OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 June 2023 (1)

Case C-376/22

Google Ireland Limited,
Meta Platforms Ireland Limited,
Tik Tok Technology Limited
v
Kommunikationsbehörde Austria (Komm Austria),
other party:
Bundesministerin für Frauen, Familie, Integration und Medien im Bundeskanzleramt

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling – Electronic commerce – Directive 2000/31/EC – Communication platform service – Legislation requiring providers of such services to establish a monitoring procedure for allegedly illegal content – Derogation from the country-of-origin principle)

I. Introduction

1. On 19 October 2022, the EU legislature adopted Regulation (EU) 2022/2065 (2) ('the Digital Services Act') in order to set out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights are effectively protected. (3) To that end, that regulation imposes a series of obligations on providers of so-called 'intermediary' services concerning transparency reporting, designation of points of contact and mechanisms for notification of illegal content. (4) That regulation will become applicable, in principle, from 17 February 2024, without prejudice to its anticipated application to providers of very large online platforms and of very large online search engines. (5)

2. Until that date, the rules on those matters will not be subject to comparable harmonisation at EU level. (6)

3. Recently, some Member States have adopted laws imposing obligations similar to those described above on the providers of information society services accessible on their territories. (7) The Austrian legislation at issue in the present case, adopted in 2020, appears to be part of that trend. (8)

4. However, since 2002, the movement of information society services has, to a large extent, been governed by Directive 2000/31/EC. (9)

5. According to Article 3(1) of Directive 2000/31, each Member State is to ensure that the information society services provided by a service provider established on its territory (the Member State of origin) comply with the national provisions which fall within the 'coordinated field', as defined in Article 2(h) of that directive. The principle that information society services must in principle be subject to the legal system of the Member State of origin is referred to as the 'country-of-origin principle'.

6. As an extension of that logic, under Article 3(2) of Directive 2000/31, Member States may not, in principle, restrict the freedom to provide information society services from another Member State. A Member State other than the Member State of origin may derogate from that principle only by measures which are taken 'in respect of a given information society service' and which fulfil the conditions set out in Article 3(4)(a) and (b) of that directive.

7. That is the legal framework governing the first question referred to the Court in the present case. By that question, the referring court seeks to ascertain whether a Member State may derogate from the freedom to provide information society services by taking not only individual and specific measures, but also general and abstract legislative measures relating to a category of given services. At the request of the Court, this Opinion is confined to an analysis of that question.

8. This issue remains relevant under the Digital Services Act, in so far as that regulation repeals neither the country-of-origin principle nor the possibility of derogating from that principle in the cases provided for in Article 3(4) of Directive 2000/31. (10)

II. Legal framework

A. European Union law

9. Article 2(a) of Directive 2000/31 defines the concept of 'information society services' by reference to Article 1(1) of Directive (EU) 2015/1535. (11) The latter directive defines an information society service as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

10. Article 2(h) of Directive 2000/31 defines the 'coordinated field' as 'requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them'.

11. Article 3 of that directive, entitled 'Internal Market', is worded as follows:

'1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

…

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State’s possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.’

B. Austrian law

12. The Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen (Kommunikationsplattformen-Gesetz) (Austrian Federal Law on measures for the protection of users on communication platforms) (12) (‘the KoPl-G’) was enacted on 23 December 2020 and entered into force on 1 January 2021. Service providers falling within the scope of that law were supposed to comply with the obligations which it imposed by no later than 31 March 2021. (13)

13. Paragraph 1 of the KoPl-G provides:

‘(1) This Law serves to promote the responsible and transparent handling and prompt processing of notifications by users relating to the following content on communication platforms.

(2) Domestic and foreign service providers which provide communication platforms (Paragraph 2(4)) for economic gain shall fall within the scope of this Law, unless:

1. the number of registered users with a right of access to the communication platform in Austria was less than an average of 100 000 persons in the preceding calendar year, and

2. the turnover from the operation of the communication platform in Austria in the preceding calendar year was less than EUR 500 000.

…

(5) Upon application by a service provider, the supervisory authority shall make a declaration on whether that service provider falls within the scope of this Law.

…’

14. Paragraph 2(4) of the KoPl-G defines a ‘communication platform’ as ‘an information society service, the main purpose or an essential function of which is to enable the exchange of information or

of representations that have intellectual content, in the form of words, writing, sound or images, between users and a large group of other users by means of mass distribution'.

15. According to Paragraph 3 of the KoPl-G:

'(1) Service providers shall establish an effective and transparent procedure for handling and processing notifications relating to allegedly illegal content available on the communication platform.

…

(4) In addition, service providers shall ensure that an effective and transparent procedure for reviewing their decisions to block or remove notified content is in place (subparagraph 3(1)). …'

16. According to Paragraph 4(1) of the KoPl-G:

'Service providers shall be obliged to draw up an annual, or, in the case of communication platforms with over one million registered users, a six-monthly, report on the handling of notifications relating to allegedly illegal content. Service providers shall submit their report to the supervisory authority no later than one month after the end of the period covered by that report and shall simultaneously make the report permanently and easily accessible on their own website.'

17. Paragraph 5 of the KoPl-G provides:

'(1) Service providers shall appoint a person who fulfils the requirements of Paragraph 9(4) of the Verwaltungsstrafgesetz 1991 (VStG) [(Austrian Law on administrative penalties 1991, BGBl., 52/1991)]. That person shall:

1. ensure compliance with the provisions of this Law,

2. have authority to issue orders so as to make it possible to ensure compliance with the provisions of this Law,

3. have the necessary German language knowledge to be able to cooperate with administrative and judicial authorities,

4. have the resources required to carry out his or her tasks.

