

**Case C-500/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

1 July 2019

**Referring court:**

Oberster Gerichtshof (Austria)

**Date of the decision to refer:**

28 May 2019

**Appellant on a point of law:**

Puls 4 TV GmbH & Co. KG

**Respondents in the appeal on a point of law:**

YouTube LLC

Google Austria GmbH

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**Subject matter of the main proceedings**

Action for an injunction and damages owing to copyright infringement

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

1. Is Article 14(1) of Directive 2000/31/EC to be interpreted as meaning that the operator of an online video platform, as a host service provider, plays an active role, leading to a loss of the liability privilege, as a result of providing or offering to the user the following accompanying activities in addition to the provision of storage space for third-party content:

- suggesting videos according to subject areas;
- facilitating visitors to search by title or content information by means of an electronic directory of content, with the user being able to specify the title or content information;
- providing online tips in relation to the use of the service ('Help');
- with the user's consent, linking the videos uploaded by the user with advertisements (but not any self-promotion by the platform operator) according to the selection of the target group by the user?

2. Is a national legal position whereby the cease-and-desist obligation of a host service provider (intermediary service provider) in an active role as accessory in respect of infringements by its users exists only on the condition that the accessory has knowingly encouraged the user's infringement consistent with the first sentence of Article 11 of Directive 2004/48/EC, or is this provision to be interpreted as meaning that the Member States must not make claims for a prohibitory injunction made by rightholders against accessories dependent on knowing encouragement of the user's infringement?

3. Are the provisions in Articles 12 to 14 of Directive 2000/31/EC on the liability of intermediary service providers to be considered to be horizontal limitations of liability that benefit any intermediary service provider in a neutral role, even where its activity is to be qualified under copyright law as communication to the public that it has committed itself?

4. Are Article 14(3) (and also Article 12(3) and Article 13(2)) of Directive 2000/31/EC, Article 8(3) of Directive 2001/29/EC and the third sentence of Article 11 of Directive 2004/48/EC to be interpreted as meaning that the liability privilege in accordance with Article 14(1) of Directive 2000/31/EC is available to a host service provider (intermediary service provider) in a neutral role even in the event of a claim for a prohibitory injunction being brought against it and that therefore even an injunction order by the courts with respect to such an intermediary service provider is admissible only if that intermediary service provider has actual knowledge of the illegal activity or information, or is such an injunction order by the courts admissible only if the host service provider does not expeditiously remove or disable the content objected to as infringing after a specific warning and confirms the infringement in judicial proceedings?

### **Provisions of EU law cited**

Treaty on the Functioning of the European Union (TFEU), specifically Article 267

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), in particular Article 8(3)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), in particular Article 14

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45), in particular Article 11

### **Provisions of national law cited**

Urheberrechtsgesetz (Law on copyright; 'the UrhG'), in particular Paragraphs 18a, 81

Gesetz über den elektronischen Geschäftsverkehr (Law on electronic commerce; 'the ECG'), in particular Paragraphs 13 to 17

### **Succinct presentation of the facts and procedure and the main arguments of the parties to the main proceedings**

- 1 Puls 4 TV is, *inter alia*, the operator of an Austrian television broadcaster.
- 2 YouTube (the proceedings before the Oberster Gerichtshof (Supreme Court, Austria) have currently been conducted only between Puls 4 TV and YouTube) operates the video platform [www.youtube.com](http://www.youtube.com), on which videos uploaded by users are provided and can be played by visitors to the platform. It operates its service as a host service provider and stores the content uploaded by users. In principle there is no *ex-ante* check for copyright infringements.
- 3 If the user agrees, the uploaded videos are provided with advertising, which YouTube calls 'monetisation'. This monetisation is effected by a YouTube group company and takes place on a purely technical and automatic basis.
- 4 Aside from the monetisation, YouTube offers the user the accompanying activities as mentioned in the questions referred.
- 5 YouTube is remunerated solely for providing its video platform and thus only for providing its services as a host service provider; it acts exclusively upon request by its users, who have to confirm that they possess the necessary copyrights or

rights of use. It has an automated review process which expeditiously results in the videos complained about being disabled on the basis of a ‘take-down notice’. If a legal infringement is identified, YouTube blocks the content or disables the account of the user concerned. In the present case, YouTube in each case expeditiously removed the videos objected to by Puls 4 TV after becoming aware of the latter’s copyrights by means of a warning.

