

Case C-492/23**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:**

3 August 2023

Referring court:

Curtea de Apel Cluj (Romania)

Date of the decision to refer:

15 June 2023

Applicant at first instance:

X

Defendants at first instance:

Russmedia Digital SRL

Inform Media Press SRL

Subject matter of the main proceedings

Appeal following the annulment of the civil judgment handed down on appeal by the Tribunalul Specializat Cluj (Specialised Court, Cluj, Romania) in the case in which the parties are, on the one hand, Russmedia Digital SRL and Inform Media Press SRL, the appellants (defendants at first instance), and, on the other hand, X, the respondent (applicant at first instance); the appeal concerns a claim for compensation in respect of non-material damage allegedly caused by the publication on various websites of advertisements containing personal data.

Subject matter and legal basis of the request

Pursuant to Article 267(3) TFEU, the interpretation is sought of Articles 12 to 15 of Directive 2000/31/EC and of Article 2(4); Article 4(7) and (11); Article 5(1)(b) and (f); Article 6(1)(a) and Articles 7, 24 and 25 of Regulation (EU) 2016/679.

Questions referred for a preliminary ruling

1. Do Articles 12 to 14 of Directive 2000/31/EC also apply to a storage and hosting information service provider that makes available to users a website on which free or paid advertisements may be published, which claims that its role in publishing users' advertisements is purely technical (making the platform available), but which, through the general terms and conditions of use of the website, indicates that it does not claim ownership over the content that is provided, published, uploaded or transmitted, yet retains the right to use the content, including by means of copying it, distributing it, transmitting it, publishing it, reproducing it, modifying it, translating it, transferring it to partners and removing it at any time, without the need for any reason for doing so?

2. Must Article 2(4), Article 4(7) and (11), Article 5(1)(f), Article 6(1)(a), Articles 7, 24 and 25 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 and Article 15 of Directive 2000/31/EC be interpreted as requiring such a storage and hosting information service provider, which is the personal data controller, to verify before publishing an advertisement whether the person publishing the advertisement and the owner of the personal data referred to in the advertisement are the same person?

3. Must Article 2(4), Article 4(7) and (11), Article 5(1)(f), Article 6(1)(a), Articles 7, 24 and 25 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 and Article 15 of Directive 2000/31/EC be interpreted as requiring such a storage and hosting information service provider, which is the personal data controller, to verify in advance the content of advertisements published by users, in order to exclude advertisements which are potentially unlawful in nature or likely to infringe a person's private and family life?

4. Must Article 5(1)(b) and (f), Articles 24 and 25 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 and Article 15 of Directive 2000/31/EC be interpreted as requiring such a storage and hosting information service provider, which is the personal data controller, to apply safeguards which prevent or limit the reproduction and redistribution of the content of the advertisements published through it?

Provisions of European Union law and case-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'), Articles 12 to 15

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive

95/46/EC (General Data Protection Regulation; ‘the GDPR’), Article 2(4), Article 4(7) and (11), Article 5(1)(b) and (f), Article 6(1)(a) and Articles 7, 24 and 25.

Joined Cases C-236/08 to C-238/08, *Google France and Google*; Case C-18/18, *Glawischnig-Piesczek*; Case C-460/20, *Google* (Dereferencing of allegedly inaccurate content); Case C-401/19, *Poland v Parliament and Council*; Case C-291/13, *Papasavvas*; Case C-521/17, *SNB-REACT*; Case C-484/14, *McFadden*; Case C-324/09, *L’Oréal and Others*.

Provisions of national law relied on

Legea nr. 365 din 7 iunie 2002 privind comerțul electronic (Law No 365 of 7 June 2002 on electronic commerce; ‘Law No 365/2002’), by which Directive 2000/31/EC, Articles 11 to 14, which forms part of Chapter IV on the liability of service providers, was transposed into national law. Article 11 lays down the conditions for civil, criminal and administrative liability, respectively, for the information provided and for the information transmitted. Article 12 specifically regulates intermediation by mere transmission, by providing that the provider of that service is not liable for the information transmitted where certain conditions relating to its lack of involvement in the initiation, reception and content of the transmission are met. Article 13 lays down the conditions under which the service provider is not liable for the automatic, intermediate and temporary storage of the information transmitted, and Article 14, entitled ‘Hosting’, provides in paragraph 1 as follows: ‘*Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*’

Normele metodologice pentru aplicarea Legii nr. 365/2002 privind comerțul electronic (Implementing Rules for the application of Law No 365/2002 on electronic commerce) approved by Hotărârea Guvernului nr. 1308/2002 (Government Decision No 1308/2002) (‘the Implementing Rules’), Article 11(1), according to which ‘*Information Society service providers which offer the services referred to in Articles 12 to 15 of the Law are not required to monitor the information which they transmit or store, nor are they required actively to seek data on activities or information having the appearance of unlawful activity in the information society services sector which they supply.*’