…

(4) The service provider shall appoint a natural or legal person as its representative responsible for the service of administrative and judicial documents. …'

III. The facts in the main proceedings

18. The appellants in the main proceedings, Google Ireland Limited ('Google'), Meta Platforms Ireland Limited ('Meta Platforms') and Tik Tok Technology Limited ('Tik Tok'), are companies established in Ireland which provide, inter alia in Austria, communication platform services.

19. Following the entry into force of the KoPl-G in 2021, the appellants in the main proceedings requested that the competent authority, the Kommunikationsbehörde Austria (Austrian Communications Regulatory Authority, 'Komm Austria'), declare, under Paragraph 1(5) of that law, that they do not fall within its scope.

20. However, by three decisions dated 26 March, 31 March and 22 April 2021, Komm Austria declared that the appellants in the main proceedings fall within the scope of the KoPl-G because they each provide a communication platform within the meaning of Paragraph 2(4) of that law.

21. The appellants in the main proceedings challenged those decisions before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), which dismissed their actions as

unfounded.

22. In essence, with regard to the issue raised in the first question referred, the Bundesverwaltungsgericht (Federal Administrative Court) held, in the first place, that the country-of-origin principle laid down in Directive 2000/31 is not absolute and that a derogation may be justified, in particular if it is necessary to achieve and/or maintain a high level of protection of valuable legal interests, such as the protection of minors or human dignity. In its view, the KoPl-G pursues such objectives. According to that court, that law provides the legal basis, in the event of repeated infringement, for specific measures to be taken against addressees designated in a sufficiently individualised manner on a case-by-case basis. However, that court held that the declaratory procedure could, in the present case, not (yet) lead to the adoption of individual and specific measures against the appellants in the main proceedings, since they had requested a decision on a purely declaratory basis, without having been prompted to do so in the context of a specific case.

23. In the second place, with regard to the procedure under Article 3(4) of Directive 2000/31, the Bundesverwaltungsgericht (Federal Administrative Court) held that no measure, within the meaning of that provision, had been adopted under the KoPl-G and that that law had been adopted solely with a view to establishing a legal basis for the purpose of the adoption of measures within the meaning of that provision.

24. In appeals on a point of law (*Revision*) against the judgments of the Bundesverwaltungsgericht (Federal Administrative Court), the appellants in the main proceedings claim before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the referring court, that the Bundesverwaltungsgericht (Federal Administrative Court) incorrectly confirmed the applicability of the KoPl-G to the platforms which they operate. In particular, they argue, first, that, since Ireland and the Commission were not informed of the adoption of the KoPl-G for the purposes of Article 3(4)(b) and (5) of Directive 2000/31, that law cannot be relied on against them and, second, that the obligations introduced by that law are disproportionate and incompatible with the free movement of services and the country-of-origin principle.

25. On account of the substantive connection between the cases of the appellants in the main proceedings, the referring court joined those cases.

26. According to the referring court, it is common ground that the services provided by the appellants in the main proceedings, inter alia in Austria, constitute information society services within the meaning of Article 2(a) of Directive 2000/31. In the light of the findings of the Bundesverwaltungsgericht (Federal Administrative Court), the referring court considers that those services must also be classified as 'communication platforms' within the meaning of the KoPl-G and that the appellants in the main proceedings fulfil the conditions laid down in Paragraph 1(2) and (3) (14) of that law and therefore fall within its scope.

27. The referring court acknowledges that, on the basis of the KoPl-G, individual and specific measures are indeed taken in relation to a service provider in the event of its failure to comply with the obligations imposed on it by that law. However, that court considers that those obligations, with which a provider is required to comply without the need for a prior individual and specific measure to be adopted, constitute requirements relating to the exercise of an information society service activity and, consequently, are covered by the coordinated field within the meaning of Article 2(h) of Directive 2000/31. In its view, those requirements are, in principle, capable of restricting the free movement of information society services in so far as they must also be fulfilled by service providers established in the territory of a Member State other than Austria.

28. The referring court notes that, under certain conditions, Article 3(4) of Directive 2000/31 allows a Member State other than that in which the provider of information society services is established to derogate from the country-of-origin principle. In that light, it is uncertain as to whether a Member State may derogate from that principle by adopting a measure which concerns a category, described in general terms, of information society services according to their nature, such as communication platforms within the meaning of the KoPl-G.

29. In essence, the referring court notes, first, that, to date, the Court has been called upon to determine whether general and abstract provisions were capable of being authorised as measures, within the meaning of Article 3(4) of Directive 2000/31, on the basis of the reasons and requirements set out in that provision. In that regard, it cites the judgments in *Ker-Optika,* (15)*Airbnb Ireland* (16) and *A (Advertising and sale of medicinal products online)*. (17) Second, the referring court states that, in my Opinion in *Airbnb Ireland,* (18) I favoured the interpretation according to which general provisions cannot be regarded as measures within the meaning of Article 3(4) of that directive and, if they were to restrict the freedom to provide information society services from another Member State for reasons falling within the coordinated field, such provisions would in any event be unlawful under Article 3(2) of that directive.

IV. The questions referred for a preliminary ruling and the procedure before the Court

30. It is in those circumstances that the Verwaltungsgerichtshof (Supreme Administrative Court), by decision of 24 May 2022, received at the Court on 10 June 2022, decided to stay the proceedings and to refer three questions to the Court of Justice for a preliminary ruling. At the request of the Court, the present Opinion focuses on the first question referred, which is worded as follows:

'Must Article 3(4)(a)(ii) of Directive [2000/31] be interpreted as meaning that a measure taken against a "given information society service" can also be understood as a legislative measure relating to a general category of certain information society services (such as communications platforms), or does the existence of a measure within the meaning of that provision require that a decision be taken in relation to a specific individual case (for example, concerning a communications platform identified by name)?'

