Case C-376/22

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:

10 June 2022

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

24 May 2022

Appellants on a point of law:

Google Ireland Limited

Meta Platforms Ireland Limited

Tik Tok Technology Limited

Defendant:

Kommunikationsbehörde Austria (KommAustria)

Subject matter of the main proceedings

Kommunikationsplattformen-Gesetz (Law on communications platforms, Austria) – Directive 2000/31/EC – Directive 2010/13/EU – Measure taken against a given information society service

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 3(4)(a)(ii) 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') (OJ 2000 L 178, p. 1), be interpreted as meaning that a measure taken against a 'given information society service' can also be understood as a legislative measure relating to a general category of certain information society services (such as communications platforms), or does the existence of a measure within the meaning of that provision require that a decision be taken in relation to a specific individual case (for example, concerning a communications platform identified by name)?

2. Must Article 3(5) of Directive 2000/31 be interpreted as meaning that failure to notify the measure taken to the Commission and the Member State in which the platform is established, which, under that provision, must be notified 'in the shortest possible time' (*ex post facto*) in the case of urgency, means that – following the expiry of a sufficient period for the (*ex post facto*) notification – that measure must not be applied to a given service?

3. Does Article 28a(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 095, p. 1), as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (OJ 2018 L 303, p. 69), preclude the application of a measure as provided for in Article 3(4) of Directive 2000/31 where it does not relate to broadcasts and user-generated videos made available on a video-sharing platform?

Provisions of Community law relied on

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' – E-Commerce Directive)

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

Provisions of national law relied on

Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen [Federal Law on measures for the protection of users

on communications platforms] (Kommunikationsplattformen-Gesetz [Law on communications platforms]) – KoPl-G)

Paragraph 1(1) This Federal Law serves to ensure that notices by users relating to content on communications platforms which is of the type referred to below are handled in a responsible and transparent manner and dealt with without delay.

(4) Service providers which operate video-sharing platforms (point 12 of Paragraph 2) are exempt from the obligations of this Federal Law with regard to broadcasts (point 9 of Paragraph 2) and user-generated videos (point 7 of Paragraph 2) which are provided on such platforms.

(5) At the request of a service provider, the supervisory authority is required to determine whether the service provider comes within the scope of this Federal Law.

Paragraph 3(1) Service providers must establish an effective and transparent procedure for handling and dealing with notices relating to allegedly illegal content available on the communications platform.

Paragraph 4(1) Service providers are obliged to draw up an annual, or, in the case of communications platforms with over one million registered users, six-monthly, report on the handling of notices relating to allegedly illegal content. The report shall be submitted to the supervisory authority no later than one month after the end of the period covered by the report and shall at the same time be made available on its own website on a permanent basis and in an easily accessible manner.

Paragraph 8(1) The supervisory authority within the meaning of this Federal Law is the Kommunikationsbehörde Austria (Austrian Communications Authority; 'KommAustria'), established in accordance with Paragraph 1 of the KommAustria-Gesetz (Law on KommAustria; 'the KOG').

Succinct presentation of the facts and procedure in the main proceedings

1 The Austrian Kommunikationsplattformen-Gesetz (Law on communications platforms; 'the KoPl-G'), which aims to enhance the 'platform accountability' of the providers of such platforms, covers domestic and foreign service providers and obliges them, inter alia, to set up a notice and action procedure for allegedly illegal content, to draw up and publish regular transparency reports on the handling of such notices, and to appoint authorised agents and persons authorised to accept service.

2 The platforms are subject to supervision by KommAustria, which can impose fines in the case of infringements.

3 The KoPl-G is an example of legislation that various Member States have already adopted or intended to adopt on issues such as the removal of illegal content online, diligence, notice and action procedures and transparency. The Austrian legislature took the view that, due to the urgency of the issue, national measures were required until a European regime is created.

4 The Austrian legislature considered that the measures set out in the KoPl-G are compatible with Directive 2000/31/EC. However, the appellants on a point of law claim that the country-of-origin principle of that directive precludes the applicability of the KoPl-G to their activities. Since the first appellant on a point of law (Google Ireland Limited) and the third appellant on a point of law (Tik Tok Technology Limited) must also be regarded as providers of video-sharing platforms, the question also arises as to whether, in the light of Article 28a of Directive 2010/13/EU, the origin principle, which was provided for specifically in respect of video-sharing platforms, precludes the application of the KoPl-G to content of those platforms which does not consist of broadcasts or user-generated videos.

