judgment In the name of the King

AMSTERDAM DISTRICT COURT

Private law division

Case number / docket number: C/13/683377 / HA ZA 20-468

Judgment in the procedural issue of 30 June 2021

in the matter of

DATA PRIVACY STICHTING,
a foundation having its registered office in Amsterdam,
claimant in the main action,
respondent in the procedural issues,
represented by J.H. Lemstra LLM of Amsterdam,

versus

1. **FACEBOOK NETHERLANDS B.V.**,
a private company with limited liability [*B.V.*]
having its registered office in Amsterdam,
2. **FACEBOOK INC.**,
a legal entity incorporated and existing in Menlo Park (California, United States),
3. **FACEBOOK IRELAND LTD.**,
a legal entity incorporated and existing in Dublin (Ireland),
defendants in the main action,
claimants in the procedural issues,
represented by G.H. Potjewijd LLM of Amsterdam.

The claimant will hereinafter be referred to as the Foundation, whereas the defendants will hereinafter be referred to as Facebook Netherlands, Facebook Inc. and Facebook Ireland (collectively: Facebook et al.).

1. The course of the proceedings

1.1. The course of the proceedings appears from:
- the identical writs of summons of 30 December 2019,
- the document containing exhibits on the part of the Foundation of 6 May 2020,
- the deed on jurisdiction, staying the proceedings, admissibility and applicable law on the part of Facebook et al. of 26 August 2020, with exhibits,
- Conclusion in the ancillary action regarding jurisdiction, stay, admissibility and applicable law, also motion amending claim, on the part of the Foundation of 25 November 2020, with exhibits,
- the interim judgment of 27 January 2021, whereby an oral hearing was ordered,
- the record of the oral hearing of 1 April 2021, and the documents referred to therein.

1.2. In conclusion a date was set for judgment to be rendered in the procedural issues.

2. The facts to the extent relevant in the procedural issues

2.1. Facebook Netherlands, Facebook Ireland and Facebook Inc. form part of the Facebook group of companies. This group offers a social network service (hereinafter also: the Facebook service). The Facebook service functions as a social media platform through which users *inter alia* are able to share experiences and come into contact with information and people. More than 2.7 billion people make use of the Facebook service worldwide. No financial compensation is paid by the user for the Facebook service. The business model of the Facebook group is based on income from the sale of (personalized) advertisements.

2.2. Facebook Inc. was incorporated on 4 February 2004 and has its head office in the United States. Facebook Ireland is a subsidiary of Facebook Inc. and was incorporated on 6 October 2008. Facebook Ireland acts as a contracting party in offering the Facebook service to users in the Netherlands (and Europe). In addition, Facebook Ireland sells advertisements through a self-service advertising platform. Facebook Netherlands was incorporated on 25 November 2010. The (ultimate) parent company of Facebook Netherlands is Facebook Inc. Facebook Netherlands provides marketing and sales support services, related to the sale of advertisements, to the Facebook group. Within that context Facebook Netherlands is inter alia engaged in providing advice on, and promoting the sale of, advertising space on Facebook and other advertising products. Facebook Netherlands for example advises undertakings and other organisations on advertising target groups and achieving marketing objectives with the help of the Facebook service.

2.3. The Foundation is a collective claims organization that was founded on 25 February 2019. In addition to a board of directors, it also has a supervisory board.

2.4. To the extent relevant, the Foundation's articles of association read as follows:

" (...)
Definitions
Article 1.
In these articles of association the following terms starting with a capital letter shall have the following meaning:
Privacy breach:
the storage, transmission or processing of Data with regard to users of a product or service whereby:

a. Data were obtained by fraud in any form whatsoever;
b. Data of users are concerned who had less control over such Data than was (initially) stated, presented or in any way implied at the time these Data were obtained;
c. Data have been or are in any way stored, transmitted or processed contrary to the instructions or obvious intentions of the users;
d. privacy rights or other related rights of users - contractual or otherwise – managed or owned, are breached or the protection of their privacy and Data is infringed;
e. users are humiliated, degraded, embarrassed or otherwise affected in connection with Data about themselves, their family members or their relations;
   or
f. users are in any way affected negatively as a result of any unlawful acts or omissions with regard to their privacy rights,

irrespective of where in the world they occur.
Data:
information which is stored in digital form and which can be used in any of the following ways:

a. to identify a person, by name or otherwise;
b. to ascertain the characteristics, qualities, location or activities of a person, whether or not specifically identified; or

c. to ascertain the characteristics, qualities, location or activities of a group.

Injured parties:

(former) users and/or their legal guardians, not acting in the conduct of a profession or business, of products or services capable of storing, transmitting or processing Data, in respect of whom a Privacy Breach occurs or has occurred at any time while they were residing in the Netherlands, and whose interests the Foundation represents in accordance with its object and who are not an Excluded Party, all in the broadest sense.

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Object and means.

Article 3.

3.1. The object of the Foundation is:

a. to represent the interests of Injured Parties in respect of whom at any time Privacy Breach occurs or has occurred;

b. to investigate and to establish the unlawfulness and the direct or indirect liability for the aforementioned Privacy Breaches, as well as all the consequences arising therefrom or otherwise with respect to the practices referred to in article 3.1 (a) above;

c. to do all that is related to the provisions of articles 3.1 (a) and article 3.1 (b) or may be conducive thereto, all in the broadest sense.

(...)

3.3 The Foundation does not seek to make a profit.

(...)

Compliance with the Claim Code.

Article 7.

7.1 The board ensures compliance with the Claim Code.

(...)"

2.5. The Foundation operates together with the Dutch Consumers' Association ('*Consumentenbond*') and with the American law firm of Lieff Cabraser Heimann & Bernstein LLP (hereinafter also: 'Lieff Cabraser'). The latter is the funder of the present action and in addition provides (logistic) support.

2.6. Towards the end of 2014, the Dutch Data Protection Authority (AP), or its legal predecessor, which acts as the regulator in the field of data protection in the Netherlands, started an inquiry into the processing of personal data of data subjects by the Facebook group in the Netherlands. In a report dated 21 February 2017, which was published on 16 May 2017, the AP reported on its findings. In its report the AP came to the conclusion that the Facebook group was acting in breach of the Personal Data Protection Act (in Dutch: *Wet bescherming persoonsgegevens*) on several points in terms of the provision of information regarding the manner in which it was processing personal data for advertising purposes.

2.7. In a letter of 19 November 2019, the Foundation informed Facebook et al., by inter alia referring to the AP report of 21 February 2017, that the Foundation was holding Facebook et al. responsible for breaches of the privacy of consumers in the Netherlands, asking Facebook et al. whether that party was prepared to enter into consultations about a settlement and requesting Facebook et al. to respond by 12 December 2019 at the latest. At the same time the Foundation announced that it would issue a writ of summons if Facebook et al. were not prepared to have these consultations, or should fail to inform the Foundation to that effect in time.

2.8. In an email dated 12 December 2019, Facebook Ireland requested the Foundation to provide more information before the Foundation's invitation could be considered or an adequate response be provided.

2.9. After a further exchange of e-mails between the Foundation and Facebook Ireland on 20 and 24 December 2019, the Foundation issued the writs of summons in the present proceedings on 30 December 2019.

3. The claims in the main action

3.1. In the main action, following a change of the claim, the Foundation requests the district court, by provisionally enforceable judgment to the extent possible:

a. stating that Facebook Netherlands B.V., Facebook Ireland LTD and Facebook Inc., jointly and/or each independently, from 1 April 2010 until 1 January 2020, or during the period recorded for each individual violation in marginal 156 of the Writ of Summons, or during a period as justly determined by your Court, acted unlawfully against the Represented Parties of the Foundation because they:

   i) violated the (privacy) rights of the Represented Parties, in violation of the disclosure obligations set forth in articles 33 and 34 Wbp, or the disclosure obligations of Directive 95/46/EC, implemented through corresponding provisions in national privacy legislation of other Member States and/or articles 12, 13 and 14 General Data Protection Regulation[1] (GDPR), by:

      1. allowing, or enabling and facilitating, external developers to use and/or have access to personal data of the Represented Parties and could subsequently process these personal data, without informing the Represented Parties sufficiently and in due time; and/or
      2. allowing, or enabling and facilitating, Aleksandr Kogan and/or Global Science Research Ltd, and/or Cambridge Analytica Ltd., Cambridge Analytica LLC, and SCLE Elections Ltd to use and/or have access to personal data of the Represented Parties and that they could subsequently process these personal data, without informing the Represented Parties sufficiently and in due time; and/or
      3. using phone numbers of the Represented Parties, provided for two-factor authentication, for placing targeted ads, on the desktop version of its platform or otherwise, without informing the Represented Parties sufficiently and in due time; and/or
      4. not informing the Represented Parties, or not sufficiently and/or in due time, about the 'integration partnership' program and the corresponding processing of personal data pertaining to the Represented Parties;

   and/or

   ii) violated the (privacy) rights of the Represented Parties by:

      1. violation of the legal basis principle from article 6 and 8 Wbp, or analogous provisions in national privacy legislation in other Member States, and/or violation of

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016 L 119.

article 5, first paragraph, sub a, and article 6, first paragraph GDPR, in each case by processing data of the Represented Parties, while such processing could not be based on a sufficient and legal basis for processing;

