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## The Contribution of EU Law to the Regulation of Online Speech

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# THE CONTRIBUTION OF EU LAW TO THE REGULATION OF ONLINE SPEECH

## *THE GLAWISCHNIG-PIESCZEK CASE AND WHAT IT MEANS FOR ONLINE CONTENT REGULATION*

*Luc von Danwitz\**

*Internet regulation in the European Union (EU) is receiving significant attention and criticism in the United States. The European Court of Justice's (ECJ) judgment in the case Glawischnig-Piesczek v. Facebook Ireland, in which the ECJ found a take-down order against Facebook for defamatory content with global effect permissible under EU law, was closely scrutinized in the United States. These transsystemic debates are valuable but need to be conducted with a thorough understanding of the relevant legal framework and its internal logic. This note aims to provide the context to properly assess the role the ECJ and EU law play in the regulation of online speech. The note argues that the alleged shortcomings of the Glawischnig-Piesczek case are actually the result of a convincing interpretation of the applicable EU law while respecting the prerogatives of the member states in the areas of speech regulation, jurisdiction, and comity. Most of the issues that commentators wanted the ECJ to decide were beyond its reach in this case. The paper argues that EU law's contribution in the field of online speech regulation should be regarded as a realization of the dangers of illegal online content, resulting in an effective protection of the interests harmed. This implies the rejection of a "whack-a-mole" approach towards illegal online content in favor of more effective ways to protect against the harm caused by illegal online speech. At the same time, the case highlights the necessity to establish a workable theory of jurisdiction and comity in the digital age.*

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## INTRODUCTION

With increasing regularity, the judiciary of the European Union (EU) is making headlines across the Atlantic. The Court of Justice of the European Union (ECJ or “the Court”) may still seem to be “tucked away in the fairy-land Duchy of Luxembourg”<sup>1</sup> for the general American public, but its rul-

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1. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1, 1 (1981).

ings become increasingly important for the United States, most notably in areas of regulation that challenge both the United States and the EU.

One such judgment was delivered in October 2019 in the case *Eva Glawischnig-Piesczek v. Facebook Ireland*.<sup>2</sup> The judgment dealt with the sensitive topic of content removal from Facebook, specifically concerning defamatory speech directed against an Austrian politician. The ECJ allowed the Austrian Supreme Court to issue an injunction against Facebook with a global reach to take down content that was identical or equivalent to the initial content identified as defamatory under Austrian law. The case has been thoroughly commented on outside of Europe. The American response was overwhelmingly negative.<sup>3</sup>

Topics that transcend jurisdictions, like online content regulation, can only benefit from a discourse across legal systems. Courts all over the world have struggled with similar questions. Competing visions for the future of the Internet are debated, tested, and rejected by lawmakers on all continents. External perspectives on local solutions with global consequences are extremely valuable. To be fruitful, however, such debates presuppose a thorough understanding of the legal questions implicated. Accordingly, this note aims to provide the context necessary to understand the role of EU law and the ECJ in the regulation of online speech as exemplified by *Glawischnig-Piesczek*. By undertaking a critical analysis of the judgment and its broader regulatory context, this note will distill and critically evaluate the key takeaways from the judgment, while pointing out the limits of EU law in this area.

This note shows that the provisions the ECJ interpreted in *Glawischnig-Piesczek* focus exclusively on the obligations of intermediary service providers (ISPs) when confronted with illegal content. This severely limits the scope of the judgment. These obligations, the note suggests, were more narrowly interpreted by the ECJ than a cursory reading of *Glawischnig-*

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2. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821 (Oct. 3, 2019). The final judgment in this case was delivered by the Austrian Supreme Court in 2020, ruling in favor of Ms. Glawischnig-Piesczek. See Oberster Gerichtshof [OGH] [Supreme Court] Sept. 15, 2020, 6 Ob 195/19y, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20200915\\_OGH0002\\_0060OB00195\\_19Y0000\\_000/JJT\\_20200915\\_OGH0002\\_0060OB00195\\_19Y0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200915_OGH0002_0060OB00195_19Y0000_000/JJT_20200915_OGH0002_0060OB00195_19Y0000_000.pdf).

3. See Jennifer Daskal & Kate Klonick, *When a Politician Is Called a 'Lousy Traitor,' Should Facebook Censor It?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/facebook-censorship-speech-law.html>; Dominic Dhil Panakal, *Europe's Bridge Too Far*, LEXOLOGY (Oct. 15, 2019), <https://www.lexology.com/library/detail.aspx?g=521ee566-425c-4280-b0e0-ffafe6487b72>; Daphne Keller, *Dolphins in the Net: Internet Content Filters and the Advocate General's Glawischnig-Piesczek v. Facebook Ireland Opinion*, STANFORD CTR. FOR INTERNET & SOC'Y (Sept. 4, 2019), <https://cyberlaw.stanford.edu/files/Dolphins-in-the-Net-AG-Analysis.pdf>; Daphne Keller, *Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Piesczek Ruling*, 69 GRUR INT'L 616, 620–22 (2020); Daphne Keller (@daphnehk), TWITTER (Oct. 3, 2019, 9:29 AM), <https://twitter.com/daphnehk/status/1179750220864745472>.

*Piesczek* might suggest. The note also maintains that EU law as it currently stands cannot get involved in the heated debate about when to regulate online speech, a question which is left to the EU member states. Also, the interpretation of the obligations of service providers, somewhat counterintuitively, mostly is not open to influence from the guarantee of the freedom of speech in the EU Charter of Fundamental Rights (CFR).<sup>4</sup> The note further maintains that allowing member states to issue orders to remove content with global effect shows due deference to the national competences in these areas, while also insisting on the applicable rules of comity and jurisdiction. With all this in mind, the note argues that the main contribution of EU law as interpreted by the ECJ to the debate around online content regulation is an emphasis on efficient removal of illegal content and the insistence on the responsibilities of service providers in that regard. The note does not pretend to spell out and solve the difficult transatlantic relationship regarding Internet regulation. It merely attempts to set the record straight as far as the *Glawischnig-Piesczek* case is concerned and to present the contributions of this judgment to the ongoing regulatory debate.

This note begins in Part I with a brief description of the case, its procedural background and the ECJ's judgment. Part II then presents a broad overview of the general setting of EU Internet regulation, focusing on the E-Commerce Directive (ECD)<sup>5</sup> which was at the heart of the case under review. The judgment is then critically analyzed against the backdrop of the most prominent critiques brought forth by commentators in Part III. This includes the allegedly too broad interpretation of the obligations of service providers (Part III.A), the problem of automated monitoring (Part III.B), the perceived lack of considerations for fundamental rights involved (Part III.C) and the global effect of removal orders that the ECJ allows national injunctions to have (Part III.D). The note proceeds in Part IV to present the main conclusions that should be drawn from the judgment and that should be taken as the key contribution of EU law to the debate on online content regulation around the world and its possible implications for the US legal and policy debate in particular.

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4. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391 [hereinafter CFR].

5. 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, 2000 O.J. (L 178) 1 [hereinafter ECD].

I. *Glawischnig-Piesczek*—THE CASE AND THE JUDGMENTA. *The Case*<sup>6</sup>

A Facebook user publicly shared on their personal page an article from the Austrian online news site *oe24.at*, which described the Austrian Green Party's support to maintain a minimum income for refugees. The article was shown as a thumbnail, including its title (“Greens: Minimum Income for Refugees Should Stay”), a summary of the article and a photograph of Ms. Glawischnig-Piesczek. At the time, she was a member of the Nationalrat (Austrian National Council) for the Austrian Green Party and its federal spokesperson. Along with the article, the user posted comments about Ms. Glawischnig-Piesczek, calling her a “lousy traitor of the people” (“miese Volksverräterin”),<sup>7</sup> “corrupt oaf” (“korrupter Trampel”), and a member of a “fascist party” (“Faschistenpartei”). Ms. Glawischnig-Piesczek asked Facebook Ireland<sup>8</sup> to remove this content, which Facebook Ireland did not do.

Ms. Glawischnig-Piesczek obtained an injunction from the Vienna Commercial Court, which ordered Facebook to cease publication of Ms. Glawischnig-Piesczek's photograph accompanied by the same or ‘equivalent’ content. Facebook only took down the initial post in Austria. The Vienna Higher Regional Court mostly upheld the order on appeal. It limited the obligation to take down equivalent content to content that was brought to the attention of Facebook but did not limit the injunction territorially to Austria. Both lower courts took the view that the posts were in violation of Sec. 78 UrhG (Law on Copyright) and Sec. 1330(1) ABGB (General Civil Code) and not protected by the freedom of expression.

Both parties appealed to the Austrian Supreme Court. This Court explicitly held that the statements at issue were intended to damage the applicant's reputation, to insult her and to defame her, which would justify an order to take down the initial posting. The Austrian Supreme Court stated that under Austrian law, a worldwide order to cease and desist that extended to identical or equivalent content would be permissible if the service pro-

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6. Unless otherwise noted, this part relies on the presentation of the case in the Opinion by Advocate General Szpunar. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:458, ¶¶ 10–21 (June 19, 2019) (Opinion of Advocate General Szpunar).

7. The term “Volksverräter”, though initially coined by revolutionaries and socialists dating back to the time before the German revolution of 1848, is today mainly understood as a reference to National Socialist Terminology. *Volksverräter*, DUDEN, <https://www.duden.de/rechtschreibung/Volksverraeter> (last visited Oct. 9, 2020). The term was used to describe people involved in “high treason” according to §§ 80–93 of the German Penal Code. The infamous *Volksgerichtshof* (People's Court) had special jurisdiction for these provisions and used them to sentence many German resistance fighters to death.

8. Facebook Ireland Ltd. is Facebook's subsidiary for outside of the United States and Canada. Every user outside of the United States and Canada contracts with Facebook Ireland Ltd.

vider was already aware that the interests of the applicant had been harmed on at least one occasion as a result of another user's action, which demonstrates the risk that other infringements could be committed. Importantly, it was not the ECJ who came up with the notions of identical or equivalent content, but the Austrian Supreme Court who decided that under national law, a removal order extending to these categories of content was appropriate.

However, the Austrian Supreme Court was unsure whether this interpretation of Austrian law would be in accordance with art. 15(1) ECD which reads: "Member States shall not impose a general obligation on providers, when providing [information society services], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

In keeping with its obligation under art. 267(3) of the Treaty on the Functioning of the European Union (TFEU),<sup>9</sup> according to which any court of last instance must refer a question on the validity or interpretation of EU law pending before it to the ECJ,<sup>10</sup> the Austrian Supreme Court stayed the proceedings to refer questions on the interpretation of art. 15 ECD to the ECJ. The Austrian Supreme Court asked whether and to what extent art. 15 ECD precludes national courts to order service providers to remove illegal content as well as identical and equivalent content with worldwide effect.

### B. *The Judgment*

The ECJ handed down its ruling on October 3, 2019. It began its analysis with a series of observations about the ECD, highlighting that Facebook Ireland offered hosting services privileged by art. 14 ECD.<sup>11</sup> The immunity they enjoy according to this article does not, in the light of art. 14(3) ECD and recital 45 ECD, preclude that national courts direct injunctions against the provider to take down illegal content, even if the provider cannot be made liable for the content.<sup>12</sup> Member states must ensure corresponding mechanisms for plaintiffs before their courts, for which they enjoy a particularly wide discretion under art. 18(1) ECD.<sup>13</sup> In light of the broad wording of art. 18(1) ECD, the ECJ also considered the range of national measures to be demanded by national courts in their injunctions against the ISPs to be broad as well.<sup>14</sup> The ECJ ended these preliminary remarks with a nod to art.

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9. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

10. See MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE, 223–29 (2d ed. 2014).

11. *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, ¶¶ 22–23.

12. *Id.* ¶¶ 24–25.

13. *Id.* ¶¶ 26, 28–29.

14. *Id.* ¶ 30.

15 ECD and its prohibition on general monitoring obligations as a limit of the member state's injunctive power.<sup>15</sup>

The ECJ first found that ordering an ISP to remove or block access to information stored by the ISP that is "identical" to the content of information previously declared to be illegal was not a prohibited general monitoring obligation,<sup>16</sup> but a specific monitoring obligation.<sup>17</sup> According to the ECJ it is "legitimate" that such injunctions are issued, regardless of who uploaded the illegal information,<sup>18</sup> in the light of how easily such content can be shared and disseminated on a social network.<sup>19</sup> Finally, the ECJ reiterated that because the content at issue is identical to content previously declared to be illegal, the obligation was not a general obligation to monitor.<sup>20</sup>

After dealing with identical content, the ECJ turned to the question of whether art. 15 ECD allows for an injunction ordering the removal of content that is "equivalent" to the illegal content. The ECJ understood equivalent information to be content "which remains essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality."<sup>21</sup> By reference to recital 41 ECD, the ECJ considered whether the obligation to remove equivalent content properly strikes a balance between the interests of the ISP and the interests of the defamed person.<sup>22</sup> In the ECJ's view, removal orders for equivalent content do not excessively burden ISPs for three reasons: (1) the injunction sets out the factors that qualify content as "equivalent," (2) equivalent content is only content that can be identified without an independent assessment, which (3) allows the ISP to use "automated search tools and technologies."<sup>23</sup>

Finally, the ECJ turned to the question whether the ECD prohibits injunctions that require the global takedown of content. By reference to the general lack of limits imposed on the member states by the ECD other than in art. 15 ECD, the ECJ held that the ECD did not contain a territorial limit for such injunctions.<sup>24</sup> Pointing to recitals 58 and 60 of the ECD, the ECJ stated only that applicable rules of international law had to be respected.<sup>25</sup>

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15. *Id.* ¶ 31.

16. *Id.* ¶ 37.

17. *Id.* ¶ 35.

18. *Id.* ¶ 37.

19. *Id.* ¶ 36.

20. *Id.* ¶ 37.

21. *Id.* ¶ 39.

22. *Id.* ¶¶ 43–44.

23. *Id.* ¶ 46.

24. *Id.* ¶¶ 48–50.

25. *Id.* ¶¶ 51–52.



## II. A BRIEF OVERVIEW OF THE RELEVANT EU INTERNET LAW

To give a full account of the EU's Internet regulation and policy would go beyond the limits of this note.<sup>26</sup> Rather, this section only tries to introduce the key institutional and legal settings in which EU Internet regulation operates.

