IN THE EUROPEAN COURT OF HUMAN RIGHTS App. No. 64569/09

DELFI v ESTONIA

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SUBMISSIONS ON BEHALF OF
European Digital Media Association, CCIA and EuroISPA

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1 By letter dated 9 May 2014 the President of the Court granted European Digital Media Association ("EdiMA"), CCIA and EUROISPA leave to submit written submissions in the above case. EDiMA, the European Digital Media Association established in 2000, is an alliance of new media companies whose members provide new media platforms offering European consumers a wide range of online services, including e-content, media, e-commerce, communications and information/search services. CCIA-Europe is a nonprofit membership organization for a wide range of companies in the computer, Internet, information technology, and telecommunications industries. EuroISPA is a pan-European association of European Internet Services Providers Associations, representing over 2300 ISPs across the EU and EFTA countries. The association was established in 1997 to represent the European ISP industry on EU policy and legislative issues and to facilitate the exchange of best practices between national ISP associations. EuroISPA represents a large variety of services providers from access to hosting providers, platform services and other operators carrying user-generated content.

I. INTRODUCTION

2 This is the first time that this Court has had to decide whether an obligation on online service providers ("OSPs") "*to ensure that comments made by third parties on their 'Internet portals' d[o] not infringe the personality rights of third persons [accords] with the guarantees set out in Article 10 of the Convention*": §84 Chamber judgment. In the words of the Estonian Government, the Court should decide whether it is permissible for Contracting States not "*to exclude the liability of an Internet Portal owner who acts as a content service provider and discloser of anonymous comments to its own articles*" and to hold them liable as 'publishers' of the comments, even absent knowledge and even where those comments are removed expeditiously on notification: Government Observations §97. Importantly, this question is also before the Court in Application No. 22947/13 *MTE v Hungary*, which was communicated on 22 January 2014, and which is considered further at paragraph 18 below.

3 In answering that question the Court must take into account the established balance struck to date in legislation, international agreements and recommendations, including the law of many of the Contracting States,[1] which all coincide in two important respects. First, host service providers are exempt from liability for content absent 'actual knowledge' and (b) secondly, States are prohibited from requiring host providers to carry out general monitoring of content. The Appellant refers at paragraphs 24-36 of its submissions to several of these agreements. Further relevant international materials are referred to by the Court in *Yildirim v Turkey* App. No. 3111/10 judgment 18 December 2012 §§19-37. As the Court has repeatedly stated, these are relevant to the Court's interpretation the Convention.[2] In the EU, of which Estonia is a Member State, these exemptions and prohibitions on monitoring are set forth in the Directive 2000/31 on e-commerce ("ECD"). Law on point under the ECD is well-established.

4 The exemption from liability for content in the absence of actual knowledge and subject to expeditious removal is commonly referred to as a system of "Notice and Take Down" ("NTD").[3] NTD is intended to

[1] EU states are bound to implement Directive 2000/31 on e-commerce ("ECD"), Directive 2001/29 on copyright; Directive 2004/48 on intellectual property rights. The 'safe harbour' or 'exemption' provisions within the EU regime are modeled on the US On-Line Copyright Infringement Liability Limitation Act 1998 (OCILLA)—commonly known as Section 512 of the DMCA, 17 U.S.C. 512.

[2] *Demir and Baykara v. Turkey*, Application no. 34503/97, 12 November 2008, §74

[3] Certain details of NTD, such as formal requirements for adequate notice, vary by Member State. The French law: Loi pour la Confiance dans l'Economie Numérique (LCEN) (law for confidence in the digital economy) art. 6-I, 5, provides a specific procedure for the notification of illicit

ensure (and must be undertaken in a way that observes) fundamental rights, in particular freedom of expression. This is made clear in recitals 46 and 9 of the ECD.[4] NTD is intended to enable swift remedies to be provided to victims of genuinely unlawful online speech whilst preventing broad "over-takedown" of lawful speech. In relation to this, the Committee of Ministers noted that:

> "Member States should, however, exercise caution in imposing liability on service providers for not reacting to such a notice. Questions about whether certain material is illegal are often complicated and best dealt with by the courts. If service providers act too quickly to remove content after a complaint is received, this might be dangerous from the point of view of freedom of expression and information[5]. Perfectly legitimate content might thus be suppressed out of fear of legal liability."[6]

5 Further, the Joint Declaration on Freedom of Expression and the Internet of the UN Special Rapporteur, the OSCE, the OAS and the ACHPR of 1 June 2011, which precludes intermediary liability makes clear that:

> "[a]t a minimum, intermediaries should not be required to monitor user generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied)."[7]

6 As operators of UGC hosting platforms, the Intervenors explain below how NTD works, as it relates to the exercise of users' freedom of expression rights (Section II), review the relevant law to show that the Estonian Court's decision involved a manifest error in its application, or varied so markedly from that

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content with a list of elements that such notification should contain including: identification of the complainant, description of the infringing material, legal justification for removal request, copy of correspondence to the author or publisher of the material asking for its interruption, removal or modification or explanation why the author or publisher could not be contacted. In some instances courts have identified legal claims that create no removal requirement for OSPs absent judicial determination because the legal issues require resolution by courts: Case 144/2013 *Graciano Palomo Cuesta* judgment Spanish Supreme Court 13 March 2013; *Davison v Habeeb* [2011] EWHC 3031 At the other extreme, some material may be so manifestly unlawful that OSPs who become aware of it can be imputed with knowledge and required to remove without user notice, for example child sexual abuse content

[4] "***(9)*** *The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression."* ***"(46)*** *In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information."*

[5] The data analysis firm Information Processing Limited recently developed a model to assess how Google manages copyright takedown requests using data Google discloses publicly. Key observations include: (1) the significant operational challenge: in a 12 month period, a 15-fold increase in the number of infringements reported to Google per month was observed; (2) accuracy and timeliness of removals remained steady despite the increase in notifications; and (3) intermediary liability rules embodied in the DMCA and ECD are working. Counter-factual analysis in the research suggests, for instance, that introducing time requirements for take-downs would be likely to significantly reduce accuracy of removal determinations; while the current rules have allowed the flexibility for Google to remove infringing results while largely avoiding abuse and mistaken takedowns. See http://www.ipl.com/knowledge-hub/white-paper/google-modelling-the-takedown-process#.U4WNd5SSzpg

[6] Explanatory Memorandum to Declaration on Freedom of Communication on the Internet 2003 http://www.coe.int/t/informationsociety/documents/Freedom%20of%20communication%20on%20the%20Internet_en.pdf

[7] §2 found at: http://www.osce.org/fom/78309

law as to make the outcome unforeseeable (unlawful) and further, was in any event unlawful, the restriction being neither proportionate, nor based on relevant or sufficient reasons (Section III).

II. INTERNET HOSTING OF UGC CONTENT

A. The Function of Content Platforms

7 The Internet has been revolutionary in creating a space where individuals can express their views directly (and respond to the views of others) through the use of facilities provided by OSPs to host such comments on web-sites, 'platforms' or 'portals'. Whilst some information available online comes from traditional publishing sources such as newspapers, and is rightly regulated by the law applicable to publishers, a large amount of online content comes instead from individual speakers - the readers and ordinary citizens who use comment fora like that provided by Delfi - to express themselves, in a way that is unprecedented in human history. This form of expression (which can take place on numerous different forms of internet hosting, as explained below) enables individuals to state their views unmediated by traditional editorial institutions. It is thus truly a means of 'free expression' and 'pluralism' of expression. Moreover, comment facilities often allow for a right of reply and are thus fundamentally different to traditional publications where no such right exists. Comment facilities/blogs/social fora thus enable a giant form of conversation, often using informal or colloquial language, which is sometimes fast moving.

8 OSPs host and transmit UGC over a wide variety of different platforms, including, for example: media web-sites that also support user comments, such as the Huffington Post and Buzzfeed; social media/networking platforms, such as facebook, Linkedin and Pinterest; blogs/micro-blogs such as Twitter, tumblr, and Reddit; blog platforms such as Blogger, WordPress and Weebly; content/information sharing sites, such as YouTube, Dailymotion and Wikipedia; e-Commerce and connected review sites such as Allegro, Amazon, Zalando and eBay; search engines such as Google, Yahoo! and Bing.