31. Written observations were submitted by the appellants in the main proceedings, the Austrian and Polish Governments, Ireland and the Commission. No hearing was held.

V. Analysis

32. By its first question, the referring court seeks to ascertain, in essence, whether Article 3(2) and (4) of Directive 2000/31 must be interpreted as meaning that a Member State may restrict the freedom to provide information society services from other Member States by adopting legislative measures of a general and abstract nature relating to a category, described in general terms, of given information society services, without those measures being taken on a case-by-case basis.

33. As a preliminary point, I must point out that the referring court states that it is common ground that the services provided by the appellants in the main proceedings, inter alia in Austria, constitute information society services within the meaning of Article 2(a) of Directive 2000/31. Although the request for a preliminary ruling does not contain any information enabling the Court to verify the classification put forward by the referring court, that classification is not, however, disputed by the parties. The analysis which I shall set out is therefore based on that premiss.

34. Before examining the question referred (Section C), I shall first make a few comments on the Austrian legislation which lies at the heart of the present reference for a preliminary ruling (Section A), and then set out the arguments put forward by the parties (Section B).

A. The Austrian legislation

35. This reference for a preliminary ruling concerns the provisions of the KoPl-G aimed at strengthening the 'platform liability' of providers of communication platforms in relation to the handling of notifications by users concerning the content of such platforms. (19)

36. Such providers operating on the territory of Austria, whether they are established in that Member State or abroad, fall, in principle, within the scope of the KoPl-G and are therefore required to fulfil certain obligations. Those obligations relate, inter alia, to (i) the establishment of a system for notification and verification of allegedly illegal content, (20) (ii) the drawing up of a transparency

report ([21]) and (iii) the appointment of an authorised representative and a representative responsible for notifications. ([22]) Providers falling within the scope of the KoPl-G are subject to the supervision of Komm Austria. In the exercise of that supervision, that authority is empowered to impose fines of up to EUR 10 million in the event of infringement of certain obligations laid down by the KoPl-G. ([23])

37. An economic operator may apply to Komm Austria for a declaration from that authority on whether it falls within the scope of the KoPl-G. However, the obligations to be fulfilled by service providers are imposed on economic operators falling within the scope of the KoPl-G without there being any need for an individual and specific measure to be adopted beforehand.

B. The positions of the parties

38. According to Google and Tik Tok, a measure such as the KoPl-G, which applies to a whole category of service providers with their registered office in another Member State, does not constitute a measure taken in respect of a given information society service within the meaning of Article 3(4) of Directive 2000/31 and therefore cannot be justified under that provision. In the same vein, Meta Platforms submits that the measures authorised by that provision cannot encompass legislation relating to a category, described in general terms, of given information society services.

39. The Commission states that it is in principle for the Member State of destination to determine 'how and where' it intends to take a measure derogating from Article 3(2) of Directive 2000/31. According to the Commission, this may include a measure that is both individual and of general application, 'provided that [that measure] is sufficiently targeted in so far as it applies clearly, from the outset, to a given information society service provided by one or more providers established in one or more other Member States'. In that regard, the Commission relies on the wording of Article 2(h) of that directive, which defines the concept of 'coordinated field' and includes within that concept requirements of a general nature. On the basis of those considerations, the Commission concludes that the measures provided for by the KoPl-G, because of their general and abstract nature, are diametrically opposed to the very essence of the country-of-origin principle, as defined in Article 3(1) and (2) of that directive.

40. A fundamentally different interpretation is proposed by the Austrian Government and Ireland, and, with some nuances, by the Polish Government.

41. The parties which favour the interpretation according to which legislative measures relating to a category, described in general terms, of information society services may also constitute 'measures', within the meaning of Article 3(4) of Directive 2000/31, appear to draw different inferences therefrom as regards the freedom to provide such services. I understand Ireland's position to be that, if the concept of 'measure' did not encompass general legislative measures, Member States would be free to adopt such general legislative measures and to restrict the freedom to provide information society services without having to comply with the conditions laid down in Article 3(4) of that directive. By contrast, the Austrian Government seems to maintain that such an interpretation would prevent any derogation from the country-of-origin principle by means of the adoption of legislative measures.

42. According to the Polish Government, in order for Article 3(4) of Directive 2000/31 to apply, the measure at issue must constitute a restriction on the freedom to provide services for the purposes of Article 56 TFEU. In that regard, in the first place, that government argues, with reference to the judgment in *Airbnb Ireland,* ([24]) that the KoPl-G does not restrict the freedom to provide information society services from another Member State since that law merely requires the establishment of procedures for handling notifications of illegal content and the publication of reports in that connection.

43. In the second place, the Polish Government draws attention to the relationship between, on the one hand, Article 3(4) of Directive 2000/31 and, on the other hand, Articles 14(3) and 15(2) thereof. In that government's submission, Article 14(3) of that directive must be regarded as a *lex specialis* in relation to the country-of-origin principle. Moreover, that government argues that Article 15(2) of that directive allows Member States to impose an obligation on providers of information society services promptly to inform the competent public authorities of unlawful activities alleged by recipients of their services or of information communicated by those recipients. According to the Polish Government, that obligation corresponds to the obligation to draw up and publish reports on the handling of notifications

of illegal content, as provided for in the KoPl-G. Consequently, it maintains that, in so far as the provisions of that law concern the notification and monitoring of illegal content, they fall within the scope of Article 14(3) and Article 15(2) of Directive 2000/31. The Polish Government argues that the provisions of that law should therefore be assessed in the light not of Article 3(4) of that directive but of Article 56 TFEU.

44. Only in the third place, in the event that the Court does not agree with those analyses, does the Polish Government argue that the concept of 'measure', within the meaning of Article 3(4) of Directive 2000/31, can also be understood as a legislative measure relating to a category, described in general terms, of given information society services.

