

EDiMA Observations on the CJEU Ruling on *Eva Glawischnig-Piesczek v Facebook Ireland*

The CJEU ruling on the case of [Eva Glawischnig-Piesczek v Facebook Ireland](#) highlights the complexity of content management and the balance with the freedom of expression online. Whereas at a first glance the judgment attempts to provide clarity regarding balance to be found in the application of Articles 14 and 15 of the e-Commerce Directive (eCD), it also highlights a number of considerations and concerns to be taken into account in light of ongoing discussions on the new EU digital policy agenda.

1) Article 14 eCD is still relevant and applicable to modern online service provider

The CJEU has clearly and explicitly reaffirmed that service providers such as Facebook are host providers for the purposes of Article 14 eCD, and that one of two criteria must be met in order to avail of the limited liability protections under Article 14: the service provider must not have knowledge of the illegal activity or information; or, it must act expeditiously to remove or to disable access to the information as soon as it becomes aware of it. The issue as to whether the service provider assumed an active or passive role did not come into the CJEU's deliberations – knowledge is enough.

2) The line between a general or a specific monitoring obligation has been significantly blurred

In this ruling the CJEU considered what might constitute a specific monitoring obligation to satisfy the injunction order, which would be compliant with Article 15 eCD. However, in reaching its conclusion the Court has significantly blurred the line between what might be considered a general or a specific monitoring obligation, without referring to previous case law on the subject or indeed to the AG Spuzner's opinion on the case.

In [L'Oréal v eBay](#), the Court noted that an order which obliges a service provider to monitor the data of all its users to locate a particular infringement would amount to a general monitoring obligation. The general monitoring obligation was identified on the basis of who was monitored, not what. This rationale was followed in [Scarlet v SABAM](#) and [SABAM v Netlog](#). However, in the case of Ms Glawischnig-Piesczek, the Court concludes that an injunction requiring a service provider to remove content which is either identical to or "equivalent" to content (which has been previously been declared unlawful) only imposes a specific monitoring obligation on a service provider for the purposes of Article 15 eCD. This assessment is based on the nature of the content - the CJEU notes that content which contains certain elements (such as the name of the individual and equivalent circumstances and content) and which does not require an "independent assessment" by the service provider to determine its illegality, will not amount to the imposition of a general monitoring obligation under Article 15.

This marks a departure in the jurisprudence of the CJEU which will be difficult for service providers to decipher – on this basis, a specific monitoring obligation might be imposed on a service provider which can apply broadly to all users of a service, somehow without undermining their fundamental right to privacy which the Article 15 prohibition against general monitoring was designed to protect. How this will impact the discussions around intermediary liability at EU level remains to be seen.

3) There is a need for an EU-wide safeguard mechanism to complement the limited liability regime of the e-Commerce Directive

The CJEU's examination of the the distinction between a general and specific monitoring obligation may also impact on how a service provider makes use of voluntary measures for content moderation and the retention of its limited liability protection under Article 14 eCD.

During its deliberations, the CJEU notes that when assessing differences in wording of "equivalent" content compared to the previously identified illegal content, a service provider cannot be mandated by an injunction to carry out an "independent assessment" of that content. Such a requirement would

amount to an excessive obligation on the service provider. In classifying the use of “independent assessment” as an excessive obligation which might equate to a general monitoring obligation under Article 15 eCD, it could be hypothesised that the use of independent assessment as part of an automated search process (e.g. such as human-in-the-loop procedures for automated content moderation) may be seen as an activity which may give rise to actual knowledge of an illegality and consequently the loss of a service provider’s limited liability protections under Article 14 eCD.

Accordingly, this ruling could be seen to call into question the status of service providers which make voluntary use of independent assessment practices as part of their content moderation policies - in order to effectively balance their obligations to act expeditiously to address illegal activity upon notification with the protection of their users’ fundamental rights. “Independent assessment” is often deployed by service providers to make difficult calls when it comes to content and activity which is notified and resides in a grey area - this is particularly true when it comes to considerations involving hate speech and defamation, which are culture and context specific.

The broader implications of this case underscore the need for an EU-wide “Good Samaritan” principle for online service providers, such that any voluntary action on their part cannot be considered to confer actual knowledge of an illegal activity or information within the meaning of Article 14 eCD and result in the loss of their limited liability protection. Service providers should be able to act in good faith to address concerns regarding illegal content and activity online with either automated or non-automated moderation as is appropriate, with due regard to fundamental rights. The inclusion of a such a mechanism in the current limited liability framework would provide legal certainty for online service providers and take account the nuance required for freedom of speech concerns, without incentivising the censorship of legitimate content and speech. The discussions around the “Digital Services Act” could be a good starting point for this conversation.

4) Ongoing discussions around content regulation could fragment the EU Internal Market

The CJEU’s ruling has indicated that there is nothing in EU law to preclude the global application of injunctions issued by Member States for identical and sometimes “equivalent” infringing content, without going into the nuances of this rationale. Outside of the freedom of speech concerns which can arise from the application of one national defamation law on a global scale, the potential for such an extension of Member State rules could incentivise and justify the creation of specific national requirements on content and activity online. This is particularly the case where a Member State disagrees with the EU approach to regulation or feels that more timely legislative intervention is required than what is possible at EU level (e.g. French and German laws on hate speech).

In such a scenario, is difficult to envisage how online service providers would be able to reconcile potentially diverging EU and national laws and indeed how this would contribute to the EU’s stated aim of modernising the Internal Market to make it fit for the digital age.

5) To what extent should EU rules conform to international rules

The CJEU ruling in this case could be seen to contradict a recent ruling on the scope of application of the Right to Be Forgotten. Although the case of *Google v CNIL* case concerned the application of EU privacy laws and this case concerns the application of injunctive relief for defamation, the different conclusions reached by the CJEU could confuse the EU legislator about the extent to which EU rules should conform to international rules.

The online space is a borderless domain and the interaction between EU rules and international norms will inevitably become more of a concern as the EU develops its policies around the moderation of content and activity online. The possibility for EU rules to be applied or initiated at an international level should not be forgotten and reinforces the need for balance and nuance when comes to discussions around content removal and fundamental rights.