9 The technology and operating processes for an online news discussion forum like Delfi are technologically indistinguishable from hosting services of the types offered by the Intervenors, as set out above. A user composes written, video, or other content and uploads it onto the hosting platform using internet, mobile or similar connections. Software on the host's servers stores the user's content and automatically makes it publicly visible without human intervention. Content uploaded by the user may be transcoded to a technical format compatible with the platform or otherwise processed for compatibility, but is otherwise substantively unaltered. Many hosts have content policies, enforced through reactive removal or screening for content inappropriate to the service. For many hosts, considerations of scale make proactive human review of all user content effectively impossible, for example, YouTube receives 100 hours of UGC video each minute, a volume that would defeat any effort pre-emptively to detect defamatory content.[8] For small web-sites and start-ups, content control is likely to be particularly challenging and may be so costly as to be prohibitive, such that these platforms would greatly decrease in number and accessibility were they to be liable for UGC content.

[8] As noted in the judgment, 190,000 comments had been posted on Delfi's web-site in one month in 2009L §30. See further Annex A

10 As regards several of the features identified by the Chamber or Estonian Government as reasons why liability could be lawfully imposed on the Applicant in this case, these are no more than standard aspects of contemporary hosting platforms. See further paragraphs 22, 26-27 below.

B. Regulation of Online Content under "Notice and Takedown"

11 Established law in the EU and other countries envisages NTD as a legal and practical framework for internet content hosting. Under this system, intermediaries are not charged with monitoring and do not assume direct legal responsibility for the great diversity of user speech hosted on their platforms. Instead, the host's legal responsibility arises on actual knowledge of the particular unlawful content, typically provided through notice from an affected party. If the host then removes the content, it cannot be held liable in respect of it; the exemption is absolute. Internet hosts operating NTD systems typically enable individuals to notify them of allegedly unlawful content by email or web forms and provide personnel and processes to handle removals of content efficiently. This balance of responsibilities between users and hosts allows platforms to identify and remove defamatory or other unlawful speech, whilst at the same time enabling robust discussion on controversial topics of public debate; it makes the operation of speech hosting platforms practicable at scale.

12 Whilst NTD is an effective and important mechanism for addressing online content alleged to breach the law, and may be a proportionate response to the challenges of regulating UGC on the internet, it is nevertheless widely acknowledged as posing real risks of erroneous "over-removal" of lawful user speech. This risk is particularly acute in areas such as defamation, where facts and considerations of public interest known to the parties or ascertainable through national court processes are simply not available to OSPs. In those circumstances OSPs have an incentive to remove to reduce the risk of liability, irrespective of whether they are sure that the material is unlawful. Indeed for small ISPs the costs of objecting to a take-down request, including the possibility of defending any court action, will act as a strong incentive to comply.

13 OSPs are in practice familiar with the widespread phenomena of erroneous or even fraudulent notices alleging that lawful user speech is infringing, defamatory, or otherwise in need of removal.[9] Independent studies substantiate this trend, for example, a study of copyright removals processed by Google under NTD found that over 50% of complaints came from businesses targeting apparent competitors, and 30% raised legal questions that the study authors considered required resolution by a court.[10] A further illustration of the risks of NTD comes from a case study of Internet intermediaries operating under India's Information Technology Act and implementing Rules, which are currently being challenged on free expression grounds in India's Supreme Court.[11] The study involved a host which, like Applicant in this case, permitted users to post comments in response to news articles. The researcher submitted a notice to the host challenging a particular user comment: "*Good that government is legalizing gambling in sports, this way corruption can be reduced besides getting revenues. But it should be well researched before implementing and tips can be followed from US & UK*." The notice alleged that the comment violated a legal prohibition on statements "relating [*sic]* or encouraging money laundering

[9]Some examples in the copyright context are listed at:
https://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests.