2. violating the prohibition on processing special categories of personal data from article 16 Wbp, or analogous provisions in national privacy legislation in other Member States, and/or article 9 first paragraph, GDPR, by, in particular (though not exclusively) using personal data pertaining to the sex life, religious beliefs and ethnicity, and the content of the Represented Parties' messages showing such information, for advertising purposes;
3. violation of the information duty and permission requirement from article 11.7a, first paragraph Tw, or analogous provisions in national privacy legislation in other Member States, by not, or not sufficiently and/or in due time, informing the Represented Parties about using cookies and/or similar technology to follow surfing behaviour and app use outside the Facebook service, and using information obtained in that manner for advertising purposes;;

and/or

iii) against the Represented Parties of the Foundation, acting in a manner that is unfair within the meaning of article 6:193b, paragraph 1 DCC and/or misleading within the meaning of article 6:193c, 193d and 193g DCC, by:

1. failing to, sufficiently and/or in due time, inform the Represented Parties about the collection and further processing of their (confidential) personal data, for the purpose of generating revenue, by sharing those personal data with third parties, or to use those data to the benefit of third parties;
2. failing to, sufficiently and/or in due time, inform the Represented Parties about the scale of the collection of these (confidential) personal data, and sharing thereof with third parties, or the use thereof to the benefit of third parties;
3. until August 2019 in any case, communicating the misleading statement to the Represented Parties that Facebook was free and would always stay that way, while the Represented Parties de facto paid for the Facebook service by providing the corresponding confidential personal data to Facebook;

b. declare that Facebook Netherlands B.V., Facebook Ireland Ltd. and Facebook Inc., jointly and/or each in respect of itself from 1 April 2010 until 1 January 2020, at least during the period mentioned in subsection 156 of the Writ of Summons for each individual violation, or at least during a period to be determined by your court of competent jurisdiction, have acted imputably unlawfully towards the Represented Parties by, via the Represented Parties, also acting with respect to the data of friends of the Represented Parties in the aforementioned subsection a. i. 1., a. i. 2., a. i. 3., a. ii. 1. and a. ii. 3.;

c. to pass a declaratory judgement, enforceable immediately, to the extent possible, stating that Facebook Netherlands B.V., Facebook Ireland LTD and Facebook Inc., jointly and/or each independently, have unlawfully been enriched at the expense of the Represented Parties in the period from 01 April 2010 to 01 January 2020, or a period as justly determined by the Court;

d. To jointly and severally order Facebook Netherlands B.V., Facebook Ireland LTD and Facebook Inc., to pay the costs incurred by the Foundation in these proceedings, increased by subsequent costs.

3.2. The word "Achterban" (Represented Parties) used in the claim is defined by the Foundation - briefly put - as the users, or former users, of the Facebook service at any moment in the period 1 April 2010 - 1 January 2020 (and/or their legal guardians), insofar as they were residing in the Netherlands at the time of that use, were not acting in the conduct of a profession or business, and whose interests the Foundation represents according to its objects clause contained in the articles of association.

3.3 The Foundation's statements in the main action will, to the extent relevant, be addressed below in the examination of the procedural issues.

3.3. Facebook et al. have not yet submitted a statement of defence in the main action.

4. The claims in the procedural issues

4.1. Facebook et al. request the district court, by provisionally enforceable judgment to the extent possible:

principally
(a) to declare that it lacks jurisdiction to hear and determine the Foundation's claims against Facebook et al. and/or
(b) to rule that the Foundation's claims against Facebook et al. are inadmissible;

in the alternative
(c) to suspend or stay, as the case may be, the further hearing of these proceedings; and/or
(d) to declare the Irish legislation on data protection and telecommunications applicable to the Foundation's claims insofar as these relate to the period prior to the entry into force of the GDPR, and to declare the GDPR and the Irish legislation implementing the GDPR applicable to the claims insofar as these relate to the period after the entry into force of the GDPR; and/or
(e) to rule that the legislation on data protection precludes consumer law claims (as *lex generalis*); and/or
(f) in the event that the district court should nevertheless rule that the Foundation is entitled to use consumer law as a basis for its claims, to declare Irish consumer law applicable to the Foundation's consumer law claims;

both principally and in the alternative
(g) to the extent that the district court should reject, either in whole or in part, the preliminary defence of Facebook et al., to rule that an interim appeal is possible from this judgment; and
(h) to order the Foundation to pay the costs of the proceedings, as well as the usual subsequent costs (both with and without service being effected), plus the statutory interest as referred to in article 119 of Book 6 DCC within fourteen days from the date of this judgment.

4.2. The Foundation has put forward a defence and moves that the interim application be dismissed and that Facebook et al. be ordered to pay the costs of the procedural issue.

4.3. To the extent relevant, the parties' arguments will be discussed below.

5. The examination of the motion contesting jurisdiction

5.1. The dispute concerns the jurisdiction of the Dutch court.

5.2. The court will first examine its jurisdiction with respect to the claims brought by the Foundation, insofar as these relate to the period before the GDPR entered into force on 25 May

2018. The jurisdiction to hear those claims should be assessed on the basis of the Brussels I bis Regulation[2] and the Dutch Code of Civil Procedure (DCCP).

5.3. Next, the Court will examine its jurisdiction over the claims brought by the Foundation, insofar as these relate to the period after 25 May 2018. At this point, the parties disagree on how the jurisdiction regime in the GDPR relates to the rules on jurisdiction laid down in the Brussels I bis Regulation and the DCCP.

<u>The period up to 25 May 2018</u>

Assessment framework Brussels I bis Regulation and DCCP

5.4. The Brussels I bis Regulation applies by virtue of article 1 and article 66 (1) of that Regulation to legal actions in civil and commercial matters brought on or after 10 January 2015.

5.5. According to settled case law of the Court of Justice of the European Union (CJEU), the provisions of the Brussels I bis Regulation must be given an autonomous interpretation in the light of the history, the objectives and the system of that regulation. The interpretation given by the CJEU with regard to provisions of the predecessor of the Brussels I bis Regulation, also applies to the Brussels I Regulation when the provisions concerned can be regarded as equivalent.

5.6. The court that, on the basis of the Brussels I bis Regulation, examines whether it has jurisdiction, should not limit its examination to the arguments of the claimant, but should consider all the information available to it regarding the legal relationship actually existing between the parties and, where appropriate, the allegations made by the defendant. However, there is a limitation in this regard that, if the defendant contests the claimant's arguments, the court, in the context of determining its jurisdiction, is not required to provide an opportunity to produce evidence. Thus, the examination of jurisdiction under Union law instruments must not take place on the basis of the claimant's chosen ground for its claim only.[3]

5.7. The standard set out above also applies if the Dutch court, in the context of applying the general rules of international jurisdiction, as laid down in the DCCP, examines whether it has jurisdiction.[4]

Facebook Netherlands

5:8. With regard to Facebook Netherlands, jurisdiction is conferred on the Dutch court by the main rule of article 2 DCCP, or in any case by article 4 (1) of the Brussels I bis Regulation. After all, Facebook Netherlands has its registered office in Amsterdam and is therefore domiciled in Amsterdam.

5.9. To the extent that Facebook et al. argue that the Dutch Court does not have jurisdiction over Facebook Netherlands - on the ground that Facebook Netherlands is not a data controller or contracting party for Facebook users in the Netherlands, so that Facebook Netherlands is not a

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[2] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351, as last amended on 26 November 2014, OJ 2015 L 54.

[3] See CJEU 11 October 2007, ECLI:EU:C:2007:595, ground 41, *Freeport/Arnoldsson*, CJEU 28 January 2015, ECLI:EU:C:2015:37, grounds 58-65, *Kolassa/Barclays Bank*, CJEU 16 June 2016, ECLI:EU:C:2016:449, grounds 42-46, *Universal Music/Schilling*.

[4] C.f. Supreme Court 12 April 2019, ECLI:NL:HR:2019:566, ground 3.4.4 and Supreme Court 29 March 2019, ECLI:NL:HR:2019:443, grounds 4.1.4-4.1.5.

relevant party in this dispute - the Court will disregard this argument. The involvement and responsibility of Facebook Netherlands concern the question of liability, the examination of which will (if necessary) be addressed in the main action.

Facebook Ireland and Facebook Inc.

5.10. The dispute between the Foundation and Facebook Ireland, both in terms of the subject matter, in a formal sense and in terms of the time period, falls within the scope of the Brussels I bis Regulation (for it concerns a commercial case brought after 10 January 2015 against a defendant domiciled in the European Union). This means that the question as to whether the Dutch court has jurisdiction with respect to Facebook Ireland must be answered on the basis of that Regulation.

5.11. Facebook Inc. is domiciled in the United States and in the present case there is no convention that applies between the Netherlands and the United States regarding the jurisdiction of the Dutch court. The question as to whether the Dutch court has jurisdiction over Facebook Inc. must therefore be answered on the basis of the general international law on jurisdiction, as laid down in the Dutch Code of Civil Procedure (DCCP).

5.12. The Foundation argues that the Dutch court has jurisdiction:
- with respect to Facebook Ireland: principally on the basis of article 8, opening words and (1), Brussels I bis Regulation, alternatively on the basis of article 7, opening words and (2), Brussels I bis Regulation;
- with respect to Facebook Inc.: principally on the basis of article 7 (1) DCCP, alternatively on the basis of article 6 (e) DCCP.

5.13. The grounds for jurisdiction brought forward by the Foundation with respect to Facebook Inc. (on the basis of the DCCP) on the substance correspond with the grounds for jurisdiction brought forward with respect to Facebook Ireland (based on the Brussels I bis Regulation). The rules on jurisdiction of articles 7 (1) and 6 (e) DCCP are to a large extent derived from the (predecessors of) the current corresponding provisions in article 8, opening words and (1), respectively article 7, opening words and (2), Brussels I bis Regulation. When interpreting the articles of the Brussels I bis Regulation, the case law of the CJEU serves as a guide. Since the Dutch legislator, when drafting the aforementioned provisions in the DCCP, intended to align with the provisions of (the predecessor of) the Brussels I bis Regulation, the district court will likewise take the case law of the CJEU as a guide for the interpretation and application of the aforementioned articles from the DCCP.