### A. *The Market and the Individual*

EU regulation of the Internet<sup>27</sup> is, broadly speaking, driven by two main concerns: the regulation of the Digital Single Market<sup>28</sup> and the protection of the individual in the digital era.<sup>29</sup> First, the Internet has enormous economic consequences for the European Single Market. Internet regulation quickly became a necessity to ensure the survival of the Single Market.<sup>30</sup> Many existing regulatory areas such as IP law became part of EU Internet regulation because of the change the regulated area underwent as part of economic digitalization. Second, the EU also began to tackle the impact of the Internet on private individuals by enacting consumer and data protection laws.

The enumerated powers of the EU contribute to the EU's focus on these two broad categories of Internet regulation. The EU does not possess general police powers. Market related Internet regulation is usually based on art. 114 TFEU, the competence to regulate the Single Market. The ECJ had ruled, as early as 2000 in the famous *Tobacco Advertising*<sup>31</sup> case that this was not a general power but required a genuine goal related to the Single Market.<sup>32</sup> Prominent legislative action by the EU in this area encompasses different directives and regulations on electronic commerce.<sup>33</sup>

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26. See ANDREJ SAVIN, EU INTERNET LAW 21–29 (2d ed. 2017) for further details.

27. This paper only includes a discussion of the regulation concerning Internet providers and Internet content. EU law also significantly regulates the physical aspect of the Internet. See PAUL NIHOUL & PETER RODFORD, EU ELECTRONIC COMMUNICATIONS LAW 171–390 (2d ed. 2011).

28. The European Single Market is a common market of the 27 EU member states, the EEA states (Norway, Liechtenstein, and Iceland), Switzerland, and, pending a resolution of the Brexit process, the United Kingdom. It in essence guarantees the free movement of capital, goods, services, labor, and persons. As a reaction to the digitalization of society and the economy, the European Commission under then President Jean-Claude Juncker announced its “Digital Single Market” policy bundle in 2015. The European Commission under its current President Ursula von der Leyen has been pursuing a “European Digital Strategy,” expanding on the policy goals of the previous Commission since 2019. European Commission, *Shaping Europe's Digital Future*, <https://ec.europa.eu/digital-single-market/>.

29. See SAVIN, *supra* note 26, at 2–5.

30. Twenty-eight of the Commission's 30 proposals as part of the “Digital Single Market” policy were taken up by the EU's legislature from 2015 to 2019. European Commission, *A Digital Single Market for the Benefit of All Europeans* (Nov. 2019), [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=53056](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=53056).

31. Case C-376/98, *Germany v. Parliament & Council*, 2000 E.C.R. I-8419.

32. *Id.* ¶¶ 83–84. This case can be read as an equivalent to *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*,

Regulation concerned with the protection of the individual as a participant in the digital market is based on more specific powers. Notably, regulation around Consumer Protection<sup>34</sup> and Data Protection Regimes<sup>35</sup> are usually based on art. 169 TFEU and art. 16 TFEU respectively.

Speech-related issues have not been a prominent part of EU Internet regulation, falling in neither of the two broad fields of EU Internet regulation. Few existing EU legislative acts encounter questions of speech and most of those only peripherally. For example, EU law extensively covers issues of jurisdiction and choice of law under the recast Brussels I Regulation<sup>36</sup> and the Rome II Regulation applicable to torts.<sup>37</sup> They may apply to cases in which speech-related torts are at issue. But because these rules deal with procedural aspects, they rarely, if at all, reach into the speech-related issues under the applicable national law.

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514 U.S. 549 (1995); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Printz v. United States*, 521 U.S. 898 (1997); and *Alden v. Maine*, 527 U.S. 706 (1999). However, this does not exclude broad regulatory powers. For example, Directive 2006/24/EC of the European Parliament and of the Council (Data Retention Directive) passed on March 15, 2006, but later invalidated by the ECJ as a violation of the CFR in *Joined Cases C-293/12 & C-594/12, Digital Rights Ireland v. Minister for Comms., Marine & Nat. Resources*, ECLI:EU:C:2014:238 (Apr. 8, 2014), based data retention legislation on the power to regulate the Single Market, which was approved by the ECJ in *Case C-301/06, Ireland v. Parliament and Council*, 2009 E.C.R. I-593. See SAVIN, *supra* note 26, at 20.

33. See, e.g., ECD, *supra* note 5; Directive 2006/123, of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 36; Directive 2009/110, of the European Parliament and of the Council of 16 September 2009 on the Taking up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions, 2009 O.J. (L 267) 7–17; Regulation 910/2014, of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal market, 2014 O.J. (L 257) 73.

34. See, e.g., Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA Relevance, 2011 O.J. (L 304) 64; Directive 2013/11 of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), 2013 O.J. (L 165) 63; Regulation 524/2013, of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), 2013 O.J. (L 165) 1.

35. See, e.g., Regulation 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), 2016 O.J. (L 119) 1.

36. Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 in Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1.

37. Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J. (L 199) 40–49.

One of the few modern instances of direct EU speech regulation is art. 17 GDPR, which enshrines the so-called “Right to be Forgotten,” based on an earlier decision by the ECJ.<sup>38</sup> Somewhere in between these two extremes lies the ECD. It does not directly regulate online speech. Rather, it sets up a comprehensive framework for electronic commerce, and is thus a cornerstone of the establishment of the Digital Single Market.<sup>39</sup> The ECD also deals with liabilities and immunities of ISPs and the actions that can be taken against them. These actions, in turn, have an impact on online content.

### B. *In Particular: The E-Commerce Directive 2000/31*

According to its art. 1(1), the ECD seeks to enhance the internal market by guaranteeing the free movement of “information society services.” It focusses on the freedom of establishment of information society services (arts. 4 and 5 ECD), the rules for commercial communication (arts. 6–8 ECD), electronic contracts (arts. 9–11 ECD), and the liabilities of service providers (arts. 12–15 ECD), supplemented by rules for transposing and enforcing the directive (arts. 16–20 ECD).<sup>40</sup>

In arts. 12–14, the ECD provides for three instances in which ISPs are not liable for illegal content their service encounters: specifically, when they are caching, conduiting, and hosting content. Each article conditions this immunity in certain ways, for example, immunity for content stored at the request of a user under art. 14(1) is only available if:

“(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.”

However, these immunities explicitly do not shield the ISPs from injunctions requiring ISPs to terminate or prevent infringements, as arts. 12(3), 13(2), and 14(3) ECD state. Art. 14(3) ECD further allows member states to establish procedures governing the removal of illegal content by the ISP. This means that the ISPs enjoy, under certain conditions, immunity from liability for the illegal content on their service but are not exempted from being obligated under national law to remove content identified as illegal. This stands in contrast to the broad immunity enjoyed by ISPs under 47 U.S.C. § 230, which grants them immunity from any cause of action

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38. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317, ¶ 34 (May 13, 2014).

39. See ECD, *supra* note 5, recitals 1–4, art. 1(1).

40. UTE WELLBROCK, EIN KOHÄRENTER RECHTSRAHMEN FÜR DEN ELEKTRONISCHEN GESCHÄFTSVERKEHR IN EUROPA 30-37 (2005).

treating them as a “publisher” or “speaker” of the content on their service.<sup>41</sup> As a limitation to the obligations of ISPs, art. 15 ECD makes clear that there is no general obligation for ISPs to monitor content.

While these provisions can easily come into play in a case regarding online content regulation, they are strictly ancillary to the illegality of content. The ECD itself does not at all define or regulate what illegal content is. Under the relevant section, the ECD is only concerned with liabilities and obligations for ISPs arising from illegal content.

### III. MAKING SENSE OF *GLAWISCHNIG-PIESCZEK*

#### A. *A Focus on the Protection of Interests Harmed by Illegal Content*

The ECJ had previously established that arts. 12–15 ECD are protections for ISPs designed to recognize their special role as intermediaries.<sup>42</sup> While art. 15 ECD prohibits general obligations to monitor, recital 45 ECD allows monitoring obligations “in a specific case.” Thus, the difficulty is to determine what kind of monitoring obligations are specific and what kind of obligations are general in nature.

#### 1. Uncertainties Surrounding art. 15 ECD Before *Glawischnig-Piesczek*

In two previous cases, *Scarlett Extended* and *SABAM*, the ECJ had the opportunity to address whether a filtering regime imposed by national law was a prohibited general obligation to monitor.<sup>43</sup> In these cases, three characteristics of the filtering regimes at issue made them problematic for the ECJ under art. 15 ECD: (1) active observation of (2) all files stored or all communication transmitted, resulting in (3) an observation of all or almost all of the information transmitted or stored by all users of the service.<sup>44</sup> The ECJ declined to formulate a general test in this regard, but concluded that the combination of these three factors went too far.

41. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49–50 (D.D.C. 1998). More recent examples include *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2016); *O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269–71 (D.C. Cir. 2019); *Madeline Byrd & Katherine J. Strandburg, CDA 230 for a Smart Internet*, 88 *FORDHAM L. REV.* 405, 408–11 (2019). For a constructive approach to the future of Sec. 230, see Andrew O. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 *RUTGERS COMPUT. & TECH. L.J.* 1, 11–17 (2016).

42. *Joined Cases C-236 to 238/08, Google Fr. SARL v. Louis Vuitton Malletier*, 2010 E.C.R. I-2417, ¶ 107; *Case C-324/09, L’Oréal v. eBay Int’l AG*, 2011 E.C.R. I-6011, ¶ 107.

43. *Case C-70/10, Scarlett Extended SA v. SABAM*, 2011 E.C.R. I-11959, ¶¶ 37–40; *Case C-360/10, SABAM v. Netlog NV*, ECLI:EU:C:2012:85, ¶¶ 36–38 (Feb. 16, 2012).

44. *Scarlett Extended SA*, 2011 E.C.R. I-11959, ¶ 39; *SABAM*, ECLI:EU:C:2012:85, ¶ 37.

Complementary to these three cumulative factors, arts. 14 and 15 ECD read in conjunction seem to provide the outer limit of what kind of obligation to monitor could still be tolerable under art 15 ECD. As Advocate General (AG) Szpunar argues, a broad interpretation of permissible obligations under art. 15 ECD may carry the risk that ISPs no longer qualify for immunities under art. 14(1) ECD.<sup>45</sup> The broader the monitoring obligation, the more likely it is for ISPs to have sufficient “actual knowledge” of illegal activity, which would strip them of their immunity under art. 14(1)(a) unless they immediately act to remove the content under 14(2)(b). Art. 14(3) ECD allows national authorities, notwithstanding the immunities of art. 14(1) ECD, to require ISPs to terminate or prevent infringements or to establish procedures governing the removal of content, thus presupposing the existence of the immunity. When read in conjunction, art. 15(1) ECD and art. 14(3) ECD do not seem to permit measures that would strip ISPs of their immunities under art. 14(1) ECD. Thus, the outer limit of general monitoring obligations seems to be that injunctions may not force ISPs to lose their immunity under arts. 14(1)(a) or (b) ECD.<sup>46</sup>

The ECJ has not yet developed a definition of what constitutes a specific obligation. But even before *Glawischnig-Piesczek*, there were some hints in the Directive and the case-law. As an initial matter, both arts. 14(3)<sup>47</sup> and 18 ECD<sup>48</sup> clearly allow Member States to impose obligations on ISPs for the future, which means that a monitoring obligation does not automatically become general in nature just because it is directed into the future.<sup>49</sup> Further, in a trademark case under the Intellectual Property Directive<sup>50</sup> (*L’Oréal v. eBay*<sup>51</sup>), the ECJ found permissible an obligation to prevent further “infringements of that kind” committed by the same seller with regard to the same trademarks.<sup>52</sup> The limits of this concept remain rather imprecise, but it seems like the ECJ is sympathetic to actions against further infringements that share all characteristics of the initial infringement. AG Szpunar argued

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45. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:458, ¶¶ 36–38 (June 19, 2019) (Opinion of Advocate General Szpunar).

46. *Id.* ¶¶ 39–40.

47. ECD, *supra* note 5, art. 14(3) (“This Article shall not affect the possibility for a court or administrative authority . . . of requiring the service provider to . . . prevent an infringement.”).

48. *Id.* art. 18 (“Member States shall ensure that court actions available under national law . . . allow for the rapid adoption of measures . . . designed to . . . prevent any further impairment of the interests involved.”).

49. ELONORA ROSATI, COPYRIGHT AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 158 (2019).

50. See generally Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 45.

51. Case C-324/09, *L’Oréal SA v. eBay Int’l AG*, 2011 E.C.R. I-6011, ¶ 139 (July 12, 2011).

52. *Id.* ¶ 141.

that this judgment was of a “cross-cutting nature”<sup>53</sup> so that a monitoring obligation is specific if it extends to the same kind of infringement of the same rights by the same user as originally at issue.<sup>54</sup>

Another suggested benchmark for what constitutes a specific monitoring obligation is its limited duration.<sup>55</sup> This idea originated from the opinion of AG Jääskinen in the *L’Oréal* case, where a time limitation was used to ensure proportionality of the injunction in question.<sup>56</sup> However, this is unconvincing. While proportionality of a monitoring obligation is important as a general principle of EU law,<sup>57</sup> it is not at all obvious that time limitations are able to make a monitoring obligation specific, because the distinction between general and specific obligations depends more on a substantive assessment than on a temporal limitation. A time limitation alone does little to make obligations more specific and less general, but merely suspends the obligation after a certain time.

In sum, significant uncertainty surrounded art. 15 ECD and its notions of general and specific obligations to monitor. It was unclear whether it mattered that the content was defamatory and therefore illegal and not a trademark or copyright law violation. In this situation, the ECJ opted for a strong protection of the interests harmed by defamatory content, a general orientation that influenced many key findings of the judgment.

## 2. Specific Monitoring Obligations—A Broad but Controllable Notion

As AG Szpunar observed,<sup>58</sup> the obligation to remove content identical or equivalent to illegal content means that all user content on the platform is subject to monitoring. Contrary to one possible reading of *Scarlett Extended* and *SABAM*, the ECJ did not treat the scope of the data to be monitored as decisive in determining whether a monitoring obligation is specific or general. Instead, the ECJ in *Glawischnig-Piesczek* found that a monitoring obligation is still specific if the monitoring of all content is focused on specific illegal content that has been defined by a court and its different reincarna-

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53. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:458, ¶ 43 (June 19, 2019) (Opinion of Advocate General Szpunar).

