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Google Ireland and Others (C-376/22): is the strict interpretation of national public policy exceptions to the benefit of EU regulation?

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On the 9th of November 2023, the Court of Justice issued a judgment concerning the interpretation of the derogation clause in Article 3 (4) of the Information Society Services Directive (also known as the e-commerce Directive). The case concerned an Austrian law that imposed obligations on communication platform services regarding illegal content (such as hate speech, harassment, and content related to terrorist and pornographic offences), even when the platform is established in another Member State.

Under the e-commerce Directive, the rules that apply to the service providers are the ones of the country of origin where they are established. Other Member States where the services are provided may not subject those services to their own national rules. However, as a derogation to this rule, Article 3 (4) provides for specific grounds under which Member States can still apply rules to the service providers, including grounds of public policy. The question hereby was whether the Austrian legislation could be considered to fall under Article 3 (4) of the Directive.

In its judgment, the Court refused to accept that such a law could fall under the derogation clause of the Directive, which cannot be used for general and abstract measures. Instead, the Court affirmed that the derogation clause could only be used to regulate services on a case-by-case basis.

Several commentaries on the case have already touched upon what this means from the point of view of the regulation of online content in the European Union (see, for instance, here and here). Indeed, this judgment is to be placed in a context where Austria is not the only Member State wanting to regulate online content and create obligations for

platforms such as Google and Meta for reasons linked to public policy and illegal content. At the European Union level, the Digital Services Act also aims for such regulation.

This commentary aims to place the judgment and the debate it sparked in the broader picture of public policy exceptions to EU rules in internal market law. Indeed, even though public policy is barely mentioned in the judgment, it is on that precise ground that the Austrian legislation intended to impose obligations to service providers, as it concerns regulation of illegal content. From this point of view, the judgment is a classic example of strict interpretation of the public policy exception in EU law. Like for other public policy exceptions in freedom of movement law, the Court subjects the possibility to derogate from such EU rules to a condition of individual assessment. This, in turn, makes it impossible for States to issue public policy measures that derogate from internal market principles in a general and abstract manner.

Such a limitation of the general public policy regulatory power of Member States is logical from the traditional internal market law perspective. Indeed, the free movement rationale would argue that to leave such a power to Member States in a context in which public policy considerations diverge from one Member State to another constitutes too high of a risk for the fragmentation of the market. However, this framework becomes more complex when public policy interests become common European interests. Indeed, the fact that Member States share a particular view when it comes to the interactions of fundamental market freedoms and public policy considerations reduces the risk of fragmentation of the internal market in that regard. This evolution triggers the question of whether the regulation of these interests necessarily takes place at the European level or whether it can also be achieved through national regulation.

The strict interpretation and procedural framing of public policy exceptions in EU law

Article 3 of the e-commerce Directive lays out a very classical internal market reasoning: services should be able to be provided everywhere in the EU without facing any extra hurdles in Member States other than the one they are established in.

In the judgment, the Court of Justice recalls that the Directive is based on home Member State control and mutual recognition principles. It then goes on to affirm that to accept that general and abstract measures could be adopted under the derogation clause of that Directive, 'without distinction to any provider of a category of information society services would call into question the principle of control in the home Member State' (para. 47). Advocate General Szpunar, who delivered the Opinion in the case, also recalls that as an exception to the general rule laid out by the Directive, 'Article 3(4) […] must be interpreted strictly' (para. 64).

This rule of strict interpretation of derogations is a classical tool used by the Court of Justice to navigate the numerous rule-exception frameworks in EU law. While it is true that the political sensitivity of the notion of public policy has sometimes led the Court to leave more leeway for Member States on their use of that exception ground, the Court has consistently repeated the idea that the 'concept of public policy in the context of the Community must be interpreted strictly' (*Van Duyn* judgment, 41/74, para. 24).

Hence, in the context of the e-commerce Directive, because the objective is free movement and not protection of the users against illegal content through public policy, and although both of those interests are acknowledged in the Directive, the former must be interpreted broadly whilst the latter can only be pursued through a strictly defined derogation frame.

Similarly, the insistence of the Court on the respect of the two procedural conditions laid down in the Directive for the use of the Article 3(4) derogation, advocating for a case-by-case approach, is in line with the general approach adopted by the Luxembourg judges concerning public policy exceptions to European rules.