5.14. The above means that the district court will assess the jurisdiction with respect to Facebook Ireland and Facebook Inc. jointly, since the assessment framework in that respect is essentially the same.

5.15. Notwithstanding the main rule that the defendant is sued in the courts of the country where the defendant is domiciled, a number of special rules on jurisdiction are provided by the Brussels I bis Regulation and the DCCP, resulting in alternative grounds of jurisdiction. These are based on the close connection between the court and the action or the need to facilitate the proper administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility that the defendant is sued before a court of a Member State which he could not reasonably have foreseen, according to recital 16 of the preamble to the Brussels I bis Regulation. The special rules on jurisdiction must be strictly interpreted[5] and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation.[6]

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[5] See CJEU 27 September 1988, ECLI:EU:C:1988:459, *Kalfelis/Schröder*.
[6] See CJEU 11 October 2007, ECLI:EU:C:2007:595, ground 35, *Freeport/Arnoldsson*.

- *related claims*?

5.16. Principally, the Foundation argues that there is a connection between the claims, referring to Facebook Netherlands as the 'anchor defendant'.

5.17. The special rule on jurisdiction of article 8, opening words and (1), Brussels I bis Regulation reads as follows, to the extent relevant for the purpose hereof:

> *A person domiciled in a Member State may also be sued:*
> *1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;*

5.18. It follows from the case law of the CJEU that it is for the national court, taking into account all the necessary elements of the case, to assess if there is a connection between various claims brought before it and, consequently, if there is a risk of irreconcilable judgments resulting from separate proceedings. The risk of irreconcilable judgments should be taken to mean the risk of conflicting judgments. In that respect, it may be important whether the defendants have acted independently of each other. Also relevant is the legal basis of the claims, in which respect it is noted that an identical legal basis is not an indispensable condition for the application of article 8, opening words and (1), Brussels I bis Regulation. Furthermore, for decisions to be regarded as contradictory within the meaning of article 8 (1) (a) of the Brussels I bis Regulation, it is not sufficient that there is a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact.[7]

5.19. Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6 (1) of the Brussels 1 bis Regulation, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled.[8]

5.20. The question to be answered is whether there is a sufficiently close connection between the Foundation's claims against Facebook Netherlands and its claims against Facebook Ireland and Facebook Inc.

5.21. The Foundation has brought identical claims against the three defendants. All these claims are in essence based on the allegation that Facebook et al. have breached the privacy of Facebook users in the Netherlands, by not properly informing those users about the manner in which Facebook et al. have handled personal data, and by sharing confidential personal data of the users with third parties without their consent. The Foundation holds all three defendants (jointly) responsible for the alleged privacy breaches. To that end, the Foundation has argued that Facebook Ireland, Facebook Inc. and Facebook Netherlands are to be regarded as joint controllers of personal data (within the meaning of formerly the Wbp and nowadays the GDPR). Facebook et al. have disputed that the three entities are to be regarded as joint data controllers and have taken the view that Facebook Ireland only is a data controller with respect to the provision of the Facebook service to users in Europe.

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[7] C.f. CJEU 13 July 2006, ECLI:EU:C:2006:458, ground 26, Roche/Primus, CJEU 11 October 2007, ECLI:EU:C:2007:595, ground 40, *Freeport/Arnoldsson*, CJEU 1 December 2011, ECLI:EU:C:2011:798, ground 79, *Painer/Standard Verlags* and CJEU 12 July 2012, ECLI:EU:C:2012:445, ground 24, *Solvay v Honeywell*.

[8] See CJEU 1 December 2011, ECLI:EU:C:2011:798, ground 81, *Painer/Standard Verlags*.

5.22. The Court finds that the substantiation put forward by the Foundation shows that the basis of the claims against the three defendants in essence is the same. The examination of the validity of that basis need not be prejudged within the context of this procedural issue. The substantive question as to who is the controller will be discussed in the main action.
The fact that the three defendants are different entities within the Facebook group and that the activities of those entities differ from each other, does not mean that in this case there are relevant differences in the factual and/or legal situation. It has not been disputed that the companies within the Facebook group form part of one and the same financial and operational business unit and that the group reports all turnover worldwide as turnover generated by Facebook Inc. The business model of the Facebook group is based on income from (personalized) advertisements. In the sale of these advertisements, the personal data obtained by the Facebook group from its users play an (essential) role. With its activities, Facebook Netherlands makes a relevant contribution to the sale of advertisements in the Netherlands and hence also a significant contribution to rendering the Facebook service profitable in the Netherlands. To that extent the activities of Facebook Netherlands make up an essential part of the activities of the Facebook group in The Netherlands. To that should be added that it is undisputed that Facebook Netherlands, in order to be able to perform its activities, has access to personal data of users of the Facebook service and that Facebook Netherlands has entered into a processor agreement with Facebook Ireland, under which the former is entitled to use data provided by Facebook Ireland for the provision of support services for marketing, advertising and sales activities.

5.23. In view of the above the district court takes the view that there is such a close connection between the identical claims against the three defendants as to make a joint hearing of these appropriate. This is not altered by whether or not Facebook Netherlands offers the Facebook service in the Netherlands and whether or not it processes personal data *within that context*.

5.24. To this the district court adds that, even if the claims did not have an identical basis, it might nevertheless have been foreseen by Facebook Ireland and Facebook Inc. that they could be summoned to appear before the Dutch court in a dispute about an alleged breach of privacy rights of Dutch users of the Facebook service, for Facebook Netherlands inter alia advises on the sale of advertisements targeting users of the Facebook Service in the Netherlands, while Facebook Ireland, according to Facebook et al., provides the Facebook service to users in the Netherlands. The circumstance that Facebook Inc., by so acting, directly targets the Dutch market in part by way of its subsidiaries Facebook Netherlands and Facebook Ireland, results in the above-mentioned foreseeability.

5.25. Facebook et al. have furthermore argued that the Foundation is abusing the rules on jurisdiction by artificially involving Facebook Netherlands in the proceedings as an irrelevant anchor defendant, in order to in that way remove the case from the jurisdiction of the appropriate court. The district court rejects this view. As has been held above, the claims are sufficiently connected. There is therefore no question of abuse. Furthermore, it has not been demonstrated that the Foundation has also instituted the claims against Facebook Netherlands for the sole purpose of removing Facebook Ireland and Facebook Inc. from the jurisdiction of their place of domicile. At this stage of the proceedings in any case, it cannot be concluded beforehand that the basis put forward by the Foundation against Facebook Netherlands is doomed to fail from the outset. Facebook et al. have not provided sufficient connecting factors to be able to rule that the jurisdiction regime of article 8 (1) of the Brussels I bis Regulation cannot apply due to abuse of rights.

5.26. The conclusion is that with regard to Facebook Ireland and Facebook Inc. jurisdiction is conferred on the Dutch courts by article 8, opening words and (1) Brussels I bis Regulation and by article 7 (1) DCCP.

- place of the harmful event

5.27. Although it has already been held above that the district court has jurisdiction to hear and determine the claims against Facebook Ireland and Facebook Inc. because of the close connection with the claims against Facebook Netherlands, the district court will also state its views on the alternative ground for jurisdiction put forward by the Foundation, since that ground has also been the subject of extensive debate between the parties.

5.28. Article 7, opening words and (2) of the Brussels I bis Regulation provides that in matters relating to tort, delict or quasi-delict, jurisdiction lies with the courts for the place where the harmful event occurred or may occur. Article 6 (e) DCCP contains a similar provision, stating that the Dutch courts have jurisdiction in matters relating to tort, delict or quasi-delict, if the harmful event has occurred or may occur in the Netherlands.

5.29. It is settled case law of the CJEU that article 7, opening words and (2), Brussels I bis Regulation, relates to both the place where the event giving rise to the damage occurred (the 'Handlungsort') and the place where the damage occurred ('Erfolgsort').[9] This special rule on jurisdiction must be given an autonomous and strict interpretation.[10] It is based (as stated above) on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.[11]

5.30. The place where the damage occurred is the place where the alleged damage actually manifests itself[12] The term "place where the harmful event occurred" cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.[13]

5.31. The Foundation's claims in the main action relate to alleged unlawful acts, unfair trade practices and unjust enrichment by Facebook et al. As such, these claims relate to matters relating to tort, delict or quasi-delict within the meaning of article 7, opening words and (2), Brussels I bis Regulation.

5.32. The acts and omissions alleged against Facebook et al. concern a breach of privacy rights. The 'Erfolgsort' of the alleged damage sustained by the persons whose interests the Foundation claims to represent, namely former and current users of the Facebook service in the Netherlands, is situated in the Netherlands. After all, the damage, consisting in the loss of control over personal data, is experienced in the Netherlands. Also relevant in this respect is the judgment of the CJEU of 25 October 2011.[14] It follows from this that the 'Erfolgsort' in the event of an alleged breach of personality rights as a result of content placed on the internet, is situated in the country in which the centre of the user's interests is based. Similar to this is the situation of a breach of privacy rights of the user of an internet service, such as Facebook. It may be assumed that the centre of the interests

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[9] Settled case law since CJEC 30 November 1976, ECLI:EU:C:1976:166, ground 25, *Mines de Potasse*.
[10] See, inter alia, CJEU 28 January 2015, ECLI:EU:C:2015:37, ground 43, *Kolassa v Barclays Bank*, CJEU 16 June 2016, ECLEEU:C:2016:449, ground 25, *Universal Music v Schilling*.
[11] See, inter alia, CJEU 16 July 2009, ECLI:EU:C:2009:475, ground 24, *Zuid-Chemie/Philippo's*, CJEU 25 October 2011, ECLI:EU:C:2011:685, ground 51, *eDate Advertising* and *Olivier Martinez*, CJEU 25 October 2012, ECLI:EU:C:2012:664, ground 37, *Folien Fischer/Ritrama*.
[12] CJ EU12 September 2018, ground 27, ECLI:EU:C:2018:701, *Löber/Barclays Bank*.
[13] CJEC 19 September 1995, ground 14, ECLI:EU:C:1995:289, *Marinari*.
[14] CJEU 25 October 2011, ECLI:EU:C:2011:685, *eDate Advertising and Olivier Martinez*.

of the users of the Facebook service whose interests the Foundation claims to represent, is based in the Netherlands.