54. *See id.* ¶¶ 42–45; Case C-324/09, *L’Oréal v. eBay Int’l AG*, 2011 E.C.R. I-6011, ¶¶ 139, 141, 144.

55. *Glawischnig-Piesczek*, ECLI:EU:C:2019:458, ¶¶ 47, 49 (Opinion of Advocate General Szpunar); Case C-484/14, *McFadden v. Sony Music Ent. Ger. GmbH*, ECLI:EU:C:2016:170, ¶ 132 (Mar. 16, 2016) (Opinion of Advocate General Szpunar).

56. Case C-324/09, *L’Oréal SA v. eBay Int’l AG*, 2011 E.C.R. I-6019, ¶ 181 (Opinion of Advocate General Jääskinen).

57. Proportionality is accepted as a general principle of EU law since the founding days. *See* Case 8/55, *Fédération Charbonnière v. High Auth. of the Eur. Coal and Steel Cmty.*, 1956 E.C.R. 293, 299; *see generally* NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* 115–70 (1996).

58. *Glawischnig-Piesczek*, ECLI:EU:C:2019:458, ¶ 59 (Opinion of Advocate General Szpunar).

tions on the service. It is thus the scope of the material inquiry that defines whether a monitoring obligation is general or specific. A broad obligation to monitor all content for any illegality is general but monitoring all content for particular instances of illegal content is specific. This clearly resembles the holding in *L'Oréal*<sup>59</sup> and confirms the idea that once illegal content is identified and defined by a Court, the ISP can be asked to remove, or block content tainted by this kind of illegality.

It may seem counterintuitive to call a monitoring obligation of all content stored on a platform “specific;” however, such an obligation is targeted and specifically limited to the grounds for illegality at issue.<sup>60</sup> To prohibit this as a general obligation would render the protection of the rights of the defamed completely futile beyond the case in which the illegality of the content was established. It is this focus on the effective protection of the interest harmed by defamatory content that runs through the entire judgment.

Importantly, this kind of specific monitoring obligation does not strip the ISP of its immunity under art. 14(1) ECD, thus clearly respecting the outer limits of specific monitoring obligations.<sup>61</sup> To focus on one particular kind of content when sifting through the traffic can hardly lead to sufficient knowledge of illegal content to qualify for the loss of immunity because of “actual knowledge of illegal activity or information” under art. 14(1)(a) ECD. The use of “automated search tools and technologies”<sup>62</sup> also does not impact the immunities granted by the ECD.<sup>63</sup>

### 3. Recognizing the Dangers of Social Networks

Another important aspect of the ECJ’s focus on the protection of the interests harmed by the illegal content is the reliance on the specific nature of social networks and their dangers for personality rights.<sup>64</sup> For the ECJ, the nature of social networks and the risk of swift reproduction of illegal content justifies particular vigilance for the interests of the defamed user. This

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59. Case C-324/09, *L'Oréal v. eBay Int'l AG*, 2011 E.C.R. I-6011, ¶ 141 (“[I]f the operator of the online marketplace does not decide . . . to prevent further infringements of **that kind by the same seller** in respect of **the same trademarks**, it may be ordered, by means of an injunction, to do so.”) (emphasis added).

60. See, e.g., *id.* ¶¶ 37, 40, 41, 45.

61. See Daphne Keller, *Dolphins in the Net: Internet Content Filters and the Advocate General's Glawischnig-Piesczek v. Facebook Ireland Opinion*, STANFORD CTR. FOR INTERNET & SOC'Y (Sept. 4, 2019), <https://cyberlaw.stanford.edu/files/Dolphins-in-the-Net-AG-Analysis.pdf>.

62. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶ 46.

63. See Joined Cases C-236 to 238/08, *Google Fr. SARL v. Louis Vuitton Malletier*, 2010 E.C.R. I-2417, ¶¶ 114–117 (holding that the use of algorithms to organize and display content did not impact immunity under art. 14 ECD).

64. See *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, ¶ 36.

seems to be the reason why the ECJ allows the monitoring obligation irrespective of who uploaded the identical content.<sup>65</sup>

In so allowing, the ECJ departs from the requirement in *L'Oréal* that the future infringements to be prevented must not only be tainted by the same illegality in respect of the same trademarks, but must also stem from the same infringer.<sup>66</sup> Indeed, such a limiting factor would clearly ignore how social networks function and would overlook the specific dangers that the dissemination of illegal speech on these network poses for the rights of the person targeted by that speech. In defamation cases on social networks, this specific vigilance is the consequence of an approach focused on protection of the rights of the person damaged by the illegal content.

#### 4. Defining Identical and Equivalent Content

The ECJ extends the possible reach of injunctions against ISPs to content that is identical or equivalent to the content originally found to be illegal. The ECJ did not attempt to define what “identical content” means. It did, however, provide a definition of “equivalent content” as “information conveying a message the content of which remains essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality.”<sup>67</sup>

It is crucial to understand that the rights of the defamed are not endangered by exact phrases. As the ECJ correctly points out, it is the defamatory message conveyed that makes the statement at issue illegal.<sup>68</sup> Accordingly, it should be evident, as the ECJ points out, that the removal of equivalent content is the best way to ensure effective termination of infringements and further damages to the rights of the defamed.<sup>69</sup>

Concerns were raised against the obligation to take down identical content, as that would likely mean a prohibition of the text ruled to be defamatory, resulting in the removal of these phrases even when they are not illegal.<sup>70</sup> The ECJ has also been criticized for not providing a sufficiently clear definition of equivalent content.<sup>71</sup> This is a valid criticism: the conceivable appearances of a message with essentially unchanged content are numerous, as are the contexts in which phrases can appear. How much can change for the message to be “essentially unchanged”? Commentators have indicated

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65. *See id.* ¶ 37.

66. Case C-324/09, *L'Oréal v. eBay Int'l AG*, 2011 E.C.R. I-6011, ¶ 141.

67. *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, ¶ 39.

68. *Id.* ¶ 40.

69. *Id.* ¶ 41.

70. Keller, *supra* note 61, at 20.

71. Jennifer Daskal, *Speech Across Borders*, 105 VA. L. REV. 1605, 1625 (2019); Matthias C. Kettemann & Anna S. Tiedeke, *Welche Regeln, welches Recht?: Glawischnig-Piesczek und die Gefahren nationaler Jurisdiktionskonflikte im Internet*, VERFASSUNGSBLOG (Oct. 10, 2019), <https://verfassungsblog.de/welche-regeln-welches-recht>.



that this poses many unsolvable questions for the ISPs, making the implementation of the judgment “close to impossible.”<sup>72</sup>

A fair reading of the judgment, however, suggests that the treatment of identical or equivalent content is not nearly as murky or burdensome on ISPs as some might fear. The ECJ clearly is concerned with stopping the infringement of rights and the further impairment of the protected interests.<sup>73</sup> The injunctions the ECJ permitted here are designed to stop some identified illegality and its harms to the person concerned but do not go beyond this goal.

This reading is why an obligation to take down “identical” content—as long as it is truly that—should not be problematic, even for other users who might want to use these phrases in other contexts.<sup>74</sup> The ECJ allows national courts to stop the same harm caused by the same means. Content is only identical, and possibly the subject of an injunction, if it is not only an exact reproduction of that content, but if it also produces the identical infringement of rights. Using the problematic phrases in jest, in news coverage, or in academic writing<sup>75</sup> is not “identical content.”

The determination of what content is “equivalent” similarly must hinge on whether the content is illegal in the same way as the original content was. Because it is the illegality that must be stopped, any kind of statement that is tainted by the same features that made the original statement illegal must be considered “equivalent.” Once a national court establishes what makes the content at issue illegal, these considerations are the blueprint for the determination of what may count as equivalent content.

This determination requires significant work for the national courts that issue such injunctions. It is their job to clearly articulate what made the content at issue an illegal defamation. Insufficiencies in that regard may indeed pose practical problems for ISPs. However, the ECJ is aware of that problem and indicates that the injunctions must contain the information that turns content into equivalent content. The ECJ specifically asks national courts to include in their injunctions “the name of the person concerned by the infringement . . . , the circumstances in which that infringement was determined and equivalent content to that which was declared to be illegal.”<sup>76</sup>

It is thus primarily up to the national court issuing the injunction to define what qualifies as equivalent. The ISPs could benefit from this. Whatever content is not specifically identified as “equivalent content” in the injunction does not have to be treated as such. If national courts fail to adequately indicate what content they had in mind, ISPs could point to the ECJ’s re-

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72. Daskal, *supra* note 71, at 1625.

73. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶ 41 (Oct. 3, 2019).

74. *But cf.* Keller, *supra* note 61, at 19.

75. *Id.* at 19–20.

76. *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, ¶ 45.

quirement for clarifications to avoid having to deal with equivalent content.<sup>77</sup>

This responsibility of the national courts is not accidental. The ECD hands over all responsibility for injunctions under art. 14(3) ECD to the national courts. And under art. 18(1) ECD, it is the member state's obligation to create effective remedies in their own courts to combat infringements.

Even if national courts did not live up to their responsibilities and ISPs still wanted to comply, the ISPs would only have to refer to the reasons the national court gave for why it found the original content to be illegal. As soon as ISPs encounter any doubts in applying these standards, the content under review automatically does not qualify as equivalent, because the “[d]ifferences in the wording of that equivalent content . . . must not . . . be such as to require the host provider concerned to carry out an independent assessment of that content.”<sup>78</sup> The ISPs will thus always have the benefit of the doubt.

### 5. A Lopsided Protection of Interests?

The ECJ's interpretation of art. 15 ECD may seem lopsided and unduly focused on the interests harmed by illegal content without sufficient regard for the interests of the users posting content and the interests of the ISP. Leaving aside for the moment considerations based on fundamental rights (see *infra*, C.III.), the ECJ's judgment follows convincingly from the basic legislative choices made in passing the ECD and offers a plausible and convincing reading of the ECD.

First, the only content the ECD is concerned with is illegal content. Arts. 12–14 ECD deal with the immunities and obligations of ISPs in confrontation with illegal content and art. 15 ECD complements and limits these obligations of ISPs. The ECD does not define the illegality but is merely triggered by content found to be illegal under EU or national law with due regard to the applicable fundamental rights guarantees. But whatever content has triggered the application of the ECD, is unprotected speech. The interests of the speakers of this unprotected speech therefore do not warrant any protection under the ECD. In the case at hand, the illegality of the content at issue in the case had already been affirmatively established by the Austrian Supreme Court under Austrian law and it was for the ECJ only to decide on the interpretation of the ECD as triggered by this illegality.

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77. This construction allows the ECJ to bypass the problem of accountability for platforms if they must decide for themselves what kind of speech to censor. Kate Klonick, *The New Governors: The People, Rules and Processes in Governing Online Speech*, 131 HARV. L. REV. 1598, 1662-68 (2018).

78. *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, ¶ 45.

Second, the ECJ balances the interests of ISPs with the interests harmed by the content.<sup>79</sup> The ECJ, in application of recital 41 ECD, achieves this, as argued above, by handing over most of the responsibilities to the national courts and requires them to come up with detailed instructions for the ISPs. The possibility to rely on automated search tools is also considered as a factor that limits the burden on ISPs. Even if one may not agree with the result, the interests of ISPs surely are considered by the ECJ.

Third, the ECD on its own terms shows special solicitude for the interests harmed by illegal content. Art. 18(1) puts member states under an obligation to “ensure that court actions available under national law concerning information society services’ activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.” (emphasis added).

With this article, the legislature indicated a very protective attitude towards the victims of infringements. The ECJ chose to interpret the limits the ECD may place on injunctions with due regard to the ECD’s clear imperative to effectively protect the interests harmed. The ECJ thus took seriously the legislative decision to allow national courts to effectively protect the interests harmed by illegal content. Any other general orientation would have seriously misrepresented art. 18(1) ECD and would have turned the clearly expressed legislative intentions upside down.

The ECJ’s focus, therefore, does not lose sight of important aspects, but faithfully sticks to the ECD and the legislative decision to effectively protect against infringements through injunctions issued by national courts. If that seems lopsided, it is mostly because the legislature conceived the ECD the way it is now enforced by the ECJ.

### B. *The Problem of Automated Monitoring*

One of the most discussed aspects of the judgment was that it apparently opened the door to upload filters that many object to on fundamental rights grounds.<sup>80</sup> On one reading of the judgment, some of the ECJ’s cryptic

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79. See *id.* ¶¶ 43–47.

80. *CJEU Ruling on Fighting Defamation Online Could Open the Door for Upload Filters*, EDRi (Oct. 3, 2019), [https://edri.org/our-work/cjeu-ruling-on-fighting-defamation-online-could-open-the-door-for-upload-filters/#:~:text=a%20defamatory%20comment-.Some%20aspects%20of%20the%20decision%20could%20pose%20a%20threat%20for,filters%20for%20all%20online%20content.](https://edri.org/our-work/cjeu-ruling-on-fighting-defamation-online-could-open-the-door-for-upload-filters/#:~:text=a%20defamatory%20comment-.Some%20aspects%20of%20the%20decision%20could%20pose%20a%20threat%20for,filters%20for%20all%20online%20content.;); Eleftherios Chelioudakis, *The Glawischnig-Piesczek v. Facebook Case: Knock, Knock. Who’s There? Automated Filters Online*, KU LEUVEN CiTIP (Nov. 12, 2019), <https://www.law.kuleuven.be/citip/blog/the-glawischnig-piesczek-v-facebook-case-knock-knock-whos-there-automated-filters-online.>

remarks could be understood as requiring the use of filters and excluding human involvement to correct the mistakes filters make.<sup>81</sup>

The use of automated filters to combat illegal content has been fiercely debated, most recently in the context of the new Copyright Directive.<sup>82</sup> Using filters as a means to counter hate speech is especially controversial because it is very doubtful, to say the least, whether filters will ever be able to comprehend the subtleties in context that may differentiate defamation from satire or the innocent use of a phrase from a use of that phrase that could be hate speech.<sup>83</sup> The legally mandated use of a technology that apparently produces many false positives by blocking legal speech poses fundamental rights problems. There is an abundance of instances in which the use of filters has produced undesirable results and they range from amusing and annoying<sup>84</sup> to distressing.<sup>85</sup>

However, a close reading of the case reveals that the ECJ's remarks in this regard are far less problematic than they may seem. Specifically, the ECJ did not endorse or demand the use of filters uncontrolled by human oversight.