- 6 By means of its action for an injunction, Puls 4 TV sought to prohibit YouTube — on the basis of Paragraph 18a(1) of the UrhG — from making available, at [www.youtube.com](http://www.youtube.com), videos which contained audiovisual works produced by Puls 4 TV and which had been uploaded by unauthorised persons. It argued that the copyright infringements (a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC) was technically facilitated by the platform operated by YouTube. YouTube; it was submitted, had played an active role. Platforms such as that of YouTube — not least due to monetisation — went far beyond the role of a host service provider. YouTube therefore had to be classified as a content provider rather than as a privileged host service provider.
- 7 YouTube countered that it did not effect any communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC. According to the case-law of the Court of Justice of the European Union (‘CJEU’), this requires the platform operator to act with intent in order to provide its customers with access to a protected work. The infringements are committed by the user, not by the platform operator. YouTube also could not be classified as an accessory. YouTube benefited from the liability privilege as a host service provider; it provided a traditional host provider service and did not perform an active role. It was liable for the infringements by users of the video platform only if it failed expeditiously to remove or disable access to such videos after sufficiently substantiated warning despite actual knowledge of illegal content. YouTube state that it complied with these obligations in the context of its ‘notice and take down’ procedure.
- 8 The court of first instance granted the form of order sought. The appellate court allowed YouTube’s appeal and dismissed the form of order sought. Puls 4 TV filed an appeal on a point of law against that decision.

### **Brief summary of the basis for the reference**

#### **Concerning the first question referred (active role of a host service provider)**

- 9 Articles 12 to 14 of Directive 2000/31/EC lay down exemptions from liability for access providers that transmit third-party content merely on a technical basis as well as limitations on liability for host service providers that provide storage space for third-party content. YouTube must be classified as a host service provider.
- 10 A host service provider is intended to be liable for the third-party content only to a limited extent, because it usually has no influence over users’ third-party content and does not check whether this content is illegal. The decisive criterion for the

neutral role of a provider therefore consists in transmitting and/or storing third-party content without selection or modification of the content thereof.

11 According to the case-law of the CJEU, a host service provider loses its liability privilege if it abandons its neutral activity in relation to infringing content and plays an active role that gives it an influence over the content ('knowledge of the content') or editorial control over the content (cf. CJEU, C-236/08 to C-238/08, *Google France*, paragraph 120; C-324/09, *L'Oreal*, paragraph 113).

12 The Oberster Gerichtshof takes the view that the performance of the aforementioned accompanying services does not lead to the host service provider playing an active role.

**Concerning the second question referred (liability as accessory in respect of third-party infringements)**

13 If YouTube plays an active role by means of its activity, its liability as accessory in respect of users' third-party infringements comes into consideration. In this case, the host provider is to be regarded as an 'infringer' (in the form of an accessory) within the meaning of the first sentence of Article 11 (and Article 13) of Directive 2004/48/EC.

14 According to the case-law of the Oberster Gerichtshof, liability as accessory differs from that as direct perpetrator. A requirement for the liability of accessories is specifically that the accessory (as a third party) knowingly encouraged or even facilitated the infringement by the direct perpetrator as a result of its conduct. The accessory must therefore be aware of the legal infringement.

15 In the case here concerned, especially in connection with Article 8(3) of Directive 2001/29/EC and the first sentence of Article 11 of Directive 2004/48/EC, the question arises as to whether it is simply at the discretion of Member States to provide for claims for a prohibitory injunction also against accessories acting unknowingly or whether Member States must provide for such claims for a prohibitory injunction.

**Concerning the third question referred (communication to the public and liability privilege)**

16 In relation to the criminal and civil liability of the provider (intermediary service provider), Directive 2000/31/EC proceeds on the basis of the following system:

17 In accordance with Article 15(1) of the Directive, Member States are prevented from imposing a general obligation on access providers and host service providers to monitor the information which they transmit or store. Member States are also not permitted to require providers to ascertain of their own accord any circumstances possibly relating to illegal activity by users of their services. They are not required to take active monitoring measures and to search their servers for illegal content.

- 18 At the same time, the exemptions or limitations on liability for intermediary service providers are laid down in Articles 12 to 14 of Directive 2000/31/EC. These provisions do not govern the material liability of the intermediary service provider, but rather take this for granted. The limitations on liability are to be understood broadly and encompass both a provider's liability under compensation law and its criminal liability or liability under administrative criminal law.
- 19 The limitations on liability are therefore horizontal provisions that apply to all areas of law. If therefore a question under civil or criminal law is to be assessed in connection with the liability of an intermediary service provider, then it is necessary firstly to examine the question referred as to whether liability within the meaning of the provisions of Directive 2000/31/EC is to be taken into consideration at all. Only if this horizontal examination results in an affirmative answer, the next question to consider is whether the liability also obtains under the substantive legal provisions applicable in each case.
- 20 The nature of the liability privilege as a horizontal provision has the consequence, in the view taken by the Oberster Gerichtshof, that this is available to the intermediary service provider (in a neutral role) regardless of whether the alleged infringement is to be classified as its own infringement or as a contribution to a third-party infringement. This means that the provider must benefit from the liability privilege even if its activity is its own communication to the public (that it has committed itself) within the meaning of Article 3(1) of Directive 2001/29/EC.

