefore applicable.

The advertisements

4.5. It is not in dispute between the parties that the advertisements described under 2.7 are fake, in the sense that they use De Mol's name, without his consent, to promote fake investments in Bitcoins. It is also not in dispute that the names of other Dutch celebrities are used in similar advertisements, without their consent, and that those advertisements are not consistent with the Advertising Policy used by Facebook itself. The parties also agree to the extent that they are of the opinion that these practices, which they both describe as 'fraud', must come to an end. These interim relief proceedings focus on the question of what may be asked of Facebook in that regard and what it can be obliged to do with respect to De Mol.

(Urgent) interest

4.6. De Mol has a reasonable interest within the meaning of Section 21 of the Dutch Copyright Act (*Auteurswet*) to oppose the dissemination of his portrait if it is used for fraudulent practices and misleading messages. Facebook has not, in itself, disputed this. However, Facebook does dispute De Mol's urgent interest in the requested relief because the Fake Ads with De Mol's portrait and/or name have allegedly not appeared for quite some time - Facebook says since the period prior to the summons. The following is considered in this regard.

4.7. De Mol has described in detail how, via his employees and/or his lawyers, he reported the Fake Ads and requested that they be removed. For the time being, it has become sufficiently plausible that reporting ads and having them removed via Facebook's standard complaints form is a long, drawn-out process and does not lead to quick results. In the fact of the statements by De Mol's lawyers on this aspect, Facebook did not make it sufficiently plausible that this is not the case. Another important aspect is that the initial result of a report using the so-called 'icon' is simply that an unwanted message or advertisement can no longer be seen by the person who reported it. What Facebook may go on to do, and when, is fairly obscure.

4.8. De Mol has also convincingly argued that, in the period prior to the summons, it was only thanks to the active involvement of the temporarily appointed communication manager named under 2.10, whom he reached 'via', that the ads were always removed within a short space of time, and that this process stagnated when the communication manager was on holiday. In response to De Mol's demand for timely removal in the future and preventing Fake Ads from turning up again, Facebook did not want to make any promises.

4.9. Against the background of the course of events outlined in 4.7 and 4.8, it is ruled that De Mol has a sufficiently urgent interest in the relief sought. Although there are indications that hardly any advertisements featuring De Mol's name or portrait have recently been published, if at all – De Mol did argue the contrary but, for the time being, has not sufficiently specifically demonstrated this to counter Facebook's dispute – he did not receive any commitments from Facebook prior to the initiation of these interim relief proceedings that this will remain so. The Fake Ads featuring De Mol's name and/or portrait appeared on Facebook quite regularly even in the second half of March 2019. This only changed after the demand was sent in April 2019. Consequently, it is likely that Facebook – consistently – started removing these advertisements and/or stopped them appearing from that time. However, similar advertisements with the names and photographs of other Dutch celebrities do still pop up on a regular basis. De Mol's fear that Fake Ads containing his details might appear again, without the pressure of these interim relief proceedings, therefore seems justified. Under these circumstances, De Mol has a sufficiently urgent interest in the relief sought, even if the advertisements featuring his name or portrait have not appeared recently. This is because the option of taking action against an imminent unlawful act also constitutes an urgent interest.

4.10. The circumstance that De Mol may also directly call the advertisers and/or other intermediaries to account based on unlawful act does not detract from his urgent interest in the claims against Facebook, since multiple persons or legal entities may be liable for the same unlawful acts. In addition to this, De Mol submitted examples to the proceedings of demand letters sent to registrars and hosting providers asking them to remove the web pages behind the Fake Ads, but to no avail – and this has not been disputed.

Unlawful?

4.11. The content of the Fake Ads, as described in 2.7, already shows their unlawful nature, not only in respect of those who are being duped (financially or otherwise) by responding to them, but also in respect of De Mol. Using his name and portrait without his permission in order to support fraudulent practices infringes his privacy, his character and his good name and, as such, damages his reputation. This is not altered by the fact that De Mol himself took action to limit the damage as far as possible, including by issuing the press release mentioned in 2.9.
Offering a platform for such advertisements, or at least failing to instantly remove them and/or failing to take the measures that may reasonably be expected in order to avoid their publication, is contrary to the societal standard of due care to be observed and therefore, in principle, may also be regarded as an unlawful act in respect of De Mol that causes this damage to his reputation.

