

Case C-188/24

Request for a preliminary ruling

Date lodged:

7 March 2024

Referring court:

Conseil d'État (France)

Date of the decision to refer:

6 March 2024

Applicant:

WebGroup Czech Republic, a.s.

NKL Associates s. r. o.

Defendant:

Ministre de la Culture

Premier ministre

**CONSEIL D'ÉTAT
(COUNCIL OF
STATE)**

acting

in its judicial capacity

[...]

**SOCIETE WEBGROUP CZECH
REPUBLIC and Another**

[...]

1. Under No 461193, by a summary application, an additional pleading, a reply and three new pleadings, registered on 7 February, 9 May and 21 November 2022, 7 September and 5 December 2023, and 19 January 2024 at the secretariat of the

judicial section of the Council of State, WebGroup Czech Republic requests that the Council of State:

(1) annul as ultra vires décret No 2021-1306 du 7 octobre 2021 relatif aux modalités de mise en œuvre des mesures visant à protéger les mineurs contre l'accès à des sites diffusant un contenu pornographique (Decree No 2021-1306 of 7 October 2021 on the detailed rules for implementing measures to protect minors from accessing websites containing pornographic content);

(2) [...]

It submits that the decree which it is challenging:

- is vitiated by a formal defect in that it and the Law of 30 July 2020 on which it is based were not notified to the European Commission and the Czech Republic in accordance with Article 3 of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market;
- is inadequate since it does not specify the nature of the technical measures to be implemented to prevent minors from accessing pornographic content on the internet;
- infringes the principles of legal certainty and proportionality enshrined in European Union law, Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, the right to a fair trial, guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the freedom of expression, guaranteed by Article 10 of that convention;
- disregards the objectives of Directive 2000/31/EC of 8 June 2000 by imposing measures of a general and abstract nature aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services.

By two statements of defence, registered on 9 September 2022 and 9 January 2024, the ministre de la culture (French Minister for Culture) contends that the action should be dismissed. She submits that the pleas raised by the applicant company are unfounded.

By a statement of defence, registered on 10 January 2024, the Premier ministre (French Prime Minister) stated that he echoed the observations of the Minister for Culture.

By two statements in intervention, registered on 15 November 2022 and 7 March 2023, the associations 'Osez le féminisme!' and 'Le Mouvement du Nid' submit that the action should be dismissed. They maintain that their intervention is admissible and the pleas raised in the application are unfounded.

By two statements in intervention, registered on 10 July and 20 September 2023, the association 'Les effronté-E-S' submits that the action should be dismissed. It maintains that its intervention is admissible and the pleas raised in the application are unfounded.

2. Under No 461195, by a summary application, an additional pleading, a reply and three new pleadings, registered on 7 February, 9 May and 21 November 2022, 7 September and 5 December 2023 and 19 January 2024 at the secretariat of the judicial section of the Council of State, NKL Associates sro requests that the Council of State:

(1) annul as ultra vires Decree No 2021-1306 of 7 October 2021 on the detailed rules for implementing measures to protect minors from accessing websites containing pornographic content;

(2) [...]

It submits that the decree which it is challenging:

- is vitiated by a formal defect in that it and the Law of 30 July 2020 on which it is based were not notified to the European Commission and the Czech Republic in accordance with Article 3 of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market;

- is inadequate since it does not specify the nature of the technical measures to be implemented to prevent minors from accessing pornographic content on the internet;

- infringes the principles of legal certainty and proportionality enshrined in European Union law, Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, the right to a fair trial, guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the freedom of expression, guaranteed by Article 10 of that convention;

- is inconsistent with the objectives of Directive 2000/31/EC of 8 June 2000 by imposing measures of a general and abstract nature aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services.

By two statements of defence, registered on 9 September 2022 and 8 January 2024, the Minister for Culture contends that the action should be dismissed. She submits that the pleas raised by the applicant company are unfounded.

By a statement of defence, registered on 10 January 2024, the Prime Minister stated that he echoed the observations of the Minister for Culture.

By two statements in intervention, registered on 15 November 2022 and 7 March 2023, the associations ‘Osez le féminisme!’ and ‘Le Mouvement du Nid’ submit that the action should be dismissed. They maintain that their intervention is admissible and the pleas raised in the application are unfounded.

By two statements in intervention, registered on 10 July and 20 September 2023, the association ‘Les effronté-E-S’ submits that the action should be dismissed. It maintains that its intervention is admissible and the pleas raised in the application are unfounded.

Having regard to the other documents in the files;

Having regard to:

- the Treaty on the Functioning of the European Union;
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000;
- the code pénal (Criminal Code);
- [...];
- Law No 2020-936 of 30 July 2020;
- [...];

[...]

