

The Greek Council of State (supreme administrative court) has recently referred several preliminary questions to the Court of Justice of the European Union (hereinafter referred to as the Court) regarding the interpretation of Directive 2010/13 as amended by Directive 2018/1808 (hereinafter referred to as the Directive) and the obligations that it imposes on the national regulatory authorities as regards media service providers that broadcast exclusively on the web. That preliminary reference could potentially produce very far reaching consequences, as the questions referred relate directly to the mandate of the national regulatory authorities and their jurisdiction over media service providers broadcasting exclusively on the web.

The case concerned the imposition by the NCRT (the competent national regulatory authority in Greece) of administrative sanctions on a media service provider broadcasting exclusively on the web: i) for incitement to hatred against persons on grounds of their alleged sexual orientation (Article 6 of the Directive) and ii) for violation of the applicable legislative provisions on the protection of human dignity and the required quality level of broadcasted content.

The Council of State concluded though (by a majority of 5 votes to 2) that national law does not expressly confer the jurisdiction on the NCRT to regulate media content broadcasted exclusively on the web. It stressed therefore that the administrative sanctions imposed on the media service provider concerned will be considered legal, only if they can be based on the provisions of the Directive.

The Council of State made then the following distinction:

i) As regards the part of the sanction based directly on Article 6 of the Directive as implemented under national law (incitement to hatred), it did not contest that the NCRT was entitled to rely on that provision against media service providers broadcasting exclusively on the web. Assumingly, the same is also the case for any other legal obligation expressly enshrined in the coordinated provisions of the Directive.

ii) As regards though the part of the sanction based on the protection of human dignity and the requirement for a minimum quality level of broadcasted content, the Council of State noted that the Directive does not expressly introduce such coordinated legal rules. As a result, it considered it necessary to stay the legal proceedings and to refer a number of preliminary questions to the Court asking in essence the following:

a) Whether the protection of human dignity and the requirement for a minimum quality level of broadcasted content do come under the regulatory scope of the Directive in the meaning of Article 4 (1) thereof, despite the fact that there is no express mention in that regard in its provisions. The Council of State unanimously proposes an affirmative answer to this question, in the light of Article 1 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter)

and the recitals of the Directive. It considers though that it is obliged to refer a preliminary question on the matter by virtue of Article 267 TFEU, because it is a court of last instance and the answer to the said question is not inherently obvious (*acte clair*).

b) Whether it violates Article 4 (1) of the Directive as interpreted in the light of the principle of equal treatment enshrined under Articles 20 and 21 of the Charter for a member state to provide for the imposition of administrative sanctions on the traditional media service providers but not to extend those same sanctions also to media service providers broadcasting exclusively on the web. The Council of State unanimously considers that both traditional media service providers and media service providers broadcasting their program exclusively on the web are clearly in a comparable situation as regards the provision of their services to the public and in a direct competitive relationship with each other, that meaning that member states are not allowed to differentiate their legal treatment. It notes though that it is obliged to refer a preliminary question on the matter by virtue of Article 267 TFEU, because it is a court of last instance and the answer to the said question is not inherently obvious (*acte clair*).

c) Whether (in the event of a negative answer to question a) a national regulatory authority is obliged under Article 2 (1) of the Directive and the principle of equal treatment as protected under the Charter to consider the possibility of extending to media service providers broadcasting exclusively on the web the sanctions that national law provides for the violation of the legislative obligations imposed on the traditional media service providers. The Council of State unanimously proposes an affirmative answer to this question. It considers in this respect that member states are in principle allowed to apply their own rules in the areas that are not covered by the coordinated rules of the Directive but they may not impose those rules only on some media service providers, in the absence of an objective reason capable of justifying this differentiated legal treatment. It reiterates though that it is obliged to refer a preliminary question on the matter by virtue of Article 267 TFEU, because it is a court of last instance and the answer to the said question is not inherently obvious (*acte clair*).

d) Whether it is compatible with the principle of legality under Article 49 (1) of the Charter (*nulla poena sine lege certa*) and the principle of legal certainty for a national regulatory authority to extend the administrative sanctions provided under national law for the traditional media service providers also to media service providers broadcasting their program exclusively on the web, in order to guarantee the practical effectiveness of the Directive and to interpret the provisions of the national legislation in the light of the objectives pursued by that Directive as required the principle of consistent interpretation. The Council of State does not propose an answer to this question.

Given that it usually takes more than one and a half year for the Court to answer a preliminary request, the answer to those questions is not expected before the beginning of 2025 (unless of course the Council of State asks for an expedited procedure and its request is accepted by the Court).