[10] Jennifer Urban and Laura Quilter, "Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act" available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210935

[11] http://www.medianama.com/2014/03/223-supreme-court-of-india-to-hear-eight-it-act-related-cases-on-11th-april-2014-sflc/

or gambling." The host reacted in a manner clearly calculated to reduce legal risk: it deleted not only this dubiously illegal statement, but seven additional user comments adjacent to it.[12]

14 Such overreaching removal of speech on matters of public interest is precisely the risk created by a broad and general requirement to monitor to remove unlawful content, which is the necessary *de facto* consequence of the Estonian Court's judgment in *Delfi*. Delfi had provided an NTD system and removed the material immediately on notification (albeit that the alleged victim failed to use the system provided). Despite that, Delfi was held liable for the harm caused prior to it having knowledge of the content. Accordingly, the only means by which it might have been able to avoid liability (or avoid it in the future) was through general *ex ante* monitoring and censorship. In holding that Estonia had not violated Article 10, the Chamber necessarily found the imposition of such a general *ex ante* monitoring obligation necessary and proportionate to some pressing social need.

15 The Intervenors note that the practical consequences of such a *general ex ante* monitoring/censorship obligation would be extremely serious for free speech. If OSPs were no longer confined in their efforts to removing content that had been identified by an affected party, but instead had to police the entirety of their hosted content, substantial over-removal would be inevitable.

C. Innovation and Investment in Speech and Content Platforms

16 The Chamber judgment establishes that OSPs that create platforms for open user dialogue in which they play no part, can be subjected to the legal responsibilities of a traditional editor or publisher in respect of that dialogue, even absent knowledge, without that violating Article 10 of the Convention. If upheld, Contracting States could therefore impose such liability on OSPs; in effect imposing monitoring obligations without beaching Article 10. This could have significant consequences for the availability of such platforms to users. First, it could result in a change to the most popular and effective sites, resulting in them only allowing limited and heavily monitored user speech. Secondly, it could have a significant impact on investment in the maintenance, development and creation of new platforms.[13] Even if incumbent platforms could continue to function, it would be likely to reduce significantly the number of new and innovative platforms or 'start-ups' frequently created by young entrepreneurs with little funding but lots of energy and initiative who are producing jobs in 'the new digital economy'. These start-ups could afford neither monitoring nor the potential cost risks that liability in the absence actual knowledge would involve. Indeed a prior monitoring regime to protect claimants such as complained in the Delfi case can only be at the cost of dramatically reducing or removing important fora for freedom of expression and public debate. NTD is the established means to ensure that does not happen.

III. LEGAL ARGUMENT

[12] Dara, Intermediary Liability in India: Chilling Effects on Free Expression on the Internet p. 15, 3.3.2.1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038214. Similarly, a Dutch study showed that 7 out of 10 ISP immediately removed content alleged to breach copyright when in fact it was written in 1871: http://edri.org/edrigramnumber2-19takedown/; see also an experiment along the same lines in relation to a request to remove John Stuart Mill's 'On Liberty': http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf

[13] Indeed, one study found that increasing liability on U.S. and E.U. intermediaries could decrease venture capital investments more than an economic recession http://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

A. Introduction

17 As stated above, the Chamber's judgment indicates to Contracting States that the Court will accept the imposition of liability on OSPs for content they host but do not create or edit, as 'necessary and proportionate' under Article 10. The only way in practice to avoid such liability would seemingly be for hosts to monitor for content that 'could be' unlawful and remove it prior to it being 'posted'. Thus, contrary to the Court's repeated disapproval of prior restraints, here the Chamber has held a *de facto* prior censorship obligation imposed on private providers of public discussion fora to be lawful, necessary and proportionate under Article 10; a very worrying conclusion. Indeed, its consequences can already be seen in the recent judgment of the Hungarian Constitutional Court of 27 May 2014, which upheld the ruling of the Supreme Court that web-sites hosting un-moderated comments must be held liable for the content of those comments and as such have to monitor and censor to avoid potential liability. In reaching that conclusion, the Constitutional Court was undoubtedly aware of the Chamber's judgment in this case, which is referred to in a concurring opinion at paragraph 74 [Annex B]. It follows that the Chamber judgment in this case has in fact already provided legitimisation for restrictions on individual expression, with serious consequences for democratic debate. The intervenors submit that the Chamber's conclusion that the restriction was lawful, proportionate and necessary was wrong both according to this Court's established case law and as a matter of EU/Estonian law, as explained below.

