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*Regulating Behaviour on Data Platforms: The Online Restraining Order as an Administrative Measure**

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ABSTRACT Data platforms assert great influence over data. The personal data of their users is used to fund the service through the sale of personalized advertisements. Though, more important for society, these platforms exert great power over the dissemination of available information. Data platforms are increasingly used to communicate with other (like-minded) people. It is a platform where information and opinions are shared. In that sense, platforms are not only the guardians of users' personal data, but also the gatekeepers of (public) information.
Access to data platforms is traditionally governed by the platforms themselves. Platforms can dictate who gets access, which content can be shared, and the grounds for a (temporary) expulsion from the platform. Despite the discussion on whether data platforms should be regulated as public utilities, or whether the operators must obey norms of fundamental rights as de facto public spheres, the direct influence of states on access to data platforms has been limited. Recently, a (political) discussion has arisen in the Netherlands as to what extent administrative bodies should be able to impose administrative measures in online spaces. In the Netherlands, access to physical places can be limited by administrative measures imposed by a municipality's mayor. Could mayors similarly impose online restraining orders, limiting a person's access to a data platform?
This article discusses online restraining orders as an administrative measure. After a short introduction to the Dutch online restraining order, the article first discusses the traditional private-governance framework to access a data platform. In this first part, the normative online order set by platforms through their terms of service is discussed. After this contextualisation, the legal grounds to impose administrative measures under Dutch law are described, followed by a discussion on the online applicability of these powers, and a discussion on the transposability of physical legislation to online spaces. Lastly, the article concludes with a reflection on the future of online restraining orders.

1. *Introduction*

In November 2021, mayor Sharon Dijksma of the city of Utrecht imposed one of the first *online restraining orders* in the Netherlands.[1] The subject, a 17-year-old citizen of the municipality, had been arrested that same day for incitement to violence on a data platform. He had urged others in a Telegram-messaging group to (violently) demonstrate against government policies on covid-19, and the banning of fireworks.[2] Following his arrest, Dijksma imposed an online restraining order, which meant that the minor had to abstain from online statements that could lead to disorder in the city of Utrecht, such as further calls to disturb public order.[3] Failure to comply with the order would result in an administrative fine of 2.500 euro. After an unsuccessful appeal, the online restraining order was revoked by Dijksma in June 2022, because there was no longer a risk of recidivism.[4]

Dijksma's action led to a political and legal academic discussion in the Netherlands on whether powers of mayors to maintain the public order in their municipality (should) extend into the online space. Currently, as will be elaborated below, Dutch mayors can impose restraining orders with effect in the

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[1] The terminology 'online restraining order' reflects the Dutch terminology of *online gebiedsverbod*, which follows the stance on the discrepancy in terminology (Internet prohibition/digital restraining order) as discussed by W. Bantema, S. Twickler and S. Vries, *Juridische Grenzen En Kansen Bij Openbare-Ordehandhaving. Een Onderzoek Naar Mogelijkheden van de APV Voor de Aanpak van Online Aangejaagde Ordeverstoringen*, 2022, 13.

[2] RTV Utrecht, 26 November 2021, *Meer aanhoudingen voor opruiing, 17-jarige jongen riep op tot vuurwerkprotest in Utrecht*, www.rtvutrecht.nl/nieuws/3231139/meer-aanhoudingen-voor-opruiing-17-jarige-jongen-riep-op-tot-vuurwerkprotest-in-utrecht (accessed 28 November 2022).

[3] RTV Utrecht, 26 November 2021 'Jongen (17) uit Zeist die op sociale media opriep tot rellen krijgt "online gebiedsverbod"', www.rtvutrecht.nl/amp/nieuws/3232804/jongen-17-uit-zeist-die-op-sociale-media-oriep-tot-rellen-krijgt-online-gebiedsverbod (accessed 28 November 2022).