1. Safe Harbour? ("not necessary")

4.12. The interim relief judge agrees with De Mol that Facebook cannot rely on the 'safe harbour clause' of Article 14(1) of the Directive on electronic commerce (Directive 2000/31/EC; hereinafter the "Directive"), implemented in Article 6:196c of the Dutch Civil Code ("DCC"), which – briefly put – entails that a 'neutral' intermediary/hosting service is not liable for the information stored on its platforms. The following is held to that end.

4.13. It is stated first and foremost that the Directive was drafted more than 20 years ago. De Mol has rightly pointed out that the internet was fairly easily surveyable at that time and that internet service providers were generally neutral and had no influence on content. The internet has developed in numerous ways since then and a large number of hybrid services have come into being, with large 'USG content' (user-generated content, i.e. content supplied by users) fora like Facebook being one of them. The assessment as to whether Facebook can rely on the safe harbour clause must be considered against that background.

4.14. In itself, even in light of the new developments, Facebook may be regarded as an 'information society service' as referred to in the Directive, which, in principle, may rely on the safe harbour clause. However, the safe harbour clause under which the service provider is not liable for harmful content on its platform only applies on condition that the service provider (i) does not have actual knowledge of illegal activity or information or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
In the case law, this standard is defined such that the safe harbour clause may only be relied on if the service provider is not actively involved in the content of what is being posted on/through its platform. The parties are particularly divided over whether Facebook satisfies this condition. It is ruled for the time being that, certainly in the case of the Fake Ads currently at issue, in which Facebook is the operator of advertising space rather than a neutral communication platform, this condition is not satisfied.

4.15. Facilitating advertisements and generating income from this is Facebook's primary business model. It not only determines the rates for this but also actively decides which advertisements are shown on its platform and which are not. Facebook is not neutral in this role, since it partly determines the content of the advertisements by reviewing them in a process laid down in the Advertising Policy cited above at 2.3, and it plays an active role in this regard. This is not altered by the fact that this policy is implemented by means of a largely automated process. Facebook applies a comprehensive and very detailed company policy for rejecting advertisements, which is not limited to content that may violate the rights of other parties and/or that is punishable. Facebook makes money from its advertising platform and determines the conditions for access by means of its Advertising Policy. This active role that Facebook plays as an advertising platform precludes any reliance on the safe harbour clause. Facebook is obliged to be alert to any infringements of third-party rights and to prevent them, if possible. To the extent that it fails to do so, it can be held accountable based on an unlawful act, since the failure to take such measures, or to take sufficient measures, may be contrary to the societal standard of due care that Facebook must observe. Its defence that it does all of this voluntarily (in its own words, as a 'Good Samaritan') and cannot be punished for its acting proactively is therefore rejected.

4.16. Also, if Facebook were able to successfully rely on the safe harbour clause, this would not preclude the award of an injunction or court order (Article 6:196c(5) DCC). Such an order may also

entail a forward-looking measure, as can be inferred from recital 45 of the Preamble to the Directive on which this Article is based:

"The limitations of the liability of intermediary service providers (...) do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it."

2. General filtering order ("not allowed")

4.17. According to Facebook, De Mol's claim at I cannot be awarded because it is at odds with Article 15 of the Directive, which prohibits a general obligation to monitor.
This is indeed expressly laid down in recital 47 of the Preamble to the Directive: *"Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature." However, the following is added: "[T]his does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*."
Consequently, on the one hand the starting point is that a general filtering order is not permitted and that the internet service provider cannot be subjected to excessive obligations. On the other hand, there is in fact room to impose a sufficiently specific order to take action – including preventive action – against any acts that must be deemed unlawful based on Article 6:162 DCC.
A recent judgment issued by the Court of Justice of the European Union on 3 October 2019 (ECLI:EU:C:2019:821 (Glawischnig-Piesczek v Facebook Ireland)) also confirms that Article 15(1) of the Directive does not preclude a court of a Member State from ordering an internet service provider to remove information or to block access to that information within the bounds of the relevant international law.
In this regard, reference is also made to recital 48 of the Preamble to the Directive:

"(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities."