The impression that the ECJ endorsed automated filter technologies rests on two remarks in the judgment. First, the ECJ makes clear that the ISPs cannot be ordered to undertake an independent assessment of the legality of the content. Second, the ECJ mentions automated search tools and technologies to which the ISPs may have recourse.<sup>86</sup>

To begin with, the ECJ does not simply state that ISPs may not undertake an assessment of a content's illegality on their own. Rather, the ECJ delimits its notion of "equivalent content" by introducing the idea that any

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81. This reading is advanced by some of the most vocal critics of the judgment. See, e.g., Daphne Keller, *Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Piesczek Ruling*, 69 GRUR INT'L 616, 620–22 (2020).

82. Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92. For a critique, see Andrej Savin, *Regulating Internet Platforms in the EU – The Emergence of the 'Level Playing Field'*, 34 COMPUT. L. & SEC. REV. 1215, 1225 (2018).

83. See, e.g., Daskal, *supra* note 71, at 1625; Cindy Cohn, *Bad Facts Make Bad Law: How Platform Censorship Has Failed So Far and How to Ensure that the Response to Neo-Nazis Doesn't Make It Worse*, 2 GEO. L. TECH. REV. 432, 437–50 (2008).

84. Amber Ferguson, *Proud Mom Orders 'Summa Cum Laude' Cake Online. Publix Censors It: Summa . . . Laude.*, WASH. POST (May 22, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/05/22/proud-mom-orders-summa-cum-laude-cake-online-publix-censors-it-to-summa-laude>.

85. Tracy Jan & Elizabeth Dwoskin, *A White Man Called Her Kids the N-Word. Facebook Stopped Her from Sharing It.*, WASH. POST (June 31, 2017), [https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83\\_story.html](https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83_story.html).

86. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶¶ 45–46 (Oct. 3, 2019).

content that would require an independent assessment by the ISP does not constitute equivalent content. Content that requires an autonomous decision on its illegality by the ISP beyond the mechanical application of the national court's judgment, is not included in the ECJ's notion of "equivalent content."<sup>87</sup> This is important because the prohibition of an independent assessment of content does not per se exclude human involvement in the review process. Rather, it is a limiting factor in what the national court can ask the ISP to deal with in an injunction. Specifically, the national court cannot ask the ISP to look at content and force it to make up its own mind regarding this content's illegality. All the ISP can be asked to do is to mechanically apply the clear parameters set out by the national court in the injunction.

Because of this limit of the ISP's obligations, the ECJ points out that they can more easily use "automated search tools and technologies" to comply with injunctions. For the ECJ, the possibility to use such technologies is a factor in the balancing of the interests involved.<sup>88</sup> The combination of a narrow conception of "equivalent content" and the rising possibility of not having to rely exclusively on human judgment to detect such content<sup>89</sup> leads the ECJ to conclude that such obligations are not an exceeding burden on the ISPs. The ECJ focusses extensively on the narrow scope of the removal obligation, which signals that a broader obligation that would have required ISPs to make up their own minds as to the illegality of related content would have been excessive. But the obligation is narrower. It explicitly excludes autonomous judgment calls and facilitates the use of technologies in assisting the ISPs. The use of filters does not seem to be a requirement or necessity. The ECJ merely explains why in a situation where ISPs can resort to technologies to aid in their tasks, this task is not burdensome enough considering the other interests involved to not allow for such an obligation.

Therefore, nothing in the judgment requires the use of broadly sweeping filters that cannot be corrected by human involvement. Nothing in the judgment even indicates that the use of humans to monitor and correct the work of filters would be problematic or an undue burden. This is because the finding that the burden on the ISP is not too heavy rests on the fact that ISPs do not have to make up their own minds as regards the illegality of content—they can only be asked to mechanically apply the factors a national court identifies in an injunction. Because of that, the task may be facilitated by technologies.

It is true that the ECJ does not require human intervention to fix the mistakes automated filters could make. ISPs may, as a result, choose to use only filters to comply with such injunctions, preferring cheaper, blunt action instead of fine-tuned precision. However, it is not the ECJ's responsibility

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87. *Id.*

88. *Id.* ¶¶ 43, 46.

89. *Id.* ¶ 46.

to tailor to the needs of ISPs. Courts enforcing a law that aims to protect the interests harmed by illegal content should not need to weaken the protection of these interests just because those to which the law assigns the responsibility to prevent future harms might decide to use improper tools in their own economic interest. The ECJ's limited concept of equivalent content that ISPs can be asked to take down with its significant burden on national courts to define this content should aid the ISPs in not having to resort to broadly sweeping filters.

### C. *The Curious Absence of Fundamental Rights*

Even though the ECJ's approach has been very protective of the interests harmed by defamatory speech, more fundamental rights interests are involved. One of the most prominent critiques of the judgment was that it did not sufficiently deal with the fundamental rights issues raised by the case.<sup>90</sup> Indeed, the case raises many urgent fundamental rights questions, perhaps most pressingly the question of what kind of speech online can be banned and how the obligations of service providers to monitor and remove content affects fundamental rights of both the ISP and the users. It is true that the ECJ does not consider these points in the judgment and merely alludes to the necessity to ensure a balance between the burdens placed on a service provider and the person who was the subject of the defamatory content.<sup>91</sup> Neither the CFR, nor national fundamental rights, nor the European Convention on Human Rights (ECHR)<sup>92</sup> are even mentioned in the judgment.

Is the ECJ willfully ignoring obvious fundamental rights problems or was there simply no majority within the ECJ for any view on these issues? A thorough analysis of the case, the principles guiding the applicability of the CFR, and the complicated interplay of fundamental rights guaranteed by national law, EU law and the ECHR suggests a more balanced view. While the ECJ's silence on these matters may be highly frustrating from an academic point of view, there are good reasons why the ECJ did not engage in such an analysis. The case simply did not trigger the CFR's guarantees of free speech and freedom of information. Instead, these questions, for now, must be handled under national fundamental rights guarantees and the ECHR. Only the freedom to conduct a business under art. 16 CFR may have a role to play here.

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90. See, e.g., Kettemann & Tiedeke, *supra* note 71.

91. See *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, ¶¶ 43, 46.

92. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 [hereinafter ECHR].

## 1. Fundamental Rights Interests Involved

There are multiple fundamental rights interests involved in this case which are, *in abstracto*, all recognized by the CFR. Art. 11 CFR protects the freedom of expression of the user who posted the initial content, the user who posts identical and equivalent content, and other users to receive information. This right is subject to the limit of a proportionate restriction for the protection of the reputation and rights of others.<sup>93</sup> The removal order may also implicate Facebook Ireland's rights to conduct a business under art. 16 CFR. For the following reasons, however, most of these Charter rights were not applicable to the case and the ECJ was correct in not implicating them in its analysis.

## 2. Standard for the Applicability of the CFR

Art. 51(1) CFR governs the applicability of the CFR. It reads:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

While there is significant debate and still much uncertainty surrounding this provision,<sup>94</sup> the caselaw of the ECJ allows one to formulate some general tests to determine the Charter's applicability, workable enough to determine whether the CFR should have played a role in the case at hand.

### a. Applicability of the Charter in "The Scope of EU Law"

The wording of art. 51(1) CFR was inspired by certain parts of the ECJ's pre-Charter caselaw<sup>95</sup> which concerned situations in which EU law required a member state to act.<sup>96</sup> In other pre-Charter cases, in which Mem-

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93. This limit is expressly recognized in art. 10(2) ECHR, which applies by virtue of art. 52(3) CFR to the interferences with fundamental rights that the Charter allows under art. 52(1) CFR.

94. For an overview of the many uncertainties surrounding this provision, see Filippo Fontanelli, *The Implementation of European Union Law by Member States Under Art. 51 (1) of the Charter of Fundamental Rights*, 20 COLUM. J. EUR. L. 193, 234–43 (2014); Daniel Sarmiento, *Who's Afraid of the Charter: The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MKT. L. REV. 1267, 1272–87 (2013).

95. Case 5/88, *Wachauf v. Fed. Republic of Germany*, 1989 E.C.R. 2609, ¶ 19; Case C-2/92, *The Queen v. Ministry of Agric., Fisheries and Food ex parte Bostock*, 1994 E.C.R. I-955, ¶ 16; Case C-292/97, *Karlsson*, 2000 E.C.R. I-2737, ¶ 27.

96. These situations also encompass situations in which member states enjoy a discretionary power, which has to be exercised in accordance with other EU law provisions. *See, e.g.*, Joined Cases C-411 & 493/10, *N.S. v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-13905, ¶ 65.

ber States had derogated from EU law or in which EU fundamental rights were found to be inapplicable, the ECJ stated that Member States are bound by EU fundamental rights in areas which “fall within the scope of EU law.”<sup>97</sup> This restrictive phrase<sup>98</sup> finally adopted by the Charter was taken out of its context as a formulation to describe one category of EU fundamental rights application prior to the elaboration of a written catalogue of fundamental rights in the EU.<sup>99</sup> The official explanations relating to the Charter,<sup>100</sup> which serve as a basis for the CFR’s interpretation,<sup>101</sup> openly contradicted a limited understanding of the CFR’s applicability by asserting that Member States are bound by the CFR when “they act in the scope of [EU] law.”

Considering these developments, the ECJ in the case of *Åkerberg Fransson*<sup>102</sup> did not accept a role for the Charter that was limited to situations in which member states acted according to obligations imposed by EU law. The ECJ held that “the fundamental rights guaranteed by the Charter must . . . be complied with where national legislation falls within the scope of European Union law.”<sup>103</sup> This meant that “situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”<sup>104</sup> Given the CFR’s history, such a broad interpretation of art. 51 CFR could hardly have come as a surprise.<sup>105</sup>

97. See Case C-260/89, *Etairia v. Pliroforissis*, 1991 E.C.R. I-2925, ¶ 42; Case C-299/95, *Kremzow v. Republik Österreich*, 1997 E.C.R. I-2629, ¶¶ 15–17; Case C-309/96, *Anibaldi v. Sindaco del Comune di Guidonia*, 1997 E.C.R. I-7493, ¶¶ 10, 14.

98. See GUY BRAIBANT, *LA CHARTE DES DROIT FONDAMENTAUX DE L’UNION EUROPEENNE: TMOIGNAGE ET COMMENTAIRES* 251 (2001); Peter Goldsmith, *A Charter of Rights, Freedoms, and Principles*, 38 COMMON MKT. L. REV., 1201, 1204-05 (2001).

99. Fabrice Picod, *Art. 51 – Champ d’Application*, in *CHARTRE DES DROITS FONDAMENTAUX DE L’UNION EUROPEENNE: COMMENTAIRE ARTICLE PAR ARTICLE* ¶ 22 (Fabrice Picod & Sébastien van Drooghenbroeck eds., 2017).

100. Explanations Relating to the Charter of Fundamental Rights, O.J. (C 303) 17.

101. Consolidated Version of the Treaty on the Functioning of the European Union art. 6, Dec. 13, 2007, 2012 O.J. (C 326) 1 (“The rights, freedoms and principles in the Charter shall be interpreted . . . with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”); Charter of Fundamental Rights of the European Union art. 52(7), Oct. 26, 2012, 2012 O.J. (C 326) 391 (“The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”); see also Case C-279/09, *Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 2010 E.C.R. I-13849, ¶ 32.

102. Case C-617/10, *Åklagaren v. Fransson*, ECLI:EU:C:2013:105 (Feb. 26, 2013).

103. *Id.* ¶ 21.

104. *Id.*

105. Bernhard Schima, *EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ’s Case Law in Its Context*, 38 *FORDHAM INT’L L.J.* 1097, 1107 (2015). Such an understanding had already clearly been on the rise by that time. See, e.g., Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 *COMMON MKT. L. REV.* 945, 993 (2002); Thomas von Danwitz & Katherina Paraschas, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*,



The ECJ thus established the formula of the “scope of EU law” as the governing approach to the interpretation of art. 51 CFR. Apart from some hints,<sup>106</sup> the ECJ, however, did not set a standard for the determination of the “scope of EU law.”<sup>107</sup>

#### b. Test: “A Degree of Connection”

After heavy criticism,<sup>108</sup> the ECJ tried to explain how the applicability of the CFR in cases beyond the implementation of EU law may be determined. After all, the CFR is only a bill of rights specifically for EU law<sup>109</sup> and not, contrary to the ECHR, a minimum standard for human rights in all of Europe. It presupposes the applicability of EU law to a case. Accordingly, the CFR’s applicability depends on “a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.”<sup>110</sup>

35 FORDHAM INT’L L.J. 1396, 1406 (2012); Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375, 385 (2012); Case C-108/10, *Scattolon v. Ministero dell’Istruzione, dell’Università e della Ricerca*, 2011 E.C.R. I-7491, ¶¶ 118–19. The inclusion of the *Wachauf* situation within art. 51 CFR had arguably already been endorsed by the ECJ in Case C-145/09, *Baden-Württemberg v. Tsakouridis*, 2010 E.C.R. I-11979, ¶ 52.

106. See *Fransson*, ECLI:EU:C:2013:105, ¶¶ 24–30; Schima, *supra* note 105, at 1108.

107. See Emily Hancox, *The Meaning of Implementing EU Law under Article 51 (1) of the Charter: Akerberg Fransson*, 50 COMMON MKT. L. REV. 1411, 1423 (2013). Post-*Fransson* orders with inconsistent reasoning that declined the application of the CFR also did not shed much light on the ECJ’s stance. The ECJ declined application of the Charter in Case C-457/09, *Chartry v. État belge*, 2011 E.C.R. I-819, ¶ 25, and Case C-339/10, *Estov v. Ministeri savet na Republika Bulgaria*, 2010 E.C.R. I-11465, ¶ 14, for lack of a connection of the case to EU law, but also formulated concern that the national measure in question did not implement EU law. See Case C-434/11, *Corpul National al Politislor v. Ministerul Administrației și Internelor*, 2011 E.C.R. I-196, ¶ 16; Case C-128/12, *Sindicato dos Bancários do Norte v. Banco Português de Negócios SA*, ECLI:EU:C:2013:149, ¶ 12 (Mar. 7, 2013).

108. See Fontanelli, *supra* note 94, at 216–17. The German Federal Constitutional Court even saw the *Fransson* case as a possible threat to national sovereignty. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 2013, 133 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 277, 313, ¶¶ 88–91 (Ger.).