C. Assessment

45. Since the Polish Government argues, first, that the question referred should be examined with reference not to Article 3(2) and (4) of Directive 2000/31 but to Article 14(3) and Article 15(2) thereof, and, second, that, in the light of the case-law relating to Article 56 TFEU, the KoPl-G does not restrict the freedom to provide information society services, such that there is no need to consider Article 3(4) of that directive, it is necessary at the outset to analyse that government's arguments.

1. Articles 14 and 15 of Directive 2000/31

46. Article 14(3) of Directive 2000/31 appears to be relevant only if the provider of the information society service falls within the scope of Article 14(1) of that directive. (25) For that to be the case, the activity of that provider must be of a mere technical, automatic and passive nature, which means that that service provider has neither knowledge of nor control over the information which is transmitted or stored. (26) Such a provider may benefit from the exemption from liability in respect of stored information where the conditions laid down in Article 14(1) of that directive are fulfilled.

47. In so far as Article 14(3) of Directive 2000/31 provides, in the first part thereof, that '[that] Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement', the effect of that provision is that a service provider may have imposed on it injunctions adopted on the basis of the national law of a Member State, even if it benefits from the exemption from liability. Like the Polish Government, I consider that such injunctions may be adopted by the authorities of a Member State other than that in which the service provider is established.

48. The request for a preliminary ruling does not contain any information that makes it possible to establish whether the appellants in the main proceedings fall within the scope of Article 14(1) of Directive 2000/31. However, each provider falling within the scope of that provision is a provider of an information society service whose service may benefit from the mechanism established in Article 3 of that directive. If Member States are permitted to adopt injunctions against a provider granted preferential treatment which may, where appropriate, benefit from the exemption provided for in Article 14(1) of that directive, they should also be permitted to do so where the provider cannot rely on that exemption.

49. The Polish Government understands the second part of Article 14(3) of Directive 2000/31, according to which 'nor does [that article] affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information', as meaning that it allows Member States to impose on a service provider established in a Member State obligations such as those laid down in the KoPl-G.

50. However, that 'possibility' concerns procedures or actions relating to the individual infringements which may form the subject matter of the injunctions referred to in the first part of Article 14(3) of Directive 2000/31. This would apply to a preliminary procedure in which a person who may seek an injunction against the provider must, before bringing proceedings before a court, inform the service provider of the infringement in order to give that provider the opportunity expeditiously to bring the infringement concerned to an end and to prevent its recurrence. (27) By contrast, the possibility reserved to Member States in the second part of Article 14(3) of that directive does not relate

to the imposition of general obligations which form part of substantive law and which have no connection with proceedings for an injunction relating to an individual infringement. (28)

51. The question referred for a preliminary ruling concerns such general obligations and, therefore, in the present case, there is no need to consider how the implementation of the possibility set out in the second part of Article 14(3) of Directive 2000/31 relates to the mechanism provided for in Article 3(2) and (4) of that directive.

52. For similar reasons, nor is Article 15(2) of Directive 2000/31 relevant to the present case. That provision appears to clarify the scope of the prohibition on Member States imposing a monitoring obligation of a general nature on service providers, as provided for in Article 15(1) of that directive. (29) As stated in recital 47 of Directive 2000/31, that prohibition does not concern monitoring obligations 'in a specific case' and, in particular, does not affect orders by national authorities in accordance with national legislation. (30)

2. Article 56 TFEU

53. Article 3(2) of Directive 2000/31 prohibits Member States from restricting the freedom to provide information society services from another Member State. The referring court states that the obligations arising from the KoPl-G are, in principle, capable of restricting the freedom to provide information society services in so far as those obligations must also be fulfilled by service providers established in the territory of a Member State other than Austria. The Polish Government argues that, in order to answer the question whether the obligations arising from the KoPl-G constitute a 'restriction' within the meaning of that provision, the reasoning of the Court in the context of Article 56 TFEU must be followed. According to that government, it must therefore be concluded, in the light of the judgment in *Airbnb Ireland,* (31) that the KoPl-G does not restrict the freedom to provide information society services, in particular because that law does not lay down conditions concerning the provision of services by the undertakings concerned.

54. In that regard, first of all, according to the approach adopted by the Court in its case-law, the enforceability of national measures falling within the coordinated field against services from another Member State or against the provider of such services must be assessed in the light of Article 3 of Directive 2000/31 and not by reference to the provisions of primary law. (32)

55. Next, it should be noted that, contrary to what the Polish Government suggests, in the judgment in *A (Advertising and sale of medicinal products online)* (33) the Court referred to the case-law relating to Article 56 TFEU not in order to establish whether the national measure was a restriction on the freedom to provide information society services, within the meaning of Article 3(2) and (4) of Directive 2000/31, but rather, having found that it was such a restriction, (34) in order to ascertain whether the conditions of necessity and proportionality were satisfied.

56. Lastly, although Article 3(2) and (4) of Directive 2000/31 is consistent with Article 56 TFEU, that directive does not constitute a mere restatement of the principles laid down by primary law. As the Court has clarified, with regard to the coordinated field, Article 3 of that directive precludes, subject to derogations authorised in accordance with the conditions set out in paragraph 4 thereof, a provider of an electronic commerce service from being made subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established. (35) I infer from this that making the provision of services subject to requirements going beyond those in force in the Member State of origin in order for such services to be accessible on the territory of another Member State is likely to restrict the freedom to provide those services.

57. In those circumstances, making the appellants in the main proceedings subject to obligations which do not concern specific items of illegal content and information(36) and which, moreover, lay down requirements falling within the coordinated field that do not appear to correspond to requirements laid down by the law of the Member State in which they are established and that concern the provision of their services in the territory of another Member State, restricts the freedom to provide information society services and thus derogates from Article 3(2) of Directive 2000/31.

