Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

3 October 2019 *

(Reference for a preliminary ruling — Information society — Free movement of services — Directive 2000/31/EC — Liability of intermediary service providers — Article 14(1) and (3) — Hosting services provider — Possibility of requiring the service provider to terminate or prevent an infringement — Article 18(1) — Personal, material and territorial limits on the scope of an injunction — Article 15(1) — No general obligation to monitor)

In Case C-18/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 25 October 2017, received at the Court on 10 January 2018, in the proceedings

Eva Glawischnig-Piesczek

v

Facebook Ireland Limited,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen, J. Malenovský (Rapporteur), C.G. Fernlund and L.S. Rossi, Judges,

Advocate General: M. Szpunar,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 13 February 2019,

after considering the observations submitted on behalf of:

– Ms Glawischnig-Piesczek, by M. Windhager and W. Niklfeld, Rechtsanwälte,

– Facebook Ireland Limited, by G. Kresbach, K. Struckmann and A. Tauchen, Rechtsanwälte,

– the Austrian Government, by G. Hesse, G. Kunnert and A. Jurgutyte-Ruez, acting as Agents,

– the Latvian Government, by I. Kucina, E. Petrocka-Petrovska and V. Soņeca, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and M. Figueiredo, acting as Agents, and T. Rendas, Legal Adviser.

* Language of the case: German.

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the European Commission, by G. Braun, F. Wilman, S.L. Kalėda, and P. Costa de Oliveira, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

2 The request has been made in proceedings between Ms Eva Glawischnig-Piesczek and Facebook Ireland Limited whose registered address is in Ireland, concerning the publication on the page of a hosted user on the social network Facebook of a message containing statements harmful to the reputation of Ms Glawischnig-Piesczek.

Legal context

EU law

3 Recitals 6, 7, 9, 10, 40, 41, 45 to 48, 52, 58 and 60 of Directive 2000/31 state:

'(6) … by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

…

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, [signed in Rome on 4 November 1950,] which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the

Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; …

…

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; …

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

…

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

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

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

…

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

…

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

…

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.'

4 Article 14 of Directive 2000/31, entitled 'Hosting', states:

'1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

…

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'

5 Article 15(1) of that directive provides:

'Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.'

6 Article 18(1) of that directive provides:

'Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

Austrian law

7 In accordance with Paragraph 1330(1) of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code), anyone who has sustained actual harm or loss of profit owing to damage to his reputation is entitled to claim compensation. Under subparagraph 2 of that paragraph, the same is to apply when a

person reports facts prejudicial to the reputation, material situation and future prospects of a third party which he knew or ought to have known to be inaccurate. In that case, a denial and publication of that denial may be required.

8 According to Paragraph 78(1) of the Urheberrechtsgesetz (Law on copyright), images representing a person must not be displayed publicly or disseminated in another way that makes them accessible to the public if such publication or dissemination harms the legitimate interests of the person concerned or, where that person has deceased without having authorised or ordered such publication, the legitimate interests of a close relative.

9 Under Paragraph 18(1) of the E-Commerce-Gesetz (Law on electronic commerce), hosting services providers are under no general obligation to monitor the information which they store, transmit or make available, or actively to seek facts or circumstances indicating illegal activity.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Ms Eva Glawischnig-Piesczek was a member of the Nationalrat (National Council, Austria), chair of the parliamentary party 'die Grünen' (The Greens) and federal spokesperson for that party.

11 Facebook Ireland operates a global social media platform ('Facebook Service') for users located outside the United States of America and Canada.

12 On 3 April 2016, a Facebook Service user shared on that user's personal page an article from the Austrian online news magazine *oe24.at* entitled 'Greens: Minimum income for refugees should stay', which had the effect of generating on that page a 'thumbnail' of the original site, containing the title and a brief summary of the article, and a photograph of Ms Glawischnig-Piesczek. That user also published, in connection with that article, a comment which the referring court found to be harmful to the reputation of the applicant in the main proceedings, and which insulted and defamed her. This post could be accessed by any Facebook user.