[4] S. Dijksma, *Letter to the municipal council: decision on appeal 'online restraining order*, 15 June 2022, accessible at: https://hetccv.nl/fileadmin/Bestanden/Onderwerpen/Online_aangejaagde_openbare_orde_verstoringen/Raadsbrief_Beslissing_op_bezwaar__online_gebiedsverbod___1_.pdf (accessed 28 November 2022).

physical world as an administrative measure.[5] However, it is unclear whether these competences apply equally into the online sphere.[6] Following Dijksma's online restraining order, two political parties questioned whether such online measures fall within the power of mayors to impose administrative measures. Minister Yeşilgöz-Zegerius of Justice and Safety answered questions posed by the Dutch parliament on the topic.[7] Rather than providing clarity, the minister's answers demonstrated that it is uncertain whether mayors can impose online measures. Following this, also the mayor of Amsterdam announced her intention to start experimenting with online restraining orders as of October 2022, followed by similar calls in Rotterdam and The Hague.

Whether there is a legal ground for imposing these online restraining orders remained unclear, until one of these orders was recently challenged before a Dutch court.[8] The District Court judged the imposition of an online restraining order unlawful, as the current definition of the 'public space' as defined in the applicable Utrecht local order does not explicitly include online Telegram messaging-groups. However, the discussion is far from settled. In Belgium, the General Police Regulations has been updated and now includes a specific competency to impose online measures. Contrarily to the Dutch example, the Belgian 'public space' now explicitly includes virtual spaces.[9]

To create a solid basis for further (European) discussion, this article will discuss several aspects of online restraining orders to answer the question of whether public bodies can preventively impose an online restraining order, meaning that specific persons are denied access to (certain parts of) an online platform. The article starts with an overview of the current infrastructure of platforms and their private-law character. Secondly, the online restraining order will be placed in its Dutch legislative context. To do so, a short outline is given of the competency to impose administrative measures under Dutch law. Thirdly, the online applicability of administrative measures is scrutinised, leading to a discussion on the difficulty of transferring existing rules to the online sphere, namely whether the physical world and the online world are comparable enough to impose equal restrictions. Lastly, the previous topics will be discussed in conjunction to reflect on the future of online restraining orders.

2. *Private governance through social media's terms of service*

Data platforms are private companies. As such, just like any other private company, the use of their property and service is managed through contracts – in this case more specifically through the terms of service that users agree to when signing-up to the service.[10] The terms of service dictate the

[5] Administrative measures, such as a restraining order, do not legally qualify as sanctions under Dutch law. Sanctions serve as punitive measures, such as fines imposed by the police for speeding. An administrative measure containing a restraining order has a preventive character. This differentiation does not play any further role in this article.

[6] See for example the first overview study from 2018: W. Bantema, S.M.A. Twickler, S.A.J. Munneke, M. Duchateau, & W.P. Stol, *Burgemeesters in cyberspace: Handhaving van de openbare orde door bestuurlijke maatregelen in een digitale wereld*, The Hague, Sdu Uitgevers, 2018. The study was recently followed up, see: W. Bantema, S.M.A. Twickler, S. de Vries, *Juridische grenzen en kansen bij openbare-ordehandhaving Een onderzoek naar mogelijkheden van de APV voor de aanpak van online aangejaagde ordeverstoringen*, 2022, DOI:10.13140/RG.2.2.24170.80329. See also M. Buitenshuis and B. Roozendaal, *De burgemeester: burgervader, handhaver, sheriff van het internet?*, *Nederlands Genootschap van Burgemeesters*, 48, 2022, 9, where it is pointed out that lacking jurisprudence in the field of administrative law and a law that was drawn-up with only the physical world in mind, creates uncertainty.

[7] The official questions (in Dutch) submitted by the parliament and the answers (28 January 2022) can be accessed here: https://open.overheid.nl/repository/ronl-c059703af332123ceec01db41873cf82776b6d94/1/pdf/antwoorden-kamervragen-over-het-bericht-jongen-17-krijgt-allereerste-online-gebiedsverbod-in-nederland-maar-wat-betekent-dat-eigenlijk.pdf (last accessed 28 November 2022).

[8] *District Court Midden-Nederland* (2023) ECLI:NL:RBMNE:2023:375.

[9] Gemeenschappelijk Algemeen Politiereglement (General Police Regulation), §5: "For the purposes of this regulation, the term 'publicly accessible space' includes not only physical spaces but also virtual spaces accessible to the public, such as social media accounts, forums, and other digital platforms that are not limited to a small number of individuals who share common interests.", www.politie.be/5341/sites/5341/files/downloads/APR_pzzuid_2020.pdf accessed 6 December 2022.