B. The restriction was not prescribed by law: the Appellant's comment forum was exempt under Article 14 ECD and/or its lack of exemption was not foreseeable.

18 Whilst in general the Court will proceed on the basis that the domestic courts have applied the law correctly, that rule is not absolute. The Court has and will hold the domestic courts to have committed a manifest error of appreciation in their interpretation or application of domestic law.[14] Where, as here, the question relates to the interpretation of EU law rather than merely domestic law, it is particularly important for this Court to examine it to determine whether or not a manifest error took place. Absent such an examination, this Court's ruling may be understood by other national Courts as an endorsement of the Estonian Supreme Court's interpretation of the relevant EU law. Moreover, to hold, as the Chamber did, that Estonia's imposition of liability on the Applicant in the absence of knowledge of content was lawful under Article 10, contradicts the position under EU law, which is that the exemption from liability absent actual knowledge is necessary to ensure freedom of expression (see recitals 9 and 46 set out at footnote 4 above). The Intervenors submit that here the error was so manifest that the Court should either:

a) Hold that OSPs that host content without editing or contributing to it are 'intermediaries' under the ECD and as such entitled to rely on Article 14 thereof, that is, hold that the interference was not 'prescribed by law', the finding of the Estonian Supreme Court involving a manifest error of appreciation; or

b) If it considers itself unable to conclude that such a manifest error was made, find that the inability of a news-site hosting comments on its articles to benefit from the exemption in relation to the content of those comments was not sufficiently foreseeable to meet the clarity of law requirements

[14] See for example *Barac and others v Montenegro* App. No. 47974/06 judgment 13 December 2011 §§3—33; *Affaire Dulaurans v France* App. No. 34553/97 judgment of 21 March 200 §37-38; *de Moor v Belgium* 23 June 1994 §55.

in Article 10.[15] In this regard, the Court is urged to emphasise that it makes no ruling on whether or not the Estonian Supreme Court's view on the lack of availability of the exemption is correct.

19 The Court of Justice of the European Union ("CJEU") has explained that acts entitled to exemption under the ECD 'cannot give rise to liability on the part of intermediary service providers'[16]. Member States have no discretion in relation to these exemptions, which are fully harmonised. Thus, an operator cannot be liable under domestic tort law if exempt under the ECD: *cf* § 75 of Chamber judgment. It is crucial therefore that the domestic court correctly determines the application of the exemption.

20 The CJEU case law[17] and its application by Member State courts establish that comment fora equivalent to that provided by the Applicant are entitled to rely on the exemption from liability under Article 14 of the ECD, and may not be compelled to monitor user speech under Article 15 of the ECD. For example, in facts directly analogous to this case, a bulletin board facility which allowed users to comment on articles published by Newsquest Media Group Limited, a large, regional media group (publishing some 200 titles and having around 180 websites) was accepted by the English High Court as constituting an intermediary hosting service under ECD.[18] Blogger (a site provided by Google that enables third parties to upload content 'blogs'), was similarly found by the Spanish Appeals Court of Barcelona to be an intermediary host provider,[19] such that it was not liable for defamatory comment in respect of a doctor on a blog that it hosted.[20] Similarly, a facility on Amazon enabling customers to submit comments, including by way of a 'discourse' with other users of Amazon's web-site, which is (a) subject to user guidelines, (b) blacklists offenders, (c) includes a filter to prevent forbidden words and blacklisted users, (d) involves manual review of comments containing forbidden words and (e) includes an NTD facility was held by the English High Court to be an intermediary service hosting content and thus entitled to rely on the exemption in article 14 ECD.[21] Where divergencies have arisen between national courts, these have related to the extent to which the service provider is 'active' in relation to the content.[22] However, neither the CJEU nor any national judgment that the Intervenors have been able to find has ever suggested that the mere technical ability to remove uploaded content or the inability of a user to change or delete comments excludes an OSP from the intermediary host exemption under the ECD, as the Estonian Courts did: §27 judgment. Indeed, such a position is impossible since all hosts can do this and are required to be able to do so in order to claim the ECD exemption. That is very different to a host playing "*an active role of such a kind as to give it knowledge of, or control over, the data stored*" (C-236/08)." Nor can the fact that the Applicant made money from its site remove it from the definition of

