# [FR] Access to pornographic websites for minors: *Conseil d'Etat* submits three preliminary questions to CJEU

**IRIS 2024-4:1/12**

*Amélie Blocman*
*Légipresse*

Two Czech-based pornographic website publishers asked the *Conseil d'État* (Council of State) to annul Decree No. 2021-1306 of 7 October 2021 on methods for implementing measures to prevent minors accessing sites with pornographic content, particularly the provision that gives the president of ARCOM (the French audiovisual regulator) the power to implement the procedure provided for in Article 23 of the Law of 30 July 2020, i.e. to issue a formal notice ordering publishers to take all possible steps to prevent minors accessing pornographic content within 15 days.

Firstly, the *Conseil d'Etat* rejected the argument that the decree was unlawful because it did not describe the nature and characteristics of suitable technical measures to be taken by publishers to ensure that pornographic content could not be seen by minors, but left it to the publishers to choose appropriate measures, merely stating that measures that only required users to state that they were adults were not suitable.

It also dismissed the claim that the provisions of the law and of the disputed decree infringed the principles of proportionality, legal certainty, the right to a fair trial and freedom of expression enshrined in the Declaration of the Rights of Man and of the Citizen and the European Convention on Human Rights.

The applicants also referred to the E-Commerce Directive (2000/31/EC) of 8 June 2000 and the Google Ireland Limited judgment of 9 November 2023 (C-376/22), according to which the directive, by establishing the so-called "country of origin" principle under which information society services are governed by the law of the member state in which they are established, prevents other member states from imposing general rules within the directive's "coordinated field" in terms of access to or the exercise of digital services.

Firstly, the applicants argued that the provisions of the disputed decree ignored the directive's objectives insofar as they established a procedure designed to enable an administrative body to issue a formal notice to an online communication service provider in order to put an end to a criminal offence. The *Conseil d'Etat* notes that the disputed provisions do not, in themselves, lay down any rule concerning the substance of the relevant obligation. They cannot

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therefore be regarded as restricting, for reasons falling within the “coordinated field” defined by Directive 2000/31/EC, the freedom to provide information society services, since the directive does not affect the possibility, for a court or administrative authority, in accordance with member states’ legal systems, to require a service provider to bring an end to or prevent a violation.

The applicants also claimed that the disputed provisions force service providers established in other member states to put in place technical measures to prevent minors accessing the content that they distribute. The *Conseil d’Etat* states that, taking into account the terms of the directive as interpreted in the Google Ireland Limited judgment of 9 November 2029 (C-376/22), the answer to this depends on the responses to three questions submitted to the Court of Justice of the European Union (CJEU).

It therefore stayed the proceedings relating to the publishers’ applications until the CJEU had answered the following questions.

Firstly, should provisions of a general and abstract nature that describe certain behaviour as constituting a criminal offence subject to prosecution be regarded as falling within the “coordinated field” defined in Directive 2000/31/EC when they are equally likely to apply to the conduct of an information society service provider as to that of any other natural or legal person? In particular, do criminal law provisions designed to protect minors fall within this “coordinated field”?

Secondly, should the obligation for online communication service providers to take measures to prevent minors accessing pornographic content that they distribute be regarded as falling within the “coordinated field” defined in Directive 2000/31/EC, which only harmonises certain legal aspects of the services concerned, even though, if this obligation concerns the exercise of an information society service’s activity insofar as it relates to the service provider’s conduct or the quality or content of the service, it does not concern any of the matters governed by the harmonisation provisions of Chapter II?

Finally, if the answer to the previous questions is positive, how should the demands resulting from Directive 2000/31/EC be reconciled with provisions on the protection of fundamental rights in the European Union, more specifically the protection of human dignity and the best interests of children, if the mere adoption of individual measures taken in regard to a given service does not appear likely to guarantee effective protection of these rights? Does European Union law contain a general principle authorising member states, especially in urgent situations, to take measures – including general, abstract measures applicable to a category of service providers – to protect minors from violations of their dignity and integrity, derogating where necessary, in relation to service providers governed by Directive 2000/31/EC, from the principle enshrined in the directive that they should be regulated by their country of origin?

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***CE, 6 mars 2024, n° 461193, Webgroup Czech Republic et a.***

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2024-03-06/461193

*Conseil d'Etat, 6 March 2024, No. 461193, Webgroup Czech Republic et al.*

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