5.33. Facebook et al. have argued that the Foundation cannot rely on the 'Erfolgsort' of the persons whose interests it claims to represent, because the Foundation is acting as the claimant in these proceedings and the Foundation itself is not suffering or has not suffered any damage as a result of the alleged unlawful conduct. The district court does not concur with Facebook et al. in its argument. Neither the Brussels I bis Regulation nor case law provide any substantiation for the view that a collective claims organisation as referred to in article 305a of Book 3 DCC (old) cannot invoke the 'Erfolgsort' of its represented parties under the articles of association. No connecting factors are in that respect provided either by the Supreme Court judgment of 14 June 2019 in the VEB/BP case[15] or by the opinion of 17 December 2020 by the Advocate General (A-G) with the CJEU[16], to which Facebook has referred at the hearing. That case involved claims by a collective claims organisation for compensation for purely financial damage (financial loss) suffered by holders of securities. The reasoning of the Supreme Court, the opinion given by the A-G and the CJEU (in the judgment which has meanwhile been handed down[17]) focus on the question where the 'Erfolgsort' should be located in that case, but do not as such call into question that a collective claims organisation too has the choice between 'Handlungsort' and 'Erfolgsort', in the event that those places are situated in different jurisdictions.

5.34. The bundling of interests by the Foundation as in this dispute does not create jurisdiction for the court seised either that would not have existed without such bundling, since in this case the 'Erfolgsort' of the individual represented parties is each time situated in the Netherlands. Moreover, it is not in dispute between the parties, or not anymore, that an individual data subject could start legal proceedings in the Netherlands.

5.35. With regard to Facebook Ireland and Facebook Inc. the Dutch court can therefore also derive jurisdiction from article 7, opening words and (2), Brussels I bis Regulation and from article 6 (e) DCCP respectively.

Period after 25 May 2018

5.36. With respect to the period after 25 May 2018, the parties first of all disagree on the relationship between the rules on jurisdiction laid down in the Brussels I bis Regulation and the DCCP on the one hand, and the rules on jurisdiction laid down in the GDPR on the other hand.

5.37. In this regard, Facebook et al. have argued that the claims brought by the Foundation that arose on or after 25 May 2018 have their basis in the GDPR. Facebook et al. argue that the GDPR represents a *lex specialis* for disputes in the field of data protection disputes and that, therefore, the GDPR has its own (international) rules on jurisdiction for legal actions based on the GDPR. These rules on jurisdiction replace the rules on jurisdiction of the Brussels I bis Regulation and the DCCP. To the extent that the Foundation's claims relate to claims under the GDPR, the district court must therefore exclusively examine its jurisdiction in the light of the GDPR, all this according to Facebook et al.

5.38. The court first and foremost notes that both the Brussels I bis Regulation and the GDPR have direct effect in the Member States.

[15] ECLI:NL:HR:2019:925
[16] 16 ECLI:EU:C:2020:1056
[17] CJEU 12 May 2021, ECLI:EU:C:2021:377 C/13/683377

5.39. To the extent relevant for the purpose hereof, article 67 Brussels I bis Regulation reads as follows:

> *This Regulation shall not prejudice the application of provisions governing jurisdiction in specific matters which are contained in Union acts or which may be adopted in the future (...).*

5.40. Article 79 (2) GDPR reads as follows:

> *Proceedings against a controller or processor shall be brought before the courts of the Member State in which the controller or processor has an establishment. Such proceedings may also be brought in the courts of the Member State where the data subject has his or her habitual residence unless the controller or processor is a public authority of a Member State acting in the exercise of public authority.*

5.41. Recital 147 to the GDPR states the following about the relationship between the GDPR and the Brussels I bis Regulation:

> *Where this Regulation provides for specific rules on jurisdiction, in particular in relation to proceedings seeking judicial remedy, including compensation, against a controller or processor, general rules on jurisdiction, such as those laid down in Regulation (EU) No 1215/2012 of the European Parliament and of the Council, should not prejudice the application of those specific rules.*

5.42. The Foundation's claims in the main action are based on unlawful conduct of Facebook et al., which the Foundation characterizes as an unlawful act, unfair trade practices and unjust enrichment. Given the general nature and the, in principle, broad material scope of the jurisdiction regime laid down in the Brussels I bis Regulation, it can only be assumed that the Union legislator intended to create a jurisdiction regime that deviates from that regulation, which is exclusively applicable (and not additionally), if such has been expressed sufficiently clearly in the regime concerned. Neither from the text of the GDPR, nor from the preamble does it follow that with respect to a claim arising from an unlawful act, even if the alleged unlawful conduct relates to the processing of personal data, the rule on jurisdiction of article 79 (2) GDPR represents an exclusive regime that overrides the Brussels I bis Regulation. It follows from 147 of the recital that the general rules on jurisdiction of the Brussels I bis Regulation must not affect the application of the specific rules on jurisdiction contained in the GDPR. All that this means is that, in a situation where both the Brussels I bis Regulation and the GDPR apply, the Brussels I bis Regulation cannot take away jurisdiction attributed by the GDPR. Thus, the GDPR to that extent represents an addition to the general rules on jurisdiction of the Brussels I bis Regulation.

5.43. An examination in the light of the Brussels I bis Regulation and the DCCP results in jurisdiction being conferred on the Dutch court, in which respect the same grounds for jurisdiction apply as those assumed by the district court regarding the claims relating to the period before 25 May 2018. Reference is made to the views stated in grounds 5.4 - 5.35 above.

5.44. Incidentally, the district court takes the view that, if an examination is (also) performed in the light of article 79 (2) GDPR, as advocated by Facebook et al., this will not lead to a different outcome when it comes to the jurisdiction of the Dutch court, the reason for this being as follows.

5.45. Article 79 (2) GDPR merely provides rules on jurisdiction for proceedings to be brought against a controller or processor. It is not in dispute that (in any event) Facebook Ireland is a data controller with respect to the processing of the personal data at issue in these proceedings. The question will in that case be, having regard to article 79 (2), first sentence GDPR, whether Facebook

Netherlands is to be regarded as an establishment of Facebook Ireland, for if such is the case, the Dutch court has jurisdiction. For the purpose of interpreting the term establishment in the GDPR, the case law of the CJEU regarding the term establishment in the Privacy Directive, the predecessor of the GDPR, is of importance. The district court takes the view that Facebook Netherlands should be regarded as an establishment of Facebook Ireland. For the sake of brevity, grounds 8.6 - 8.12 are referred to for the reasons for this decision, that passage being the place where the term establishment is discussed. Moreover, the Dutch court may also derive jurisdiction in these proceedings with respect to Facebook Ireland from article 79 (2), second sentence, GDPR, for the that second sentence offers the possibility to also bring the proceedings before the courts of the Member State where the data subject has its habitual residence. In this case, the data subjects whose personal data have been processed reside in the Netherlands. The district court does not follow the argument that the Foundation as a representative of the interests of the represented parties might not rely on the place of residence of the data subjects, as Facebook et al. have argued, since article 80 GDPR expressly offers the possibility of a representation of interests and states that the representative of the interests may exercise the data subjects' rights without, in so doing, making a distinction between procedural and substantive rights. The comparison with article 18 Brussels I bis Regulation and the Schrems judgment[18] made by Facebook et al. does not apply in this case, because the Foundation does not litigate on the basis of a power of attorney or assignment, but on the basis of article 305a of Book 3 DCC (old). The above means that both the first full sentence and the second full sentence of article 79 (2) GDPR (likewise) create jurisdiction for the Dutch court with respect to Facebook Ireland.

5.46. With regard to Facebook Netherlands and Facebook Inc., Facebook et al. have furthermore argued, as the district court understands it, that article 79 (2) GDPR precludes proceedings being brought against them, because they are not data controllers or processors within the meaning of the GDPR. The parties disagree on whether Facebook Netherlands and Facebook Inc. are to be regarded as such. Whether they are data controllers and/or processors within the meaning of the GDPR need not be discussed in the context of this procedural issue, for even if they are not, it is true that article 79 (2) would not apply with respect to Facebook Netherlands and Facebook Inc., but in that case it would be possible to fall back on the jurisdiction regime of the Brussels I bis Regulation and the DCCP. Neither Union legislation nor the case law of the CJEU provides support for the view taken by Facebook et al., i.e. that conducting legal proceedings regarding data protection against a party other than a controller or processor, would have to lead to a lack of jurisdiction of the court seized.

Conclusion

5.47. The conclusion is that this court has jurisdiction to hear and determine the dispute against all three defendants. The motion contesting the court's jurisdiction will therefore have to be dismissed.