58. Accordingly, it remains to be determined whether a Member State may derogate from Article 3(2) of Directive 2000/31 by adopting legislative measures of a general and abstract nature relating to a category, described in general terms, of given information society services.

3. Article 3 of Directive 2000/31

(a) Preliminary remarks

59. In my Opinion in *Airbnb Ireland,* (37) to which reference is made in this reference for a preliminary ruling and in the written observations of the parties, my analysis led me to conclude that a Member State other than the Member State of origin can derogate from the free movement of information society services only by measures taken on a 'case-by-case' basis.

60. I should point out that, in that Opinion, I first recalled the substantive conditions laid down in Article 3(4)(a) of Directive 2000/31, (38) that is to say (i) the need to adopt a measure for reasons relating to public policy, the protection of public health, public security or the protection of consumers, (ii) the prejudice caused by an information society service to one of those objectives or a serious and grave risk of such prejudice and (iii) the proportionality of the measure to that objective.

61. Second, I noted that, in the absence of clarification concerning the need to adopt the measure at issue and the possibility that AIRBNB Ireland's service prejudices one of the objectives specified in Article 3(4)(a)(i) of Directive 2000/31, the second question referred in that case could not be understood otherwise than as seeking to ascertain whether a Member State other than the Member State of origin may be allowed to impose, on its own initiative and without examining the substantive conditions, the requirements relating to the practice of the profession of real estate agent on providers of a category of information society services. It is in that context that, third, I put forward a series of arguments for considering that a Member State other than the Member State of origin can derogate from the free movement of information society services only by measures taken on a 'case-by-case' basis.

62. In the present case, the referring court takes the view that the obligations imposed by the KoPl-G are, in principle, capable of contributing to ensuring public policy and that it has sufficient information to determine whether the provisions of that law are necessary to secure that objective and whether they are proportionate to it. It is true that the wording of the first question referred may give the impression that the referring court is, by that question, referring to Article 3(4)(a)(ii) of Directive 2000/31, which lays down the substantive condition relating to the prejudice caused by an information society service to a given objective, or a serious and grave risk of such prejudice. However, the referring court acknowledges that it in fact has doubts as to whether general and abstract provisions imposing on providers of information society services, defined according to their nature, general obligations which take effect in the absence of any individual and specific measure, can actually constitute measures within the meaning of Article 3(4) of that directive. Accordingly, the arguments which I put forward in the context of my analysis in the Opinion in *Airbnb Ireland* (39) are also relevant to the present case. In this Opinion, I shall develop those arguments in the light of the issues raised by the referring court in the present case and I shall present some additional arguments.

(b) Analysis

63. In the first place, in order not to 'dilute' the country-of-origin principle set out in Article 3(1) of Directive 2000/31, Article 3(4) of that directive could be understood as allowing Member States other than the Member State of origin to derogate from that principle only indirectly. To take the view that a general and abstract provision which applies to any provider of a category of information society services may constitute a 'measure', within the meaning of Article 3(4) of that directive, would be tantamount to authorising the fragmentation of the internal market by national regulations.

64. In the second place, Article 3 of Directive 2000/31 must be interpreted in such a way as to guarantee the free movement of information society services between the Member States. (40) Moreover, an exception to the general rule laid down in Article 3(2) of that directive, such as Article 3(4) thereof, must be interpreted strictly. With that in mind, as is clear from recitals 5 and 6 of Directive 2000/31, the EU legislature, through that directive, sought to eliminate legal obstacles to the

proper functioning of the internal market, namely obstacles arising from divergences in legislation and from the legal uncertainty as to which national rules apply to such services. Allowing different laws to apply to a provider or to its service would run counter to that objective.

65. In the third place, the nature of a measure by which a Member State of destination may derogate from the country-of-origin principle can be determined on the basis of the substantive and procedural conditions laid down in Article 3(4)(a) and (b) of Directive 2000/31.

66. On the one hand, measures adopted on the basis of Article 3(4) of Directive 2000/31 concern a *given* service which, as required by Article 3(4)(a)(ii) of that directive, *must prejudice* the objective concerned or *present a serious and grave risk of* prejudice to that objective. In those circumstances, allowing, under that directive, which is based on the country-of-origin principle and the rule on the control at source of information society services, (41) a Member State to restrict the freedom to provide a category of services from other Member States would call into question the mutual trust between those Member States (42) and would presuppose a general mistrust of any other Member State with regard to their supervision of the information society services provided by providers established in their territories. This is a further reason to consider that, in all cases falling within Article 3(4) of that directive, an examination of the circumstances of the particular case is required.

67. On the other hand, in so far as Article 3(4)(b) of Directive 2000/31 requires a Member State of destination to ask the Member State of origin to take measures in respect of information society services, that provision presupposes that the Member State to which such a request is addressed is clearly identifiable and identified before a measure within the meaning of Article 3(4) of that directive is taken. A legislative measure of a general and abstract nature which applied without distinction to any provider of a category of services would not respect the logic of the procedural requirement laid down in Article 3(4) of that directive.

68. Moreover, Article 3(4)(b) of Directive 2000/31 makes the derogating effect of measures taken at national level subject to prior notification to the Commission of the intention to take such measures. If the term 'measure', within the meaning of Article 3(4) of that directive, were to be understood as including legislative measures of a general and abstract nature which apply without distinction to any provider of a category of services, this would mean that Article 3(4)(b) of that directive adds a notification additional to that required by Directive 2015/1535. Under the latter directive, Member States have an obligation to notify the Commission of requirements of a general nature relating to the taking up and pursuit of information society service activities. (43)

69. In the fourth place, I am sympathetic to the Commission's argument that it is in principle for the Member State of destination to determine 'how and where' it intends to take a measure derogating from Article 3(2) of Directive 2000/31. The system of sources of law in each Member State may take different forms. With that in mind, the Commission does not rule out the possibility that such a measure may be general in scope, 'provided that that measure is sufficiently targeted in so far as it applies clearly, from the outset, to a given information society service provided by one or more providers established in one or more other Member States'. However, for the reasons put forward in points 63 to 68 of this Opinion, a legislative measure of a general and abstract nature which applies without distinction to any provider of a category of services does not fulfil that condition.

