Case C-470/22

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:

14 July 2022

Referring court:

Vrchní soud v Praze (Czech Republic)

Date of the decision to refer:

22 June 2022

Applicant:

Česká národní skupina Mezinárodní federace hudebního průmyslu, z. s.

Defendants:

I&Q GROUP, spol. s r.o.

Hellspy SE

Subject of the original proceedings

This request was submitted in the context of proceedings concerning an action whereby the applicant seeks protection from conduct on the part of the defendants and allegedly constituting unfair competition in the provision of hosting services on their websites.

Questions referred

1) Does the spirit and purpose of Directive 2000/31/EC preclude Article 14(1) thereof from being interpreted as meaning that the liability of a provider of an information gathering (hosting) service for the contents of such service includes liability for the manner in which such service is provided?

2) Does the spirit and purpose of Directive 2000/31/EC allow for Article 14(1) thereof to be interpreted as meaning that the rules for limiting the liability of

a provider of an information gathering (hosting) service set out therein cannot exclude the private-law liability of such a provider for the choice of a particular business model for the provision of the service, even if that model has the potential to benefit from copyright infringement?

3) Does the liability waiver set out in Article 14(1) of Directive 2000/31/EC apply to the provider of an information gathering service, and selection from it by means of a search engine, in terms of liability for the manner of its provision, if that manner encourages the service recipient to store the information on it without the consent of the copyright holders, but without the active participation of the service provider in the copyright infringement?

Applicable European legislation

Article 14(1) and (3) and Article 15 of 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') ('the Directive').

Applicable national legislation

Pursuant to Paragraph 5 of zákon č. 480/2004 Sb., o některých službách informační společnosti a o změně některých zákonů (Law 480/2004 on certain information society services and amending certain laws,); 'the LISS'),[1] as amended, the provider of a service that consists in the storage of information provided by the user shall be liable for the content of the information stored at the request of the user, only if: (a) it could have known, with a view to the subject matter of its activity and the circumstances and nature of the case, that the content of the information stored or the actions of the user are unlawful; or (b) if it has demonstrably become aware of the unlawful nature of the content of the information stored or the unlawful actions of the user and has not immediately taken all steps that may be required of it to remove such information or make it unavailable.

Pursuant to Paragraph 2988 of zákon č. 89/2012 Sb., občanský zákoník (Law 89/2012, the Civil Code), a person whose right has been threatened or infringed by unfair competition may demand that the infringer refrain from unfair competition or that it remedy the defective situation.

[1] The Directive was implemented in the Czech legal system by that law.

Facts of the case, basic arguments, and original proceedings

1 The defendants' websites [2] are mutually interconnected. [3] The defendants' services make it possible for end users to upload any files, search for files, and download them. Files of domestic and foreign artists represented by the applicant are available for downloading on the websites concerned.

2 By its application, the applicant seeks protection against the defendants' conduct allegedly constituting unfair competition, which consists of the fact that, in addition to the possibility of uploading files, the defendants offer a search engine service on their websites and encourage their users, by financial rewards, to upload files containing impermissible content that infringes intellectual property rights. By that conduct, the defendants have abandoned their passive position as a mere provider of free space and commit the illegal offering of attractive files, to the detriment of competitors, and do so free of charge or below market price.

3 The defendants, on the other hand, claim that they do not engage in any deliberate operations involving the files uploaded, that they only address any technical issues or remove, on an *ad hoc* basis, any files that infringe the service terms and conditions. Their service for the storage of information by users constitutes an intermediary service for the purposes of Paragraph 5 LISS, based on an unmatched content upload and download speed, and it does not constitute an illegal alternative to internet sales of music. Furthermore, it alleges that it and the applicant are not competitors. Pursuant to the LISS, the defendants, as hosting service providers, are not obliged to monitor the content uploaded by users, which is not even objectively possible, due to the significant content of the files uploaded, and would also constitute impermissible censorship. Pursuant to the LISS, however, anyone is entitled to require a hosting services provider to remove or make unavailable objectionable files, if their objectionability is demonstrable, and the defendants do so.