6. The examination of the motion requesting a stay of the proceedings

6.1. Initially, Facebook et al. demanded a stay of these proceedings because of earlier proceedings initiated in Belgium, in which, according to Facebook et al., related claims are at issue. At the hearing Facebook et al. changed their position. They now request the district court to stay the proceedings, pending the answer from the CJEU to the request for a preliminary ruling of 28 May 2020 from the *Bundesgerichtshof* in Germany and of 25 November 2020 from the *Oberster Gerichtshof* in Austria[19]. According to Facebook et al., those requests have brought up the question whether article 80 GDPR precludes rules of national law that empower associations, foundations and other entities to bring actions in civil courts for alleged breaches of the GDPR on the basis of the

[18] CJEU 25 January 2018, ECLI:EU:C:2018:37.
[19] ECLI:DE:BGH:2020:280520BIZR186.17.0 and ECLI:AT:OGH0002:2020:0060OB00077.20X.1125.00

prohibition on unfair business practices, breaches of consumer law or the prohibition on the use of invalid general terms and conditions, independently of the specific breach of the rights of individual data subjects and without having received instructions to that end from the data subject. This causes the request for a preliminary ruling and the decision in respect thereof from the CJEU to be of direct relevance to the present proceedings, all this according to Facebook.

6.2. The Foundation opposes a stay of the case.

6.3. In the district court's view the request for a preliminary ruling is not sufficient to stay these proceedings. Based on the decisions of the German and Austrian courts, it may be established that the claims in those proceedings are of a different nature than those brought by the Foundation in these proceedings and that the claimants too are a type of organization which is different from the Foundation as a collective action organisation. The claims filed in the German and Austrian actions were more in the nature of what, under Dutch law, might be characterized as a public interest action. The German and Austrian courts have raised the question how these claims brought before the civil courts relate to the enforcement and supervisory powers of the national regulator. In view of the aforementioned differences, Facebook et al. have insufficiently substantiated that the request for a preliminary ruling may be relevant to the examination in this case. Contrary to what has been argued by Facebook et al., there is no basis for the view that the claims brought by the Foundation cannot and should not be brought before the civil courts, but before the Dutch Data Protection Authority (AP) as the regulatory authority only.

6.4. The motion to stay the proceedings will be dismissed.

7. The examination of the motion of inadmissibility

7.1. Facebook et al. request the court to rule that the Foundation's claims are inadmissible on account of, briefly put, the Foundation's failure to meet the requirements that apply to a collective action organisation.

7.2. The question whether the Foundation is admissible as a collective action organisation must - regardless of the law applicable to the Foundation's claims - pursuant to article 3 of Book 10 DCC be answered under Dutch law. Below, the Court will first address the criteria for admissibility set forth in article 305a of Book 3 DCC (old). Subsequently, the relevance of article 80 of the GDPR to the admissibility issue will be discussed.

7.3. In its assessment, the district court will use the object and definitions set forth in the Foundation's articles of association, as well as the description of the Represented Parties whose interests it represents in these proceedings, as provided by the Foundation in paragraph 10 of the summons.

Assessment framework

7.4. On 1 January 2020, the Settlement of Large-scale Losses or Damage (Class Actions) Act (in Dutch: *Wet afwikkeling massaschade in collective actie* (WAMCA)) entered into force. However, in view of section 119a of the New Civil Code Transition Act (in Dutch: *Overgangswet nieuw Burgerlijk Wetboek*) in conjunction with section III (2) WAMCA, the WAMCA does not apply to this case, because the claims in this case were brought before the date of entry into force of the WAMCA. This matter is governed by the Class Actions (Settlement of Large-scale Losses or Damage) (in Dutch: *Wet collectieve afwikkeling massaschade* (WCAM)), as laid down in, inter alia, article 305a of Book 3 DCC, as it applied until 1 January 2020.

7.5. The (old) article 305a (1) of Book 3 DCC provides that (inter alia) a foundation may institute a legal action seeking to protect the similar interests of other persons ('the similarity requirement'), insofar as it represents these interests pursuant to its articles of association ('the articles of association requirement').
Paragraph 2 provides that a legal entity as referred to in paragraph 1 has no cause of action, if, under the circumstances, it has insufficiently attempted to pursue its claims by having consultations with the defendant. Pursuant to paragraph 2, it has no cause of action either, if the legal action does not sufficiently safeguard the interests of the persons on whose behalf it is brought.
Paragraph 3 provides that the claim cannot seek to obtain monetary damages.

7.6. The Foundation is under the obligation to state facts and, if disputed, under the burden of proof regarding the requirements of article 305a (1) of Book 3 DCC (old). After all, these are the two conditions for being able to institute a legal action as a collective action organisation. Facebook et al. on the other hand are in principle under the obligation to state facts and under the burden of proof that a situation has arisen as referred to in article 305a (2) of Book 3 DCC (old). After all, these situations represent an exception to paragraph 1 and Facebook et al. invoke the existence of these situations.

7.7. It is not in dispute that the Foundation meets the articles of association requirement. The parties disagree as to whether the requirement of similarity has been fulfilled and whether one of the situations described in paragraph 2 arises.

The similarity requirement

7.8. The first question is whether the requirement has been met that the claims brought by the Foundation 'seek to protect similar interests of other persons', as referred to in (article 305a of Book 3 DCC (old). This requirement is met if the interests which the legal actions seek to protect lend themselves to being bundled together, thus furthering an efficient and effective legal protection for the benefit of those concerned. After all, in this way the points of dispute and the claims raised by the legal action can be decided in one procedure, without any of the special circumstances on the part of the individual interested parties having to be considered.[20] Sufficient similarity of interests need not imply that the positions, backgrounds and interests of those on whose behalf a collective action is brought, are identical or even predominantly identical. In a collective action, therefore, a certain abstract review is appropriate.[21]

7.9. According to Facebook et al. the Foundation's claims do not lend themselves to being heard collectively, because the issues of fact and law are not the same, or at least are not sufficiently similar, and the interests of the individual data subjects vary. To that end, Facebook's arguments may be summarized as follows. There are divergent factual allegations covering nearly a decade. There are also different groups of users and different legal provisions apply. The summons lists seven incidents, each of which should be viewed as an isolated event. It is not possible to group these incidents under one heading. Furthermore, the Facebook service has a unique and individualized character, for the use of the Facebook service involves a considerable degree of sophistication at individual level. Different user agreements, policy forms and provisions of information apply to the users, depending on the period in time during which each of them used the Facebook service. An individual user may also have used the different types of functions, settings and controls visible to them on the platform in different ways. The basis for data processing has varied over time. The question if, and if so, to what extent, an individual has been affected ultimately can be answered

[20] Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, Baas in Eigen Huis/Plazacasa, ground 4.2.
[21] C.f. Supreme Court 27 November 2009, ECLI:NL:HR:2009:BH2162, WorldOnline, ground 4.8.

only by investigating at individual level how each individual has used the Facebook service at various moments over the past ten years, all this according to Facebook et al.

7.10. In response to Facebook et al.'s argument, the Foundation has stated that the privacy breaches were committed without regard to the individual and that the manner in which information was provided and (inadequate) consent was obtained, took place in a uniform and standardized manner. Throughout time, these practices were always the same for all users of the Facebook service and individual aspects played no role in this. Facebook et al. made no distinction between users, or groups of users, and the manner in which they were informed. According to the Foundation, at no time in the relevant period between 2010 and 2020 and in no set of user terms were the users of the Facebook service ever properly informed about the use and processing of their personal data. This means that several generic privacy breaches have been committed by Facebook et al. The Foundation furthermore argues that, for the examination of the claims, it is irrelevant which data an individual user has provided and if one user has shared more personal data with Facebook et al. than another user, for apart from the data shared by the user itself, Facebook et al, have themselves also unlawfully obtained and processed data from users, all this according to the Foundation.

7.11. The district court holds as follows. The question as to whether the interests involved in the claims lend themselves to being bundled together, in part depends on the nature of the claims. The Foundation's claims are confined to rulings that unlawful acts, unfair trade practices and unjustified enrichment have taken place. Unlike in some of the judgments to which Facebook et al. have referred, the Foundation for example does not request a ruling relating to error, in the examination of which individual circumstances are particularly relevant.

7.12. The Foundation's claims relate to various, sufficiently specified practices of Facebook et al. Those claims are in essence based on the fact that Facebook et al. have breached the privacy of their users (as far as these form part of the represented parties), by processing personal data without the required consent. With the claims brought by it, the Foundation thus wants a decision on the question whether personal data of (certain) users of the Facebook service have been processed in accordance with the rules. A decision of that nature on the lawfulness or unlawfulness of the practices of Facebook et al. with regard to the processing of personal data, lends itself to a collective action. This is not altered by the fact that, over time, there have been various sets of conditions of use and different statutory provision. If necessary, this may after all be considered in the judgment in the main action. The question of whether the conduct of Facebook et al. is lawful or unlawful, may furthermore be answered without thereby taking into account the special circumstances on the part of the individual data subjects. After all, in these proceedings matters of damage or the existence of a causal connection are not yet at issue and on the basis of the grounds put forward by the Foundation, it is not important for the examination of its claims which and how many data an individual user has provided to Facebook et al.

7.13. Insofar as the Foundation is asking the court for a judgment on one or more specific events, the claims relating to them can be bundled together as well. In that respect too, the first question that needs to be addressed is whether the event in question has occurred and whether the conduct of Facebook et al. is lawful or unlawful. In these collective proceedings it does not yet have to be established which individual data subjects may have been affected by such conduct. For this purpose it will suffice that a member can establish, on the basis of the opinion of the district court, whether or not he or she has been affected by a privacy breach, if any. It should be possible to do so on the basis of the claims formulated by the Foundation, since in the assessment by the district court it will be possible to, if necessary, differentiate according to, for example, statutory provision, time period and/or event.