4.18. After a change of claim, De Mol limited its claim at I to taking measures (after the fact and preventively) with regard to *"advertisements in which John de Mol's name or portrait is linked to Bitcoin or other cryptocurrencies in the advertisement and/or the website to which clicking on the advertisement leads"*. Because this limitation has been added, the measures requested are now so specific and tailored to this particular case that they cannot be regarded as 'monitoring obligations of a general nature' to which the prohibition in the Directive pertains. Consequently, Facebook's defence in this respect fails.

4.19. Contrary to what Facebook has argued, the provisions of Article 10 ECHR, the right to freedom of information and expression, do not preclude the measures sought, either. This is not about limiting a natural person's freedom of expression or the right to be freely informed, but about statements made for commercial gain, presumably also comprising criminal offences, i.e. fraudulent practices. To the extent that any 'freedom of expression' is at issue here, Article 6:162 DCC offers a sufficient legal basis for limiting this freedom. The fact that John de Mol is a public figure who

generally, in terms of critical statements, must tolerate more than the average citizen is irrelevant in this regard. After all, there are no 'critical statements' in this case. Finally, the risk that a filtering order, as sought after the limitation of the claim, would deny Facebook users access to legitimate information if the claim is awarded is deemed negligible. Should this nevertheless be the case, then this insignificant risk does not, in any event, outweigh the need to take measures. This point is addressed in more detail at 4.26 et seq. below, where the individual claims are discussed.

4.20. Nor does Article 52 of the EU Charter (free enterprise) provide a ground for dismissing the relief sought at I. Since the claim was limited to very specific advertisements, which, moreover, do not in the least seem to cover legitimate business activities, the violation of Facebook's free enterprise will be of a limited nature if the claim is awarded. In this regard, too, to the extent necessary, Article 6:162 DCC may be regarded as a sufficient legal basis for the intervention sought.

3. Technically impossible? ("cannot be done")

4.21. Facebook has also argued that the measures sought should be denied because it already does everything that may be expected of it and what De Mol is asking is impossible, or at least will not be or cannot be effective.

4.22. Facebook's assertion that its screening process cannot always identify, let alone prevent, all breaches of the Advertising Policy cannot be classified as incorrect in advance. The publications in the press that it has cited also indicate this. However, this does not necessarily preclude an award of the claim at I. De Mol has rightly argued in this regard that the imposition of a measure does not require that 100% effectiveness be established in advance. In addition, there is no requirement that a court order specifies precisely which measures the intermediary must take. The order may contain an order to cease unlawful statements or to cease providing access to such statements. In the end, if necessary, it is up to the intermediary to demonstrate that it has taken all reasonable measures to prevent or seriously discourage infringements through its platforms (cf. CJEU, 27 March 2014, ECLI:EU:C:2014:192 (UPC Telekabel v Wien)).

4.23. As found above, Facebook has pointed out that it is already taking numerous measures. For instance, it uses an ad review system that checks (including manually) for any violations of its Advertising Policy, that reactively assesses advertisements following reports by users, that bans bad actors by means of (a) 'ban hammers', i.e. blocking an advertiser's access to the platform, and (b) the 'Sparse model', which detects properties of advertisements in advertisement accounts that may be associated with already identified bad actors, and it is actively expanding its tracing and banning methods. By doing this, according to Facebook, millions of advertisements are rejected or removed from its platform every week.

