[AT] CJEU to answer questions on hate speech classification

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Christina Etteldorf

In a decision of 25 October 2017 (6Ob116/17b), Austria's Oberste Gerichtshof (Supreme Court - OGH) submitted a series of questions to the Court of Justice of the European Union (CJEU) concerning the legal classification of so-called hate speech and its consequences under European law. In particular, the questions concern the scope of hosting providers' obligations to take down illegal content in the light of Directive 2000/31/EC (E-Commerce Directive).

The (interim) decision concerned hate speech published on the Facebook social network. On 3 April 2016, a private user of the online platform, registered as 'Michaela Jaskova', shared a news article comprising a photograph of an Austrian MP and accompanying text concerning her party's position on refugee policy. In the text, the user called the politician, among other things, a "miese Volksverräterin" (wretched traitor to her people) and a "korrupte(s) Trampel" (corrupt oaf), who "has not earned a single cent through honest work in her entire life". Her party was also described as a "Faschistenpartei" (party of fascists).

The politician initially contacted Facebook directly to ask for the article to be deleted and for the user's real name and personal details to be disclosed - requests that were both rejected. It was only when she successfully applied to the courts for an injunction that the social network removed the article concerned.

In the legal proceedings, which have now reached the OGH, the MP also applied for injunctive relief against Facebook concerning identical and/or similar comments in the accompanying text. She argued, inter alia, that Facebook could easily have identified the defamatory content and should therefore have deleted it. She claimed that, since the company had failed to remove the article after being requested to do so, it was unable to rely on the liability exemption for hosting providers contained in Article 16 of the Austrian E-Commerce-Gesetz (E-Commerce Act).

In response, Facebook claimed that a hosting provider was only required to take action if it became aware of an illegal act or information and if its unlawfulness was obvious to a legal layman. This was not the case here because the disputed text concerned a topic that was highly controversial, it argued.

This therefore raised the question of whether and when the operator of a social network such as Facebook has a specific obligation to check content. According to

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the OGH, previous case law concerning Article 18 of the E-Commerce Act suggested that such an obligation existed if the operator had been made aware of at least one infringement that created the risk of further infringements by individual users. However, since Articles 16 and 18 of the E-Commerce Act were designed to transpose the E-Commerce Directive, they should be interpreted in the light of European law.

According to the OGH, the general question of whether, in order to protect an individual's personality rights (honour) after an infringement had been identified, a social network operator could be obliged to filter content in such a way as to identify identical and/or similar content could not clearly be answered on the basis of legal principles derived from previous ECJ case law concerning the interpretation of EU law. It was therefore necessary to clarify in general terms whether, following an unlawful act that infringed personality rights, the operator could also be obliged to prevent further infringements of the same personality rights, because this was not a 'general obligation' to monitor 'information which they transmit or store' within the meaning of Article 15(1) of Directive 2000/31/EC, but an obligation arising from an actual infringement.

On these grounds, the OGH submitted the following questions to the CJEU:

"1. Does Article 15(1) of the E-Commerce Directive, in general, contradict any of the following obligations of a hosting provider who fails to immediately remove illegal information, and not only illegal information in the sense of Article 14(1)(a) of the Directive but also other identical information:

- worldwide?

- in the relevant member state?

- of the user concerned worldwide?

- of the user concerned in the relevant member state?

2. If the answer to question 1 is no: does this also apply to similar information?

3. Does this also apply to similar information if the operator is made aware of the circumstances?"

Beschluss des OGH, 6Ob116/17b, 25. Oktober 2017

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20171025_OGH0002_0060OB00116_17B0000_000

Decision of the OGH, 6Ob116/17b, 25 October 2017

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