7.14. The position adopted by Facebook et al., namely that it is highly likely that a large part of the alleged claims have become time-barred, does not preclude the similarity of the interests involved in the claims. An assessment of an invocation of the limitation period, if any, will be performed in the main action, insofar as this defence relates to distinctive categories of users. Facebook et al. have insufficiently substantiated that, in this case, the assessment of a possible invocation of the limitation period requires an examination at the level of the individual user, since Facebook et al. in this respect have merely referred to the period of time that has lapsed since 2010.

7.15. The foregoing means that the claims instituted by the Foundation seek to protect similar interests of other persons, meaning that, in principle, these claims lend themselves to being bundled together in a collective action.

7.16. Specifically in respect of the requested declaratory decision to the effect that this concerns a case of unjust enrichment, Facebook et al. have furthermore argued that such a claim by necessity requires an examination at individual level. The district court finds that in general, when assessing a claim of unjust enrichment, individual circumstances must be taken into account. However, in this case the Foundation has substantiated with reasons that the degree of enrichment and the degree of impoverishment, as well as the causal connection between them, are conceptually the same with regard to all data subjects, because the impoverishment has consisted in the fact that the injured parties have (unwittingly) lost control over their personal data, whereas Facebook et al. have been (unjustly) enriched due to their having obtained those personal data (in breach of the privacy rules) and having been able to use those personal data for their earnings model. In the opinion of the Court, the correctness of this argument of the Foundation may be determined without a review of any individual circumstances. In this respect it is also important that, within the context of these collective proceedings, the extent of the enrichment does not yet need to be addressed, but that it should merely be decided if any unjustified enrichment has at all occurred. The deciding factor for the answer to that question in particular is whether the processing (and the further use) of personal data were permitted and whether those personal data represented any particular value. These are questions which, in this case, can be answered without considering the individual circumstances.

7.17. The district court therefore concludes that the Foundation's claims relate to interests that can be sufficiently generalized and that may be regarded as forming part of the similar interests as referred to in article 305a of Book 3 DCC.

7.18. Contrary to what has been argued by Facebook et al., a grouping together of the interests of the Foundation's represented parties also ensures an efficient and effective legal protection. After all, the general question of the unlawfulness of the alleged conduct and the liability of Facebook et al. can be answered in these collective proceedings, thus making these collective proceedings more efficient than conducting proceedings on an individual basis about the lawfulness of the processing of personal data by Facebook et al. It is also clear that the individual data subjects whose interests the Foundation claims to represent will unmistakably benefit from obtaining the declaratory decisions requested by the Foundation. The foregoing does not alter the fact that obtaining the requested declaratory decisions in this collective action does not yet mean that an individual data subject can automatically claim damages, for which (individual) follow-up proceedings may be required. The comparison made by Facebook et al. with the judgment in the case of Stichting Elco versus Rabobank et al.[22] does not hold. In that case the decision as to the lawfulness or unlawfulness of the conduct could not be arrived at without also considering the individual circumstances of each of the possible injured parties, whereas an assessment of the lawfulness or unlawfulness of the privacy breaches alleged by the Foundation can be made without considering the individual

[22] Amsterdam district court 9 December 2020, ECLI:NL:R_BAMS:2020:6122.

circumstances. The district court therefore comes to the conclusion that in this case the bundling together of the claims represents an added value in terms of an efficient administration of justice.

Insufficient consultations?

7.19. Facebook et al. have argued that the Foundation has failed to conduct reasonable consultations before bringing the claims. According to Facebook et al., the Foundation was not prepared to engage in constructive consultations before commencing proceedings, but rather aimed to leave the consultation phase behind as soon as possible and to commence these proceedings before the WAMCA would enter into force. According to Facebook et al., Facebook Ireland on the other hand demonstrated its willingness to have consultations, by immediately requesting from the Foundation the additional information necessary for proper consultations and by indicating that it was willing to schedule an appointment in early 2020 to consult with the Foundation.

7.20. Pursuant to article 305a (2), first sentence, of Book 3 DCC (old), a party commencing a collective action is inadmissible, if, in the given circumstances, that party has not made sufficient efforts to pursue its claims by consulting with the defendant. A period of two weeks after receipt by the defendant of a request for consultations, stating what is claimed, is sufficient in any case according to paragraph 2, second full sentence.

7.21. It follows from legislative history that the purpose of conducting consultations is, in short, to prevent a defendant from being sued without previous notice and to encourage the parties to reach a solution themselves. The time limit that was offered to Facebook et al. by the Foundation in its letter of 19 November 2019 satisfies the statutory minimum. Moreover, contrary to what is argued by Facebook et al., Facebook Ireland's response does not contain a clear indication of willingness to enter into consultations, for it states that Facebook Ireland first wanted to receive additional information before the Foundation's invitation could be considered. Furthermore, it has not become apparent that Facebook et al.'s interests have been harmed by the period between the Foundation's letter of 19 November 2019 and the summons of 30 December 2019, which, admittedly, was short, but did in fact comply with the minimum set by the law. In that respect it may also be pointed out that the Foundation chose to summon Facebook et al. in ample time (by 6 May 2020), thus providing Facebook et al. with yet another opportunity to enter into consultations in the intervening five-month period.

7.22. In view of the foregoing, the district court therefore sees no basis for taking the view that, in the given circumstances, the Foundation has made insufficient attempts at pursuing its claims by conducting consultations.

Interests of the represented parties insufficiently safeguarded?

7.23. The question whether the interests of the persons on whose behalf the legal action has been instituted are sufficiently safeguarded, must be answered on the basis of the concrete circumstances of the case. According to the legislative history[23], two central questions must be answered in the event of a dispute:

1. to what extent do those involved ultimately benefit from the collective action if the claim is allowed, and
2. to what extent can a party be confident that the claiming organisation has sufficient knowledge and skills to conduct the proceedings.

Among the points of view that may be relevant in that respect are:

a. what else has been done by the organisation in order to promote the interests of those

[23] TK 2011-2012, 33 126, no. 3, pages 12 and 13.

involved and has the organisation actually been able to achieve any objectives in the past,
b. if the organisation is an ad hoc organisation, was it set up by an already existing organisation that has successfully represented the interests of the parties concerned in the past,
c. how many injured parties have joined the organisation and to what extent do they support the collective action, and
d. does the organisation comply with the principles of the Claims Code.

7.24. It follows from the legislative history that the background of the safeguard criterion has mainly been prompted by the wish to keep out incompetent organisations or organisations with motives that are purely commercially driven.[24] Furthermore, there is no requirement that the interest group must be sufficiently representative with regard to the interests of those on whose behalf the action has been instituted.[25]

7.25. Facebook et al. have taken the position that the Foundation insufficiently safeguards the interests of those whom it claims to represent. To that end Facebook et al. have argued, briefly summarized, that the Foundation is an instrument of litigation funders, that it is pursuing its own financial interests, that it has no track record as an organisation representing the interests of third parties, that it has not demonstrated representing persons who have joined it and that it fails to meet the requirements of the Claims Code. With respect to that Claims Code, Facebook et al. have argued that the Foundation is not independent of its funder, that the represented parties of the Foundation's management board and supervisory board are lacking in sufficient experience and expertise, and that the Foundation does not operate on a non-profit basis.

7.26. The district court holds as follows. The Foundation was set up especially for this collective action and in that sense is an 'ad hoc organisation'. Article 3.3 of the articles of association states that it does not operate for gain. The Foundation receives funding from a third party, the American law firm of Lieff Cabraser, to conduct these proceedings. Proceedings in a class action being financed by a third party is a generally accepted principle (which is also expressed in the Claims Code), something against which there is no objection in itself that is relevant from a legal point of view. What is relevant, however, is that the directors and the members of the supervisory board of the interest group are independent of the external funder (principle III of the Claims Code). The Foundation has alleged that this is the case, referring not only to the background of its three directors and three members of the supervisory board, but also to the agreements made with the litigation funder. Regarding that cooperation, the Foundation has explained having concluded an arm's length agreement with Lieff Cabraser, in which the independence and autonomy of the Foundation are enshrined, that the agreement provides that only the Foundation, together with its lawyers, determines the litigation strategy and the settlement strategy, and that the Foundation only seeks advice from Lieff Cabraser. The funder cannot or should not have a decisive influence on the procedural documents. The Foundation's lawyers are likewise independent of the funder; they act solely on the instructions of the Foundation's board. In response to the explanation provided by the Foundation, no concrete information has been presented by Facebook on the basis of which the independence of the Foundation in relation to the litigation funder should be questioned. The district court therefore disregards Facebook's unsubstantiated allegation that the Foundation is an instrument of the litigation funder. The Foundation has explained that Lieff Cabraser will receive compensation of up to 18% plus costs, subject to court approval, if the Foundation obtains compensation for the injured parties. It has not been demonstrated that this compensation for the

[24] TK 2011-2012, 33 126, no. 3, p. 5.
[25] TK 2012-2013, 33 126, no. 7, p. 8 and Supreme Court 26 February 2010, ECLI:NL:FIR:2010:BK5756, Baas in Eigen Huis/Plazacasa, ground 4.2.

litigation funder falls outside the range of what is customary and - from the point of view of independence - acceptable.