13 By letter of 7 July 2016, Ms Glawischnig-Piesczek, inter alia, asked Facebook Ireland to delete that comment.

14 Because Facebook Ireland did not withdraw the comment in question, Ms Glawischnig-Piesczek brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) which, by interim order of 7 December 2016, directed Facebook Ireland, with immediate effect and until the proceedings relating to the action for a prohibitory injunction have been finally concluded, to cease and desist from publishing and/or disseminating photographs showing the applicant [in the main proceedings] if the accompanying text contained the assertions, verbatim and/or using words having an equivalent meaning as that of the comment referred to in paragraph 12 above.

15 Facebook Ireland disabled access in Austria to the content initially published.

16 On appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) upheld the order made at first instance as regards the identical allegations. However, it also held that the dissemination of allegations of equivalent content had to cease only as regards those brought to the knowledge of Facebook Ireland by the applicant in the main proceedings, by third parties or otherwise.

17 The Handelsgericht Wien (Commercial Court, Vienna) and the Oberlandesgericht Wien (Higher Regional Court, Vienna) based their decisions on Paragraph 78 of the Law on copyright and Paragraph 1330 of the General Civil Code, on the ground, inter alia, that the published comment

contained statements which were excessively harmful to the reputation of Ms Glawischnig-Piesczek and, in addition, gave the impression that she was involved in unlawful conduct, without providing the slightest evidence in that regard.

18 Each of the parties in the main proceedings lodged appeals on a point of law at the Oberster Gerichtshof (Supreme Court, Austria).

19 Having been called on to adjudicate whether the cease and desist order made against a host provider which operates a social network with a large number of users may also be extended to statements with identical wording and/or having equivalent content of which it is not aware, the Oberster Gerichtshof (Supreme Court) states that, in accordance with its own case-law, such an obligation must be considered to be proportionate where the host provider was already aware that the interests of the person concerned had been harmed on at least one occasion as a result of a user's post and the risk that other infringements may be committed is thus demonstrated.

20 However, considering that the dispute before it raises questions of the interpretation of EU law, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 15(1) of Directive [2000/31] generally preclude any of the obligations listed below of a host provider which has not expeditiously removed illegal information, specifically not just this illegal information within the meaning of Article 14(1)(a) of [that] directive, but also other identically worded items of information:

– worldwide;

– in the relevant Member State;

– of the relevant user worldwide;

– of the relevant user in the relevant Member State?

(2) In so far as Question 1 is answered in the negative: does this also apply in each case for information with an equivalent meaning?

(3) Does this also apply for information with an equivalent meaning as soon as the operator has become aware of this circumstance?'

Consideration of the questions referred

The first and second questions

21 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2000/31, in particular Article 15(1), must be interpreted as meaning that it precludes a court of a Member State from:

– ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be illegal, or to block access to that information, irrespective of who requested the storage of that information;

– ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be illegal, or to block access to that information, and

– extending the effects of that injunction worldwide.

22 As a preliminary point, it is common ground that Facebook Ireland provides the services of a host provider for the purposes of Article 14 of Directive 2000/31.

23 In that respect, it should be recalled that Article 14(1) of that directive is intended to exempt the host provider from liability where it satisfies one of the two conditions listed in that provision, that is to say, not having knowledge of the illegal activity or information, or acting expeditiously to remove or to disable access to that information as soon as it becomes aware of it.

24 In addition, it is apparent from Article 14(3) of Directive 2000/31, read in conjunction with recital 45, that that exemption is without prejudice to the power of the national courts or administrative authorities to require the host provider concerned to terminate or prevent an infringement, including by removing the illegal information or by disabling access to it.