70. The definition of the concept of 'coordinated field' in Article 2(h) of Directive 2000/31 does not call that consideration into question. The reference to requirements of a general nature in the definition of that concept relates not to the range of powers which a Member State of destination may exercise for the purposes of derogating from Article 3(2) of that directive, but to that of a Member State of origin.

71. Nor does an analysis of the *travaux préparatoires* for Directive 2000/31 call that consideration into question. It is true that the proposal for that directive stated that 'the Commission will fully account for the Member States' need to enforce laws seeking to protect fundamental societal interests [and it] would … be out of the question for the Commission to prevent a Member State from applying a law which would forbid the arrival of racist messages'. (44) However, it is not clear how, in that context, the reference to 'applying a law which would forbid the arrival of [specific content]' is to be understood, in so far as such application is concerned rather with the issue of the injunctions referred to

in Articles 14 and 15 of that directive, and, moreover, according to that proposal, derogations from the country-of-origin principle are permissible ‘in very specific cases’.

72. For the sake of completeness, I would point out that the interpretation according to which a legislative measure of a general and abstract nature which applies without distinction to any provider of a category of services does not constitute a ‘measure’ within the meaning of Article 3(4) of Directive 2000/31 is the interpretation adopted by most academic commentators. (45) Those favouring the opposite interpretation state that it is necessary to take into account the significant weight which combatting illegal hate speech adds to that discussion. In support of that interpretation, they argue that that approach echoes Directive 2000/31, recital 10 of which states that that directive must ensure a high level of protection of objectives of general interest. (46) I am sympathetic to that argument and I do not exclude the possibility that the Digital Services Act is intended to address such concerns. However, with regard to Directive 2000/31, I must point out that recital 22 thereof states that ‘information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives … not only for the citizens of [the Member State in which a service provider is established] but for all [Union] citizens’.

73. In the light of the foregoing, I consider that Article 3(2) and (4) of Directive 2000/31 must be interpreted as precluding a Member State from restricting the freedom to provide information society services from other Member States by adopting legislative measures of a general and abstract nature relating to a category, described in general terms, of given information society services, without those measures being taken on a case-by-case basis.

74. For the sake of completeness, I must point out that the foregoing considerations are in no way called into question by the guidance to be derived from the judgments in *Ker-Optika*, *Airbnb Ireland* and *A (Advertising and sale of medicinal products online)*.

(c) The judgment in Ker-Optika

75. In the judgment in *Ker-Optika,* (47) the Court found that, since it contained a prohibition on selling contact lenses via the internet, the national legislation at issue in that judgment could not be held to be proportionate to the objective of ensuring the protection of public health, for the purposes of Article 3(4) of Directive 2000/31. That passage may therefore give the impression, *a contrario*, that national legislation such as that at issue in that judgment may constitute a ‘measure’ within the meaning of that provision. However, the reference to that provision must be read in the context in which it is made.

76. In the case which gave rise to the judgment in *Ker-Optika*, the referring court was seeking to ascertain whether EU law precludes national legislation which authorises the sale of contact lenses only in shops which specialise in the sale of medical devices and which prohibits, consequently, their sale via the internet.

77. In that judgment, the Court held that, in the context of the sale of contact lenses via the internet, two elements can be distinguished, namely the act of selling per se and the delivery of the product. Having made that distinction, the Court proceeded to identify the provisions of EU law applicable to those two elements of the sale. The Court therefore held that the conditions of sale as such are covered by Directive 2000/31, (48) whereas, given the definition of the concept of ‘coordinated field’ contained in that directive, the conditions of the supply of the product are excluded from the scope of that directive (49) and must be assessed under the provisions of primary law relating to the free movement of goods. (50)

78. First, the Court held that the conditions of supply introduced by the national legislation constituted a restriction on the free movement of goods and that that restriction could not be justified since it went beyond what was necessary to attain the objective relied on in support of the restriction which it imposed. (51) Second, with regard to the conditions of sale as such, the Court held that, ‘for the same reasons’, since it contained a prohibition on selling contact lenses via the internet, that legislation could not be held to be proportionate to the objective of ensuring the protection of public health, for the purposes of Article 3(4) of Directive 2000/31. (52) On that basis, the Court concluded that Articles 34 and 36 TFEU, and, without however citing its specific provisions, that directive,

preclude national legislation which authorises the selling of contact lenses only in shops which specialise in medical devices. (53)

79. However, as is apparent from the Opinion of Advocate General Mengozzi in that case, (54) the Hungarian legislation prohibiting the sale of contact lenses via the internet was applied to a company governed by Hungarian law. That was therefore a situation falling within the scope not of Article 3(4) of Directive 2000/31, but rather of Article 3(1) of that directive.

80. In those circumstances, the reference to that provision in the judgment in *Ker-Optika* (55) lends itself to different readings. It could be concluded that, by referring to that provision, the Court intended to maintain the approach adopted by the EU judicature in assessing the conditions of supply in the light of the provisions of primary law on the free movement of goods, which are applicable only in situations which at least potentially have a cross-border dimension. Another possible interpretation is that the Court's conclusion that Directive 2000/31 precludes national legislation which does not authorise the selling of contact lenses online relates to Article 9 of that directive, also referred to in that judgment, (56) which provides that Member States are to ensure that their legal system allows contracts to be concluded by electronic means.

