Court of Justice of the European Union: EU Law and Fundamental Rights Preclude Requested Filtering Injunction against Hosting Provider

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On 16 February 2012, the Court of Justice of the European Union delivered its preliminary ruling in the case of SABAM v. Netlog NV. The judgment was issued on a request made by the Court of First Instance of Brussels.

In the main proceedings the Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA ('SABAM'), a management company representing authors, composers and publishers of musical works, alleged that the hosting service offered by Netlog, a social network, enables its users to make works from SABAM's repertoire available to the public. Consequently, other users of the network could then access the works without SABAM's consent and without Netlog paying remuneration to SABAM.

SABAM then started injunction proceedings before the Court of First Instance of Brussels, requesting Netlog to be ordered instantly to stop unlawfully making available works from SABAM's catalogue and to pay a EUR 1000 penalty for each day of delay. Netlog however argued that when this injunction would be awarded, this could lead to the imposition of a general monitoring obligation, prohibited by the E-commerce Directive and to the imposition of a general filtering system.

This led to the referral for a preliminary ruling by the Court of First Instance of Brussels. According to the Court of Justice, the issue referred by the Court of First Instance comes down to the question whether Directives 2000/31 ('the E-Commerce Directive'), 2001/29 ('the Infosoc Directive'), 2004/48 ('the Enforcement Directive'), 95/46 ('the Data Protection Directive') and 2002/58 ('the E-Privacy Directive'), taken together with the relevant fundamental rights (articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, regarding privacy and freedom of expression and information, and article 16 of the Charter of Fundamental Rights of the European Union, regarding the freedom to conduct a business), must be interpreted as containing a prohibition for national courts to grant an injunction against a hosting service provider requiring it to install a filtering-system for stored information on its servers by its customers at its own cost and for an unlimited period.

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According to the Court of Justice, the proposed injunction contains a requirement for preventive monitoring and for installing a filtering system of such a kind that this would oblige Netlog to actively monitor almost all the data of all its users to rule out any future infringement of intellectual property rights. This would thus entail a requirement for the hosting provider to carry out general monitoring, which is prohibited by article 15(1) of the E-Commerce Directive.

As to the part of the question that relates to fundamental rights, the Court stresses that a fair balance must be found between the protection of the intellectual property right of the copyright holder on the one hand, and the freedom for Netlog to conduct a business as well as the right to data protection and freedom to receive or impart information of Netlog's users on the other hand. The Court observes that installing the filtering-system would be a severe infringement of the freedom of Netlog to conduct its business. The injunction would oblige the hosting service provider to install at its own cost a complex and expensive system of a permanent nature. This would also go against the conditions of article 3(1) of the Enforcement Directive, that provide that measures to guarantee respect for intellectual property rights should not be unnecessarily intricate or costly. As to the users' right to protection of personal data, the Court states that the injunction may infringe this right, since the filtering would entail the identification, systematic analysis and processing of the information connected with the profiles that the users have created. This data however is protected data, because it is connected to the users' profiles and thus allows the users to be identified. Lastly, the Court observes that the filtering system can also infringe the freedom of expression and information of Netlog's users, since the system might block lawful communications as well. All in all, the Court holds that if the national court would adopt the injunction, this would mean that it would not have fairly balanced the right to intellectual property with the three other fundamental rights mentioned above.

In conclusion, the Court's answer to the question of the Court of First Instance of Brussels is that "Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system".

Finally, it should be noted that throughout this judgment, the Court refers to its ruling in the Scarlet Extended case (Case-70/10 Scarlet Extended [2011] ECR I-0000) (see IRIS 2012-1/2).

Judgment of the Court (Third Chamber) in Case C-360/10, 16 February 2012

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