[10] Although it has been empirically proven that users do not read the terms of service, and if they did, they would not be able to understand them, see on this J.A Obar and A. Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services'*, *SocialScience Research Network 2018*, SSRN Scholarly Paper ID 2757465 https://papers.ssrn.com/abstract=2757465 accessed 21 September 2021; and U. Benoliel and S.I Becher, *The Duty to Read the Unreadable*, in *Boston*

scope of the service, what can and cannot be shared on the platform, the sanctions for breaching the terms of service, and the redress mechanisms for decisions to remove content or user profiles.[11] Platforms are free to one-sidedly decide what should be included in the user terms and exert normative power over the scope of freedom of expression on their platforms.[12] As such, platforms can decide that also content that would otherwise fall within the scope of the freedom of expression, is to be deleted from their services. If that is the case, a user can solely complain over a *wrongful-moderation* decision – a removal by a platform in violation of (the process stipulated in) the user terms.[13] Normative, but justifiable moderation decisions are – in principle – unopposable.

Thus, the decision to offer a service to a person, to delete content, or to suspend and/or terminate a user account is governed by the rules set out by the data platform in its terms of service. However, data platforms are not fully free to decide their terms of service in the way they please. They must adhere to national law and as such, they are obliged to follow orders to delete illegal content. If the law prescribes that a person charged with or convicted of a certain crime should be suspended from their services, platforms must comply. Obligations on data platforms to remove illegal content have been increasing over the last years, both on a national level and on a European level,[14] and through numerous codes of conducts.[15]

Online restraining orders add a new dimension to the restrictions on data platforms. However, data platforms will not be affected much by these administrative measures, as the enforcement of these measures lies equally in administrative hands.[16] The online restraining order issued by Dijksma puts no additional enforcement obligation on online platforms. However, the users of these platforms do face an increase in restrictions. Not only can users be denied access to the platform based on the (normative) restrictions outlined in the terms of service, but their behaviour online can also trigger administrative measures.

3. *A mayor's competencies under Dutch administrative law*

The imposition of the online restraining order as issued by Dijksma is problematic since the legal ground on which the online restraining order was based is aimed and intended for use in *physical spaces*. As such, it does not only challenge the exclusiveness of data platforms' power as private companies, but it does so without a sound legal basis. Administrative measures are used to deter (potentially) criminal behaviour and to sustain *public order*.[17] As such, they differ from criminal sanctions as their administrative counterparts can be used fully preventively. The application of administrative measures is aimed at quick intervention, for example in the case of football hooligans or violent demonstrations.

College Law Review, vol. 2019, 2255.

[11] The new Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 ona Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) 2022 (OJ L) regulates the transparency and obligations to enforce such terms. For example, users must be presented with the reason of why content or an account has been suspended and/or terminated and be presented with the redress possibilities.

[12] See previously by the author: B. van der Donk, *The Freedom to Conduct a Business as a Counterargument to Limit Platform Users' Freedom of Expression*, in S Hindelang & A Moberg (eds.), *YSEC Yearbook of Socio-Economic Constitutions 2021: Triangulating Freedom of Speech*, Cham, Springer, 2022, 33.

[13] See for examples of successful claims in Italy: *Corte appello L'Aquila (Correggiari)* [2021] n. 1659/2021; *Tribunale di Bologna sez II (De Gaetano)* [2021] RG 5206/2020. In the Netherlands, a successful reinstatement request for a user account was based on (lack of) transparency: *District Court Noord-Holland (Van Haga/LinkedIn)* (2021) ECLI:NL:RBNHO:2021:8539.

[14] National obligations can increase the removal of content, for example the Network Enforcement Act in Germany. See on European legislation for example the European Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [OJ L 136]; Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

[15] The EU Code of conduct on countering illegal hate speech online 2016; European Commission, Code of Practice on Disinformation 2021; European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation.

[16] The enforcement of administrative orders in the Netherlands lies with the police, who are under the mayor's authority, as opposed to the restrictions outlined in the terms and conditions and the restrictions outlined therein which are to be enforced by the platform itself.