Whereas:

- 1 In order to combat the increasing exposure of young minors to pornographic content and the harmful effects of such exposure on their psychological development and on violence against women, the Law of 30 July 2020 to protect victims of domestic violence was intended to strengthen, with regard to pornographic websites that allow minors to access their content, the effectiveness of the provisions of Article 227-24 of the Criminal Code, which has long punished *‘the manufacture, transport, distribution by whatever means and however supported, of a message bearing a pornographic or violent character or a character seriously violating human dignity or constituting an incitement to terrorism or inciting minors to engage in games that place them in physical danger, or the trafficking in such a message, ... where the message may be seen or perceived by a minor’* by three years’ imprisonment and a fine of EUR 75 000.
- 2 To that end, Article 22 of the Law of 30 July 2020, in the first place, added clarity to Article 227-24 of the Criminal Code, transcribing the settled case-law of the Cour de cassation (Court of Cassation), to the effect that the offence described in that article was constituted *‘including where access by a minor to the messages*

mentioned in the first paragraph is the result of that minor simply declaring that he or she is at least 18 years of age’.

- 3 In the second place, Article 23 of that law established a procedure enabling the President of the Autorité de régulation de la communication audiovisuelle et numérique (Authority for the regulation of audiovisual and digital communication, France; ‘Arcom’), where he finds that a person whose activity is to publish an online public communication service allows minors to access pornographic content in breach of Article 227-24 of the Criminal Code, to issue that person with a formal notice ordering him or her to take any measure likely to prevent minors from accessing the offending content within a period of 15 days. If the person served with the formal notice fails to comply with that order, the President of Arcom may bring an action before the President of the tribunal judiciaire de Paris (Court of Paris) seeking an order that access to that service and its referencing by a search engine or a directory be terminated. Article 23 of the law refers to a decree to specify the conditions for its application. On that basis, the decree of 7 October 2021 on the detailed rules for implementing measures to protect minors from accessing websites containing pornographic content specified the procedures by which the President of Arcom may implement the procedure laid down in Article 23 of the law.
- 4 By two applications which should be joined to give a ruling by way of a single decision, WebGroup Czech Republic and NKL Associates sro seek the annulment as ultra vires of that decree.

The interventions by the associations ‘Osez le féminisme’, ‘Mouvement du Nid’ and ‘Les effronté-E-S’:

- 5 Having regard to the subject matter and nature of the dispute, the associations ‘Osez le féminisme’, ‘Mouvement du Nid’ and ‘Les effronté-E-S’ have demonstrated, by their objects as provided for in their statutes and their action, a sufficient interest in upholding the contested decree. Their interventions are therefore admissible.

The plea in law alleging that the contested decree lacks precision:

- 6 [...] [Rejection of the plea by the referring court]

The pleas in law alleging reliance on the principles of legal certainty and proportionality, the right to a fair trial and freedom of expression:

- 7 [...] [Rejection of the pleas by the referring court]

Reliance on Directive 2000/31/EC of 8 June 2000:

- 8 In accordance with Article 1 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: ‘1. *This Directive seeks to contribute*

to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States. 2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.’

- 9 Under Article 2 of that directive: *‘For the purpose of this Directive, the following terms shall bear the following meanings: ... (h) “coordinated field”: 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. (i) The coordinated field concerns requirements with which the service provider has to comply in respect of: – the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification, – the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.’*
- 10 In accordance with Article 3 of that directive: *‘1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. ... 4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled: (a) the measures shall be: (i) necessary for one of the following reasons: – public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons, – the protection of public health, – public security, including the safeguarding of national security and defence, – the protection of consumers, including investors; (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives; (iii) proportionate to those objectives; (b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has: – asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate, – notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures. ...’.*

- 11 Article 14(3) of the directive, which is applicable where an information society service is provided that consists of the storage of information provided by a recipient of the service, provides as follows: *‘This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.’*
- 12 Recital 8 of the directive states: *‘The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such’*. According to recital 45: *‘The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it’*. Lastly, recital 48 of that directive states: *‘This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.’*
- 13 By its judgment of 9 November 2023, *Google Ireland Limited, Meta Platforms Ireland Limited, Tik Tok Technology Limited v Kommunikationsbehörde Austria (KommAustria)* (C-376/22), the Court of Justice of the European Union held, in paragraphs 42 to 44 of that judgment, that ‘Directive 2000/31 is ... based on the application of the principles of home Member State control and mutual recognition, so that, within the coordinated field defined in Article 2(h) of that directive, information society services are regulated solely in the Member State on whose territory the providers of those services are established’, in order to conclude that, ‘consequently, it is the responsibility of each Member State as the Member State where information society services originate to regulate those services and, on that basis, to protect the general interest objectives referred to in Article 3(4)(a)(i) of Directive 2000/31’ and ‘moreover, in accordance with the principle of mutual recognition, it is for each Member State, as the Member State of destination of information society services, not to restrict the free movement of those services by requiring compliance with additional obligations, falling within the coordinated field, which it has adopted’. On those grounds, the Court ruled that ‘Article 3(4) of Directive 2000/31/EC ... must be interpreted as meaning that general and abstract measures aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services do not fall within the concept of measures taken against a “given information society service” within the meaning of that provision’.
- 14 In the first place, the applicants submit that the provisions of the contested decree and those of the Law of 30 July 2020, which they are also challenging by way of

exception, are inconsistent with the objectives of Directive 2000/31/EC in so far as they establish a procedure intended to enable an administrative authority to give formal notice to a person whose activity consists in publishing an online communication service to put an end to a criminal offence.