(d) The judgment in Airbnb Ireland

81. As the referring court notes, the Court, in the judgment in *Airbnb Ireland,* did not rule on the concept of 'measure' within the meaning of Article 3(4) of Directive 2000/31. Bearing in mind that the French Republic did not give notification of the law at issue in that case, as required by Article 3(4)(b) of that directive, the Court deemed it appropriate to limit itself to taking the view that that law could not, 'on any view', be applied to an individual, 'regardless of whether that law satisfies the other conditions laid down in that provision'. (57)

(e) The judgment in A (Advertising and sale of medicinal products online)

82. The question referred in the case which gave rise to the judgment in *A (Advertising and sale of medicinal products online)* concerned the conformity with EU law of the application of national legislation of the Member State of destination of an online sales service relating to medicinal products not subject to medical prescription to the provider of that service established in another Member State. By that question, the referring court asked the Court whether that national legislation was compatible with Article 34 TFEU, Article 85c of Directive 2001/83/EC (58) and/or Article 3 of Directive 2000/31. In its judgment, the Court held that the question referred had to be analysed from the point of view of the latter directive.

83. Although a reading of that judgment might give the impression that, under Article 3(4) of Directive 2000/31, a Member State may derogate from the free movement of services by adopting general and abstract rules, the Court's answer cannot be understood as a final judgment on the merits of the case without taking into account the nature of the preliminary ruling procedure and the scope of the request made to the Court. The Court was not asked whether the national legislation in question could constitute a 'measure' within the meaning of Article 3(4) of that directive. Similarly, it was argued in that case that that legislation had not been notified in accordance with Article 3(4)(b) of that directive. Nevertheless, in answering the question referred, the Court held that it was appropriate to allow the application of that legislation to a service provider established in another Member State, in view of the presumption of relevance which questions referred for a preliminary ruling relating to EU law enjoy. (59)

84. In that context, moreover, it is significant that the operative part of the judgment in *A (Advertising and sale of medicinal products online)* does not refer to a specific provision of Directive 2000/31, despite the fact that the question referred made reference to Article 3 of that directive. Perhaps even more important is the fact that, in that judgment, the Court also referred to Article 8(1) of that directive. (60)

85. In that regard, the national legislation at issue in that case and the justification relied on in support of it may give the impression that that legislation comprised, in essence, professional rules regarding pharmacists and best practice in the dispensing of medicinal products by them. It is important

to point out in that context that Article 8(1) of Directive 2000/31 provides that ‘Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession’. Like Articles 14 and 15 of that directive, that provision is included not in Chapter I, which contains Article 3, but in Chapter II of that directive. It cannot therefore be ruled out that Article 8 of Directive 2000/31, like Articles 14 and 15 thereof, (61) also applies to Member States of destination which determine the professional activities that are regulated within their legal orders and which may therefore adopt certain rules relating to commercial communications by a member of a regulated profession, without undermining the mechanism in Article 3 of that directive.

86. In the light of the foregoing, I maintain the position which I put forward in point 73 of this Opinion.

VI. Conclusion

87. In the light of all the foregoing considerations, I propose that the Court answer the first question referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

Article 3(2) and (4) of 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,

must be interpreted as precluding a Member State from restricting the freedom to provide information society services from other Member States by adopting legislative measures of a general and abstract nature relating to a category, described in general terms, of given information society services, without those measures being taken on a case-by-case basis.

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1 Original language: French.

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2 Regulation of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ 2022 L 277, p. 1).

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3 See Article 1 of the Digital Services Act.

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4 For a description of those obligations, see, inter alia, Wilman, F., ‘The Digital Services Act (DSA) – An Overview’, SSRN (papers.ssrn.com), 27 December 2022, p. 7 et seq.

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5 See Articles 92 and 93 of the Digital Services Act.

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6 Subject to the exceptions provided for in more specific measures governing those matters, such as Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 2011 L 335, p. 1, and corrigendum OJ 2012 L 18, p. 7) and Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online (OJ 2021 L 172, p. 79).

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7 In particular, the Federal Republic of Germany and the French Republic have adopted, respectively, the Netzwerkdurchsetzungsgesetz (NetzDG) (Law on the monitoring of social media platforms) of 1 September 2017 (BGBl. 2017 I, p. 3352), and loi No 2020-766, du 24 juin 2020, visant à lutter contre les contenus

haineux sur l'internet (Law No 2020-766 of 24 June 2020 combatting hateful content online) (JORF No 0156 of 25 June 2020).

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8 The European Commission stated, in its written observations, that that Austrian legislation lays down obligations which overlap with those of the Digital Services Act.

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9 Directive 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 ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

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10 See Article 2(3) of the Digital Services Act. Moreover, while that regulation fully harmonises certain rules applicable to intermediary services in the internal market, it probably does not eliminate the possibility of derogating from the country-of-origin principle set out in Article 3 of Directive 2000/31 as regards matters other than those covered by the harmonised rules. See recital 9 of that regulation.

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11 Directive of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1). Prior to the entry into force of Directive 2015/1535, Article 2(a) of Directive 2000/31 defined 'information society services' as 'services within the meaning of Article 1(2) of Directive [98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37)]'. Since the entry into force of Directive 2015/1535, that reference should be understood, by virtue of Article 10 of that directive, as referring to Article 1(1)(b) thereof.

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12 BGBl. I, 151/2020.

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13 Paragraph 14 of the KoPl-G.

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14 Paragraph 1(3) of the KoPl-G is not cited by the referring court. In essence, that provision excludes from the scope of that law providers of communication platforms (1) which are used solely for the trading or sale of goods or services, and for the trading of real estate or job offers, (2) whose main purpose is to provide services on a non-profit basis and (3) which are provided by media undertakings.