[17] According to settled case-law, public order must be interpreted as "*orderly conduct of community life*" or "*the normal conduct of business in or adjacent to a public space*", see Dutch Council of State, case of 12 November 2014, ECLI:NL:RVS:2014:4117, §6.1; and Dutch Supreme Court, case of 30 January 2007, ECLI:NL:HR:2007:AZ2104.

The power to impose administrative measures is outlined by the Dutch *Municipal Act* ('Gemeentewet'[18]). The general description of the mayor's tasks in article 172(3) charges the mayor with the burden to maintain public order in the municipality. In addition to this general competence, the mayor can impose various specific orders against individuals (article 172a sub 1), such as area bans, assembly bans, or curfews. As part hereof, the mayor can include an order for incremental penalty payments based on article 125. These specific competences have been added to the Municipal Act in 2010 as measures to curb disturbances by football hooligans and loitering by minors. To impose an area ban or an assembly ban, the individual must have been involved in (a) serious or repeated disturbance(s) of the public order in the municipality, and simultaneously, a serious risk must exist for repetition of such disturbances. These orders can last a maximum of three months and can be extended three times. The maximum duration of an area ban or an assembly ban is therefore nine months. When the reasonable threat for public order no longer persists, the ban must be revoked.

The application and interpretation of the scope of these competences is strict. Outside the scope of these articles, the mayor cannot impose measures unless these are prescribed by a municipal ordinance and have been adopted in accordance with the principle of legality.[19] That leads to the legal uncertainty as to whether mayors can impose *online measures*, such as an online area ban since the law currently does not mention that these powers can be exercised in an online environment.

[18] The full text of the *Gemeentewet* in Dutch (valid as of 5 November 2022) is available at https://wetten.overheid.nl/BWBR0005416/2022-11-05 (accessed 6 December 2022).

[19] Neither of the municipalities which are experimenting or wanting to experiment with online restraining orders have included such specific sanctions in their municipal ordinances. It is unlikely that any municipal council could 'simply' add an online ban to their municipal ordinance. An online ban would presumably limit the freedom of expression (or other constitutional rights for that matter) in a way that goes beyond what was intended by the legislator. As such, a formal law by the legislator is needed before local administration can initiate subordinate legislation. See on this discussion Bantema, Twickler and Vries (n 1), p. 27-28. This would mean a legal basis must be created by the Dutch Parliament, before online area bans can be included in a municipal ordinance.

4. *Imposing online administrative measures*

In the case of Dijksma discussed in the introduction, the online restraining order she imposed consisted of an order for incremental penalty payments (2.500 euros) prohibiting the individual from using data platforms for incitement with an effect in the municipality of Utrecht during the indicated period. The decision was described as an *'online area ban'* by the mayor herself and later by the Municipal Council. The measure aimed to prevent a further escalation of demonstrations in the city of Utrecht, which falls within the description of the mayor's tasks. However, the exact legal basis to impose the restraining order in an *online context* – if there is one at all – has led to debate.

Dijksma refers to articles 125 sub 3 of the Municipal Act ('competence to impose incremental penalty payments'), which can be relied on 'to enforce rules which belong to the tasks of the mayor'. The general description in article 172 describes these tasks as 'maintaining public order'. The only requirements included under article 172 are, firstly, that a disturbance of public order or serious fear of such disturbance must exist, and secondly, that the order must be necessary to maintain or restore public order. Both requirements were met. Dijksma highlights that the individual breached the municipal ordinance and as such, the first requirement of article 172 was fulfilled. Furthermore, the incitement to violent demonstrations affected the public order in the city of Utrecht. As such, the online restraining order would stand the test. However, whether article 172 provides a solid legal basis to impose administrative measures or merely describes the general tasks of a mayor is disputed.[20] Whether *the effect* of online behaviour in a physical place forms a sufficient base to broaden the scope of the legal powers of the mayors to the online sphere is equally unclear, but this way forward seems plausible.[21]

[20] W. Bantema, S. Twickler and S. Vries, *Juridische Grenzen En Kansen Bij Openbare-Ordehandhaving*, 6, outlining the current discussion. It is argued that article 172 only describes the general tasks of mayors and does not infer any actual competences to act and as such cannot serve as a basis for an administrative sanction.