4.24. Although, in itself, it is laudable that Facebook takes the measures it has mentioned, these measures are evidently not yet sufficient. The Fake Ads featuring De Mol and other Dutch celebrities have slipped through and are still slipping through, in any event the advertisements featuring Dutch celebrities other than De Mol. In view of Facebook's responsibility for its own advertising platform and the impact that the unlawful advertisements have, Facebook may be expected to take the necessary steps on this point based on the societal standard of due care that Facebook must observe, even if the measures are technically complex and require additional efforts, manpower and money. In view of the statements made by a Facebook employee and quoted by De

Mol – in which the employee stated, for instance, that the checks were "*limited*" and "*not designed to detect all policy violations*" – it may be assumed that more measures can be taken than just the ones that are currently implemented.

4.25. What is more, by all appearances Facebook does seem able to take additional measures when it comes down to it. What is striking in this regard is that (only) the Fake Ads featuring De Mol seem to have hardly appeared since the announcement of these interim relief proceedings. Since Facebook has not been willing to make any commitments to De Mol that it will make every effort to prevent the Fake Ads featuring his name and/or portrait, in principle the claim at I is allowable based on what has been held above.

The individual claims

Claim I

4.26. De Mol has further specified the claim at I such that he is now (only) seeking an order for Facebook to take all reasonable measures to filter all advertisements featuring the name John de Mol and/or his portrait in which reference is made to Bitcoin or other cryptocurrencies. Facebook has argued that it is not clear how an 'advertisement' is to be defined precisely. What is clear is that it must be a commercial statement, i.e. the statement must be offered as an advertisement. Contrary to what Facebook has argued, the risk that this will also keep back messages that are not Fake Ads as referred to at 2.7 is negligible. De Mol has stated that he has nothing to do with cryptocurrencies and does not want to be involved in this in any way. Consequently, the risk of a message appearing in the form of an advertisement about a conference where De Mol will speak and where someone else will also speak about Bitcoin or other cryptocurrencies – which Facebook mentions as an example of an undesired effect of a potential order against it – is mainly theoretical. What is more, such an undesired effect – if it should occur – could be undone. The risk of any undesired overblocking of legitimate advertisements therefore does not outweigh the seriousness of the problem of the Fake Ads and the need to take measures against them.

4.27. Facebook has also pointed out the problem of 'cloaking', which allegedly complicates – if not prevents – the countering of fake advertisements. 'Cloaking' literally means 'covering with a cloak'. The term is used for pages that present search engines with different content than the content displayed to visitors.
According to Facebook, this is also often the case with Fake Ads: the advertisement/website that calls on people to invest money in Bitcoins (the 'landing page') is generally 'behind' the advertisement that is visible first. According to Facebook, the advertisers – or, more accurately, the fraudsters behind the advertisements – use more and more sophisticated methods to circumvent monitoring methods.

4.28. Facebook may have a point here, too. However, this is insufficient for dismissing the claim. Facebook will have to do everything in its power to keep the advertisements from appearing and prevent them from popping up again. If Facebook does so and argues convincingly that it has done so, it will not automatically incur a penalty for non-compliance. That is because if an advertisement should nevertheless pop up on its platform again, which could not be identified in advance because of technical ingenuity – which Facebook must also argue convincingly if that is the case – and it immediately removes the advertisement after becoming aware of it, it will have sufficiently

complied with any order to be imposed and will not incur a penalty for non-compliance. Furthermore, it is up to Facebook to also take measures to prevent any circumvention of its policy, even if that is no easy technical task.

4.29. The principle of proportionality or subsidiarity is not violated if claim I is awarded. With the adjustments. Facebook should be able to assess the impact of the measures requested, while the seriousness of the problem and the extent of the damage are substantial (proportionality). Facebook has also pointed out that De Mol could also have made a report to the police and the judicial authorities, but it cannot be expected at this stage that this will result in the effect desired by De Mol in the near future, since De Mol has asserted – and this has not been disputed – that the police and the Public Prosecutions Service do not give priority to this type of report (subsidiarity).

4.30. Considering all the circumstances of this case, the foregoing leads to the conclusion that the claim at I will be awarded, as stated below in the decision, with partial mitigation and capping of the penalties claimed for non-compliance. In this respect, obviously no penalties will be incurred if it is unreasonable to require Facebook to put in more effort and observe greater care than it has done, as De Mol also acknowledges (see 3.2 above).

