CJEU judgment: Google Ireland and others v. Austria

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Amélie Lacourt
European Audiovisual Observatory

The Court of Justice of the European Union (CJUE) issued a judgment (C-376/22) in a case opposing Google Ireland Limited, Meta Platforms Ireland Limited and TikTok Technology Limited to the *Kommunikationsbehörde* (the Austrian National regulatory Authority – *KommAustria*) - on 9 November 2023. This judgment follows the request for a preliminary ruling made by the Verwaltungsgerichtshof *(* Supreme Administrative Court of Austria) under Article 267 TFEU on 24 May 2022.

Google, Meta and TikTok, while established in Ireland, provide communication platform services abroad, in particular in Austria. In 2021, *KommAustria* declared in a set of decisions, that the three services were subject to an Austrian law, known as the *Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen* - BGBl. I, 151/2020 (Federal Act on Measures for the Protection of Users on Communication Platforms). This law imposes in particular a set of obligations on domestic and foreign providers of communication platforms for monitoring and notifying allegedly illegal content. The three providers at stake, who considered they should not be subject to such measures, lodged complaints against the decisions of *KommAustria*, which were rejected. The claimants therefore appealed before the Austrian Administrative Court, arguing in particular that the obligations introduced by the Austrian law were disproportionate and incompatible with the free movement of information society services and with the principle of control of those services by the member state of origin, which is the state on whose territory the service provider is established, as provided in the E-Commerce Directive.

It is in this context that the Administrative Court referred to the CJEU for a preliminary ruling on the interpretation of the Directive. The Court of Justice ruled in particular on whether a member state receiving information society services may derogate from the free movement of those services by taking not only individual and specific measures, but also general and abstract measures aimed at a given category of services and, whether those measures are capable of falling within the concept of “measures taken against a given information society service” within the meaning of article 3 paragraph 4 of the E-commerce Directive.

On this matter, the Court first provided a literal interpretation of the said article and noted that the possibility of derogating from the principle of free movement of information society services concerns a "*given* information society service". The

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use of the word "given" tends to indicate that the service in question must be understood as an individualised service. In other terms, member states may not adopt measures of a general and abstract nature which apply without distinction to any provider of a category of information society services. The term 'without distinction' means providers established in that member state and providers established in other member states. The CJEU also addressed in particular the concept of "*measures*" as provided in the E-Commerce Directive and stated that, although such a broad and general concept leaves member states the discretion as to the nature and form of the measures that may be taken to derogate from the principle of free movement of information society services, it does not in any way prejudge the substance or material content of those measures.

In addition, the CJEU recalled that the possibility of derogating from the principle of free movement is subject to the condition that the member state of destination of such services must first request the member state of origin to take measures (according to Article 3, paragraph 4 (b)), which also presupposes the possibility of identifying the providers and, consequently, the member states concerned.

The Court also pointed out that the E-commerce Directive is intended to remove legal obstacles to the proper functioning of the internal market arising from the divergence of legislation and the legal uncertainty of the national regimes applicable to those services. However, the possibility of adopting the aforementioned measures would ultimately mean subjecting the service providers concerned to different legislation and, consequently, reintroducing the legal obstacles to freedom to provide services that this directive aims to remove. The E-commerce Directive is based on the application of the principles of control in the member state of origin and of mutual recognition, so that, within the coordinated field, information society services are regulated only in the member state on whose territory the providers of those services are established.

The Court concluded that a member state may therefore not subject a provider established in another member state to general and abstract obligations.

Judgment of the Court (Second Chamber) in Case C-376/22, Google Ireland and others, 9 November 2023

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