

Insights

NO GENERAL OBLIGATION ON WEBSITE HOSTS TO MONITOR THE DATA THEY TRANSMIT AND STORE

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In a ruling dated 27 March 2024 (Cour de cassation, 27 March 2024, no. 22-21.586), the Cour de cassation reviewed the obligation of website hosts to monitor the content they host.

In this case, the Olivo company had issued an interlocutory injunction against LBC France, the host of the leboncoin.fr website, to put an end to the distribution of fraudulent advertisements using the identity of the Olivo company. These advertisements marketed containers for maritime use and included the company name, RCS number and IBAN of Olivo, with the aim of producing false quotes and orders.

The Court of Appeal ordered the publication of the advertisements using Olivo's identity to be banned, subject to a fine, within eight days of the decision being issued. LBC, arguing that the ban imposed by the Court of Appeal constituted an excessive obligation in breach of Article 6 of the LCEN Act No. 2004-575 of 21 June 2004 governing the status of hosting companies, appealed to the French Cour de Cassation.

The question was therefore whether a judge could make a host subject to a general prohibition, not limited in time, on the dissemination of unlawful content on the site it hosts. In other words, can a host be subject to a general obligation to monitor the content it hosts?

As a reminder, hosts are defined as 'natural or legal persons who ensure, even free of charge, that signals, writings, images, sounds or messages of any kind provided by recipients of these services are made available to the public via online public communication services' (article 6-I-2 of the LCEN law of 21 June 2004). The central criterion of this definition is the storage activity engaged in by hosting providers, demonstrating their passive and purely technical role in the processing of content.

The key to this definition lies in the liability regime applicable to them. While hosting providers have an obligation to act promptly to remove unlawful content once they have been informed of its existence, they cannot be held liable solely on the basis of the presence of unlawful content on the site they host. Once unlawful content has been removed, the rules applicable to web hosts do not require them to constantly monitor the site and spontaneously remove any unlawful content that

might reappear at a later date. This is what emerges from the now established case law of the Cour de cassation of 12 July 2012 (Civ. 1re, 12 July 2012, nos. 11-13.666 , 11-13.669 , 11-15.165 and 11-15.188), which refuses to apply the 'notice and stay down' principle derived from American law, which requires permanent monitoring of unlawful content so as to make it impossible for it to be reposted at a later date.

In this case, the Court of Appeal had rightly characterised the existence of damage to Olivo caused by the illegal content hosted by LBC. In this respect, the judge could therefore order measures to prevent or stop the damage caused by this online content.

It is precisely this injunction issued by the court that is the subject of this dispute. The wording of this injunction imposed a twofold obligation on LBC. On the one hand, it was required to remove the illegal content in question. Secondly, it was required to comply with the prohibition on disseminating advertisements 'using the company name and/or the RCS number and/or the IBAN of the Olivo company for the purpose of drawing up false quotations and false orders relating to the marketing of containers for maritime use'.

While the first part of the injunction requiring the host to remove unlawful content was not debated, the Cour de cassation considered that the general prohibition on disseminating advertisements using the identity of Olivo was tantamount to imposing on the host a general obligation to monitor the content it hosted, in breach of Article 6 of the aforementioned law.

Such an obligation required the host to make an independent assessment of the lawfulness of the content in question. In order to comply with this injunction, it would therefore have been necessary for the host to systematically filter the content to ensure that no advertisement containing the identity of Olivo was published. Moreover, this obligation was not limited in time.

The Court of Cassation therefore considered that, while a judge may order a web host to take steps to remove unlawful content, it cannot impose a general obligation to monitor the content it hosts.

This ruling, whose solution is not innovative, comes in the context of the general entry into force on 17 February 2023 of the Digital Services Act. This European regulation, which is based on the premise that anything that is illegal offline is illegal online, strengthens the liability regime for web hosts by imposing new obligations in terms of content moderation. In particular, it requires web hosts to set up a platform enabling any user to report content that they consider illegal. In this respect, the DSA provides a framework for the collection of these notifications, which must include a certain amount of information relating to the content reported. In addition, an internal complaints handling system must be put in place to allow users to challenge decisions taken by the platform.

MEET THE TEAM



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