Court of Justice of the European Union
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Press and Information

Advocate General's Opinion in Case C-18/18
Eva Glawischnig-Piesczek v Facebook Ireland Limited

According to Advocate General Szpunar, Facebook can be ordered to seek and identify all comments identical to a defamatory comment that has been found to be illegal, and equivalent comments in so far as the latter originate from the same user

In the present case, the EU law relied on does not regulate the question whether Facebook can be ordered to delete the comments at issue worldwide

Ms Eva Glawischnig-Piesczek, who was a member of the Nationalrat (Austrian National Council), chair of the parliamentary party *die Grünen* ('the Greens') and the party's federal spokesperson, applied to the Austrian courts for an injunction to be issued ordering Facebook[1] to bring to an end the publication of a defamatory comment.

A Facebook user had shared, on their personal page, an article from the Austrian online news magazine oe24.at entitled 'Greens: Minimum income for refugees should stay'. That publication had the effect of generating on Facebook a 'thumbnail' of the website oe24.at, containing the title and a brief summary of the article, and a photograph of Ms Glawischnig-Piesczek. The user also published, in connection with that article, a disparaging comment about Ms Glawischnig-Piesczek. This content could be accessed by any Facebook user.

As Facebook did not react to her request for that comment to be deleted, Ms Glawischnig-Piesczek sought an order requiring Facebook to cease publication and/or dissemination of photographs of Ms Glawischnig-Piesczek if the accompanying message disseminated the same allegations as the comment in question and/or 'equivalent content'.

The court at first instance made the interlocutory order applied for, and Facebook disabled access in Austria to the content initially published.

The Oberster Gerichtshof (Supreme Court, Austria), before which this case was ultimately brought, considers that the statements at issue were intended to damage the reputation of Ms Glawischnig-Piesczek, to insult her and to defame her.

Having been called upon to adjudicate on the question whether the injunction can also be extended, worldwide, to statements with identical wording and/or having equivalent content of which Facebook is not aware, the Oberster Gerichtshof requested the Court of Justice to interpret the Directive on electronic commerce[2] in that context.

According to that directive, a host provider (and thus an operator of a social network platform[3] such as Facebook) is, in principle, not liable for the information stored on its servers by third parties if it is not aware of the illegal nature of that information. However, once made aware of its illegality, the host provider must delete that information or block access to it. The directive also provides that a host provider cannot be placed under a general obligation to monitor the information which it stores, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

[1] Specifically, Facebook Ireland which, as a subsidiary of Facebook Inc, operates an electronic platform solely for users located outside the United States and Canada.
[2] 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 (OJ 2000 L 178, p. 1).
[3] Case: C-360/10 SABAM; see also Press Release No. 11/12.

In today's opinion, **Advocate General Maciej Szpunar considers that the Directive on electronic commerce does not preclude a host provider which operates a social network platform, such as Facebook, from being ordered, in the context of an injunction, to seek and identify**, among all the information disseminated by users of that platform, the **information *identical* to the information that has been characterised as illegal by a court that issued that injunction.**

According to the Advocate General, that approach ensures a fair balance between the fundamental rights involved, namely the protection of private life and personality rights, the protection of freedom to conduct a business, and the protection of freedom of expression and information. First, it does not require sophisticated techniques that might represent an extraordinary burden. Second, in view of the ease with which information can be reproduced in the internet environment, this approach is necessary in order to ensure the effective protection of privacy and personality rights.

In the context of the injunction, **the host provider may also be ordered to seek and identify information *equivalent* to that characterised as illegal, but only among the information disseminated by the user that disseminated that illegal information.** A court adjudicating on the removal of such equivalent information must ensure that the effects of its injunction are clear, precise and foreseeable. In doing so, it must weigh up the fundamental rights involved and take account of the principle of proportionality.

An obligation to identify equivalent information originating from any user would not ensure a fair balance between the fundamental rights concerned. On the one hand, seeking and identifying such information would require costly solutions. On the other hand, the implementation of those solutions would lead to censorship, so that freedom of expression and information might well be systematically restricted.

Furthermore, **according to the Advocate General, since the directive does not regulate the territorial scope of an obligation to remove information disseminated via a social network platform, it does not preclude a host provider from being ordered to remove such information *worldwide***. Nor, moreover, is the territorial scope regulated by other provisions of EU law, since in the present case Ms Glawischnig-Piesczek is not relying on EU law but on the general provisions of Austrian civil law relating to breach of privacy and of personality rights, including defamation,[4] which have not been harmonised. Both the question of the extraterritorial effects of an injunction imposing a removal obligation and the question of the territorial scope of such an obligation should be analysed, in particular, by reference to public and private international law.

In addition, **the Advocate General considers that the directive does not preclude a host provider from being ordered to remove information e*quivalent* to the information characterised as illegal, where it has been made aware of that equivalent information by the person concerned, third parties or another source,** as, in that case, the removal obligation does not entail general monitoring of information stored.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[4] The Advocate General notes in particular that Ms Glawischnig-Piesczek is not relying on rights relating to the protection of personal data, which have been harmonised at EU level.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the Opinion are available from "Europe by Satellite" ☎ (+32) 2 2964106