[15] See for an analogous situation *Case of Editorial Board of Pravoye delo and Shtekel v. Ukraine*, App. no. 33014/05 judgment 5 May 2011 §§56-59 and 66.

[16] C-236/08-238/08 *Google France v LVMH and others* judgment 23 March 2010 §107.

[17] C-324/09 *L'Oréal SA and others* judgment of 12 July 2011 §§113, 116, 123 (e-bay); Case C-238/08 and C-238/08 *Google France/LVHM* [2010] ECR I 2467 §113-117 (Google ads). See also Case C-360/*10 Netlog/SABAM* judgment 16 February 2012 §27, an exempt intermediary for the purposes of the Copyright Directive (an online social networking platform hosting (storing) content produced by individuals).

[18] *Imran Karim v Newsquest Media Group Ltd* [2009] EWHC 3205 §§3, 15, 17. Indeed, even the Hungarian Constitutional Court accepted that a site such as Delfi's was an intermediary:§38-39 but the domestic law did not exempt 'personal statements'§40.

[19] Under Article 16 of Law 34/2002 that implemented the Article 14 of the ECD. The Supreme Court noted in the last paragraph of its judgment that "what the law seeks to prevent is the provider of such hosting service from becoming the censor or judge of the statements made in such a context. To this end, the law provides for a general framework establishing the lack of liability of the provider of that service...They will only bear liability in exceptional circumstances."

[20] *Royo v Google*: judgment 76/2013 of 13 February 2013. The English High Court took the same view of Blogger, holding on the basis of the CJEU judgment in *e-Bay*, that it was an intermediary hosting service such that the Article 14 exemption applied to UGC that it hosted: *Tamiz v Google Inc* [2012] EWHC 449 §§55-61; *Davison v Habeeb* [2011] EWHC 3031 §56.

[21] *McGrath v Dawkins, Amazon and others* [2012] Lexis Citation 28 §§33, 42, 48.

[22] For a survey of national cases of 'active'/'passive' see Commission Staff Working Paper SEC (2011) 1641 final.

'intermediary' or 'information society service', as the Estonian Court appears to have held: §27 judgment. On the contrary, the definition of 'information society service' require that they involve economic activities and recital 18 to the ECD specifically refers to the content/information hosting services such as those provided by the Applicant in this case and OSPs in general.[23]

21 A facility for the posting of unmodified comments on a news web-site is either identical or directly analogous to the services referred to above. As such it involves the provision of an 'intermediary service', the provider being exempt from liability in respect of the content of the comments. Delfi's understanding to that effect was indeed, initially vindicated by the Estonian County Court: §19 Chamber judgment. Whilst that ruling was overturned by judgments of the higher courts, the Estonian Government itself observes that there was no direct authority on point: §62 Observations. Moreover, those judgments preceded the CJEU judgment in C-324/09 *L'Oréal SA.*

22 The Intervenors submit therefore that the law clearly establishes that 'hosting' a comment facility on a news web-site where those comments are not modified is an 'intermediary service' under Article 14 of the ECD and that the Estonian Supreme Court's decision to the contrary (see §27 judgment) was a manifest error of appreciation in applying the law to the facts. That being so, the failure to exempt the Applicant from liability and the imposition of a *de facto* monitoring requirement were unlawful under Articles 14 and 15 of the ECD. In the alternative, an un-moderated comment facility hosted by a news-site in Estonia at the time was entitled to consider itself to be exempt in respect of the content of comments on that facility absent actual knowledge and could not have foreseen that it would be held liable, such that the restriction was unlawful, as not being sufficiently clearly 'prescribed by law'.