109. According to art. 6(1) TEU, “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” To that effect, see Case C-400/10, *McB. v. L. E.*, 2010 E.C.R. I-8965, ¶ 51; Case C-256/11, *Dereci v. Bundesministerium für Inneres*, 2011 E.C.R. I-11315, ¶ 71; *Fransson*, ECLI:EU:C:2013:105, ¶ 23; Case C-483/12, *Pelckmans Turnhout NV v. Walter Van Gastel Balen NV*, ECLI:EU:C:2014:304, ¶ 21 (May 8, 2014); Lenaerts, *supra* note 105, at 377.

110. Case C-206/13, *Siragusa v. Sicilia*, ECLI:EU:C:2014:126, ¶ 24 (Mar. 6, 2014). This test has become part of the ECJ’s settled jurisprudence. See, e.g., Case C-198/13, *Hernández v. Reino de España*, ECLI:EU:C:2014:2055, ¶ 34 (July 10, 2014); Case C-562/12, *Liivimaa Lihaveis MTÜ v. Eesti-Läti programmi 2007–2013 Seirekomitee*, ECLI:EU:C:2014:2229, ¶ 62 (Sept. 17, 2014); Case C-218/15, *Paoletti v. Procura della Repubblica*, ECLI:EU:C:2016:748, ¶ 14 (Oct. 6, 2016); Joined Cases C-177 & 178/17, *Sas v. Ministero della Giustizia*, ECLI:EU:C:2017:656, ¶ 19 (Sept. 7, 2017). The ECJ itself traces the formulation back to the pre-Charter Case C-299/95, *Kremzow v. Republik Österreich*, 1995 E.C.R. I-

The ECJ later established a (non-exhaustive) list of factors to establish such a connection: (1) whether the national legislation is intended to implement a provision of EU law; (2) the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; (3) whether there are specific rules of EU law on the matter or rules which are capable of affecting it.<sup>111</sup> The ECJ also stressed the maintenance of previous case-law limiting the applicability of EU fundamental rights to member states.<sup>112</sup> Notably, EU fundamental rights are not applicable to national measures if EU law does not impose specific obligations on the Member States in this regard,<sup>113</sup> if the national measure was not adopted within the framework of measures adopted under EU law,<sup>114</sup> and if the only connection of EU law to the measure in question is the fact that the EU also possesses power in this area.<sup>115</sup> Furthermore, the ECJ pointed out that EU fundamental rights protection is necessary when the application of different, varying fundamental rights would undermine the unity, primacy, and effectiveness of EU law.<sup>116</sup>

This analysis shows that the ECJ has chosen to undertake a case-by-case analysis of the applicability of the CFR.<sup>117</sup> The case-law of the ECJ oscillates between an expansive understanding of the CFR and the more limited requirement of a substantive link of a given case to EU law. But the general sentiment in all the judgments is that the CFR is the “shadow of EU

2629, ¶ 16. A similar sentiment had, in a different context, already been expressed in Case 149/77, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1978 E.C.R. 1365, ¶¶ 29–33.

111. *Hernández*, ECLI:EU:C:2014:2055, ¶ 37. This enumeration was introduced in Case C-40/11, *Iida v. Ulm*, ECLI:EU:C:2012:691, ¶ 79 (Nov. 8, 2012), on citizenship, drawing inspiration from Case C-309/96, *Annibaldi v. Sindaco del Comunedì Guidonia*, 1997 E.C.R. I-7493, ¶¶ 21–23. This approach was thought to have been overruled by *Fransson*. See *Sarmiento*, *supra* note 94, at 1276. However, later citizenship cases rejected this idea. See Case C-87/12, *Ymeraga v. Ministre du Travail*, ECLI:EU:C:2013:291, ¶ 41 (May 8, 2013).

112. *Hernández*, ECLI:EU:C:2014:2055, ¶¶ 35–36.

113. Case 144/95, *Ministère Public v. Maurin*, 1996 E.C.R. I-2909, ¶¶ 11–12; *Siragusa*, ECLI:EU:C:2014:126, ¶¶ 26–27.

114. Case C-427/06, *Bratsch v. Bosch und Siemens Haugeräte*, 2008 E.C.R. I-7245, ¶ 18; Case C-555/07, *Küçükdeveci v. Swedex*, 2010 E.C.R. I-00365, ¶ 25; Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, 2011 E.C.R. I-03591, ¶ 61.

115. See, e.g., *Joined Cases C-483/09 & 1/10, Gueye*, 2011 E.C.R. I-08263, ¶¶ 55, 69, 70; Case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756, ¶¶ 104, 105, 180, 181 (Nov. 22, 2012).

116. *Siragusa*, ECLI:EU:C:2014:126, ¶ 25. This is mirrored by the fact that the CFR allows for the application of national standards within its scope of application, as long as unity, primacy, and effectiveness of EU law are respected. See Case C-399/11, *Melloni v. Fiscal*, ECLI:EU:C:2013:107, ¶¶ 58–60 (Feb. 26, 2013).

117. *Schima*, *supra* note 105, at 1123.

law” and goes wherever EU law goes.<sup>118</sup> With this in mind, the role for the CFR in the *Glawischnig-Pieszcek* case was rather limited.

### 3. Application to the Case

As this note has argued, the fundamental rights questions raised by upload filters were not for the ECJ to decide. But there are other fundamental rights issues that are related to the case. They are, however, not properly dealt with under EU law. They must be dealt with under national law and the ECHR.

At the outset, it is important to note that the scope of the ECJ’s review was limited in two important ways. First, the Austrian Supreme Court had only asked about situations in which content had already been identified as illegal under domestic law. Second, the ECJ was only asked to decide whether the ECD would stop the Austrian Supreme Court from ordering what it would have ordered under national law. All other questions were *ultra petita* for the ECJ.

The nature of the preliminary reference procedure before the ECJ only emphasizes these limits. It is the sole responsibility of the national courts to determine the need for a preliminary ruling and the relevance of the questions referred to the ECJ and the ECJ is then bound to give a ruling on the questions referred.<sup>119</sup> The questions referred by a national court can significantly predetermine the perspective the ECJ has on a case.

More specifically, the ECJ can only interpret EU law, never national law.<sup>120</sup> The ECJ is able to narrow down a question<sup>121</sup> and take into account

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118. Koen Lenaerts & José A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 1559, 1566–67 (Steve Peers et al. eds., 2014).

119. For recent examples, see Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:400, ¶ 24 (June 16, 2015); Case C-304/16, *Am. Express Co. v. The Lords Comm’rs of Her Majesty’s Treasury*, ECLI:EU:C:2018:66, ¶ 31 (Feb. 7, 2018); Case C-621/18, *Wightman v. Sec’y of State for Exiting the Eur. Union*, ECLI:EU:C:2018:999, ¶ 26 (Dec. 10, 2018).

120. See, e.g., Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5123, ¶¶ 55–56; Case C-19/00, *SIAC Construction Ltd. v. Mayo Cnty. Council*, 2001 E.C.R. I-7725, ¶ 30; Case C-390/99, *Canal Satélite Digital v. Administración General del Estado*, 2002 E.C.R. I-607, ¶ 24; C-212/04, *Adeneler v. Ellinikos Organismos Galaktos*, 2006 E.C.R. I-6057, ¶ 103; Case C-328/04, *Vajnai v. Hungary*, 2005 E.C.R. I-8577, ¶ 13; Case C-287/08, *Crocefissa Savia v. Ministero dell’Istruzione, dell’Università e della Ricerca*, 2008 E.C.R. I-136; Case C-345/09, *Van Delft v. College voor Zorgverzekeringen*, 2010 E.C.R. I-9879, ¶¶ 110–115; Case C-23/12, *Zakaria v. Latvia*, ECLI:EU:C:2013:24, ¶ 29 (Jan. 17, 2013).

121. See, e.g., Case 83/78, *Pigs Mktg. Bd. v. Redmond*, 1978 E.C.R. 2347, ¶¶ 25–26; Case 35/85, *Procureur de la Republique v. Tissier*, 1986 E.C.R. 1207, ¶¶ 5–11; Case C-228/98, *Dounias v. Ipourgos Ikonomikon*, 2000 E.C.R. I-577, ¶ 36; Case C-560/15, *Europa Way Srl v. Autorità per le Garanzie nelle Comunicazioni*, ECLI:EU:C:2017:593, ¶¶ 35–36 (July 26, 2017); Case C-189/18, *Glencore Agriculture Hungary Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2019:861, ¶ 31 (Oct. 16, 2019).

EU law provisions not referred to in the reference if their interpretation is necessary to give a complete answer to the question.<sup>122</sup> But the Court is often reticent to address problems other than those submitted by the national court.<sup>123</sup> The ECJ only breaks with this rule if these further issues were clearly raised before the national court as a problem of EU law and if the ECJ itself has been thoroughly briefed on the issue.<sup>124</sup> Anyone who had hoped for a sweeping clarification from the ECJ on all the delicate issues concerning the regulation of online speech risked a serious disappointment.

This limitation means that the question is not whether there is some way the ECJ could have dealt with the fundamental rights issues this case may present. Rather, it must be asked whether these questions arise in this case as a matter of interpretation of the ECD. They do not.

#### a. Declaring Defamatory Content Illegal

The question of which kind of online speech may be banned does not fall under the ECD and thus not within the “scope of EU law” relevant for this case. The ECD docks to the otherwise established illegality of content. The interpretation of the ECD with which the ECJ was tasked in this case does not involve determining the illegality of content. Rather, the illegality of online content is a prerequisite for the involvement of the ECD, notably for the immunities it grants and the injunctions it allows. Any fundamental rights questions raised by declaring certain online content illegal are thus of no interest to the ECD and, by extension, to the CFR.

To begin with, it should be noted that the EU lacks any consistent policy on Internet content regulation. EU law only offers sector specific provisions which, as far as speech is concerned, mostly deal with jurisdiction, choice of law and the responsibilities of ISPs.<sup>125</sup> The EU has not harmonized substantive defamation law<sup>126</sup> and it is doubtful that it could in a general

122. See, e.g., Case C-387/01, *Weigel v. Finanzlandesdirektion für Vorarlberg*, 2004 E.C.R. I-4981, ¶ 44; Case C-275/06, *Promusicae v. Telefónica de España SAU*, 2008 E.C.R. I-271, ¶¶ 42–46; Case C-341/08, *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, 2010 E.C.R. I-47, ¶¶ 47–50; Case C-461/10, *Bonnier Audio v. Perfect Comm’n Swed.*, ECLI:EU:C:2012:219, ¶¶ 45–50 (Apr. 19, 2012); Case C-636/11, *Berger v. Freistaat Bayern*, ECLI:EU:C:2013:227, ¶ 31 (Apr. 11, 2013). For recent examples, see Case C-222/18, *VIPA Kereskedelmi és Szolgáltató Kft. v. Országos Gyógyszerészeti és Élelmezés-egészségügyi Intézet*, ECLI:EU:C:2019:751, ¶ 50 (June 12, 2019); Case C-671/18, *Centraal Justitieel Incassobureau v. Z. P.*, ECLI:EU:C:2019:1054, ¶ 26 (Dec. 5, 2019).

123. See, e.g., Case C-338/89, *Slagterier v. Landbrugsministeriet*, 1991 E.C.R. I-2315, ¶ 14; Case C-131/97, *Carbonari v. Università degli Studi di Bologna*, 1999 E.C.R. I-1103, ¶¶ 48–53; Case C-311/08, *SGI v. Etat Belge*, 2010 E.C.R. I-487, ¶¶ 19–23.

124. See Joined Cases C-95 & 96/07, *Ecotrade v. Agenzia delle Entrate – Ufficio di Genova 3*, 2008 E.C.R. I-3457, ¶¶ 35–38; Case C-362/14, *Schrems v. Data Protection Comm’r*, ECLI:EU:C:2015:650, ¶ 67 (Oct. 6, 2015).

125. SAVIN, *supra* note 26, at 130, 142.

126. *Id.* at 130.

manner.<sup>127</sup> The ECD especially shows awareness for its limits, stressing in recital 9 that “this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.” This alone, of course, does not exclude any interaction of the ECD with the freedom of expression or the applicability of the CFR. But it shows that EU law is happily deferring to national guarantees of freedom of expression.

More specifically, this is demonstrated by how the relevant provisions of the ECD function and how they interact with national law. In section 4, the ECD sets up a common framework for ISPs in their confrontation with illegal content but it nowhere defines what makes content illegal. Both the ISP immunities (arts. 12–14 ECD) and the ban on general monitoring obligations (art. 15 ECD) are triggered by the existence of illegal content but the ECD has no role in determining the content’s illegality. The ECD does not reach the question of what content is illegal. And because the ECD does not go into the questions of content illegality, the CFR also cannot go there as a “shadow” of the ECD.

The illegality of content that triggers the ECD could result from national law, but it could also be a result of EU law. If certain EU legislation could harmonize the standard for the illegality of certain content, this piece of EU legislation would reach the determination of illegality and trigger the applicability of the CFR to deal with the fundamental rights issues arising from this determination of illegality. However, the applicability of the CFR would be triggered by EU law’s harmonization of standards for illegality, not by the ECD.

There is, however, no legal standard resulting from EU law concerning the illegality of defamatory content.<sup>128</sup> The illegality of the content at issue in *Glawischnig-Piesczek* resulted from Sec. 78 UrhG (Law on Copyright) and Sec. 1330 (1) ABGB (General Civil Code), which, at least insofar as they protect against defamatory speech, cannot be traced back to any EU legislation. Sec. 78 UrhG,<sup>129</sup> a copyright statute, is a prohibition on the dissemination of images harming the legitimate interests of a person. And Sec.

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127. Specific EU law provisions on content control do exist in Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), O.J. 2010 (L 95) 1. But they are limited to specific issues that arise indirectly from the otherwise regulated area. See SAVIN, *supra* note 26, at 142.

128. SAVIN, *supra* note 26, at 130.

129. Urheberrechtsgesetz [UrhG] [Copyright Act], July 1, 1936, BGBL I at 1273 § 78 (1) (Ger). (“Images representing a person must neither be displayed publicly nor otherwise publicly disseminated in another way, if this harms the legitimate interests of the person pictured . . .”) (translation provided by the author).