Succinct presentation of the facts and procedure in the main proceedings

- 1 X, as the applicant, brought an action before the Judecătoria Cluj-Napoca (Court of First Instance, Cluj-Napoca) against the company Russmedia Digital SRL as owner of the www.publi24.ro website. She claimed that, on 1 August 2018, an advertisement appeared on the website published by an unidentified third party, without her consent, that contained denigrating and offensive content. Specifically, according to the advertisement, the applicant offered sexual services, and photographs of the applicant also appeared in the advertisement without her consent, along with her telephone number. The advertisement published without the applicant's consent was quickly reproduced on other web pages containing advertising content and is currently also published on numerous websites, indicating the original source.
- 2 The Court of First Instance, Cluj-Napoca upheld that action and ordered Russmedia Digital SRL to pay the sum of EUR 7 000, corresponding to the non-material damage caused by the infringement of the applicant's right of personal portrayal, right to honour and reputation and right to privacy, as well as the improper processing of her personal data.
- 3 The Court of First Instance found that that publication constituted a breach of the obligations imposed on the defendant by the GDPR and that the defendant's passivity had seriously undermined the applicant's private life, as that act was unlawful within the meaning of Article 253 of the Codul civil (Civil Code).
- 4 The aspects concerning Inform Media Press SRL are irrelevant for the purposes of the questions referred for a preliminary ruling.
- 5 Russmedia Digital SRL brought an appeal against that judgment before the Specialised Court, Cluj. The latter varied the judgment under appeal and dismissed as unfounded the action brought by X against Russmedia Digital SRL. At the same time, X was ordered to pay Russmedia Digital SRL, the appellant, the sum of RON 4 550 corresponding to the costs of the appeal.
- 6 The Specialised Court, Cluj considered that the advertisement did not contain information originating from the appellant company, since the company had provided only an advertisement hosting service, without being actively involved in its content. In addition, as soon as it discovered that the advertisement was capable of infringing the respondent's rights, the appellant deactivated it.
- 7 Consequently, that court held that Law No 365/2002, more specifically Article 14(1)(b), which exempted the appellant from liability for non-material damage caused by the content of advertisements published by users on its website, www.publi24.ro, was applicable in the present case. Similarly, it took the view that Article 11(1) of the Implementing Rules was also relevant, such that the appellant was not required to verify the information which it transmitted.

- 8 X brought an appeal against that judgment before the Curtea de Apel Cluj (Court of Appeal, Cluj), requesting that the appeal be upheld, that the judgment of the Specialised Court, Cluj be annulled, that the appeal brought by Russmedia Digital SRL be dismissed as unfounded and that the judgment of the Court of First Instance, Cluj-Napoca be upheld as being legitimate and well founded.
- 9 X argued that the judgment of the appeal court is unlawful in that it misinterpreted and misapplied the provisions of Law No 365/2002 and that the reason for annulment provided for in Article 488(1)(8) of the Codul de procedură civilă (Code of Civil Procedure) was relevant. She submits that Law No 365/2002 is not a special law in relation to the GDPR, which is directly applicable, and that it does not create any liability which derogates from, and takes priority over, the GDPR. In that sense, the Specialised Court, Cluj should also have analysed Russmedia Digital SRL's liability from the point of view of the GDPR.
- 10 In X's view, Russmedia Digital SRL did not merely offer a storage or hosting service and Law No 365/2002 is not applicable to it, but also played a management role, intervening at the content level for the purpose of good information management. Its role, which is to store certain applications on the server, in a certain order, with a certain format or design, available on a certain interface entirely managed by Russmedia Digital SRL, makes that company an information content provider because of its active involvement in respect of the data and information that are stored. The company is also the personal data processor and breached the provisions of the GDPR by means of processing which does not comply with that regulation. X's personal data were used without her consent, and it is possible, on the aforementioned website, for any individual to publish any text with any content, including images of other persons, without ensuring the security of those personal data processed through the website, which makes it impossible to permanently delete such data from the online space. The deletion of the advertisement does not exempt the company from liability because, at the time of removal, the message had already been taken up by other websites and disseminated on a large scale, and the damage had already occurred and cannot be repaired in full.
- 11 Russmedia Digital SRL contended that the extraordinary appeal should be dismissed as unfounded and the outcome of the appeal should be confirmed as lawful and well-founded, and also claimed payment of the costs of the proceedings, arguing that the Specialised Court's solution is reasoned both in fact and in law. In its view, special and derogating rules, such as Law No 365/2002, take precedence over a rule of EU law.
- 12 The Court of Appeal, Cluj, the referring court, held that the Specialised Court, Cluj did not refer to the provisions of the GDPR, even though it was under a procedural obligation to analyse them incidentally and they were also expressly and insistently invoked by X, in a context in which that court was required to analyse the relationship between the national law, Law No 365/2002, and the

GDPR, a legal act with direct and mandatory application in the national legal system.