C. The restriction was not strictly necessary and proportionate to any social need.

23 On the basis of the Chamber's judgment, Contracting States will not breach Article 10 if they *de facto* require OSPs to carry out general *ex ante* control over web-hosted expression in particular, by holding those who enable UGC liable for content that may infringe 'reputational' or 'privacy' law rights of other individuals, even absent knowledge. In order to avoid or limit such potential liability host providers would seemingly have to carry out general monitoring of content prior to hosting, including assessing its 'truth', 'value', and potential harm. Such a requirement, which amounts in effect to a 'prior restraint' is a very grave interference in freedom of expression. It is one for which the Court has always required the most serious justification that must be supported by 'relevant sufficient reasons' from the domestic courts, which the Court would examine in the light of the specific nature and content of the restricted speech: *Fatullayev v Azerbaijan* App. No. 40984/07 judgment 22 April 2007, §§93-100 (reasons for restriction examined in light of nature and content of internet postings to determine whether 'relevant and sufficient'); *Unabhängige Initiative Informationsvielfalt v. Austria,* App. No. 28525/95 judgment 26 February 2002 §§46-48 (injunctions to prevent the expression of value judgments including accusations of criminal conduct not necessary when expression made in the context of political debate even if made by journalists). Special regard should be had to the nature and the context of the speech. In the context of comment facilities on web-sites, a particularly wide margin should be applied since these involve

[23] See Recital 18 to ECD: "Information society services span a wide range of economic activities which take place on-line..., information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications....; services consisting of ...hosting information provided by a recipient of the service...". See also definition of 'information society service' set out in §42 judgment.

citizens expressing personal views in an informal, dynamic context; quite different from considered journalistic articles.

24 Here, the reasons given by the Estonian Supreme Court for holding that Delfi should have prevented unlawful material from being uploaded onto its comment platform were: (a) that it made money from the comment section, the number of visits affecting its advertising revenue; (b) it had rules in relation to commenting and a filtering system to remove comments containing obscene language (c) it could remove comments and users could not delete comments after they had been posted such that it could be said to have 'control' over comments (even though it did not use that facility): §27 judgment. The Chamber did not examine whether these reasons were 'relevant and sufficient' to justify the imposition of liability in the absence of knowledge, as it would normally have done. The Intervenors submit that these reasons were manifestly not 'relevant and sufficient'. First, in relation to (a) the Court has repeatedly stated that commercial enterprises are entitled to protection of fundamental rights. Many hosts operate as for-profit enterprises and thus seek wider audiences for UGC, whether that UGC is itself the core product offering (Twitter, YouTube) or provides valuable commentary on other goods, services and information (Amazon user comments on products or vendors). Further some blogs are only free of charge because advertising is displayed on them; freedom of expression is enabled by way of a commercial mechanism. Moreover, the rights of users to disseminate and obtain information must also be safeguarded. As to (b) numerous Internet hosts, including those operated by some of the Intervenors, maintain policies against bullying, hate speech and similar behaviour and enforce these policies through removal of offensive content. To hold that when an OSP makes such an effort it will be held responsible for all content (losing its exemption under the ECD) is not only inconsistent with case law, it creates perverse incentives; to avoid potential liability a host will forego attempts to find and remove offensive content. It is notable moreover, that the Chamber did not accept this particular reason as relevant to whether the restriction could be justified: §87.

25 As to (c) crucially, every host has the technical ability to remove user content from its service. Indeed, hosts' exercise of this ability is presumed by the ECD, which predicates its exemption from liability on hosts acting to "remove or to disable access" to hosted content."[24] Further, many allow for anonymous comments or do not enable all users to delete comments once posted. As a technical matter, only account-based or otherwise de-anonymised comments can be subject to deletion by the original speaker without opening the speech up to a "heckler's veto" of deletion by other users. Thus, the crucial factor relied on by the Chamber at paragraph 89 as justifying the restriction, the possibility of controlling or removing content, would apply to any host; the ability to remove content is a definitional requirement of being a host able to rely on an Article 14 exemption.