5 The three sets of main proceedings, which have been joined, each concern the question as to the applicability of the KoPl-G to a provider of a communications platform which is established in Ireland. All three appellants on a point of law sought a finding that the KoPl-G is not applicable to them. In all three cases, KommAustria found that the KoPl-G is applicable; the service providers concerned each brought an appeal on the merits before the Bundesverwaltungsgericht (Federal Administrative Court, Austria).

6 The Federal Administrative Court dismissed all three of those appeals as unfounded. It stated, in essence, that the origin principle of Directive 2000/31 does not apply without restriction and that derogations are necessary, in particular in order to maintain or achieve a high level of protection for highly valued interests (such as the protection of minors or human dignity). According to the Federal Administrative Court, the KoPl-G pursues such objectives and, furthermore, establishes only the legal basis for specific measures in individual cases. The finding of non-applicability was sought even before specific measures had been taken and therefore before the various service providers had been individualised. However, specific measures against individual addressees can be adopted only in the event of frequent infringements; the KoPl-G establishes only the legal basis required in that regard and therefore does not run counter to the origin principle of Directive 2000/31.

7 The Federal Administrative Court also held that, to date, the Member State of establishment of the appellants on a point of law has not been asked to take measures itself. Nor was the European Commission notified of such restrictive measures in advance. However, no measures within the meaning of Article 3(4) of Directive 2000/31 have been taken – only the necessary legal basis has been established. The KoPl-G itself does not provide that the Member State of establishment must be asked to take measures or that the European Commission

must be informed. Nor is provision made for informing it *ex post facto*. However, for the purposes of an interpretation in conformity with the directives, Paragraph 23(1) and (2) of the E-Commerce-Gesetz (Law on e-commerce, Austria), which transposed Article 3(4)(b) and (5) of Directive 2000/31 into national law, is applicable to the taking of measures. With regard to video-sharing platforms, the Federal Administrative Court stated that the KoPl-G exempts service providers which operate video-sharing platforms from their obligations with regard to broadcasts and user-generated videos provided on those platforms.

8 In their appeals on a point of law against those findings of the Federal Administrative Court, the appellants on a point of law claim that the applicability of the KoPl-G to their platforms was wrongly confirmed. They submit that, since neither Ireland nor the Commission was notified, that law should not apply to them, as it imposes direct obligations on them (for example, the obligation to set up a notice and action procedure), which is contrary to the country-of-origin principle. Furthermore, the restriction of the freedom to provide services imposed by the KoPl-G was not examined on a case-by-case basis and the obligations imposed by that law are disproportionate.

9 The first and third appellants on a point of law also submit that the country-of-origin principle of Directive 2010/13 has also been infringed, since, in accordance with the finding of the Federal Administrative Court, services constituting video-sharing platform services are also covered. The comments on the videos also form part of the video-sharing platform services.

Succinct presentation of the reasoning in the request for a preliminary ruling

10 It is common ground that the services offered by the appellants on a point of law in (inter alia) Austria are information society services within the meaning of Article 2(a) of Directive 2000/31. The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) proceeds on the assumption that those services are to be regarded as communications platforms within the meaning of the KoPl-G and that the appellants on a point of law are subject to that law. Furthermore, the first and third appellants on a point of law are service providers which operate video-sharing platforms, which are exempt from the obligations of the KoPl-G with regard to broadcasts and user-generated videos made available on those platforms, but not with regard to other communications or offerings in which thoughts are expressed (in particular comments) which are distributed on those platforms.

Question 1

11 According to Article 3(2) of Directive 2000/31, Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. According to Article 2(h) of Directive 2000/31, the coordinated field covers requirements laid

down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

12 The KoPl-G contains a number of provisions laying down certain obligations as to conduct for domestic and foreign service providers, without adopting an individual, specific legal act (for example, the establishment of a notice and review system). It is only if those obligations are not complied with that the supervisory authority can issue enforcement measures or impose fines. In addition, service providers can apply to the supervisory authority for a statement as to whether they come within the scope of that law. Those statements are issued with regard to specific communications platforms offered by the applicant concerned.

13 The referring court takes the view that, by virtue of the obligations laid down in the KoPl-G, that law lays down requirements relating to the exercise of the activities of an information society service and therefore affects the coordinated field within the meaning of Article 2(h) of Directive 2000/31. It must therefore be examined whether the conditions for a derogation from Article 3(2) of the directive are fulfilled.

14 In order for that to be the case, three requirements must be met cumulatively. First, the restrictive measure concerned must be necessary in the interests of public policy, the protection of public health, public security or the protection of consumers; second, it must be taken against a given information society service which actually prejudices or presents a risk to those objectives; and, third, it must be proportionate to those objectives. In addition, the Member State of establishment and the Commission must be notified of the intention to take such measures.

