A Resurrection of Shevill? – AG Szpunar's Opinion in Glawischnig-Piesczek v Facebook Ireland (C-18/18)

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Anna Bizer, doctoral candidate at the University of Freiburg, has kindly provided us with her thoughts on AG Szpunar's opinion in the case of Glawischnig-Piesczek v Facebook Ireland (C-18/18).

Since the EP-proposal from 2012, the European Union has not shown any efforts to fill the gap still existing in the Rome II Regulation regarding violations of personality rights (Article 1(2)(g)). However, Advocate General Szpunar has just offered some thoughts on the issue in his opinion on the case of *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (C-18/18) from 18 June 2019.

Eva Glawischnig-Piesczek, an Austrian politician, claimed that a Facebook user had violated her personality right by posting a defamatory comment on the social network. She sued Facebook Ireland for the removal of the publication in question as well as other identical and/or equivalent publications. The commercial court in Vienna granted a corresponding injunction and Facebook Ireland did indeed disable access to the publication – but only in Austria by means of geo-blocking. Hereafter, the Austrian Supreme Court referred various questions to the CJEU regarding the interpretation of Article 15(1) of the e-Commerce Directive (Directive 2000/31) which prohibits the imposition of a general monitoring obligation on host providers. While the details of the responsibility of host providers regarding their users' activities are certainly interesting, this comment focuses on the territorial dimension of the provider's obligation to delete certain online content. So, the crucial question is whether an Austrian court may oblige Facebook Ireland to make a user's comment globally inaccessible or whether the injunction is limited to the respective state of the court.

First of all, the AG addresses the issue of jurisdiction by referring to the CJEU's *eDate* decision (C-509/09, C-161/10): *„the court of a Member State may, as a*

general rule, adjudicate on the removal of content outside the territory of that Member State, as the territorial extent of its jurisdiction is universal. A court of a Member State may be prevented from adjudicating on a removal worldwide not because of a question of jurisdiction but, possibly, because of a question of substance." (para. 86) This statement is, in fact, convincing as the CJEU decided in *Bolagsupplysningen* (C-194/16, para. 48) that the removal of content is a single and indivisible application which can only be made by a court with "universal" jurisdiction (see our earlier posts here and here).

AG Szpunar further states that the territorial dimension of an injunction cannot be determined by Articles 1, 7 and 8 of the Charter of Fundamental Rights because the original claim was not based on EU law and was therefore outside the scope of the Charter (para. 89). In addition, neither did the claimant invoke the European law on data protection (para. 90) nor does the Brussels I*bis* Regulation require that an injunction issued by the court of a Member State also has effects in third states (para. 91). Thus, the AG's – convincing – result is that EU law does not regulate the question of the territorial scope of an injunction regarding the violation of personality rights (para. 93).

However – and now the interesting part begins – AG Szpunar elaborates on the question of assessing cross-border violations of personality rights in case the CJEU did not agree with the inapplicability of EU law (para. 94-103). These considerations are not based on any legal text as, according to the AG, the question is not regulated by EU law.

Generally, AG Szpunar is not comfortable with a worldwide obligation to remove an online publication, "*because of the illegality of that information established under an applicable law,* [such an obligation] *would have the consequence that the finding of its illegality would have effects in other States. In other words, the finding of the illegal nature of the information in question would extend to the territories of those other States*" (para. 80). To avoid this effect, a worldwide obligation of removal could only be justified when all potentially applicable laws agree. Of course, this leads to disadvantages: "*should a claimant be required, in spite of the practical difficulties, to prove that the information characterised as illegal according to the law designated as applicable under the conflict rules of the Member State in which he brought the action is illegal according to all the potentially applicable laws?*" (para. 97). AG Szpunar leaves this question unanswered and continues to focus on the freedom of information: „*the legitimate*

public interest in having access to information will necessarily vary, depending on its geographic location, from one third State to another. Thus, as regards removal worldwide, there is a danger that its implementation will prevent persons established in States other than that of the court seised from having access to the information." (para. 99)

To avoid this conflict between the freedom of information and personality rights, AG Szpunar recommends the following: "*However, owing to the differences between, on the one hand, national laws and, on the other, the protection of the private life and personality rights provided for in those laws, and in order to respect the widely recognised fundamental rights, such* ***a court must****, rather,* ***adopt an approach of self-limitation****. Therefore, in the interest of international comity […] that court should, as far as possible, limit the extraterritorial effects of its junctions concerning harm to private life and personality rights. The implementation of a removal obligation should not go beyond what is necessary to achieve the protection of the injured person. Thus, instead of removing the content, that court might, in an appropriate case, order that access to that information be disabled with the help of geo-blocking*." (para. 100) "*Those considerations cannot be called into question by the applicant's argument that the geo-blocking of the illegal information could be easily circumvented by a proxy server or by other means.*" (Rz. 101)

First, it is noteworthy that the AG strongly emphasizes the freedom of information. So far, this aspect has been rather neglected in the discussion on violations of personality rights compared to freedom of speech and freedom of the press. However, including freedom of information in the balancing of interest reflects that a publication necessarily requires to be noted by at least one other person to have defamatory effects.

Second, the AG sees the solution in geo-blocking. This solution can of course be considered worthy to be debated further as geo-blocking is already a popular means used amongst host providers. However, it is not clear from the AG's statement why the risk of circumvention should not be considered, although any order by a court to protect personality rights ought to be effective. In any case, this approach conflicts with the efforts of the European Union to restrict geo-blocking within the internal market (Regulation (EU) 2018/302) and should thus not be supported.

Third, the AG's approach leads to a rather unsatisfactory result for the claimant. One should not forget how the internet generally and social media especially operate: interesting content will be shared and disseminated again and again. These new publications, however, will not be restricted by geo-blocking unless the host provider actively intervenes.

Fourth, it is doubtful if the AG's approach is fit for reality: the idea of an approach of self-limitation for the courts based on the question "What is really necessary?" appears rather vague and not helpful for the deciding judges. This question is of a fundamental nature and requires an evaluative assessment. In order to achieve legal certainty, this crucial question of necessity should be answered by the legislature or at least the CJEU and should not be decided on a case-by-case-basis.

Fifth, one has to consider the effects of this proposal in the context of conflict of laws in a technical sense: if a claimant wanted Facebook to delete a publication globally and a court had "universal" jurisdiction according to *eDate* and *Bolagsupplysningen*, the court – in accordance with the suggestion of the AG – would have to apply the laws of each state from which the publication is still accessible. To make a long story short: Adopting the AG's proposal means resurrecting the mosaic approach in conflict of laws! This appears to be a step backwards. Not only are the disadvantages of the mosaic principle in times of the internet commonly known, but also this approach contradicts the CJEU's rejection of the mosaic principle regarding the question of jurisdiction in actions for the removal of publications (*Bolagsupplysningen*).

Finally, the question of the direct consequences of this opinion remains. It is likely that the CJEU will follow the first proposal of AG Szpunar that the question of the territorial dimension of an injunction for the violation of personality rights is not regulated by EU law and can thus not be decided by the CJEU. However, the AG's opinion offers a new and interesting perspective on the issue of cross-border violations of personality rights which might give a boost to achieve international harmonisation.