7.27. The Foundation has furthermore stated that it has expert directors and members of the supervisory board, who have extensive experience and expertise in the field of, inter alia, the representation of (collective) interests. In substantiation of this argument, the Foundation has outlined the careers and backgrounds of its directors and supervisors on the basis of the submitted resumes and has also published these on its website. In the opinion of the court, the information on the background of these persons adequately shows that the Foundation's directors and members of the supervisory board have the required experience and expertise. The Foundation has also provided an insight into the remuneration of its directors and members of the supervisory board. It is undisputed that this remuneration is in line with market conditions. In view of the above, Facebook et al. have insufficiently substantiated that the Foundation does not comply with the Claims Code or that the Foundation is pursuing its own financial interests.

7.28 It is furthermore an established fact that the Foundation cooperates with the Consumentenbond, a non-profit interest group that has been representing the interests of consumers in the Netherlands for many years and that supports the collective action. That there is also sufficient support among its represented parties for conducting these proceedings furthermore appears from the number of expressions of support (over 183,000 on 25 November 2020) received by the Consumentenbond and the Foundation since July 2020.

7.29. All of the foregoing causes the district court to take the view that the parties involved will ultimately benefit from this collective action if the claim is allowed and that the represented parties may be confident that the Foundation has sufficient knowledge and skills to conduct these proceedings. Facebook et al. have not provided sufficient concrete information to make the court take a different view. Therefore, there is no ground for the view that the interests of the persons on whose benefit the legal actions were brought are insufficiently safeguarded.

Article 80 of the GDPR

7.30. Facebook et al. have argued that the Foundation does not meet the (additional) requirement of admissibility of article 80 of the GDPR with respect to the claims relating to the period after 25 May 2018. For example, the Foundation does not qualify as a non-profit organisation, the Foundation is not active in the field of data protection and the Foundation was not instructed by the data subjects to commence these proceedings, all this according to Facebook et al.

7.31. Article 80 GDPR reads as follows:

1. *The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.*
2. *Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers*

that the rights of a data subject under this Regulation have been infringed as a result of the processing.

7.32. The district court holds that the enforcement possibilities laid down in article 80 GDPR must be exercised through national (procedural) law. According to article 80 (2) GDPR, the Union legislator has left it to the Member States to determine whether the organisations referred to in Article 80 (1) GDPR also have a right of their own, independent of any instructions from the data subject, to exercise the options of articles 77, 78 and 79 GDPR. Pursuant to article 305a of Book 3 DCC (old), no instructions from the data subject are required. Contrary to what has been argued by Facebook et al., the GDPR in these proceedings (in which only declaratory judgments are requested, and not damages), does not require the Foundation to have received instructions from the data subjects.

7.33. As to the question of whether the Foundation satisfies the definition given in article 80 (1) GDPR, it is in dispute between the parties whether the Foundation operates on a non-profit basis and whether it is active in the field of data protection. On the basis of article 3.3 of the Foundation's articles of association and what has been held further in grounds 7.26 - 7.27, it may be assumed that the Foundation is a non-profit organization. There is no need to impose strict requirements with respect to being active in the field of data protection as referred to in article 80 GDPR from a point of view of the effective exercise of enforcement powers. The recitals to the GDPR likewise do not show that this term should be given a strict interpretation. The Foundation was set up in 2019 and at this moment its activities are principally reflected in the conduct of these proceedings. In addition, as has been explained by the Foundation, it has a partnership with the Consumentenbond, it consults with other interest groups and informs the public of this through the media. In view of this, the Foundation is actually performing activities, and the requirement that the Foundation is active in the field of data protection has been satisfied.

Conclusion

7.34. Based on all the above, the district court concludes that the Foundation is admissible in its collective action. The motion of inadmissibility is therefore dismissed.

8. The assessment of applicable law

8.1. The parties disagree on the question which law is applicable to the claims brought by the Foundation. They have asked the district court to give an opinion on this as early as at this stage of the proceedings, prior to any substantive hearing.

8.2. In its assessment, the district court will first of all address the applicable privacy law and next the general law governing tort, delict or quasi-delict, which also applies, this because privacy law does not comprise the entire substantive law for the purpose of assessing the Foundation's tort-based claims under discussion in these proceedings.

8.3. According to the Foundation, the unlawful acts and omissions that the Foundation accuses Facebook et al. of having committed, occurred over an extended period of time, namely from 1 April 2010 to 1 January 2020. This has an influence on the assessment framework. For that reason the district court will below likewise make a distinction according to period.

The applicable privacy law

<u>Period 1 April 2010 - 25 May 2018</u>

8.4. To the extent that the claims relate to the period before 25 May 2018, it should be borne in mind that at that time the Privacy Directive[26] applied.

8.5. Pursuant to article 4 (1) opening words and (a) of the Privacy Directive, each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State. When the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable.

8.6. Article 4 (1) (a) of the Privacy Directive enables the application of the laws on the protection of personal data of a Member State other than the one where the controller is registered. This requires that the controller exercises, through stable arrangements in the territory of that Member State, a real and effective activity in the context of which that processing is carried out.[27]

8.7. According to recital 19 of the Privacy Directive, an establishment as referred to in article 4 of the Privacy Directive presupposes the effective and real exercise of activities by a permanent establishment. In this context the legal form of such establishment, whether it is a branch or a subsidiary with legal personality, is not decisive.

8.8. It follows from case law of the CJEU that the concept of 'establishment', within the meaning of article 4 of the Privacy Directive, must be interpreted flexibly. This concept extends to any real and effective activity - even a minimal one - exercised through stable arrangements. In order to establish whether a company, the data controller, has an establishment in a Member State other than the Member State or third country where it is registered, both the degree of stability of the arrangements and the effective exercise of activities in that other Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned. This is particularly true for undertakings offering services exclusively over the Internet. In some circumstances, the presence of only one representative can suffice to constitute a stable arrangement if that representative acts with a sufficient degree of stability through the presence of the necessary equipment for the provision of the specific services concerned in the Member State in question.[28]

8.9. Facebook Netherlands must, in view of the aforementioned interpretation of the CJEU, be regarded as an establishment of Facebook Ireland and Facebook Inc. It is an established fact that Facebook Netherlands has been carrying out activities in the field of marketing and sales support for the Facebook group for many years. Those activities are closely related to the provision of services by Facebook et al., because providing the Facebook service is not possible without the sale of advertisements and Facebook Netherlands makes an important contribution to the sale of these advertisement. This means that Facebook Netherlands is performing real and effective activities, as well as acting with a sufficient degree of stability. The above is not altered by the fact that, according to Facebook et al., these are 'supporting' activities and that Facebook Netherlands itself does not offer the Facebook service.

8.10. Next, it will have to be examined whether the processing of personal data takes place in the context of the activities of the establishment.

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[26] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EU 1995, L 281.
[27] CJEU 1 October 2015, ground 41, ECLI:EU:C:2015:639, *Weltimmo*.
[28] CJEU 1 October 2015, grounds 29-31, ECLI:EU:C:2015:639, *Weltimmo*, and CJEU 28 July 2016, grounds 75 and 77, ECLI:EU:C:2016:612, *Verein für Konsumenteninformation/Amazon*.

8.11. Article 4 of the Privacy Directive does not require that the processing of personal data in question is carried out by the establishment concerned itself, but merely that it is carried out in the context of its activities. The phrase "in the context of the activities of an establishment" cannot be interpreted restrictively.[29] In the case against Google Spain and Google, the CJEU held that there is processing of personal data in the course of the activities of an establishment of the controller in the territory of the Member State, within the meaning of article 4 of the Privacy Directive, where the operator of a search engine in a Member State establishes, for the purpose of promoting and selling advertising space offered by that search engine, a branch or subsidiary whose activities are directed towards the residents of that Member State. In such circumstances, the activities of the operator of the search engine and that of its establishment in the Member State concerned are inextricably linked, since the activities relating to the advertising spaces constitute the means by which the search engine in question is rendered economically profitable while, at the same time, that machine is the means enabling those activities to be carried out.[30]

8.12. It is not in dispute that personal data of the users of the Facebook service who are located in the Netherlands have been processed by Facebook et al. In view of the earning model of Facebook et al. outlined by the Foundation, and insufficiently contradicted by Facebook et al., Facebook et al. generate the greater part of their income through the sale of advertisements, thus making the Facebook service profitable, while at the same time that service is the means that enables the sale of advertisements. In view of this, the activities of Facebook Netherlands, through which a significant contribution is made to the sale of advertisements, is to be regarded as being inextricably linked to the activities of Facebook Ireland and Facebook Inc. On this basis it must be held that the processing of personal data of the users of the Facebook service whose interests the Foundation represents, has (also) taken place within the framework of the activities of Facebook Netherlands. The fact that, as Facebook et al. argue, the users of the Facebook service in the Netherlands only enter into a contractual relationship with Facebook Ireland, is not decisive in this respect.

8.13. The conclusion is that pursuant to Article 4 of the Privacy Directive, Dutch law may be applied to the data processing at issue in this dispute.

8.14. The territorial scope of Dutch law should be used to determine whether the Personal Data Protection Act (Wbp) is applicable. Section 4 (1) Wbp provides that this act applies to the processing of personal data in the context of activities of an establishment of a controller in the Netherlands. This means that the Wbp is applicable, also taking into account that the aforementioned description must be interpreted in conformity with the Directive.

8.15. With respect to the discussion about the applicability of the Telecommunications Act (Tw), it is noted that this act is an implementation of the E-Privacy Directive[31]. This directive does not contain a conflict rule for the purpose of determining the applicability of national law. Regardless of whether article 4 of the Privacy Directive should be considered (the view taken by Facebook et al.) or whether the controller targets internet users in the Netherlands (the view taken by the Foundation), in both cases the result is that section 11.7a of the Telecommunications Act applies.