- 13 Consequently, the referring court upheld the appeal and set aside the judgment under appeal in its entirety, finding there to be grounds for a new judgment on the appeal.

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

- 14 The referring court analysed a series of judgments of the Court of Justice in cases in which the question of the classification of the type of operator and the services provided, from the point of view of the operator's liability, was raised.
- 15 For example, in Joined Cases C-236/08 to C-238/08, the Court held that, in the case of an internet referencing service provider, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned. In Case C-18/18, the Court held that a court of a Member State may not, first, grant an injunction against a host provider requiring it to monitor generally the information which it stores or, second, require that host provider actively to seek facts or circumstances underlying the illegal content. In Case C-460/20, the Court dealt with the question of the veracity and accuracy of information which can be accessed through the use of online search engines. Thus, when applying the data subject's 'right to be forgotten', the operator of a search engine will be required to remove the information contained in the indexed content where the data subject requesting the dereferencing establishes the manifest inaccuracy of the information. In Case C-401/19, the Court found, as regards online content-sharing platforms, that, in order to avoid liability where users upload unlawful content to the platforms of online content-sharing service providers for which the latter have no authorisation from the rightholders, those providers must demonstrate that they fulfil all the other conditions for exemption laid down in Article 17(4)(a), (b) and (c) of Directive (EU) 2019/790. The application of Article 17 of Directive 2000/31/EC does not entail any general monitoring obligation, even though Article 17(8) of Directive (EU) 2019/790 establishes an additional guarantee for compliance with the right to freedom of expression and information of users of online services. Providers of such services cannot be required to prevent the uploading and making available to the public of content which, if it were found to be unlawful, would require an independent assessment of the content in the light of the information provided by the rightholders. In Case C-291/13, the Court concluded that the limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31/EC do not apply to the case of a newspaper publishing company which operates a website on which the online version of a newspaper is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, since it has knowledge of the information posted and exercises control

over that information. In Case C-521/17, the Court ruled that Articles 12 to 14 of Directive 2000/31/EC must be interpreted as meaning that the limitations of liability for which they provide apply to the provider of an IP address rental and registration service allowing the anonymous use of internet domain names, such as that at issue in the case in the main proceedings, inasmuch as that service comes within the scope of one of the categories of service referred to in those articles and meets all the corresponding conditions, in so far as the activity of such a service provider is of a merely technical, automatic and passive nature, implying that he has neither knowledge of nor control over the information transmitted or cached by his customers, and in so far as he does not play an active role in allowing those customers to optimise their online sales activity. In Case C-324/09, the Court held that Article 14(1) of Directive 2000/31/EC must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them. The operator nonetheless cannot rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31/EC.

- 16 The Court of Appeal, Cluj, also cites the judgment of the European Court of Human Rights in *Delfi A.S. v. Estonia*, in which the appellant company, which operated a commercial news portal, was declared by the national courts to be liable for the offensive comments posted by its readers regarding a newspaper article about a ferry company. At the request of the ferry company's lawyers, the appellant company removed the offensive comments, but only about six weeks after their publication. The ECtHR held that the decision of the national court did not breach Article 10 (freedom of expression) of the Convention for the Protection of Human Rights and Fundamental Freedoms, since, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals if they fail to take measures to remove clearly unlawful comments without delay.
- 17 The analysed case-law of the Court of Justice refers only to offers published on a website, the unlawful nature of which results from the analysis of facts and circumstances which were expressly communicated to the operator after the publication of the advertisement, but does not also analyse the situation identified in the present case, the specific nature of which lies in the fact that the content of the advertisement published by an unidentified user contained unequivocally unlawful content which was deeply harmful to the data subject. That unlawful nature was obvious since the alleged services offered by the injured party seriously infringe, by their very nature, their right to personal portrayal. Moreover, the sexual services allegedly offered under the published advertisement may be

associated with serious offences under the Codul penal (Criminal Code), such as procuring (Article 213 of the Criminal Code) and human trafficking (Article 210 of the Criminal Code).

- 18 Under the terms and conditions of use of the online platform operated by Russmedia Digital SRL, the latter does not appear to be a mere passive user of the data (intermediary service provider), since, although it does not claim an ownership right over the content provided, published, uploaded or transmitted, it nevertheless retains the right to use the content, including the right to copy, distribute, transmit, publish, reproduce, modify, translate, transfer it to partners and remove it at any time, without the need for any reason for doing so.
- 19 The Court of Appeal, Cluj is ruling on the case as the appellate court and the decision will therefore be final.