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15 Judgment of 2 December 2010 (C-108/09, EU:C:2010:725; 'the judgment in *Ker-Optika*').

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16 Judgment of 19 December 2019 (C-390/18, EU:C:2019:1112; 'the judgment in *Airbnb Ireland*').

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17 Judgment of 1 October 2020 (C-649/18, EU:C:2020:764; 'the judgment in *A (Advertising and sale of medicinal products online)*').

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18 C-390/18, EU:C:2019:336, points 134 and 135.

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19 See Paragraph 1 of the KoPl-G.

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20 See Paragraph 3(1) and (4) of the KoPl-G.

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21 See Paragraph 4(1) of the KoPl-G.

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22 See Paragraph 5(1) and (4) of the KoPl-G.

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23 See Paragraph 10 of the KoPl-G, which is not reproduced in the request for a preliminary ruling.

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24 Judgment in *Airbnb Ireland* (paragraph 42).

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25 Article 14(1) of Directive 2000/31 provides that 'where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (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'.

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26 See judgment of 22 June 2021, *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraph 105).

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27 See judgment of 22 June 2021, *YouTube and Cyando* (C-682/18 and C-683/18, EU:C:2021:503, paragraphs 131 and 133).

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28 Moreover, Article 6(4) of the Digital Services Act, which assumes the role of Article 14(3) of Directive 2000/31, merely states that that article 'shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement' (like the first part of Article 14(3) of that directive), though without reproducing the second part of the abovementioned Article 14(3) (set out in point 49 of this Opinion). However, the rules relating to injunctions are now harmonised by that regulation and, moreover, that regulation provides that the conditions and requirements relating to injunctions are to be without prejudice to civil procedural law. See Articles 9(6) and 10(6) of that regulation.

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29 Article 15(1) of Directive 2000/31 provides that 'Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity'. Article 15(2) of that directive adds that 'Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements'.

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30 See also, to that effect, judgment of 3 October 2019, *Glawischnig-Piesczek* (C-18/18, EU:C:2019:821, paragraph 35), in which the Court stated that 'such a specific case may, in particular, be found, as in the main proceedings, in a particular piece of information stored by the host provider concerned at the request of a certain user of its social network, the content of which was examined and assessed by a court having jurisdiction in the Member State, which, following its assessment, declared it to be illegal'.

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31 Paragraph 42 of that judgment.

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32 See, to that effect, judgment in *A (Advertising and sale of medicinal products online)* (paragraph 34). See also my Opinion in *LEA* (C-10/22, EU:C:2023:437, point 84).

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33 Paragraph 64 of that judgment.

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34 Judgment in *A (Advertising and sale of medicinal products online)* (paragraph 62). See also, to that effect, judgment in *Airbnb Ireland* (paragraphs 81 and 82).

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35 See judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraphs 67 and 68).

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36 See point 47 of this Opinion. See also recital 38 of the Digital Services Act.

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37 C-390/18, EU:C:2019:336, point 135.

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38 See my Opinion in *Airbnb Ireland* (C-390/18, EU:C:2019:336, points 123 to 125).

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39 C-390/18, EU:C:2019:336, point 135.

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40 See judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 64).

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41 See recital 24 of Directive 2000/31.

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42 See recital 22 of Directive 2000/31.

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43 See Article 1(1)(e) and Article 5 of Directive 2015/1535. In its written observations, the Commission states that the KoPl-G was notified to it not under Directive 2000/31 but under Directive 2015/1535, although it does not rule out the possibility that a Member State may fulfil the notification requirements laid down by both those directives by means of a single notification.

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44 Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, p. 33.

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45 See, inter alia, Crabit, E., 'La directive sur le commerce électronique: le projet "Méditerranée"', *Revue du droit de l'Union européenne*, 2000, No 4, p. 749 and, in particular, pp. 762 and 792; Drexl. J., 'Mondialisation et société de l'information. Le commerce électronique et la protection des consommateurs', *Revue internationale de droit économique*, 2002, Nos 2 and 3, p. 405 and, in particular, p. 432 ('*[l'État membre de destination peut] prendre des mesures individuelles*'); Gkoutzinis, A., *Internet Banking and the Law in Europe: Regulation, Financial Integration and Electronic Commerce*, Cambridge University Press, Cambridge-New York, 2006, p. 283; and Schulz, W., 'Regulating Intermediaries to Protect Privacy Online – the Case of the German NetzDG', *HIIG Discussion Paper Series*, 2018, p. 7 ('exemption clause of art. 3 sec. 4 e-Commerce Directive [is] restricted to individual cases and does not allow members states to apply their jurisdiction all together "through the backdoor"').

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46 See Holznagel, D., 'Platform Liability for Hate Speech & the Country of Origin Principle: Too Much Internal Market?', *Computer Law Review International*, 2020, Vol. 4, p. 107.

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47 Paragraph 76 of that judgment.

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48 Judgment in *Ker-Optika* (paragraph 28).

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49 Judgment in *Ker-Optika* (paragraph 31).

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50 Judgment in *Ker-Optika* (paragraph 41).

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51 Judgment in *Ker-Optika* (paragraph 75).

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52 Judgment in *Ker-Optika* (paragraph 76).

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53 Judgment in *Ker-Optika* (paragraph 78).

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54 See Opinion of Advocate General Mengozzi in *Ker-Optika* (C-108/09, EU:C:2010:341, point 21).

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55 Paragraph 76 of that judgment.

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56 Judgment in *Ker-Optika* (paragraph 26).

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57 Judgment in *Airbnb Ireland* (paragraph 99).

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58 Directive of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34).

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59 See judgment in *A (Advertising and sale of medicinal products online)* (paragraphs 41 and 44).

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60 See judgment in *A (Advertising and sale of medicinal products online)* (paragraph 66).

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61 See point 47 of this Opinion.