<u>Period 25 May 2018 to 1 January 2020</u>

[29] See also the CJEU judgments in *Weltimmo* and *Verein für Konsumenteninformation / Amazon*.
[30] See CJEU 13 May 2014, grounds 55-56, ECLI:EU:C:2014:3 17, *Google Spain and Google*.
[31] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

8.16. It is not in dispute that, to the extent that the claims relate to the period after 25 May 2018, the GDPR applies. The GDPR, as a regulation, has direct effect and the dispute falls within both the material and the territorial scope as defined in articles 2 and 3 GDPR.

8.17. The parties disagree as to which national implementing legislation applies. According to the Foundation, it is the Dutch General Data Protection Regulation (Implementation) Act (UAVG). According to Facebook et al. it is the Irish Data Protection Act 2018 (DPA 2018).

8.18. Although the parties have debated which national implementing legislation is relevant, it is not yet clear to the district court at this point if the contents of the aforementioned legislation are relevant in terms of the examination of the dispute in the main action, while it is equally unclear whether or not the Dutch and Irish implementing legislation differ in any respects relevant to the dispute. Should the legislation concerned prove to be relevant, the following applies.

8.19. The district court finds that the GDPR does not contain a conflict rule on the basis of which it may be determined which national implementation legislation is applicable to a dispute of an international nature to which the GDPR (also) applies. Article 3 of the GDPR, contrary to the parties' opinion, cannot be regarded as such a conflict rule. This means that the territorial scope of the national legislation must be used to determine whether this legislation applies.

8.20. Pursuant to article 4 (1) of the Dutch General Data Protection Regulation (Implementation) Act (UAVG), this act and the provisions based on it apply to the processing of personal data in the context of activities of an establishment of a controller or a processor in the Netherlands. This description is in line with the description in the GDPR and the Privacy Directive. In view of the case law of the CJEU, Facebook Netherlands must be regarded as an establishment of Facebook Ireland and Facebook Inc. (see what was held above about article 4 of the Privacy Directive) and for that reason the UAVG may be applied to this dispute.

The Applicable Tort Law

Period 1 January 2012 to 1 January 2020

8.21. The Rome II Regulation[32] (hereinafter Rome II) has applied since 11 January 2009. It contains conflict rules for non-contractual obligations and has a universal formal scope of application. However, in article 1 (2) opening words and (g), Rome II inter alia excludes from its scope non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. For this reason, given the allegations made by the Foundation against Facebook et al. which qualify as a violation of privacy and/or personality rights, Rome II does not apply directly.

8.22. Pursuant to article 159 of Book 10 of the Dutch Civil Code, which entered into force on 1 January 2012, the provisions of Rome II nevertheless apply mutatis mutandis to obligations that are outside the scope of Rome II and the related treaties, and which can be qualified as an unlawful act. This means that the provisions of Rome II apply mutatis mutandis, by way of article 159 of Book 10 DCC, to the (alleged) unlawful acts and omissions of Facebook et al. in so far as they occurred as from 1 January 2012.

8.23. Article 4 (1) Rome II provides that, unless the Regulation provides otherwise, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage

[32] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ 2007 L 199/40.

occurred and irrespective of the country or countries in which the indirect consequences of that event occur. Article 4 (3) Rome II provides that, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

8.24. For the phrase 'the country where the damage occurs' of article 4 (1) Rome II, regard may be had to the phrase 'the place where the harmful event occurred or may occur' as referred to in (the predecessor of) article 7, opening words and (2) Brussels I bis Regulation and the related case law of the CJEU.[33]

8.25. It is not in dispute that the Netherlands is the country where the (alleged) damage suffered by the represented parties of the Foundation occurs. Furthermore, it has neither been argued nor become apparent that this is a case where the wrongful act has a manifestly closer connection with another country. This means that pursuant to the main rule of article 4 (1) Rome II in conjunction with article 159 of Book 10 DCC, Dutch law applies to the Foundation's claims, insofar as they relate to the period after 1 January 2012. Insofar as the claims for this period are based on unjustified enrichment, the district court will apply Dutch law pursuant to article 10 (1) Rome II. Article 6 (1) Rome II equally leads to the applicability of Dutch law.

<u>Period from 1 April 2010 to 1 January 2012</u>

8.26. The applicable law to the (alleged) unlawful conduct that occurred before 1 January 2012 has to be determined on the basis of the Conflict of Laws (Torts) Act (WCOD), which applied until that date.

8.27. Pursuant to the main rule of section 3 (1) WCOD, obligations arising from unlawful acts are in principle governed by the law of the state where the act took place. According to the Foundation, the unlawful act of Facebook et al. in summary consists in Facebook et al. having breached the privacy of the users of the Facebook service in the Netherlands, due to Facebook et al. having failed to (fully) inform those users about, and obtain their consent for, in short, collecting and using personal data. Since the first and most important link in the alleged unlawful act consists in a failure to act, which acting (namely informing and obtaining consent) should have taken place in the Netherlands, the Netherlands is the country that, in this case, has to be regarded as the country where the unlawful act occurred.
The claims, insofar as they relate to the period 1 April 2010 - 1 January 2012, are therefore also governed by Dutch law.

Relationship between data protection law and consumer law

8.28. As part of its interim applications, Facebook et al. furthermore have requested a ruling from the district court to the effect that the law on data protection law precludes claims concerning consumer law (see the claim for relief of Facebook et al. as represented in ground 4.1 (e). In reply the Foundation has argued that this element of the claim made by Facebook et al. in the procedural issue does not form part of the procedural agreements made between the parties about what they would submit to the court in the first phase. Since this has not been contradicted by Facebook et al., while it has not become sufficiently clear either that, and why, this concerns an interim application that must be decided first, and prior to the main action, the district court will not give an opinion on this part of the claim.

[33] C.f. Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054.

9. Request for a preliminary ruling

9.1. During the oral hearing Facebook et al. have requested the District Court to refer a number of questions to the European Court of Justice for a preliminary ruling.

9.2. The CJEU has jurisdiction to give preliminary rulings concerning the interpretation of Union law. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon (article 267, second paragraph, Treaty on the Functioning of the European Union). In this case the district court sees no reason to request a preliminary ruling, since there is no well-founded doubt about the interpretation of Union law.

10. Conclusion and costs of the proceedings in the procedural issues

10.1. The motion contesting jurisdiction, the motion requesting a stay of the proceedings and the motion for inadmissibility are dismissed.

10.2. Facebook et al. will be ordered to pay the costs of the proceedings as the unsuccessful party. Thus far, these costs have been estimated at EUR 3,378 in lawyers' fees on the part of the Foundation. In this respect the district court has regarded the procedural issues raised by Facebook et al. as three separate procedural issues and has charged two points for each of them according to the court-approved scale of costs II (3 x 2 x EUR 563.00).

10.3. The subsequent costs claimed can be allowed and will be estimated in the manner stated in the decision.

11. The request for an interim appeal

11.1. Since the interim applications have been dismissed, the district court will now discuss the request of Facebook et al. for a ruling that an interim appeal may be lodged against this interim judgment. To that end, Facebook et al. argue that suspending the proceedings pending the outcome of the appeal will further the efficiency and will prevent conflicting decisions on the disputed requests for a preliminary ruling.

11.2. The Foundation has opposed the granting of an interim appeal.

11.3. Pursuant to article 337 (2) DCCP, an interim judgment may only be appealed against at the same time as the final judgment, unless the court has determined otherwise. There will be little reason to make an exception to the main rule, because the interim use of legal remedies will lead to a delay in the proceedings. In the district court's opinion, there are no compelling interests or special procedural reasons in this case to deviate from the principle formulated above. The request of Facebook et al. will therefore be dismissed.

12. The continuation of the proceedings in the main action

12.1. In the joint proposed procedure presented to the district court by the parties on 26 May 2020, they provided - by way of derogation from the procedural rules - for a term of sixteen weeks after the judgment in the procedural issue for Facebook et al. to deliver a statement of defence. In view of the agreement between the parties and the size of the case, the district court sees no reason to deviate from the period proposed by the parties. The district court will therefore refer the case to the calendar hearing of 20 October 2021 for a statement of defence to be delivered.

12.2. The parties have requested permission to submit a written reply and rejoinder prior to the oral hearing (on the merits of the case). The parties have proposed to set a term of 16 weeks for these statements to be delivered. In view of the nature and the size of these proceedings and from the point of view of hearing both sides, the district court will allow the parties to submit a reply and a rejoinder after the statement of defence, each time within a period of sixteen weeks. Thereafter an oral hearing will be scheduled.

12.3. Any further decision will be stayed.

13. The decision

The district court

With respect to the motion contesting jurisdiction, the motion requesting a stay of the proceedings and the motion for inadmissibility.

13.1. dismisses the claims,

13.2. orders Facebook et al. to pay the costs of the procedural issues, estimated thus far on the part of the Foundation at EUR 3,378,

13.3. orders Facebook et al. to pay the subsequent costs incurred by the Foundation after this judgment, estimated at EUR 163 in lawyers' fees, plus, on condition that the judgment has been served and Facebook et al. have failed to comply with the judgment within 14 days from having been notified thereof, an amount of EUR 85 in lawyers' fees and the cost of service of the judgment,

13.4. declares these orders for costs provisionally enforceable,

in the main action

13.5. orders that the case will be placed on the calendar hearing again on **20 October 2021** in order for a statement of defence to be submitted by Facebook et al.,

13.6. defers any further decision.

This judgment was rendered by C. Bakker LLM, presiding judge, and L. Voetelink LLM and J.T. Kruis LLM, judges, and was pronounced in open court on 30 June 2021.

(signature) (signature)

ISSUED AS A TRUE COPY
The clerk of the
Amsterdam District Court