Court of Justice of the European Union: Papasavvas v O Fileleftheros

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On 11 September 2014, the Court of Justice of the European Union (CJEU) handed down a judgement in case C-291/13, Papasavvas. The case concerned an action for damages brought against a Cypriot newspaper for harm caused by articles published on the paper's website that were of an allegedly defamatory nature. The district court of Nicosia submitted a series of five questions to the CJEU. The answers given were as follows:

(1) Should the laws of the Member States on defamation be regarded as restrictions on the provision of information services for the purposes of applying the E-Commerce Directive (Directive 2000/31)?

Article 3(2) of the E-Commerce Directive states that "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State." Given that the services at issue in the case at hand originate in Cyprus, Article 3(2) does not apply. Accordingly, the Court found, the Directive does not preclude the application of the Cypriot rules of civil liability for defamation.

(2) If so, do the safe harbour provisions of Articles 12, 13 and 14 of the E-Commerce Directive apply to civil liability for defamation?

The Court noted that Article 2(b) of the E-Commerce Directive defines the concept of "service provider" as "any natural or legal person providing an information society service". Therefore, according to the Court, the E-Commerce safe harbours are capable of applying to civil liability for defamation, as long as the conditions listed in those provisions are satisfied.

(3) Do the safe harbours create individual rights, which may be pleaded as defences in law in a civil action for defamation, or do they operate as an obstacle in law to the bringing of such actions?

The CJEU reminded the referring court that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. Instead, it is the Member States that are obliged to implement the safe harbour provisions in national law. If there is no transposition into national law, the national courts are nevertheless required to interpret the law, as far as

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possible, so as to achieve the result pursued by the directive.

As the Court noted, the safe harbour provisions do not concern the conditions in which remedies for civil liability may be exercised against service providers: this is a matter that, in the absence of any specific provision of EU law, is decided entirely by the national law of the Member States.

(4) Are online information services that are remunerated by means of commercial advertisements posted on the website included in the definition of an "information society service" and "service provider" in Article 2 of the E-Commerce Directive and Article 1(2) of Directive 98/34?

The Court first clarified the relationship between the two provisions by observing that Article 2(a) of the E-Commerce Directive defines the term "information society services" by making a reference to Article 1 of Directive 98/34. The latter refers to any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

It then observed that Recital 18 of the E-Commerce Directive expressly excludes conditioning the definition of "information society services" on remuneration that derives directly from the recipient of the service. Consequently, the CJEU concluded, the notion of an "information society service" must be interpreted as including online information services for which the service provider is financed, not by the end-user, but by the placement of ads on the website.

(5) May a newspaper publishing company that operates a website on which the online version of a newspaper drafted by staff or freelance journalists is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, be regarded as providing "mere conduit" or "caching" or "hosting" services for the purposes of the safe harbour provisions of Articles 12, 13 and 14 of the E-Commerce Directive? Does the answer to that question depend on whether or not access to that website is free of charge?

In answering this question, the Court referred back to its previous judgements in Google France (C-236/08 to C-238/08) and L'Oréal (C-324/09), in which it emphasised that, in order to benefit from safe harbour protection, a service provider must play a neutral role, in the sense that its conduct is merely technical, automatic and passive and that it has no knowledge or control over the data it stores. As a result, the mere fact that a referencing service is subject to payment, that the provider sets the payment terms or that it provides general information to its clients cannot have the effect of depriving that provider of immunity from liability.

However, since a newspaper publishing company which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered

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to be an “intermediary service provider” that benefits from the safe harbours of Articles 12 to 14 of the E-Commerce Directive, whether or not access to that website is free of charge.

Judgment of the Court (Seventh Chamber) in Case C 291/13 Sotiris Papasavvas v O Fileleftheros Dimosia Etairia Ltd, CJEU 11 September 2014

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