[21] Mayors can limit communication channels to prevent a disturbance of the public order, see Bantema, Twickler and Vries (n 2), p.70-71. The measure may not make any effective communication impossible, which is unlikely the case in the way the online restriction had been formulated by Dijksma.

Nevertheless, article 172a forms a problematic base for an online sanction. An area ban can only be imposed on or near "*one or more designated objects within the municipality, or in one or more specified areas of the municipality."* Firstly, one could wonder whether the Internet as a whole, or data platforms in particular, are located *within* the municipality. Secondly, the legislative text is solely aimed at the physical world ('objects' and 'areas'), which does not automatically translate to the online world.[22] Equally as set out above, *the effect* of the online behaviour is felt within the municipality, though whether that is sufficient to conclude that the requirement of 172a is met, is quite a stretch of the legal text. In the decision on appeal, the mayor expressed the view that "the mere fact that the behaviour takes place online does not mean that it does not violate the municipal ordinance. What matters is the effect of the behaviour (the desire to cause riots) and that effect is aimed at a physical location in Utrecht. The measure can therefore be upheld (legally). There is no (unjustified) infringement of fundamental rights (including the freedom of expression)"[23] Previously, Dijksma highlighted in answers to the municipal council that the online space does not abide by territorial borders. According to her, the targeted effect within the municipality serves as a sufficient basis to fulfil the territoriality requirement. That same view is reflected in the wording of the online restraining order, which solely consists of an order to refrain from online statements aimed at disrupting public order *in the city of Utrecht*. The individual remains free to use data platforms for any other communicative purposes, including similar expressions aimed at other municipalities over which mayor Dijksma does not govern.

In a 2022-study on online restraining orders, Bantema argued that online restraining orders limit the freedom of expression of platform's users. Opposed to a physical area ban, an online area ban does not only restrict an individual's freedom to be in a certain place, but it also limits the user's possibilities to communicate and express him- or herself. One could imagine that if a mayor would be given unlimited, broad competence to limit the access to (parts of) the Internet, individuals would be limited in their possibilities to express themselves. However, from the example of Dijksma's online restraining order in the municipality of Utrecht, it follows that an online administrative measure does not necessarily restrict an individual more than a similar traditional administrative measure in the physical world would. In the example, the individual's restriction to express himself on a data platform was solely limited to the behaviour distorting public order, namely the incitement to (violently) demonstrate with an effect in Utrecht.

In February 2023, the Dutch District Court *Midden-Nederland* decided on the legality of the online restraining order imposed by Dijksma. Firstly, the court argues that an online Telegram messaging-group does not fall within the legal definition of a 'publicly accessible place' in the applicable Utrecht local order.[24] Secondly, the court affirms that Dutch law does not explicitly grant mayors the power to restrict expressions on social media platforms, which the court argues would be the effect of an online restraining order. The local order cannot serve as a basis for a restriction of freedom of expression as protected in the Dutch Constitution.

Despite this, and whilst the reasoning of Dijksma shows the best intentions to keep the municipality safe and to sustain the public order, an explicit legal basis to impose an online administrative measure does not exist. The latter requires an unjust stretch of the current provisions and as such contravenes the principle of legality. As such, the best way forward seems an update of Dutch law that reflects and includes specific competences for

[22] *Ibid*, 30.

[23] S. Dijksma, *Letter to the municipal council: decision on appeal 'online restraining order,* 15 June 2022, accessible at: https://hetccv.nl/fileadmin/Bestanden/Onderwerpen/Online_aangejaagde_openbare_orde_verstoringen/Raadsbrief_Beslissing_op_bezwaar__online_gebiedsverbod___1_.pdf (accessed 28 November 2022) (translation by the author).