1330(1) ABGB<sup>130</sup> provides compensation for anyone who has suffered actual harm or loss of profit owing to an injury of their honor. The ECD docks to those kinds of statutes without any substantive or formal link to them. The substantive reasons for this illegality do not matter to the ECD, which by design takes its cue from an external determination of illegality.

Different standards of the illegality of certain content are the default setting under which the ECD operates. Accordingly, it seems strenuous at best to construct a sufficient connection between the ECD and the national norms that determine content illegality which would trigger the guarantees of the CFR in the application of these national norms. In cases where a national norm merely triggers the ECD instead of another EU norm, EU law simply is not concerned with the substantive determination of illegality. Because EU law does not reach these questions, the Charter cannot reach them either.

#### b. Designing Injunctions

A little more delicate is the question whether the CFR should have played a more prominent role in establishing what kind of injunctions art. 15 ECD and art. 18 ECD allow.

The ECD, despite granting immunities to ISPs in arts. 12–14, specifically allows for injunctions against the ISPs to terminate or prevent infringements in arts. 12(3), 13(2), and 14(3) ECD. Art. 18(1) ECD further puts member states under an obligation to make measures available under national law to terminate any infringement and protect against further infringements. Any injunction like the one issued by the Austrian Courts in this case can be understood as a fulfillment of this obligation. As such, in issuing injunctions, member states courts are effectively “implementing EU law.” Because EU law governs these kinds of injunctions, the CFR “shadows” EU law in this respect. The CFR must thus generally be respected by these injunctions. In determining what these injunctions may look like regarding the limits of the ECD, the ECJ must have due regard to the guarantees of the CFR. This requirement means that the question whether art. 15 ECD allows a national court to include identical or equivalent content in an injunction must, as a general matter, comply with the CFR. Yet, things are more complicated than this.

It must be noted, again, that the ECD fully defers to other sources of law to define the infringements that injunctions can target. In the *Glaw-ischnig-Piesczek* case, these happen to be national sources of law not subject to the CFR. Even though the existence and the extent of the injunctions is determined by EU law, the infringement which they are targeting is not de-

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130. Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code], Jan. 1, 1917, § 1330 (Ger). (“If anyone has sustained actual harm or loss of profit through defamation, he is entitled to demand compensation.”) (translation provided by the author).

terminated by EU law. In this regard, the ECJ's interpretation of art. 15 ECD and the injunctions it allows only extends to content which shares in all respects all the relevant characteristics that led national courts to find the original content illegal. Any interests of the creator content and any interests of another user who wishes to view this content are exactly the same interests that were at play with regard to the initial content and were found to be un-compelling under national law.

This interpretation means that the fundamental rights interests involved in the decision to extend the injunction to identical and equivalent content are merely duplications of fundamental rights decisions made under national law. All the identical or equivalent postings could individually be subject to an injunction and the CFR would have absolutely no role in determining whether these contents could be declared illegal and included in injunctions.

If the CFR got involved in determining whether the extension of the injunction to identical or equivalent content is possible, the CFR would be able to prohibit the extension of one injunction to content which, as a matter of EU law, could be subject to individual injunctions, even though the fundamental rights interests at issue do not differ at all. The CFR would have to take issue with extending the injunction to content that by itself was also perfectly suited to be included in an injunction. This means that when evaluated under the CFR, the determination of illegality and the balance of interests involved would have to come out differently than it would have under national law. To check the extension of injunctions to identical or equivalent content for its compliance with the CFR thus also means to second-guess the national determination of illegality, which could not be questioned if it were made in individual injunctions.

To establish such a backdoor is extremely problematic, given the limits of the CFR. EU defamation law is non-existent and EU law generally defers to national law in these matters. In this particular situation, the design of the injunction, which came within the scope of EU law, would force EU law to determine the illegality of content, which EU law tends to fully avoid and does not, as a matter of the ECD, have any business in. The material link of the breadth of injunctions and the content's illegality does not seem strong enough to extend the CFR to these questions. It would therefore be an undue intrusion of EU law into the reserved sphere of the member states if the CFR were able to second guess fundamental rights determinations by the member states through the backdoor of ECD injunctions.

Still, any other question regarding the design and impact of the injunctions, warrants the application of the CFR. For example, it could be debated whether the ECJ should have considered the incentives broad injunctions set for the over-policing content. The dangers of over-blocking are regularly

recounted whenever ISPs are required by law to moderate content.<sup>131</sup> But as even the most ardent critics of measures allegedly leading to over-blocking must admit, over-blocking is an economically driven reaction by the ISPs to shield themselves against liability for under-blocking.<sup>132</sup> It is far from clear why the detriment to rights caused by an economic choice to over-enforce rules that demand nothing but the elimination of illegal content should be attributed to the state as an abridgment of fundamental rights. Because over-blocking is not mandated by the laws and merely an economically motivated reaction by ISPs to deal with their removal obligations, the ISPs and not the state or the laws are to blame for this phenomenon. Over-blocking concerns may be legitimate in a policy debate, but over-blocking is not a direct, legally mandated consequence of these laws that should lead courts to underenforce removal obligations out of fear that companies might bluntly do more than they are required to.

### c. Fundamental Rights of ISPs

Unlike the speech related fundamental rights determinations, any other aspect of the design and impact of the injunctions under the ECD is subject to a review under the CFR. Most notably, this means that the right of the ISP to conduct a business under art. 16 CFR is involved.

The case-law of the ECJ recognizes a limited scope of this right. Art. 16 CFR protects the freedom to exercise an economic activity, freedom of contract, and free competition.<sup>133</sup> It extends to the protection of business secrets<sup>134</sup> and encompasses the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and

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131. Most statistical and anecdotal evidence comes from the experience with the DMCA safe harbors. See, e.g., Jennifer Urban et al., *Takedown in Two Worlds: An Empirical Analysis*, 64 J. COPYRIGHT SOC'Y 483, 489, 514–20 (2018) (analyzing “288,675 notices containing well over 100 million (108,331,663) individual takedown requests—i.e., claims of infringement.”).

132. For a critique that the GDPR sets such incentives, see Daphne Keller, *The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33 BERKELEY TECH. L.J. 297, 332 (2018).

133. Case C-134/15, *Lidl GmbH & Co. v. Freistaat Sachsen*, ECLI:EU:C:2016:498, ¶ 28 (June 30, 2016). The right to exercise economic or commercial activity dates back to cases like Case 4/73 *Nold v. Comm'n of the Eur. Cmty.*, 1974 E.C.R. 491, ¶ 14, and Case 230/78, *SpA Eridiana v. Minister Agric. & Forestry*, 1979 E.C.R. 2749, ¶¶ 20, 31. The right to freedom of contract had been recognized, inter alia, in cases such as Case 151/78, *Nykøbing v. Ministry of Agric.*, 1979 E.C.R. 1, ¶ 19, and Case C-240/97, *Spain v. Comm'n*, 1999 E.C.R. I-6571, ¶ 99. Free competition is recognized by TFEU arts. 119 (1) and (3).

134. Case C-1/11, *Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Mgmt.-Gesellschaft Rheinland-Pfalz mbH*, ECLI:EU:C:2012:194, ¶ 43 (Mar. 29, 2012).



financial resources available to it.<sup>135</sup> However, the success rate of claims related to art. 16 CFR has been exceptionally low before the ECJ.<sup>136</sup>

In contrast to *Scarlet*,<sup>137</sup> in which the ECJ found the injunction at issue to be a disproportionate limitation of art. 16 CFR, because the injunction did not strike a fair balance of the interests involved,<sup>138</sup> the ECJ did not undertake such a balancing test under art. 16 CFR in *Glawischnig-Piesczek*. But the ECJ resorted to a balancing test inspired by recital 41 of the Directive,<sup>139</sup> finding that interpretation of art. 15 ECD struck a fair balance between the different interests protected by the ECD.<sup>140</sup> It is not obvious that conducting this balancing test under art. 16 CFR would have changed the outcome of the case.

#### d. The Role of the ECJ, National Law and the ECHR

Vigilance for fundamental rights protection is obviously very important. Even though the ECJ has become a vigorous defender of Charter rights,<sup>141</sup> commentators should not give the ECJ an easy pass when fundamental rights are not duly considered. However, as the foregoing considerations have tried to show, applying the CFR can be a tricky business and a thorough analysis of its scope is often warranted.

For now, critics of the fundamental rights situation in the *Glawischnig-Piesczek* case must turn to the guarantees of fundamental rights in the mem-

135. Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, ECLI:EU:C:2014:192, ¶ 49 (Mar. 27, 2014).

136. Peter Oliver, *What Purpose Does Article 16 of the Charter Serve?*, in *GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW* 281 (Ulf Bernitz et al. eds. 2013).

137. Case C-70/10, *Scarlet Extended SA v. SABAM*, 2011 E.C.R. I-11959.

138. *Id.* ¶ 53.

139. Recital 41 states: “This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.”

140. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶ 46 (Oct. 3, 2019).

141. For examples regarding arts. 7 and 8 CFR, see *Joined Cases C-92 & 93/09 Schecke v. Land Hessen*, 2010 E.C.R. I-11063; *Joined Cases C-293/12 & C-594/12, Digital Rights Ireland v. Minister for Comms., Marine & Nat. Resources*, ECLI:EU:C:2014:238 (Apr. 8, 2014); *Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014); *Case C-362/14, Schrems v. Data Protection Comm’r*, ECLI:EU:C:2015:650 (Oct. 6, 2015); *Joined Cases C 203/15 & C 698/15, Tele2 Sverige AB v. Post-och telestyrelsen*, ECLI:EU:C:2016:970 (Dec. 21, 2016); *Opinion 1/15, Transfer of Passenger Name Record Data from the European Union to Canada*, ECLI:EU:C:2017:592 (July 26, 2017); *Case C-311/18, Data Prot. Comm’r v. Facebook Ireland*, ECLI:EU:C:2020:559 (July 16, 2020); *Joined Cases C-511/18, C-512/18 & C-520/18, La Quadrature du Net v. Premier ministre and Ordre des barreaux francophones et germanophones v. Conseil des ministres*, ECLI:EU:2020:791 (Oct. 6, 2020); *Case C-623/17, Privacy Int’l v. Sec’y of State for Foreign and Commonwealth Affs.*, ECLI:EU:C:2020:790 (Oct. 6, 2020).

ber states and to the ECHR.<sup>142</sup> In particular, Austria has had certain problems in the past in complying with art. 10 ECHR.<sup>143</sup> It is the responsibility of the Austrian courts and the European Court of Human Rights (ECtHR) to ensure compliance with the ECHR. Any fundamental rights-based objections to the *Glawischnig-Piesczek* judgment could have been raised in those venues, but it was not for the ECJ to ensure Austria's compliance with the ECHR. Instead, the ECJ left intact the delicate separation of responsibilities created by the three layers of European fundamental rights protection.

### D. Global Removal Orders: Respecting the Limits of EU Law

What makes *Glawischnig-Piesczek* so intriguing is that it does not only deal with intricate questions of speech rights on the Internet and the regulation of ISPs but that it also ventures into the delicate jurisdictional questions Internet governance poses. The Austrian Supreme Court also submitted a question to the ECJ regarding the territorial scope of the injunctions it planned to issue against Facebook and was seeking clarification on the limits EU law might set in this regard. The ECJ's answer was as short and simple as it was compelling: not many.

#### 1. A Bête Noire of Internet Regulation

Some commentators display an almost reflexive rejection of any kind of Internet removal orders with extraterritorial reach.<sup>144</sup> The emotions run high in these matters and the fact that a coherent theory of jurisdiction in online cases still has not been found<sup>145</sup> adds to the difficulty of the discussion. The

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142. For a comprehensive study of the ECtHR's case-law on the Freedom of Expression of the Internet, see generally WOLFGANG BENEDEK & MATTHIAS C. KETTEMANN, *LIBERTÉ D'EXPRESSION ET INTERNET* 23–54 (2013).

143. See, e.g., *Lingens v. Austria*, App. No. 9815/82 (1986); *Oberschlick v. Austria I*, App. No. 11662/85 (1991); *Oberschlick v. Austria II*, App. No. 10834/92 (1997); see generally Lukas Gahleitner, *Wie meinen?*, JURIDIKUM, 2019, at 123.

144. Keller, *supra* note 61, at 35; Dan J. Svantesson, *Grading AG Szpunar's Opinion in Case C-18/18 – A Caution Against Worldwide Content Blocking as Default*, 13 MASARYK U. J.L. & TECH. 389, 400 (2019) [hereinafter Svantesson, *Grading AG Szpunar's Opinion*] (asserting that a “court with jurisdiction founded in EU law does not enjoy unfettered global jurisdiction just because it applies national law.”); Dan J. Svantesson, *Bad News for the Internet as Europe's Top Court Opens the Door for Global Content Blocking Orders [Amended Again]*, LINKEDIN (Oct. 3, 2019), <https://www.linkedin.com/pulse/bad-news-internet-europes-top-court-opens-door-global-svantesson> [hereinafter Svantesson, *Europe's Top Court*].

145. Although, there are some preliminary works in this direction. For a list of works by the Internet and Jurisdiction Policy Network, see generally INTERNET & JURISDICTION POL'Y NETWORK, <https://www.internetjurisdiction.net/work/content-jurisdiction> (last visited Oct. 2, 2020).

ECJ adds extremely little to this discussion by offering only five short paragraphs.<sup>146</sup>

The reasons supporting global removal orders in Internet cases rest mostly on efficiency concerns in the light of the global nature of the Internet. This is illustrated by the Supreme Court of Canada's holding in the case of *Google Inc. v. Equustek Solutions Inc.*, an intellectual property case, in which the court upheld a takedown order with worldwide effect.<sup>147</sup> Critics lament the inconsistency of such a possibility with comity.<sup>148</sup> Others argue that comity does not require an automatic deference to interests of other states, but only to determine whether such interests exist and then to seriously consider whether they are worth deferring to.<sup>149</sup> Some called the *Equustek* judgment "ominous,"<sup>150</sup> "potentially quite dangerous,"<sup>151</sup> and warned that it could be abused by authoritarian regimes to globally delist any unwelcome content from online search results.<sup>152</sup> Its defenders point to the carefully crafted limiting principles set out in the *Equustek* case.<sup>153</sup> It is also argued that enforceability of such global removal orders would, at least in the United States, not be automatic, but could be denied if "the cause of action . . . or the judgment itself, is repugnant to the public policy of the United States . . . ."<sup>154</sup> Beyond case specific debates, scholars are busy de-

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146. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶¶ 48–52 (Oct. 3, 2019).