4.31. Partly against that background, the order will also be awarded against Facebook Netherlands. For the time being, there is insufficient reason to assume that Facebook Netherlands could not play any part in this.

4.32. Finally, it is up to Facebook to use methods that allow it to comply with the order. Whether it is possible to use 'facial recognition', which the parties discussed at the hearing, is a question that currently needs no answer.

Claim II

4.33. Facebook does not object to the provision of the identifying data sought in itself, as ultimately defined, on the understanding that Facebook believes that it should be the court rather than Facebook that should consider whether such an order should be given.

4.34. The standards that the Amsterdam Court of Appeal worded in its judgment of 24 June 2004, which was upheld by the Dutch Supreme Court (ECLI:NL:HR:2005:AU4019 (Lycos Pessers)), may serve as a basis for this consideration. In that judgment, the Court of Appeal ruled that an obligation for the service provider to surrender such data to a third party may be justified if the following conditions are met:
a. it is sufficiently likely that the information, viewed on its own, may be unlawful and harmful in respect of the third party;
b. the third party has a real interest in obtaining the data;
c. it is likely that, in the specific case, there is no less far-reaching possibility of retrieving the data;
d. a balancing of the third party and the internet service provider's interests entails that the third party's interest should prevail.
These conditions are met in this case, as ensues from what has been held above. Article 6(1) of the General Data Protection Regulation offers room for the provision of this data and, for the rest, there are no grounds in this specific case based on which the claims should be dismissed.

4.35. Therefore, the claim at II will also be awarded, as stated below in the decision, with mitigation and capping of the penalties claimed for non-compliance.

Claim III

4.36. As regards the claim at III, Facebook has argued that it should be dismissed since the order sought here is too far-reaching. Facebook has already blocked all advertisers of advertisements – submitted by De Mol as Exhibits 1A and 1B – from the advertising platform.
The court agrees with Facebook on this point. De Mol's interest is in having no more advertisements appear in which his name/portrait is misused. How Facebook brings this about and what blockades it subsequently applies is, in principle, up to Facebook. It is not clear what interest De Mol has in this additional, far-reaching claim. Against this background, the claim at III will be dismissed.

4.37. Facebook, being the more unsuccessful party, will be ordered to pay the costs of the proceedings.

5. The decision

The interim relief judge

5.1. orders Facebook, within five days of service of this judgment, to cease and desist from each and every unlawful act against De Mol as described in the summons, namely allowing advertisements on its fora Facebook and Instagram in which John de Mol's name or portrait is linked to Bitcoin or other cryptocurrencies in the advertisement and/or the website to which clicking on the advertisement leads,

5.2. orders that Facebook will incur a penalty for non-compliance of € 10,000 for every day (24 hours) that it fails to comply with the order stated at 5.1, subject to a maximum of € 1,000,000,

5.3. orders Facebook Ireland, within seven days of service of this judgment, to provide De Mol with user data and payment data corresponding to the Payment Account IDs, as identified by Facebook Ireland based on De Mol's Exhibits 1A and 1B, to the extent that Facebook Ireland has such data,

5.4. orders that Facebook will incur a penalty for non-compliance of € 1,000 for every day (24 hours) that it fails to comply with the order stated at 5.3, subject to a maximum of € 100,000,

5.5. orders Facebook to pay the costs of the proceedings, set to date on De Mol's part at:
- € 99.01 in costs of service,
- € 297 in court registry fee, and
- € 1,470 in lawyer's fees,

5.6. declares this judgment immediately enforceable to this extent,

5.7. dismisses any additional or other claims.

This judgment was issued by R.A. Dudok van Heel, interim relief judge, assisted by M. Balk, court clerk, and pronounced in public on 11 November 2019.

[signature] [signature]

type: MB
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[stamp: ISSUED AS A TRUE COPY
The registrar of the
District Court of Amsterdam]
[signature]

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