[24] District Court Midden-Nederland (2023) ECLI:NL:RBMNE:2023:375, §4: "It cannot be inferred from the [local order] or its explanatory notes that it is intended to designate (also) a digital platform such as a group chat on Telegram as a "public place". This is also logical, because although a group chat (accessible to everyone) on Telegram is public, it is not a place within the meaning of the [local order] that falls within the mayor's powers. No other arguments have been invoked by the mayor from which it appears that the term "public place" within the meaning of the [local order] could also include a group chat on social media. Therefore, the court does not follow the mayor's contention that a group chat on Telegram is a public place within the meaning of the [local order]."

mayors to impose online restraining orders in analogy with the physical world the current administrative measures are aimed at.

5. *Transposing 'physical' legislation to the online space*

Considering the above, online applicability of administrative measures touches upon an interesting discussion, namely to what extent legislation applicable to physical places can be transposed to online spaces. More specifically, it questions to what extent administrative bodies have competency over privately-owned online spaces when the legislation their powers are based on solely foresees 'physical-space' interference. Therefore, a comparison of similarities and discrepancies between these two types of spaces can serve to answer what an updated version of the Dutch Municipal Act should include to make sure that mayors have sufficient powers to maintain public order whilst simultaneously safeguarding freedom of expression on the Internet.

In the Belgian equivalent of the Dutch Municipal Act for the city of Brussels, online spaces have been explicitly included in the terminology of publicly accessible spaces:

"For the purposes of these regulations, the term "publicly accessible space" includes, in addition to real spaces, virtual spaces accessible to the public, such as accounts on social media, forums and other digital platforms that are not limited to a small number of individuals who share common interests."[25]

The Brussels municipal act explicitly expands the competences of the public administration to a very broad interpretation of 'virtual spaces'. However, the answer to whether physical and online spaces overlap or are interchangeable is not as easy as portrayed by the Belgian regulation. The online space is not easily caught in a definition, and the Belgian example seems to demonstrate this perfectly. One could for example debate whether 'social media accounts' are 'virtual spaces accessible to the public'. In general, users can pick who to show their social media account, which renders it per definition not publicly accessible. Similarly, the limitations to exclude 'individuals who share common interests' and the terminology of 'a small number of individuals' are too vague to apply online. One could argue that anyone with a Telegram account has a common interest (to send messages). Similar argumentation would apply to online forums such as Reddit (discussing topics), or data platforms like Instagram or TikTok (entertainment).

The discussion on whether legislation from the physical world can be transferred to the online world is not new and is neither confined to the borders of administrative law. Platforms connect their users in a scale that has hitherto not been seen and have (at least partially) taken over the role of the state in safeguarding communicative spaces.[26] Due to the control data platforms have over the behaviour of users on their service, and consequently, over their users' communication possibilities in general, scholars have argued to regulate the access to and content on these platforms from various angles.[27] The same discussion – do platforms constitute *public places*? – must be tackled when looking at the application of administrative measures. Even though the specific administrative measures in article 172a were written with physical territorial borders in mind, the main requirement for a mayor to act depends on whether the place is

[25] The *Gemeenschappelijk algemeen politiereglement voor alle 19 Brusselse gemeenten* (valid from 1 April 2020), article 1 §5 (translation from Dutch by the author), available at: www.brussel.be/sites/default/files/bxl/Reglement_de_police_-_Politiereglement.pdf (accessed 30 November 2022).

[26] S. Benesch, *But Facebook's Not a Country: How to Interpret Human Rights Law for Social Media Companies*, in *Yale Journal on Regulation*, 2020, www.yalejreg.com/bulletin/but-facebooks-not-a-country-how-to-interpret-human-rights-law-for-social-media-companies accessed 13 September 2021; N. Helberger, J. Pierson and T. Poell, *Governing Online Platforms: From Contested to Cooperative Responsibility*, 34 The Information Society vol. 34, n. 1, 2018, 1.

[27] Whilst some argue to stick closely to the private nature of data platforms, others argue that data platforms provide a public communicative sphere where ideas and information are exchanged, see J. Burkell and others, *Facebook: Public Space, or Private Space?*, in *Information, Communication & Society* 2014, 974; A. Bruns and T. Highfield, *Is Habermas on Twitter?: Social Media and the Public Sphere*, in A. Bruns, G. Enli, E. Skogerbo, A. Larsson, C. Christensen (eds.) *The Routledge companion to social media and politics*, New York & London, Routledge, 2016, 56; M.S. Schäfer, *Digital Public Sphere, The International Encyclopedia of Political Communication*, in *The International Encyclopedia of Political Communication*, 2016; A.P. Heldt, *Merging the "Social" and the "Public": How Data platforms Could Be a New Public Forum*, in *Mitchell Hamline Law Review*, vol. 46, issue 5, 1; P.L. Morris and S.H. Sarapin, *You Can't Block Me: When Social Media Spaces Are Public Forums*, in *First Amendment Studies* vol. 54, No. 2020, 52.

publicly accessible. A mayor can solely exert the powers in the Municipal Act in public places or places that are accessible to the general public.