147. *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824, ¶ 41 (Can.) (Abella, J., writing for a 7-2 majority of the Court, aptly explained that "[t]he problem in this case is occurring online and globally. The Internet has no borders—its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates—globally.")

148. Complaint at 43, *Google Inc. v. Equustek Sols., Inc.*, No. 5:17-cv-04207-NC (N.D. Cal. Dec. 14, 2017), 2017 U.S. Dist. LEXIS 206818.

149. See Andrew K. Woods, *Litigating Data Sovereignty*, 128 YALE L.J. 328, 390 (2018).

150. Daphne Keller, *Ominous: Canadian Court Orders Google to Remove Search Results Globally*, STAN. CTR. FOR INTERNET AND SOC'Y BLOG (June 28, 2017, 11:31 AM), <http://cyberlaw.stanford.edu/blog/2017/06/ominous-canadian-court-orders-google-remove-search-results-globally>.

151. Eugene Volokh, 'Canadian Court Orders Google to Remove Search Results Globally', WASH. POST (June 29, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/29/canadian-court-orders-google-to-remove-search-results-globally>.

152. Michael Geist, *Global Internet Takedown Orders Come to Canada: Supreme Court Upholds International Removal of Google Search Results*, MICHAEL GEIST (June 28, 2017), <http://www.michaelgeist.ca/2017/06/global-internet-takedown-orders-come-canada-supreme-court-upholds-international-removal-google-search-results>.

153. *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824, ¶¶ 43–53 (Can.); Andrew K. Woods, *No, the Canadian Supreme Court Did Not Ruin the Internet*, LAWFARE (July 06, 2017, 2:25 PM), <https://lawfareblog.com/no-canadian-supreme-court-did-not-ruin-internet>.

154. RESTATEMENT (THIRD) OF FOREIGN REL. L. OF THE UNITED STATES § 482(2)(d) (AM. LAW INST. 1987); see also *Yahoo! Inc. v. La Ligue Contre Le Racisme et*

veloping general frameworks for these issues – proposing for example a rebuttable presumption in favor of geographic segmentation.<sup>155</sup>

EU law, for its part, knows only few instances of genuine extraterritorial application, mostly confined to financial regulations.<sup>156</sup> EU legislation requiring the evaluation of foreign conduct or third country law while maintaining a territorial connection with the EU<sup>157</sup> is, on the other hand, relatively common.<sup>158</sup> A recent example includes art. 3 of the General Data Protection Regulation, defining its territorial scope. This article can be understood as part of the EU’s mission to “uphold and promote its values and interests and contribute to the protection of its citizens” in its relations with the world, as art. 3(5) TEU provides.<sup>159</sup> The case-law of the ECJ that affords a robust protection of the data of EU citizens when they are transferred to third-countries also fits into this narrative.<sup>160</sup>

Nothing regarding these delicate questions appeared in *Glawischnig-Pieszcsek*. Instead, the ECJ resorted to a technical answer, limited to the question put before it.

## 2. Nothing to See Here: The ECD’s Silence on Global Removal Orders

All the ECJ has been asked to do was to clarify whether the ECD prohibits injunctions with worldwide effects. The ECJ finds that it does not, pointing to art. 18(1) ECD and the ECD’s general lack of territorial limitations when it comes to the reach of injunctions.<sup>161</sup> As argued above, these injunctions might come within the “scope of EU law” for the purposes of the CFR. But neither the ECD nor the CFR contain any clear limits with regards to the territorial scope of the injunctions. And even some of the Courts harshest critics agree that the ECJ got it right in this regard.<sup>162</sup> Even if the

l’Antisemitisme, 433 F.3d 1199, 1215 (9th Cir. 2006) (en banc) (per curiam); Woods, *supra* note 149, at 391–93.

155. Daskal, *supra* note 71, at 1651.

156. Joanne Scott, *The Global Reach of EU Law*, in *EU LAW BEYOND EU BORDERS: THE EXTRATERRITORIAL REACH OF EU LAW* 21, 24 (Marisa Cremona & Joanne Scott eds., 2019).

157. For this distinction between ‘extraterritoriality’ and ‘territorial extension’, see Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 *AM. J. COMP. L.* 87, 90 (2014).

158. Scott, *supra* note 156, at 24.

159. See generally Christopher Kuner, *The Internet and the Global Reach of EU law*, in *EU LAW BEYOND EU BORDERS: THE EXTRATERRITORIAL REACH OF EU LAW* 112 (Marisa Cremona & Joanne Scott eds., 2019).

160. See, e.g., Case C-362/14, *Schrems v. Data Protection Comm’r*, ECLI:EU:C:2015:650 (Oct. 6, 2015); Opinion 1/15, *Accord PNR EU-Canada*, ECLI:EU:C:2017:592 (July 26, 2017); Case C-311/18, *Data Prot. Comm’r v. Facebook Ireland*, ECLI:EU:C:2020:559 (July 16, 2020).

161. Case C-18/18, *Glawischnig-Pieszcsek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶¶ 48–49 (Oct. 3, 2019).

162. See, e.g., Kettemann & Tiedke, *supra* note 71; Keller, *supra* note 61, at 36.

Austrian Courts were not the proper venue for this specific case, as Facebook, the Latvian, and the Finish governments had argued before the ECJ,<sup>163</sup> this would still be true, because art. 35 of the recast Brussels I Regulation places the responsibility for injunctions firmly in the hands of national courts under their own national law, even if courts of another member state have jurisdiction over the subject matter.<sup>164</sup> The applicable EU law thus puts national courts in charge in this regard. Limits of their discretion to determine the appropriate territorial scope deriving directly from EU law are not evident.

The ECJ, however, was aware of the intricate questions that are raised by global removal orders. It showed itself cognizant of the limits created by comity<sup>165</sup> and made clear that, as a matter of EU law, the determination on whether an injunction with worldwide effect is issued must be made in accordance with the applicable rules of international law.<sup>166</sup> The ECJ derives this one limit from recitals 58 and 60 of the ECD, which express the wish of the EU legislator to keep EU law in accordance with international law.<sup>167</sup> This simple reference to international law as a whole grossly oversimplifies the actual problems and is far from precise, but the applicable law is also far from precise. EU law has nothing more to offer on these questions and the ECJ declined to artfully invent any standards that lack any grounding in the applicable EU law. Arguably, the ECJ even manifestly lacks jurisdiction to make any further clarifications on these unresolved questions of International law.

Any other course of action would have led the ECJ to set a standard in a highly contentious issue of International law on which the ECJ was neither asked to rule nor had any jurisdiction to rule on. It is an odd position to unironically demand that the ECJ prevent national courts from issuing injunctions they are allegedly not allowed to issue,<sup>168</sup> by giving a ruling on things it was not asked to and could not rule on due to a lack of jurisdiction. Before the ECJ, this case was never about all the intricate questions of jurisdiction

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163. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:458, ¶ 86 (June 19, 2019) (Opinion of Advocate General Szpunar) (¶¶ 82–86 also explain why the Austrian courts did have jurisdiction over the case).

164. 2012 O.J. (L 351) 13 (“Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.”).

165. Keller, *supra* note 61, at 38 (urging the Court to do so).

166. *Glawischnig-Piesczek*, ECLI:EU:C:2019:458, ¶ 51.

167. *Id.* ¶ 3 (recital 58 ECD reads in relevant part: “in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules”; recital 60 ECD reads in relevant part: “In order to allow the unhampered development of electronic commerce, the legal framework must be . . . consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.”).

168. See Svantesson, *Europe’s Top Court*, *supra* note 144.

and comity. It was about what the ECD can contribute to this debate, which is very little. These battles will have to be fought in front of national courts contemplating global injunctions. These national courts, as the example of a Belgian Court of Appeals shows,<sup>169</sup> should be presumed to be more than able to live up to this task.

### 3. Comparing *Glawischnig-Piesczek* to *Google v. CNIL*

A judgment the ECJ delivered merely nine days before *Glawischnig-Piesczek* may have contributed to the confusion. In *Google LLC v. CNIL*,<sup>170</sup> the ECJ had ruled that the obligations for search engines under the so-called “Right to be Forgotten”<sup>171</sup> are limited to de-referencing search items on the versions of search engines corresponding to EU member states and do not extend to every globally available version of that search engine. The ECJ has been praised for its restraint in this case, which some declared to be a victory for Google.<sup>172</sup> How does *Glawischnig-Piesczek* fit into this?

It is important to note the fundamentally different settings of the two cases. *Google v. CNIL* involved the question whether EU law requires global de-referencing. In *Glawischnig-Piesczek*, the ECJ was asked to clarify whether EU law prohibited a global removal order. On the latter question, the two judgments are remarkably similar. All the ECJ decided (and was asked to decide) in *Glawischnig-Piesczek* was that art. 15 ECD does not

169. See Geert van Calster, *Brussels Court of Appeal Rejects Jurisdiction Against Facebook Inc, Facebook Ireland in Privacy, Data Protection Case*, GAVC LAW BLOG (JUNE 19, 2019), <https://gavclaw.com/2019/06/19/brussels-court-of-appeal-rejects-jurisdiction-against-facebook-inc-facebook-ireland-in-privacy-data-protection-case/> (reporting on a case in which the Brussels Court of Appeals held that it had no jurisdiction over Facebook Ireland or Facebook, Inc.).

170. See Case C-507/17, *Google LLC v. Commission nationale de l’informatique et des libertés (CNIL)*, ECLI:EU:C:2019:772 (Sept. 24, 2019).

171. Derived from arts. 12(b) and 14(1)(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 by the ECJ in Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014), and since explicitly enshrined in art. 17 GDPR. For the many scholarly contributions concerning the judgment and its broader implications, see, e.g., Robert L. Bolton III, *The Right to Be Forgotten: Forced Amnesia in the Digital Age*, 31 J. MARSHALL J. INFO. TECH. & PRIV. L. 133, 136 (2014); Chelsea E. Carbone, *To Be or Not to Be Forgotten: Balancing the Right to Know with the Right to Privacy in the Digital Age*, 22 VA. J. SOC. POL’Y & L. 525, 533 (2015); Ignacio Cofone, *Google v. Spain: A Right to Be Forgotten?*, 15 CHI.-KENT J. INT’L & COMP. L. 1 (2015); Aidan Forde, *Implications of the Right to Be Forgotten*, 18 TUL. J. TECH. & INTELL. PROP. 83 (2015); PAUL LAMBERT, *THE RIGHT TO BE FORGOTTEN – INTERPRETATION AND PRACTICE* (2019); Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981 (2018).

172. Sarah Marsh, *Right to Be Forgotten on Google Only Applies in EU, Court Rules*, GUARDIAN (Sept. 24, 2019), <https://www.theguardian.com/technology/2019/sep/24/victory-for-google-in-landmark-right-to-be-forgotten-case>.

stop a member state court from issuing global removal orders.<sup>173</sup> *Google v. CNIL* holds explicitly that, even though EU law currently<sup>174</sup> does not require global de-referencing, EU law does not prohibit this and leaves it up to the national data protection authorities to decide under national fundamental rights standards on such global de-referencing.<sup>175</sup> To find these judgments to be inconsistent<sup>176</sup>, one must ignore how openly the ECJ in *Google v. CNIL* endorsed national Internet regulation with extraterritorial effect.<sup>177</sup> The *Google v. CNIL* judgment is far from a victory for Google and others who argue against extraterritorial Internet regulation in the EU.<sup>178</sup>

There are many good reasons to think that the ECJ should have decided in favor of a global applicability of the Right to be Forgotten in *Google v. CNIL*. However, it is important to note that *Google v. CNIL* did not have to come out the way it did for *Glawischnig-Piesczek* to make sense. Neither case expounded a general theory of the extraterritoriality of European Internet regulation. Both cases are clearly limited to their respective legal frameworks, the GDPR and the ECD. Having found that art. 17 GDPR does not require global de-referencing does not prejudice whether art. 15 ECD allows national courts to issue global removal orders for illegal content. Contrary to the GDPR, art. 15 ECD harmonizes only specific aspects and art. 18 ECD leaves national courts a broad discretion in remedying rights violations. Nothing in the ECD sets any limits for national courts to issue such takedown orders.<sup>179</sup> The Court simply held as much.

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173. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶ 50 (Oct. 3, 2019).

174. The ECJ also clearly affirms that the EU legislator could have enacted a global right to be forgotten. See *Google LLC*, ECLI:EU:C:2019:772, ¶ 58 (“Such considerations [concerning the global nature of the Internet and the effects this has on the rights of Union citizens] are such as to justify the existence of a competence on the part of the EU legislature to lay down the obligation, for a search engine operator, to carry out, when granting a request for de-referencing made by such a person, a de-referencing on all the versions of its search engine.”).

175. *Id.* ¶ 72.

176. See, e.g., Cathryn Hopkins, *Territorial Scope in Recent CJEU Cases: Google v. CNIL / Glawischnig-Piesczek v. Facebook*, INFORM (Nov. 9, 2019), <https://inform.org/2019/11/09/territorial-scope-in-recent-cjeu-cases-google-v-cn-il-glawischnig-piesczek-v-facebook-cathryn-hopkins>.

177. Andrew K. Woods, *Three Things to Remember from Europe’s ‘Right to Be Forgotten’ Decisions*, LAWFARE (Oct. 1, 2019), <https://www.lawfareblog.com/three-things-remember-europes-right-be-forgotten-decisions>.

178. Mary Samonte, *Google v. CNIL: The Territorial Scope of the Right to Be Forgotten Under EU Law*, 4 EUR. PAPERS 839, 845 (2019).

179. See, e.g., Daskal, *supra* note 71, at 1624.

#### IV. IMPULSES FOR ONLINE SPEECH REGULATION

The foregoing analysis of the ruling has tried to show both its limited scope and, despite its often unclear, cryptic, and unstructured style, its overall convincing reasoning and result. Much of the criticism directed at the ECJ does not hold up against a thorough analysis of the judgment. The limited scope of both the questions presented and the rationale supporting the ECJ's answers should be recognized and considered when the judgment is inevitably scrutinized for EU law's contribution to the regulation of online speech.

Many questions remain unanswered. But the judgment should be read as providing two key impulses for the future debate of Internet regulation: ISP responsibility for illegal speech and the need for the development of sensible rules of jurisdiction and comity in the digital era.