In freedom of movement of persons law and migration law, the framework adopted by the Court to frame the use of exceptions to the right of stay of individuals mainly revolves around the individual assessment requirement. Indeed, the Court's control over public policy measures derogating from EU rights generally holds Member States accountable to carry out an 'assessment of where lies the fair balance between the legitimate interests in issue" (*Orfanopoulos and Oliveri* judgment, C-482/02 and C-493/01, para. 96).

In that context, the judgment in Google Ireland upholds a classical framework for public policy exceptions in EU law established by the Court, which forbids Member States from derogating from EU rules in a general and abstract manner.

This procedural safeguard over the use of public policy exceptions is logical in a context where public policy is referred to as a national interest, the interpretation of which can vary from country to country and hence where the balance of interests needs to rest on this case-by-case analysis. Such logic, however, becomes more complex and controversial when the Member State's derogation aligns with an EU-wide political understanding to regulate an area for public policy reasons.

When public policy concerns become European: EU regulation as the way forward?

In its judgment, the Court of Justice points to the fact that Article 3(4) "was not designed to allow Member States to adopt general and abstract measures aimed at regulating a category of information society service providers as a whole, even though such measures

would combat content which seriously undermines the objectives set out in Article 3(4)(a)(i)" (para. 52). As Article 3(4)(a)(i) provides for the public policy exception ground, the Court here acknowledges the importance of such public policy regulations but by arguing that the e-commerce Directive is not the fit EU law instrument under which to do so. There is only one step missing to affirm that such regulations could, for instance, be taken under the Digital Services Act.

Advocate General Szpunar makes the link with the Digital Services Act in his Opinion on the case, where he addresses the argument of the importance of combatting illegal hate speech in the case at hand by hinting at the fact that the Digital Services Act 'is intended to address such concerns' (para. 72).

This deference to an EU legislation that was not yet in force at the time of the judgment is interesting as it points to the question of whether general and abstract public policy measures in the field of internal market law necessarily need to be translated by an EU legislation. Indeed, the Court did not seem to be in contradiction with the goals of the Austrian legislation. However, precisely because this regulation would align with a European political will to act on these issues, the regulatory solution seems reserved for the EU level.

This is confirmed by the Digital Services Act itself, the preamble of which states that the recent introduction of 'national laws on the matters covered by this Regulation [...] negatively affect the internal market' (recital 2).

These elements are particularly interesting when applied to public policy, which was traditionally an area of law where conceptions of public policy were considered to be national and diverse. As the EU develops, it grows around shared values, which in turn sketch a common vision on some aspects of public policy. Hate speech, which is at the heart of online content platform regulation, has recently been proposed by the Commission as an addition to the list of EU crimes in Article 83 para. 1 of the TFEU. This provision of the Treaty seeks to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. Together with the creation of a European Public Prosecutor's Office, the existence and expansion of the list of EU crimes point towards the development of a common European concept of public policy. As a matter of fact, some of the illegal content that the Austrian legislation aimed to tackle through its legislation refer to crimes that are already included in the list of Article 83 para. 1: terrorism, sexual exploitation of women and children, … In this sense, the Austrian public policy objectives are at least partly aligned with the public policy objectives of the European Union.

Yet, as a European conception of public policy concerns arises in the field of online content, the regulatory framework becomes European, thereby limiting Member States to exceptional measures. As other commentators have pointed out, this can become problematic if national legislators wish to set a higher protection standard than the Digital Services Act.

While it is true that in theory national legislations cannot intervene in a field that has been fully harmonised by the EU legislator, some EU Directives such as Directive 2004/38 on the right of Union citizens to move and reside in the Union have a clause that allows for more favourable national legislations to apply, should Member States want to set such a higher standard.

The consequential relationship between the common conception of public policy interests and the European regulatory framework does not, however, hold true for every public policy exception in EU law. In free movement of persons, for instance, even though the definitions of EU crimes could lead to a shared vision of how to best balance the danger to society and the rights of the individuals who are found guilty of those crimes, the framework is still very much centered on national expulsion measures, in exception to free movement rules (see for instance the *K. and H.F* judgment, C-331/16 and C-336/16).

Does a common conception of public policy interests change the way in which public policy exceptions are being adjudicated in internal market law? In the particular case of limitation of the online platform's freedom of movement of services on ground of public policy, the existence of a common conception of public policy limitation regarding for instance hate speech is evidenced by the political agreement on the Digital Services Act. However, rather than enhancing the Member State's powers to regulate on those matters themselves, the Court of Justice seems to point to the use of the EU regulation framework in an exclusive way. Indeed, when it comes to national regulations of such interests, Member States will still be submitted to the strict procedural framework of the public policy exceptions in internal market.