Proceedings before the court of first instance

4 In its judgment of 20 July 2018, the court of first instance imposed on the defendants the obligation to refrain from rewarding users of their websites for the downloading by a third party of files uploaded by them, if those users do not have consent to make the files available to the public.

5 The court assessed the case as claims arising from unfair competition and found that the defendants' service is an information service as defined by the LISS. The court stated that:

[2] See www.hellshare.cz,www.hellshare.pl, www.hellshare.sk and www.hellshare.com as well as www.hcllspy.cz, www.hellspy.com, www.hellspy.pl, www.hellspy.sk, www.hellspy.eu and www.stiahnito.sk.

[3] They have the same data store and search engine, and a single user profile can be used for both services, etc.

(i) there is a competitive relationship between the parties in the market for music production, since the applicant, as a person entitled to defend the interests of competitors, associates producers in the music industry;

(ii) the defendants make possible and actively promote the uploading and downloading of files, including files with recorded music whose contents infringe the rights of the producers of audio and audio-visual music recordings, without holding the necessary consent or licence from the producers;

(iii) the defendants thereby infringe fair competition and are capable of causing harm to competitors, in this case the members of the applicant, in the form of lost revenue;

(iv) the defendants are not thus acting passively and are therefore not eligible for the 'safe harbour' regime and, hence, cannot rely on the exclusion of liability pursuant to Paragraph 5 LISS; it is evident they should or could have been, given the subject matter and nature of their activity, aware of the illegal nature of the uploaded content.

Proceedings before the court of appeal

6 In its judgment of 26 February 2020, the referring court, as the court of appeal, considered the question of the permissibility of the defendants' actions differently than the court of first instance.

7 The referring court held that the defendants' actions did not extend beyond the conditions for limiting the defendants' liability for illegal content on their websites (known as 'safe harbour'), within the meaning of the judgment of the Court of Justice of 14 June 2017 in Case C-610/15.

1) It had not been proven that:

a) the defendants were aware of the illegal nature of the conduct of certain customers, but, on the contrary, responded to warnings from the applicant's members concerning copyright infringement by removing the objectionable content;

b) the defendants' websites were the subject of advertising and promotion aimed at encouraging the acquisition of copies of copyrighted works.

2) The provision of rewards by the defendants is intended to increase interest in storage services and its prohibition would entail a breach of the freedom to engage in business and the right to own property. Furthermore, by continuing the provision of rewards, the defendants would *de facto* accept liability for their customers who breach the law, which would violate the above 'safe harbour' principle.

3) The operation of a search engine is a common function of many internet platforms and publicly-accessible data storage services to render their content easier to use, the prohibition of which would effectively render the services inoperable.

Proceedings before the court hearing the appeal on a point of law

8 In its judgment of 31 August 2021, the Nejvyšší soud (Supreme Court, Czech Republic) as the court hearing the extraordinary appeal on a point of law, overturned the judgment of the referring court on the applicant's appeal, to the extent to which it concerned the conclusion pertaining to the exclusion of the defendants' liability under Paragraph 5(1) LISS.

9 The court hearing the appeal on a point of law held that the subject matter of the proceedings is not the prohibition of the provision of the defendants' service in itself, or an order to remove the information stored, but the protection against unfair competition which consists in the particular economic method (business model) of the provision of the defendants' service in question, and not the defendants' liability for the content of the information stored. Hence, a limitation of the liability of the provider of the information storage service under Paragraph 5 LISS will not apply in this case, nor will the findings of the judgment of the Court of Justice in Case C-610/15 used by the court of first appeal.