25 It follows that, as the Advocate General stated in point 32 of his Opinion, a host provider may be the addressee of injunctions adopted on the basis of the national law of a Member State, even if it satisfies one of the alternate conditions set out in Article 14(1) of Directive 2000/31, that is to say, even in the event that it is not considered to be liable.

26 Furthermore, Article 18 of Directive 2000/31, which is part of Chapter III of that directive entitled 'Implementation', provides in paragraph 1 that Member States must ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

27 In the present case, as follows from paragraph 13 above and from the actual wording of the questions raised, Facebook Ireland, first of all, did have knowledge of the illegal information at issue. Next, that company did not act expeditiously to remove or to disable access to that information, as laid down in Article 14(1) of Directive 2000/31. In the end, the applicant in the main proceedings brought an action before a national court for an injunction like the one referred to in Article 18.

28 Recital 52 of that directive states that the specific character arising from the fact that the damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent, and also by the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, led the legislature of the European Union to request Member States to ensure that appropriate court actions are available.

29 Thus, when implementing Article 18(1) of Directive 2000/31, Member States have a particularly broad discretion in relation to the actions and procedures for taking the necessary measures.

30 Moreover, given that those measures, according to a number of linguistic versions of that provision, including the English, Spanish and French-language versions, are expressly intended to terminate 'any' alleged infringement and to prevent 'any' further impairment of the interests involved, no limitation on their scope can, in principle, be presumed for the purposes of their implementation. That interpretation is not called into question by the fact that other linguistic versions of that provision, including the German version, provide that those measures are intended to terminate 'an alleged infringement' and to prevent 'further impairment of the interests involved'.

31 Article 15(1) of Directive 2000/31 states that Member States must not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity.

32 It is by taking all of those provisions into consideration that the Court will reply to the questions raised by the referring court.

33 In the first place, the referring court asks, in essence, whether Article 15(1) of Directive 2000/31 precludes a court of a Member State from ordering a host provider to remove or block access to information which it stores, the content of which is identical to the content of information which was previously declared to be illegal.

34 In that regard, although Article 15(1) prohibits Member States from imposing on host providers a general obligation to monitor information which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity, as is clear from recital 47 of that directive, such a prohibition does not concern the monitoring obligations 'in a specific case'.

35 Such a specific case may, in particular, be found, as in the main proceedings, in a particular piece of information stored by the host provider concerned at the request of a certain user of its social network, the content of which was examined and assessed by a court having jurisdiction in the Member State, which, following its assessment, declared it to be illegal.

36 Given that a social network facilitates the swift flow of information stored by the host provider between its different users, there is a genuine risk that information which was held to be illegal is subsequently reproduced and shared by another user of that network.

37 In those circumstances, in order to ensure that the host provider at issue prevents any further impairment of the interests involved, it is legitimate for the court having jurisdiction to be able to require that host provider to block access to the information stored, the content of which is identical to the content previously declared to be illegal, or to remove that information, irrespective of who requested the storage of that information. In particular, in view of the identical content of the information concerned, the injunction granted for that purpose cannot be regarded as imposing on the host provider an obligation to monitor generally the information which it stores, or a general obligation actively to seek facts or circumstances indicating illegal activity, as provided for in Article 15(1) of Directive 2000/31.

38 In the second place, the referring court asks, in essence, whether Article 15(1) of Directive 2000/31 precludes a court of a Member State from ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be illegal, or to block access to that information.

39 It is apparent from the information set out in the order for reference that, in using the words 'information with an equivalent meaning', the referring court intends to refer to information conveying a message the content of which remains essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality.

40 In that regard, it should be made clear that the illegality of the content of information does not in itself stem from the use of certain terms combined in a certain way, but from the fact that the message conveyed by that content is held to be illegal, when, as in the present case, it concerns defamatory statements made against a specific person.

