

Opinion of Advocate General Szpunar in the joined cases of Airbnb, Amazon and others

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In Italy, providers of online intermediation services and online search engines are required by law to be entered in a register and to provide information relating to their structure and economic situation, even if they are not established on Italian soil. This information must be provided to the Italian Communications Authority (AGCOM) and entered in the Register of Communications Operators (RCO). Service providers must also pay an annual contribution to AGCOM.

Various providers of online intermediation services and online search engines (including Amazon and Airbnb, which are based in Luxembourg and Ireland respectively) contested this Italian legislation with the Lazio Regional Administrative Court, claiming that it was incompatible with European Union (EU) law. The Italian court decided to stay the proceedings and to refer some questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling on whether these measures are consistent with EU law or not.

In this context, Advocate General Maciej Szpunar presented his conclusions to the CJEU.

The Advocate General analysed the questions in the light of various EU laws, in particular the directive on electronic commerce (E-Commerce Directive), which introduces the principle of mutual recognition between member states. According to this principle, a service provider that meets the requirements in its member state of origin (the state in which it is established) may operate in another member state of destination, which may not restrict its freedom to provide services. The member states therefore mutually recognise the conditions for access to the activity of information society services (and for the exercise of that activity). These conditions fall within the coordinated field established under Article 3 of the E-Commerce Directive.

A member state may derogate from this principle of mutual recognition to protect public policy, public health, public security or consumers.

The Advocate General pointed out that, under Article 3(1) of the E-Commerce Directive, the member state of origin must ensure that a service provider respects said rules of establishment. Moreover, Article 3(2) of the directive prevents member states from restricting the freedom to provide services for reasons falling

within the coordinated field (access to and exercise of the activity).

Since the three measures challenged in this case (entry in the RCO, communication of information to AGCOM and payment of a financial contribution) allow access to and the exercise of an activity in Italy, they fall within the coordinated field, within the meaning of Article 3 of the directive. According to the Advocate General, they therefore restrict the freedom to provide services, as the CJEU explained in its recent judgment in the case of Google Ireland (IRIS 2023-10:1/4). In that case, it was decided that rules within the coordinated field that were adopted by a member state of destination were contrary to EU law if the information society service provider met its obligations in its country of origin (where it was established). It therefore could not be subjected to new measures concerning access to and exercise of its activity in a member state of destination.

According to Article 3(4) of the directive, a member state may derogate from Article 3(2) and take restrictive measures on its territory as long as the measures are necessary and proportionate. It must do so for a reason linked to public policy or the protection of public health, public security or consumers.

In the case at hand, the Italian government argues that these measures are necessary to monitor and manage distortions of competition. The Advocate General therefore considers that they do not pursue any of the objectives referred to in Article 3(4) of the directive and are therefore incompatible with EU law.

The Advocate General proposes that the CJEU should declare the Italian rules incompatible with EU law in the sense that they impose measures of a general and abstract nature on the provider of an information society service established in another member state, and are therefore in contravention of Article 3 of the E-Commerce Directive.

Conclusions de l'AG Maciej Szpuar, présentées le 11 janvier 2024, dans les affaires C-662/22 à C-667/2

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Directive 2000/31/CE du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce

électronique, dans le marché intérieur (« Directive sur le commerce électronique »)

<https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32000L0031>

Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

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