15 The Supreme Administrative Court provisionally proceeds on the assumption that the first and third requirements are met. With regard to the second requirement, however, the question arises as to whether the obligations under the KoPl-G constitute a measure relating to a given information society service (which prejudices or presents a risk to the protection objectives).

16 The Austrian legislature considered that the obligations provided for constituted 'measures' within the meaning of Article 3(4) of Directive 2000/31. However, the Supreme Administrative Court takes the view that it is not certain whether a general and abstract rule which lays down general obligations without an individual, specific legal act being adopted can in fact constitute such a measure. It raises the question as to whether a measure which is directed at a general category of service providers rather than individualised service providers is permissible. It refers to the Opinion of the Advocate General in Case C-390/18, according to which measures under Article 3(4) of Directive 2000/31 can be adopted only on an ad hoc basis. However, that question remained unanswered in the corresponding judgment, with the result that it remains open whether measures

such as those provided for in the KoPl-G, which relate to domestic and foreign service providers in a general manner, are to be regarded as measures relating to 'a given information society service'.

17 The fact that, under Directive 2000/31, the Member State of origin must be asked to take measures before the measure is taken also militates against a general and abstract measure being considered to constitute a measure within the meaning of Article 3(4) of the directive, since, when a law such as the KoPl-G is being passed, it is not necessarily known in which other Member States service providers may be affected.

18 However, if such a general and abstract rule does not constitute a measure relating to a given service within the meaning of Article 3(4) of Directive 2000/31, the country-of-origin principle would, in the view of the referring court, preclude obligations such as those under the KoPl-G. In that case, the findings made by the supervisory authority and confirmed by the Supreme Administrative Court in relation to the applicability of the KoPl-G to the appellants on a point of law should not have been made.

Question 2

19 Under Article 3(4)(b) of Directive 2000/31, before taking the measures in question, a Member State must notify the Commission and the Member State in whose territory the service provider is established of its intention to take the measures in question. Prior to that, the Member State must have unsuccessfully asked the Member State of establishment to take measures. Neither the Republic of Ireland nor the European Commission was informed by Austria prior to the adoption of the KoPl-G.

20 The Supreme Administrative Court therefore proceeds on the assumption that, even if the obligations provided for in that law were to be regarded as constituting measures relating to a given information society service and the other requirements referred to above were also met, the KoPl-G would, in the absence of prior notification, be applicable to the appellants on a point of law only if there were a case of urgency within the meaning of Article 3(5) of the directive. That provision was expressly referred to in the explanatory notes to the KoPl-G. However, there is no indication that the Member State of establishment or the Commission was notified *ex post facto*, with the result that they were in any event not notified 'in the shortest possible time', as provided for in Article 3(5) of Directive 2000/31. The question therefore arises as to whether the requirement of *ex post facto* notification is a mere administrative rule, or whether failure to comply with that requirement can lead to the impermissibility of the measure taken.

21 An interpretation of Article 3(5) of Directive 2000/31 is therefore requested in order to be able to assess whether the failure to give notification *ex post facto*

means that the KoPl-G cannot be applied to the appellants on a point of law, even if all the requirements of Article 3(4)(a) of the directive are otherwise met.

Question 3

22 If the obligations under the KoPl-G are to be assessed as constituting measures relating to a given service, which are in principle applicable to the services offered by the appellants on a point of law, the question arises, in connection with the providers which also offer a video-sharing platform service, as to whether, with regard to service providers established in another Member State, the country-of-origin principle of Directive 2010/13 precludes the application of the obligations under the KoPl-G to content which does not consists of broadcasts or user-generated videos.

23 The Supreme Administrative Court takes the view that the reference to Directive 2000/31 in Article 28a(1) of Directive 2010/13 is to be interpreted broadly to the effect that, under the conditions laid down in Directive 2000/31, it is also possible to take the measures referred to. In that case, the application of measures which are permissible under Article 3(4) of Directive 2000/31 to video-sharing platform services would therefore be permissible unless this interferes with the field harmonised by Directive 2010/13.

24 Since broadcasts and user-generated videos provided on video-sharing platforms are excluded from the scope of the KoPl-G but are an essential element of the term ‘video-sharing platform service’, the Supreme Administrative Court takes the view that application of the obligations under the KoPl-G is likely to be compatible with Directive 2010/13, provided that the conditions under Article 3(4) of Directive 2000/31 are met.