- 15 In that regard, however, the contested provisions, in so far as they establish a procedure whereby an administrative authority may give formal notice to information society service providers to put an end to an infringement and bring an action for failure to fulfil obligations before a court in the event of failure to comply with its formal notice, do not, in themselves, lay down any rule relating to the substance of the obligation in question. Consequently, and to that extent, they cannot be regarded as infringing, for reasons falling within ‘coordinated field’ of Directive 2000/31/EC, the freedom to provide information society services, since the directive, in accordance with the excerpts cited in paragraphs 11 and 12, must not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, to require the service provider to terminate or prevent an infringement. Accordingly, the applicants are not justified in claiming that the contested provisions, in so far as they provide for a mechanism enabling an administrative authority to give formal notice to a service provider to put an end to an infringement, are unlawful on the ground that they are inconsistent with the objectives of Article 3 of Directive 2000/31/EC.
- 16 In the second place, however, the applicants also submit that the contested provisions do not merely lay down a procedure enabling an administrative authority to order a service provider to bring an infringement to an end, but that they also have the effect, having regard to the substance of the criminal offence at issue, clarified by the addition to Article 227-24 of the Criminal Code of the provisions, stemming from the Law of 30 July 2020, cited in paragraph 2 above, of requiring service providers established in other Member States of the European Union to put in place technical measures to block access by minors to the content that they broadcast. In that regard, the response to the plea alleging infringement of the objectives of Directive 2000/31/EC depends, having regard to the wording of the directive as interpreted by the Court of Justice of the European Union in the judgment referred to in paragraph 13, on the answers to be given to the questions [set out in the operative part] [...]:
- [...] [Repetition of the questions in the operative part]
- 17 Those questions are decisive for the outcome of the dispute before the Council of State. They present serious difficulties. It is therefore necessary to refer the matter to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union and, pending a ruling from the Court, to stay the proceedings.

HEREBY ORDERS:

Article 1: The interventions in support of the defendants, submitted by the associations ‘Osez le féminisme’, ‘Le Mouvement du Nid’ and ‘Les effronté-E-S’, are permitted.

Article 2: The proceedings brought by WebGroup Czech Republic and NKL Associates sro shall be stayed pending a ruling by the Court of Justice of the European Union on the following questions:

(a) In the first place, must provisions falling within the scope of criminal law, in particular general and abstract provisions which refer to certain conduct as constituting a criminal offence liable to prosecution, be regarded as falling within the scope of the ‘coordinated field’ of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 where they are capable of applying both to the conduct of an information society service provider and to that of any other natural or legal person? Or must it be considered, since the sole purpose of the directive is to harmonise certain legal aspects of such services without harmonising the field of criminal law as such and since it lays down only requirements applicable to services, that such criminal provisions cannot be regarded as requirements applicable to the taking up and pursuit of the activity of the information society services falling within the ‘coordinated field’ of that directive? In particular, do the criminal provisions intended to ensure the protection of minors fall within the scope of that ‘coordinated field’?

(b) Must the requirement that publishers of online communication services are to put in place measures to prevent minors from accessing pornographic content which they broadcast be regarded as falling within the scope of the ‘coordinated field’ of Directive 2000/31/EC, which harmonises only certain legal aspects of the services concerned, whereas, if that obligation concerns the pursuit of the activity of an information society service, in so far as it relates to the behaviour of the service provider and the quality or the content of the service, it does not concern, however, the establishment of service providers, commercial communications, electronic contracts, the rules on the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions or cooperation between Member States and, therefore, does not relate to any of the subjects governed by the harmonising provisions of Chapter II of that directive?

(c) If the answer to the preceding questions is in the affirmative, how should the requirements of Directive 2000/31/EC be reconciled with those arising from the protection of human rights and fundamental freedoms in the European Union, in particular the protection of human dignity and the best interests of the child, guaranteed by Articles 1 and 24 of the Charter of Fundamental Rights of the European Union and by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, where the mere adoption of individual measures taken in respect of a given service does not appear to be such as to ensure effective protection of those rights? Is there a general principle of EU law that allows Member States to take, in particular in case of an emergency, measures – including when they are general and abstract with regard to a category

of service providers – that are required to protect minors against violations of their dignity and integrity, by way of derogation, where necessary, in respect of providers governed by Directive 2000/31/EC, from the principle of regulation of those providers by their State of origin laid down in that directive?

[...]

[Procedural information]

WORKING DOCUMENT