10 The ownership of the Defendants' property itself is not prejudiced in this case, as the applicant is not seeking the removal or other reduction of the Defendants' property in the proceedings. The right to freely engage in business is limited by the protection of business activities against unfair competition from other businesses. While the possibility of rewarding users is part of that right, the particular manner in which it is exercised may be contrary to fair competition and may cause harm to other competitors or customers.

11 Generally, unfair competitive conduct of a provider of an information storage service occurs when a reward is paid to users of the service depending on the number or quantity of downloads of data files stored by them by other users of the service, without adequate verification of the legitimacy of the provision of such data files, even though the technical parameters of the service objectively enable its users to compromise or infringe intellectual property rights to a non-negligible (i.e., competitively significant) extent, through the information stored by them. According to the court hearing the appeal on a point of law, these facts are to be verified by the referring court, including other facts such as the nature of the search engine, which is either purely automatic or can influence the search results.

Further proceedings

12 The court hearing the appeal on a point of law returned the case to the referring court for further proceedings, in which the referring court is bound by its legal

opinion. [4] The referring court holds, nevertheless, that the interpretation of Paragraph 5(1) LISS used by the court hearing the appeal on a point of law does not comply with Article 14(1) of the Directive.

13 Furthermore, it holds that the *acte éclairé* exception cannot be applied, unlike the court hearing the appeal on a point of law according to which the Court of Justice has adequately interpreted the scope of the Directive. According to the referring court, the Court of Justice has not yet addressed a conflict between liability for conduct amounting to unfair competition and the exclusion of liability of the provider of an information society service.

Summary of the grounds for the order for reference

The first question

14 It is evident that the service provided by the defendants is an information society service. Therefore, the question arises whether the limitation of the liability of the provider of an information storage service, for the purpose of Paragraph 5(1) LISS, and Article 14(1) of the Directive, applies to the defendants' conduct allegedly constituting unfair competition. If so, would their situation be assessed under the 'safe harbour' rule set out in the case-law of the Court of Justice?[5] Such a concept of the limitation of the liability of such a provider would mean that it would not be liable for the data which it has stored at the request of the service recipient, including data of an unlawful nature, with the exception of specified cases.

15 The court hearing the appeal on a point of law, referring to the judgment of the Court of Justice of 3 October 2019 in Case C-18/18, held that, even if the service provider is not liable within the meaning of Article 14(1) of the Directive, the Member States may regulate, on the basis of the Directive, *inter alia* for procedures for the issuance of effective and proportionate judicial orders. That court, referring to the judgments of the Court of Justice of 12 July 2011 in Case C-324/09 and of 7 July 2016 in Case C-494/15, also mentioned a case where a service provider in the position of a so-called intermediary whose services are used by third parties to infringe intellectual property rights was obliged to refrain from providing its service to the extent to which it was defective.

16 On the basis of those facts, the court hearing the appeal on a point of law concluded that the limitation of liability under Article 14 of the Directive pertains only to liability for the content of the information stored and will not apply in cases where the alleged legal obligation of the service provider arises for a reason

[4] In terms of the binding nature of legal opinion in proceedings concerning an appeal on a point of law, see judgment of the Court of Justice of 9 September 2021, in Case C-107/19, *XR* v *Dopravní podnik hl. m. Praha, a.s.*

[5] Cf. judgment of the Court of Justice of 23 March 2010, in Joined Cases C-236/08, C-237/08 and C-238/08.

other than the content of the information stored, such as, for example, the obligation of the service provider not to harm competition by the manner in which it is operated, which is at issue in the present case. The defendants' conduct allegedly constituting unfair competition thus amounts to unfair profiting from infringement of the intellectual property rights of others, i.e., freeriding on them.

17 According to the referring court, however, the defendants' actions should be assessed on the basis the fact that defendants in this case allegedly do not freeride on the selected business model of remuneration or use of the search engine, but on the very works protected by intellectual property rights (that is, on the content of the information stored), since otherwise a person entitled to defend the interests of producers in the music industry would have no reason to challenge the remuneration normally provided to customers for the use of the services provided. Article 14 of the Directive governs the provider's derivative liability for the actions of a third party, consisting of the storage of information, whereas the court hearing the appeal on a point of law automatically establishes direct liability of the service provider for the actions of that third party.

