Court of Justice of the European Union: Facebook can be compelled to track illegal content worldwide

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In a judgment issued on Thursday 3 October 2019, the Court of Justice of the European Union (CJEU) decided that EU law does not prevent Facebook from being ordered to monitor and remove, at worldwide level, content that is declared to be illegal in an EU member state, or content that is identical or deemed equivalent. The judgment follows a request for a preliminary ruling from the Austrian Supreme Court concerning the interpretation of Article 15(1) of Directive 2000/31/EC on electronic commerce, which prohibits member states from imposing a general obligation on providers to monitor the information which they transmit or store, or to actively seek facts indicating illegal activity.

The request was submitted as part of a dispute between the former Austrian Green MP Eva Glawischnig-Piesczek and Facebook Ireland Limited concerning a comment posted by a Facebook user that insulted and defamed the applicant in relation to the publication of a press article containing a photograph of her. The applicant had previously written to Facebook asking it to delete the comment, before turning to the Austrian courts when her request was not met. The dispute revolved around whether a cease-and-desist order made against a host provider that operates a social network may be extended to statements whose wording is identical to a statement previously declared unlawful and/or having equivalent content of which it is not aware, and if so, at what geographical level.

The CJEU stated first of all that the exemption from liability provided in Article 14(1) of the Directive is without prejudice to the power of a national court to require a host provider to terminate or prevent an infringement. In this case, Facebook could not have benefited from such an exemption because it had been informed of the infringement and had failed to respond expeditiously. The Court then explained that the prohibition against imposing a general obligation enshrined in Article 15 did not concern the monitoring obligations in a specific case. A specific case was defined as a case similar to the one at hand, that is, a particular piece of information stored by a host provider that was the subject of a complaint by a user of the social network concerned and declared illegal by a court in a member state. Regarding the extension of an injunction to include identical content, the Court noted that the very nature of a social network was the swift flow of information on a large scale, which created “a genuine risk that information which was held to be illegal is subsequently reproduced and shared”.

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Concerning equivalent content, the Court stressed that this was “information conveying a message the content of which remains essentially unchanged”. In other words, it was the content of the conveyed message that had, in itself, been declared illegal, so the inclusion of such information was justified when the message conveyed was unchanged, provided that the search for the equivalent content did not “require the host provider to carry out an independent assessment of that content”, although the latter could have recourse to automated search tools and technologies. Finally, the Court stated that such an injunction could produce effects worldwide because the directive did not impose any territorial limitation, as long as the directive was consistent with the rules applicable at international level.

Facebook and digital rights activists have heavily criticised this decision, especially its inclusion of equivalent content, which they consider “a vague concept” that may lead to severe restrictions of freedom of expression. Others have welcomed the judgment because it does not oblige host providers to actively search and monitor all content, but requires them to take greater responsibility, as a minimum, for illegal information and content that is brought to their attention.

CJEU, judgment of 3 October 2019, Eva Glawischnig-Piesczek v Facebook Ireland Limited, C-18/18

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