From this starting point, an application of the rules to online spaces by analogy might prove a suitable solution.[28] *Public* does not necessarily equal *not privately owned*. Privately-owned property can also be publicly accessible, but that is not the case for all private property.[29] To make a proper analogy, the differences in the physical and online world must be considered. It is here that the disparities in the two types of infrastructures become evident. In the physical world 'access is allowed unless it is explicitly restricted'.[30] One can enter a physical place, until the proprietor decides to build a fence, lock the entrance, or take other measures to obstruct access. In that sense, deciding whether a physical place is publicly accessible depends solely on *accessibility*.[31] The online space does not function in that way. The technical interface of data platforms does not allow a user to join the platform without accepting its terms of service. As such, there is no default accessibility. In the online space, all access is restricted, unless it is explicitly allowed – except for a few open platforms.[32] That is exactly opposite from the structure in the physical world.

That does not mean that an analogy cannot be made. In the physical space there are places that function similarly to data platforms. One can access these physical places, but to do so, one must accept the house rules.[33] Rather than focusing on accessibility, an interesting parallel can be drawn when considering the Dutch case-law on these types of physical places and compare them to the aim of users when using data platforms.

In various occasions, Dutch courts have ruled that certain types of private companies are not at liberty to define their house rules or to (arbitrarily) refuse access to their physical property. This is the case if the property is (i) publicly accessible and (ii) used to fulfil a 'societal role' (*maatschappelijke functie*). Examples consist of a football stadium,[34] a nursing home,[35] and a house of worship.[36] Interestingly, an underlying, identical line of thought links together these types of properties and as such the limitations to the liberty to exclude visitors. None of these places are visited for the characteristics of the property itself, nor are any of them a one-of-a-kind place – there are other football stadiums, nursing homes, and houses of worship that can be visited instead of the specific property. However, when one visits a football stadium, one visits this exact property to cheer for the team playing on the field. Similarly, one visits a certain nursing home because a relative is being taken care of in said property, just as one visits a house of worship due to the connection with the (religious) group connected to that certain property. As such, these places become a one-of-a-kind-property due to visitors' *aim of visiting*. Another football stadium, nursing home, or house of worship would simply not be a sufficient alternative to the exact property. Online users of data platforms decide to sign-up for an online platform in a similar way as people decide to visit specific types of property. A user signs up for a specific platform, because friends, family, or other likeminded groups are present on the platform, or because there is

[28] See on this analogy: W. Bantema and others, *Burgemeesters in cyberspace. Handhaving van de openbare orde door bestuurlijke maatregelen in een digitale wereld*, in www.politieenwetenschap.nl/publicatie/politiewetenschap/2018/burgemeesters-in-cyberspace-313 accessed 28 November 2022, 29 ff.

[29] See for an example the case of *Appleby*, where the right to publicly protest and freedom of expression were at stake in a privately-owned, but publicly-accessible shopping mall: *Appl. No. 44306/98 (Appleby and Others/United Kingdom)* (2003) ECLI:CE:ECHR:2003:0506JUD004430698 (ECtHR).

[30] See further on this also B. van der Donk, *Digital Bouncers. A European roadmap to navigate access rights and moderation issues on social media platforms*, PhD Thesis, Copenhagen, University of Copenhagen, 2023, 123-125.

[31] It has been argued that 'accessibility' can also be used to define whether online spaces are public, but I strongly disagree with this. See for the discussion: Bantema and others (n 22), 29, discussing the work of Vols (2010) on using accessibility as a requirement to decide whether physical and online places are publicly accessible.