41 It follows therefore that, in order for an injunction which is intended to bring an end to an illegal act and to prevent it being repeated, in addition to any further impairment of the interests involved, to be capable of achieving those objectives effectively, that injunction must be able to extend to information, the content of which, whilst essentially conveying the same message, is worded slightly differently, because of the words used or their combination, compared with the information whose content was declared to be illegal. Otherwise, as the referring court made clear, the effects of such an injunction could easily be circumvented by the storing of messages which are scarcely different from those which were previously declared to be illegal, which could result in the person concerned having to initiate multiple proceedings in order to bring an end to the conduct of which he is a victim.

42 However, it must also be observed that, in this context, as is apparent from Article 15(1) of Directive 2000/31 and as was observed in paragraph 34 above, a court of a Member State may not, first, grant an injunction against a host provider requiring it to monitor generally the information which it stores or, second, require that host provider actively to seek facts or circumstances underlying the illegal content.

43 In that regard, it should be pointed out in particular that, as is apparent from recital 41 of Directive 2000/31, in adopting that directive, the EU legislature wished to strike a balance between the different interests at stake.

44 Thus, Article 15(1) of Directive 2000/31 implies that the objective of an injunction such as the one referred to in Article 18(1) of that directive, read in conjunction with recital 41, consisting, inter alia, of effectively protecting a person's reputation and honour, may not be pursued by imposing an excessive obligation on the host provider.

45 In light of the foregoing, it is important that the equivalent information referred to in paragraph 41 above contains specific elements which are properly identified in the injunction, such as the name of the person concerned by the infringement determined previously, the circumstances in which that infringement was determined and equivalent content to that which was declared to be illegal. Differences in the wording of that equivalent content, compared with the content which was declared to be illegal, must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content.

46 In those circumstances, an obligation such as the one described in paragraphs 41 and 45 above, on the one hand — in so far as it also extends to information with equivalent content — appears to be sufficiently effective for ensuring that the person targeted by the defamatory statements is protected. On the other hand, that protection is not provided by means of an excessive obligation being imposed on the host provider, in so far as the monitoring of and search for information which it requires are limited to information containing the elements specified in the injunction, and its defamatory content of an equivalent nature does not require the host provider to carry out an independent assessment, since the latter has recourse to automated search tools and technologies.

47 Thus, such an injunction specifically does not impose on the host provider an obligation to monitor generally the information which it stores, or a general obligation actively to seek facts or circumstances indicating illegal activity, as provided for in Article 15(1) of Directive 2000/31.

48 In the third place, although the referring court does not provide any explanations in that regard in the grounds for its order for reference, the wording of the questions which it addressed to the Court suggests that its doubts also concern the issue whether Article 15(1) of Directive 2000/31 precludes injunctions such as those referred to in paragraphs 37 and 46 above from being able to produce effects which extend worldwide.

49 In order to answer that question, it must be observed that, as is apparent, notably from Article 18(1), Directive 2000/31 does not make provision in that regard for any limitation, including a territorial limitation, on the scope of the measures which Member States are entitled to adopt in accordance with that directive.

50 Consequently, and also with reference to paragraphs 29 and 30 above, Directive 2000/31 does not preclude those injunction measures from producing effects worldwide.

51 However, it is apparent from recitals 58 and 60 of that directive that, in view of the global dimension of electronic commerce, the EU legislature considered it necessary to ensure that EU rules in that area are consistent with the rules applicable at international level.

52 It is up to Member States to ensure that the measures which they adopt and which produce effects worldwide take due account of those rules.

53 In the light of all the foregoing, the answer to the first and second questions is that Directive 2000/31, in particular Article 15(1), must be interpreted as meaning that it does not preclude a court of a Member State from:

– ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;

– ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content, or

– ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law.

The third question

54 In the light of the reply given to the first and second questions, it is not necessary to consider the third question referred.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in particular Article 15(1), must be interpreted as meaning that it does not preclude a court of a Member State from:

– **ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information;**

– **ordering a host provider to remove information which it stores, the content of which is equivalent to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content, and**

– **ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law.**

[Signatures]