**Concerning the fourth question referred (claim for a prohibitory injunction and liability privilege)**

- 21 In accordance with Article 14(1) of Directive 2000/31/EC (Paragraph 16 of the ECG) the host service provider is not liable in respect of third-party information if it does not have actual knowledge of the illegal activity or information. In respect of claims for damages, the host service provider is not liable if it is not aware of circumstances from which the illegal activity or information is apparent. The subjective component firstly relates to the existence of the illegal information. Actual knowledge requires positive knowledge; becoming aware of circumstances requires a substantiated suspicion, with grossly negligent ignorance being sufficient. Secondly, the subjective component also has to relate to the illegality. The host service provider must be aware of the illegality. A requirement for this is that the illegality should be obvious to a layperson without any further reflection and that that person is convinced that the content is prohibited. If the subjective requirements are present, the host service provider must act expeditiously to delete or to disable access to the illegal information.
- 22 However, Articles 12 to 14 of Directive 2000/31/EC do not affect the possibility of a court or an authority requiring, under the legal systems of the Member States, the termination or prevention of the infringement by the intermediary service provider. It is thereby intended that the courts should continue to be at liberty to issue an injunction order to an intermediary service provider due to illegal activity

or information on the basis of a corresponding request for an injunction or to require the intermediary service provider to remove illegal information or to disable access to that information if the substantive conditions for a claim to a prohibitory injunction obtain.

- 23 In accordance with the legislative materials relating to the Austrian Law on electronic commerce, the liability privilege in accordance with Articles 12 to 14 of Directive 2000/31/EC relates only to providers' criminal liability or liability under administrative criminal law and their liability under compensation law. The liability privilege is not available in respect of injunction orders issued by the courts. Accordingly, in the case of an injunction order it does not matter whether or not the intermediary service provider has actual knowledge of the illegal activity or information transmitted by it. The sole decisive factor is whether, in the court proceedings, the infringement of which the intermediary service provider is accused proves to be objectively well founded.
- 24 In respect of claims for damages under copyright law, in accordance with Paragraph 81(1a) of the UrhG the following applies: If the claim for a prohibitory injunction is directed against an intermediary service provider within the meaning of Directive 2000/31/EC and the requirements for the liability privilege are present, an action can be brought against the intermediary service provider only after a specific warning.
- 25 In relation to the liability privilege in accordance with Article 14(1) of Directive 2000/31/EC, in its request for a preliminary ruling the Bundesgerichtshof (German Federal Court of Justice; 'the BGH') also proceeds on the assumption that the actual knowledge (or the awareness in the case of claims for damages) of the host service provider must relate to the specifically (currently) illegal activity or information that it must remove or disable upon becoming aware, and that it is not sufficient for the host service provider to generally know or be aware of the fact that its services are being used for any illegal activities. However, the BGH puts forward the view that the liability privilege also relates to claims for a prohibitory injunction and the operator of an internet platform that does not have actual knowledge of illegal activity or information is not liable in respect of an injunction either.
- 26 The question therefore arises as to whether the liability privilege for intermediary service providers in accordance with Directive 2000/31/EC also exists in respect of claims for a prohibitory injunction (injunction orders issued by the courts). In this connection, consideration should be given to the fact that the warning provided for in Paragraph 81(1a) of the UrhG for an action for an injunction should not necessarily be equated to actual knowledge of the illegal activity or information, because it could be argued that the creation of actual knowledge only takes place upon examination by the host provider of the content objected to (after the warning has been issued). From this perspective, the obligation to cease and desist would have to be rejected, in spite of a warning, if the liability privilege were to be applicable.

- 27 The wording of Article 14(3) of the Directive, which is formulated in an identical manner to the exceptions in Article 12(3) and Article 13(2) of the Directive, in the view taken by the Oberster Gerichtshof argues in favour of a complete exclusion of injunction orders issued by the courts from the liability exemption scheme in accordance with Article 14(1). Consistently with this, injunction orders against intermediary service providers in Article 8(3) of Directive 2001/29/EC and in the third sentence of Article 11 of Directive 2004/48/EC are regulated separately.

WORKING DOCUMENT