26 As noted above, Article 15 of the ECD specifically prohibits a general monitoring obligation, which, as explained by the Appellant at paragraphs 34-35 of its observations, the CJEU has referred to in rejecting every proposed monitoring requirement it has considered. In the *SABAM* cases,[25] the Court considered both the clear language of Article 15 and the impact of monitoring on fundamental rights. It concluded that requiring a host to filter content to protect copyright-holders could "*infringe the fundamental rights of the hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information...safeguarded by Articles 8 and 11 of the Charter*

[24] Art 14(1)(b).
[25] Case C-360/10 *Netlog/SABAM* judgment 16 February 2012

respectively" and would not strike "*a fair balance...between the right to intellectual property... and the freedom to conduct a business, the right to protection of personal data and the freedom to receive or impart information*": §§48 and 51.[26] In this regard, it would be surprising if this Court were to take a more restrictive view of the protection afforded by Convention rights than that taken by the CJEU.

27 Accordingly, it is submitted that in line with its previous statements, the Grand Chamber should re-emphasise in this case that Contracting States are obliged by Article 10 of the Convention to facilitate the free communication of views, including controversial ones. That must include an obligation not to regulate speech by proxy through private actors by imposing liabilities on internet platforms that host comments, beyond those that can be justified as strictly necessary and proportionate in the specific circumstances of the case. This cannot include a general *ex ante* obligation on OSPs (whether *de jure* or *de facto*) to prevent potentially unlawful material in general from being uploaded onto a web-site, which amounts to an obligation to monitor; in effect a prior restraint regulated by a private operator.

28 Indeed, it is submitted that no encouragement should be given by this Court to the increasing levels of State control in relation to UGC on the web. In this regard, the Court is asked to consider in addition to the *MTE v Hungary* case referred to above, the recent restrictive legislation of the Russian Federation, Federal Law No. 97-FZ of 5 May 2014, a translation of which is provided at Annex C to these submissions. This legislation requires any operator disseminating information through the internet to notify the federal executive body, to keep communications and information relating to internet users in Russia and provide it to state authorities. Bloggers are registered when accessed by more than 3000 users, must identify themselves and are subject to monitoring by the federal executive agency. Amongst other things, they must prevent the disclosure of information "*that defames of discredits the reputation of individuals or the business reputation of organisations*" and must otherwise ensure content is not hosted unless it complies with the law. Non-compliance with the data retention, local storage, disclosure and the other requirements established under this law for online service providers, will lead to the internet service being restricted by the operator of the telecommunications system that provides access to the Internet. The Court is also asked to recall the situation in Turkey, where Twitter and YouTube were blocked, the latter blocking only recently being lifted by the Constitutional Court.

CONCLUSION

29 This case offers an important opportunity for the Grand Chamber to protect open expression on the internet, which has been a force for freedom and democracy and which is currently under significant threat. For all the reasons set out above, the Court is urged to follow the established balance that has been struck by way of NTD in EU and national legislation, international agreements and recommendations. The balance was intended to and has been successful in encouraging a growing, diverse, pluralistic and dynamic internet that enables individuals to express themselves, whilst at the same time providing for the protection of individual rights.

JESSICA SIMOR QC

[26] See also C-70/10 *Scarlett Extended* considered at §45 Chamber's judgment.

6 June 2014

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ANNEX A

Data on the scale of UGC includes:

● Over 83 million Europeans uploaded self-created content to a website, including 47% of 16 to 24 year olds. 11% of Europeans posted opinions on civic or political issues via websites (Eurostat)

● 758 million photos a day were uploaded and shared online in 2013 (all platforms)

● WordPress users produce c. 36 million new posts and 63.1 million new comments

each month (1 of several blogging platforms)

● YouTube - 130 hours of video are uploaded every minute.

● Wikipedia - 77,000 active contributors to Wikipedia for more than 22,000,000 articles in 285 languages;

● Facebook - 41 000 posts a second;

● Twitter - 5,700 Tweets a second on Twitter

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ANNEX B

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ANNEX C