18 None of that can be changed by argumentation based on Article 14(3) of the Directive, as that article does not apply to the present case. In this case, the information society service providers are being sued directly in connection with their own conduct allegedly constituting unfair competition, and the illegal nature of the content uploaded by a third party has not yet been authoritatively established and, moreover, has not been specifically alleged by the applicant. That article allows for justified intervention in a specific case where such intervention is justified.

19 It is also necessary to take into account the fact that the defendants provide their services to all their users, meaning not only to those who store digital files whose contents infringe the copyright rights of third parties. It is on that overlap that the first question referred is based.

20 In concluding, the referring court notes that there has been harmonisation in the field of copyright, [6] which must have an impact on the possibility of finding liability for conduct constituting unfair competition that is in fact based on copyright infringement. The referring court thus holds, with reference to the judgment of the Court of Justice of 22 June 2021 in Joined Cases C-682/18 and C-683/18 (paragraphs 108 and 143), that the question of unfair competition is not in itself decisive for the purposes of the applicability of Article 14(1) of the Directive.

The second and third questions

6 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.

21 The nature of these questions lies in whether the Directive, including Article 14(3) and Article 15 thereof, makes it possible to automatically impose on a hosting provider obligations arising from its private-law liability for:

a) the choice of a specific business model for the provision of the service, even though the model has the potential to benefit from copyright infringement; or

b) the method of providing information on the service provider's platform, if the method encourages service recipients to store the information without the consent of their copyright holders, but without the active involvement of the service provider in copyright infringement, for example, through a machine keyword search engine or by providing rewards to the service recipients;

and all this in a situation when the service provider is alleged to engage in conduct constituting unfair competition based on gaining a competitive advantage consisting of copyright infringement by service recipients.

22 As explained above, according to the referring court, Article 14(3) of the Directive is not applicable here. As far as concerns Article 15 of the Directive, that Article precludes the imposition of an obligation on service providers to exercise general supervision over the content of information uploaded on their platform. The prohibitions proposed by the applicant do, however, in fact constitute such general supervision in that respect.

23 The referring court refers to the above-mentioned judgment of the Court of Justice in Joined Cases C-682/18 and C-683/18, from which it infers that:

(a) the above provisions of the Directive have in common that the service provider should first be given the opportunity by the person concerned to put an end to the unlawful conduct of the users of the platform (paragraphs 133 and 136);

(b) the existence of a search engine on cloud storage cannot suffice for an operator to become specifically aware of unlawful activities or information on its platform (paragraph 114).

24 Furthermore, the referring court, referring to the judgment of the Court of Justice of 13 February 2014 in Case C-466/12, states that, in the case of copyright, Member States cannot go beyond the harmonised regulation in that field.

25 In relation to claims made in the application, a reasonable balance must be struck between intellectual property rights protection (Article 17(2) of the Charter of Fundamental Rights of the EU) on the one hand, and the protection of the freedom to conduct a business (Article 16 of the Charter) and the protection of the freedom of expression and information (Article 11 of the Charter) on the other.

26 Hence, the referring court considers that the court orders derived from otherwise unlimited claims arising from national legislation on conduct constituting unfair competition, that conduct in the present case being closely linked precisely to an alleged copyright infringement, are mitigated in terms of their content by Article 14(3) and 15 of the Directive, provided that the 'safe harbour' rules apply to the hosting provider's actions, even though the business model chosen by the hosting provider has the potential to benefit from copyright [infringement] or may encourage the recipients of the service to store information without the consent of the copyright holder. This restriction shall, however, only apply to the hosting provider if the provider of the service was not actively involved in copyright infringement.