[32] Such open platforms (a platform that does not require a sign-up before entering and does not apply implicit user terms) are extremely rare in the current age of the Internet. To date, one of the only platforms providing such an open service is Chatroulette (chatroulette.com).

[33] B. van der Donk, *European views on the privatization of the "online public space"*, 29 June 2022, Media Research Blog, https://leibniz-hbi.de/de/blog/european-views-on-the-privatization-of-the-online-public-space (accessed 1 December 2022).

[34] *District Court Gelderland (Stadionverbod Vitesse)* (2015) ECLI:NL:RBGEL:2015:452, §4.2.

[35] *Appeals Court Arnhem-Leeuwarden (Nursing home)* (2013) ECLI:NL:GHARL:2013:6873, §4.7.

[36] *District Court 's-Hertogenbosch (Refusal of entry to a mosque)* (2009) ECLI:NL:RBSHE:2009:BH4029.

specific information or content to be found. There is a specific *aim of visiting*, which cannot be substituted by joining another platform (yet[37]).

By analogy, that means that data platforms that are publicly accessible - meaning not aimed at or (technically) limited to a specific group of persons – and which fulfil a societal role, should adhere to a duty of care to safeguard public access to their service. Similarly, as the competences of mayors apply to physical places that are publicly available, it seems desirable that at least the spaces that fall within the definition of publicly accessible and societal relevant fall within the scope of power of mayors. This extra requirement would simultaneously balance the interests of the platform (right to property and the freedom to conduct a business) and guarantee that the administrative measure does not interfere in a disproportionate way with the users' right to private life and freedom of expression.

6. *Concluding remarks: the future of online restraining orders*

That brings us to the concluding remarks of this article. The first online restraining order in the Netherlands that was issued in November 2021 was based on an unstable legal foundation. The Dutch Municipal Act imposes powers on a mayor to safeguard the public order in the municipality. These powers, however, were intended to have effect in the physical world only, as reflected by the wording of the provisions in article 172a. Stretching these provisions - in their current form - to also include the online world, would jeopardize the principle of legality.

Following the public intentions of the mayors of Amsterdam, Rotterdam, and the Hague to experiment with online restraining orders, and the imposition of the first online restraining order in Utrecht, there is a clear call from practice to provide legislative options to tackle online disruptive behaviour. The preventive nature of administrative measures proves a good basis for curbing online content that can lead to harm in the physical world.

As such, there is a need for a legislative update. The Belgian inclusion of 'virtual spaces' in Brussel's Municipal act is an example of such a legislative update. However, an updated Dutch version should preferably not be worded similarly to its Belgian counterpart. The latter's terminology does not provide a sufficient future-proof basis for administrative measures, and it does not strike a sufficient analogy between physical properties included in the administrative competences and privatelyowned properties in the online world. The sole requirement of 'accessibility to the public' does not work adequately in the online world, due to the technical infrastructure applied by platform services. This leads to legal uncertainty. Rather than sole accessibility, the power to impose administrative measures should also be limited to those places that fulfil a service with a societal interest. These are places (whether online or physical) that due to their aim of visiting constitute a unique place – an aim that cannot be substituted by offering access to another platform or property. This terminology allows for a future-proof system, where any potential changes in the Internet infrastructure can be addressed on a case-by-case assessment.

Lastly, since data platforms are an important source of information and way of communication, the law will have to reflect the same safeguards that it prescribes for physical restraining orders when imposing online administrative measures. This to ensure that freedom of expression is not unduly restricted. That means that administrative measure must comply with the provisions on the maximum-time duration, and the necessity and proportionality requirements. Since Dutch mayors can only impose administrative measures within their own municipality, online restriction orders must reflect this. As such, as was the case in the online restraining order imposed by Dijksma, the measure must be limited to content that affects a specific municipality and may under no circumstances result in a full-access restriction to the Internet.

[37] Platform interoperability might be able to solve the problem created by exclusivity. If users of one platform can reach users on another platform, there is no longer a need to be a member of a certain data platform. Whether this can adequately solve the problem will be proven in the next years, as the newly adopted Digital Markets Act (Regulation (EU) 2022/1925) stipulates interoperability obligations for (certain) gatekeepers of communications services in article 7.