

[DE] Federal Supreme Court suspends proceedings on social networks' liability for memes with identical content pending ECJ ruling

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Christina Etteldorf
Institute of European Media Law

In a decision of 18 February 2025, the *Bundesgerichtshof* (Federal Supreme Court – BGH), Germany's highest civil court, suspended proceedings concerning the liability of social networks for content that is identical or similar to content that has already been declared illegal by a court. The BGH wants to review the European Court of Justice's decision in case C-492/23 (Russmedia Digital and Inform Media Press), which also deals with the questions referred for a preliminary ruling as to whether providers of hosting services are obliged to check the legality of content before publishing it and whether they must take protective measures to prevent copying and redistribution.

The proceedings concern a legal dispute between a well-known German politician and the Facebook social network over a meme created by users and distributed on the platform. The meme shows a photo of the politician with her full name and the quote "Integration starts with you, as a German, learning Turkish". However, the politician never actually said these words. The original meme was removed from Facebook at the politician's instigation because it was indisputably a dissemination of false facts. However, as is typical on social networks, the meme and slightly modified versions of it were re-uploaded numerous times immediately after the initial post. The politician took legal action and her claim was upheld by the lower courts. The *Landgericht Frankfurt* (Frankfurt regional court), in a decision later confirmed by the *Oberlandesgericht* (higher regional court) on appeal, ordered Facebook to refrain from disseminating any content that was "identical and similar in essence" to the meme reproduced in the court decision. Facebook, which would therefore have to search its platform for similar memes and remove them, lodged an appeal against this decision with the BGH. The Frankfurt court allowed the appeal due to the fundamental importance of the question of whether and under what conditions a hosting provider is obliged to check and take action with regard to similar content. Facebook claimed to be exempt from liability under provisions of the e-Commerce Directive that were still relevant at the time of the decision but are now contained in the Digital Services Act. Its main argument was that the instruction to remove content that was "similar in essence" was too vague and technically impossible to implement. It also claimed that the decision disregarded the risk to users' freedom of expression, since filtering content to such an extent might lead to "overblocking".

The proceedings before the ECJ now centre on the question of whether a hosting service such as Facebook, if it is legally obliged to remove a post, can also be obliged to remove posts that are identical or similar in essence, or whether this would amount to an imposition of monitoring obligations prohibited by the e-Commerce Directive (and the DSA). However, as this concerns a fundamental question of EU law and an affirmative answer would have significant consequences in terms of platforms' obligations, the BGH initially suspended the proceedings in order to await the ECJ's decision in another pending case. The request for a preliminary ruling submitted by a Romanian court in case C-49/492/23 concerns an online marketplace operator's liability for user content. Without the plaintiff's consent, a third party had placed in the online marketplace an advert offering sexual services and containing the plaintiff's photo. This advert had also been redistributed by other users after being removed. The Romanian court, which wanted to place extensive liability on the marketplace operator, asked the ECJ, among other things, whether a hosting service was obliged to take protective measures to prevent or restrict the copying and retransmission of the content of adverts published through it. In his opinion of 6 February 2025, Advocate General Szpunar said this was not the case. Nevertheless, he added that the hosting provider should take appropriate organisational and technical measures to ensure the security of processing of personal data vis-à-vis third parties, which had also been raised in the order for reference.

Urteil des LG Frankfurt 2-03 O 188/21

<https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002783>

Judgement of the Frankfurt Regional Court 2-03 O 188/21

Schlussanträge des Generalanwalts in der Rs. C-49/492/23

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=295080&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=8945122>

Opinion of the Advocate General in Case C-49/492/23