##### A. *Recognizing the Problem and the Provider's Responsibilities*

###### 1. Of Moles and Aphids

If there is a coherent theme that runs through the *Glawischnig-Piesczek* judgment, it is that of an efficient protection of the rights of those harmed by illegal online content. The ECJ understands the ECD as a framework that adequately remedies violations of rights and interests that have occurred online. This reading is based on a functionalist reading of art. 18(1) ECD and its obligation for member states to ensure that courts can adopt rapid measures to fully protect the rights and interests involved. Once illegal content is identified, EU law allows for efficient removal orders that go far beyond notice-and-takedown procedures.

These procedures, of course, stands in direct contrast to the frameworks developed in the United States. Although applicable in copyright law, the "DMCA Safe Harbors" of 17 U.S.C. § 512 provide an adequate point of reference in this regard, because they are designed similarly to the ECD, but have been interpreted quite differently. Much like arts. 12–14 ECD provide the ISPs with immunity from liability for conduiting, caching or hosting illegal content, Secs. 512(a)–(d) establish similar immunities in the copyright context.<sup>180</sup> Art. 15 ECD does not allow for a general obligation to monitor and Sec. 512(m)(1) clarifies that the immunity cannot be conditioned<sup>181</sup> on "a service provider monitoring its service affirmatively seeking facts indicating infringing activity".

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180. 17 U.S.C. §§ 512(a)–(d).

181. In this regard, the connection between the intensity of a monitoring obligation and the immunities of ISPs under the ECD uncovered by Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶¶ 36–40 (Oct. 3, 2019), is made explicit by § 512(m).



In contrast to the ECJ's interpretation of art. 15 ECD, Sec. 512(m) has consistently been interpreted quite narrowly. Most prominently in cases like *Viacom v. Youtube* and *Capital Records v. Vimeo*, it has been established that no form of active participation can be required from service providers at all.<sup>182</sup> This fits rather well into the elaborate notice-and-takedown framework that Sec. 512 established,<sup>183</sup> but it also makes it necessary to send out new takedown notices for every copyright violation that has occurred, leading to an endless game of “whack-a-mole” for someone who wishes to see their rights protected.<sup>184</sup> This inefficiency is precisely what *Glawischnig-Piesczek*, informed by an expansive reading of art. 18 ECD, rejected.

Speech on social networks is characterized by a combination of persistence in time, visibility, ability to spread, and searchability.<sup>185</sup> This special nature of social networks is explicitly highlighted by the ECJ to justify its rigid stance on the removal of illegal content on these platforms.<sup>186</sup> The ECJ extends these concerns to all kinds of online content. But the serious dangers of hate speech<sup>187</sup> combined with the fact that many European countries find hate speech to be unprotected illegal speech, make this orientation especially compelling in the European hate speech context. Given the nature of social networks, a formalistic notice-and-takedown approach makes little sense. Rather, a procedure that allows the removal of all other identical and narrowly defined equivalent illegal content adequately neutralizes the threat. The narrow definition of equivalent content which the ECJ advances is, insofar, an important feature to limit the solution to the problem.

Sticking with the “whack-a-mole”-metaphor, according to the vision of the *Glawischnig-Piesczek* judgment, illegal online content is not like having a mole in your garden which is only destroying your lawn when it surfaces and can be “whacked” when it does. Rather, it is like an infestation with aphids that are constantly multiplying and spreading through the entire garden, continuously repeating their destructive work. They can only be fought by a broadly applied insecticide. Ideally, this insecticide only targets these kinds of parasites and does not harm other animals and plants.

This approach requires substantial work from the ISPs. For the ECJ, this focus on the ISPs is a natural result of art. 15 ECD's focus on ISP obligations, which it was asked to interpret. However, it is also a statement

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182. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012); *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2013).

183. See Emily M. Asp, *Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration*, 103 IOWA L. REV. 751, 761 (2018).

184. Although, some argue that the current framework DMCA framework already chills too much protected speech and should be amended. See *id.* at 763–64.

185. DANAH BOYD, *IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 11 (2014).

186. Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, ECLI:EU:C:2019:821, ¶ 36 (Oct. 3, 2019).

187. See, e.g., JEREMY WALDRON, *THE HARM IN HATE SPEECH* 65–104, 204–34 (2012).

about the inherent responsibilities of ISPs for the services they are offering. In fact, there is nothing unusual about such a responsibility: any other company conducting a business with potential harms for society and potential illegal outcome has the responsibility to prevent, deal with, and carry the consequences of these potential harms and illegalities. Companies either make sure their business does not harm people and does not violate the law, or the service cannot be offered. This responsibility also gives these companies significant power because they are the first ones that can decide how to comply with any given regulation. But this power is obviously subject to judicial control. There is nothing unusual in this construction either, insofar as companies are always primarily responsible to ensure compliance with the law, even if their compliance decisions impact individual rights, as is the case with health or environmental regulations. Granting not only immunity from liability for third-party content, but also allowing for inaction when the use of the service harms protected rights and interests in the name of innovation and technological advancement<sup>188</sup> subordinates these rights and interests to the economic well-being of tech-companies, who are even benefiting from this kind of traffic on their services. With a forceful grounding in art. 18(1) ECD, the ECJ has taken the illegality of the content at issue as a cue for allowing decisive and efficient action to eliminate illegal content, pushing ISPs to accept the responsibility EU law has assigned to them.

## 2. Any Impulses for U.S. Legislation?

This European approach would run into significant difficulties in the United States as far as speech rights are concerned. At the outset, the strictly defined categories of unprotected speech,<sup>189</sup> which only encompass the “historic and traditional categories long familiar to the bar”<sup>190</sup> severely limit the scope of evidently illegal speech that EU law presupposes. Moreover, the fact that content-based restrictions of speech<sup>191</sup> are subject to strict scrutiny

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188. As was the case for the DMCA safe harbors which were hailed to be “the law that saved the web”. David Kravets, *10 Years Later, Misunderstood DMCA Is the Law that Saved the Web*, WIRED (Oct. 27, 2008), <https://www.wired.com/2008/10/ten-years-later>.

189. See *United States v. Stevens*, 559 U.S. 460, 468 (2010), for an exclusive list of unprotected speech with many further references.

190. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment).

191. Defined as restrictions of expression “because of its message, its ideas, its subject matter, or its content” in *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); as restrictions “adopted . . . because of the disagreement with the message [the speech] conveyed” in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); or as “a law [that] applies to particular speech because of the topic discussed or the idea or message expressed” in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

by the Courts<sup>192</sup> has plagued legislators when trying to deal with undesirable speech online.<sup>193</sup>

Even legislation limited to the removal of clearly unprotected speech but including a removal obligation extending to identical and equivalent content would need to withstand serious overbreadth and vagueness challenges under the First Amendment. Depending on its design, a statute modeled after the European example could conceivably chill a third party's lawful speech<sup>194</sup> because through the broad reach<sup>195</sup> of ISP obligations, it could lead to the take-down of "a substantial amount of protected speech"<sup>196</sup>, unless it is susceptible to a limiting construction that would cure its unconstitutional defect.<sup>197</sup> Relatedly, vagueness doctrine in the First Amendment context requires an especially clear demarcation of what kind of speech is targeted by the law and prohibits any uncertain meanings for their chilling effect<sup>198</sup> which will be a challenge, as the controllable, but broad formulas used by the ECJ have shown.

Some cases seem to set a high bar for online legislation to pass muster under this standard and make it seem unlikely that any law could stand that does not specifically and exclusively in any given application affect unprotected speech.<sup>199</sup> Other, more limited versions of the overbreadth doctrine exist in the case-law, however, making its actual force difficult to determine.<sup>200</sup> Especially in the context of online harassment, courts have shown

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192. See, e.g., *Simon & Schuster*, 502 U.S. at 115, 118; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Reed*, 135 S. Ct. at 2226.

193. See, e.g., *State of North Carolina v. Bishop*, 368 N.C. 869, 880 (2016) (holding a cyberbullying statute to be a content-based restriction failing the applicable strict scrutiny standard); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding a provision prohibiting transmission of obscene or indecent communications by means of telecommunications device to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18 to be unconstitutional.).

194. See, e.g., *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

195. *United States v. Stevens*, 559 U.S. 460, 474 (2010).

196. See, e.g., *United States v. Williams*, 553 U.S. 285, 304 (2008).

197. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

198. See, e.g., *Smith v. California*, 361 U.S. 147, 150–51 (1959) ("[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech."); *Grayned v. Rockford*, 408 U.S. 104, 109 (1972); see generally Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75–99 (1960).

199. See *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

200. See, e.g., *New York v. Ferber*, 458 U.S. 747, 771 (1982) ("a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications"); *id.* at 772 (connecting the overbreadth doctrine directly to the chilling effect on protected speech a law might have); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 590 (1998) (upholding as not substantially overbroad a federal statute directing the National Endowment of the Arts, in establishing procedures to judge the artistic merit of grant applications, to take into considerations "general standards of decency and respect for the diverse beliefs and values of the American public").

their willingness to construct statutes in a way that saves them from overbreadth and vagueness challenges.<sup>201</sup>

It seems difficult to conceive that the loss of some valid speech could be balanced against the efficient removal of all harmful, unprotected speech in U.S. law. Under a strict interpretation of the overbreadth doctrine, insisting on efficient removal of identical and equivalent content will probably not be upheld. But this would be a construction of the overbreadth doctrine that sanctions any conceivable application of the law without much regard for its actual requirements.

Because the ECJ's conception of removable identical and equivalent content is strictly limited to content that is just as illegal as the initial content and shares all factors that led to the finding of illegality of the initial content, the removal obligation is strictly limited to categories of defined illegality. Mere imprecision in removal by providers for economic convenience should, in any event, not suffice to make the statute itself overbroad, because the ISPs could rid themselves of an unwanted obligation by incompetently dealing with it. Similarly, whether the danger of over-blocking should play a role would depend on how willing the courts are to see the reason for such an overbroad application in the law itself, or only in the economic considerations of ISPs that would make them block more than they should.

In any case, legislative creativity could also limit the success of overbreadth challenges: for example, human involvement in specific cases could be required. This involvement could take the form of a unanimous vote of a group of informed experts in uncertain cases to remove content, essentially limiting the removal obligation to "evidently" identical or equivalent content. This requirement might be an additional burden on ISPs, but a possible safeguard as a matter of First Amendment law.

### B. Enforcement and Power

Finally, the lack of any clear guidance concerning the global reach of takedown orders against Internet companies evidences the need for the development of a theory of jurisdiction and comity in the digital age.<sup>202</sup> The ECJ did not and could not have articulated such a theory in its judgment. These questions are properly dealt with by the national courts contemplating these issues in cases when they arise.

It seems likely that these issues, for now, will be resolved by the mechanisms of recognition and enforcement. The litigation in the United States

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201. See *Lebo v. State*, 474 S.W.3d 402, 406–08 (Tex. Ct. App. 2015) (holding that that communications proscribed by statute delineating offense of harassment through electronic communication did not fall within scope of free speech protected by First Amendment, and thus statute was not unconstitutional on its face).

202. Kettemann & Tiedke, *supra* note 71.

following the Canadian *Equustek* judgment illustrates how this might function. In this litigation, Google succeeded in blocking the global removal order from enforcement in the United States.<sup>203</sup> As already pointed out, enforcement of global removal orders is by no means always automatic.

Fundamentally, courts that issue removal orders with global reach will inevitably run into difficulties in their enforcement abroad, as they will have to rely on their judicial counterparts in other countries if they cannot order the use of state power against the relevant ISP within their jurisdiction. This enforcement leaves the companies with a significant advantage of being able to strategically make an assessment whether they can find a way to resist orders of which they do not approve. If there are no assets in a given jurisdiction against which an order can be enforced and if the company can count on domestic courts to reject the domestic enforcement of the foreign judgment like in the *Equustek* litigation,<sup>204</sup> such companies can effectively resist removal orders. The economic importance of the jurisdiction that issued such a global order will likely play a significant role in deciding whether this jurisdiction can have a say in the struggle to regulate the Internet.

#### CONCLUSION

This note has tried to thoroughly analyze the *Glawischnig-Piesczek* judgment, to clarify its reasoning and actual impact and to rebut some of the reactions it had provoked which resulted from an erroneous reading of the, admittedly often insufficiently reasoned, judgment. Under a fair reading of the judgment, it is by no means a “worst-case-scenario.”<sup>205</sup> Rather, it is a correctly limited interpretation of the ECD, endorsing swift and efficient actions to allow for the removal of illegal online content. Neither are the removal obligations too broad, nor has the Court forgotten about fundamental rights.

Most importantly, the judgment does not provide and could not have provided any guidance on what kind of speech should be regulated online. This culturally highly sensitive topic of the limits of free speech<sup>206</sup> still is left to each European country and EU law itself does not contribute to the now global debate concerning free speech on the Internet. Rather than shed-

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203. Google LLC v. Equustek Sols. Inc., No. 5:17-cv-04207-EJD, 2017 WL 50008342, at \*2–4 (N.D. Cal. Nov. 2, 2017).

204. Daskal, *supra* note 71, at 1631.

205. *Contra* Daphne Keller (@daphnek), TWITTER (Oct. 3, 2019, 9:29 AM), <https://twitter.com/daphnehk/status/1179750220864745472>.

206. For a classic description of the German restrictions on free speech in relation to the “Auschwitz lie”, see Eric Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—“Lies”*, 85 MICH. L. REV. 277, 281–86, 288–304, 320–22 (1986).

ding any light on this fundamental question, *Glawischnig-Piesczek* is instructive when it comes to the question how content that has been identified as illegal should be handled. *Glawischnig-Piesczek* stands for the proposition that illegal content must be efficiently and thoroughly removed, and that the ISP are primarily responsible in that regard. EU law now allows for, but does not mandate, the removal of content that is identical and equivalent to initial illegal content already brought to the attention of the ISP. This general regulatory orientation is still foreign to U.S. law but would, with some creativity, not crash into definitive constitutional obstacles. The (lack of) political will to regulate the activities of ISPs seems to be more decisive than the constitutional questions in this regard.

The judgment also does not bring and could not have brought much clarity to the question of extraterritorial Internet regulation. Instead, the case shows the necessity for the development of clearer standards of comity and jurisdiction of the digital age.

In all these respects, much work remains to be done and *Glawischnig-Piesczek* has only been one important step along the way.

