“LIABILITY OF INTERNET INTERMEDIARIES FOR USER-GENERATED CONTENT UNDER EUROPEAN LAW, FOLLOWING THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON DELFI AS V. ESTONIA CASE

Stefanidou Dimitra

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Thessaloniki – Greece
Student Name: Dimitra Stefanidou
SID: 1104140047
Supervisor: Dr. Eleni Kosta

I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

The dissertation is based on the recent judgment of the European Court of the Human Rights on Delfi v. Estonia case. This judgment caused a lot of reaction as it brought a lot of changes to the Internet Intermediaries’ regime as we know it under the e-Commerce Directive.

The Court held that there was no interference with the freedom of expression of the intermediary, Delfi, when held liable for comments that third parties had published as a response to an article Delfi uploaded. Moreover, it equated an internet intermediary with a traditional publisher of printed media and established an obligation of intermediaries to exercise prior control to the content posted on their website, which is currently not allowed under the e-Commerce Directive regime.

In this thesis, I will describe the current regime on Internet liability in the EU as it is established by the e-Commerce directive, the decision taken by the European Court of the Human Rights the reactions it has caused, its contradiction with the current EU regime and the legislative changes that have to take place in order for the EU regime to be up-to-date with the development and expanding of the Internet.

At this point I would like to thank the International Hellenic University for the opportunity to attend the LLM and gain useful experience and knowledge. I would also like to thank my supervisor professor, Mrs. Eleni Kosta, who helped me with the choice of the thesis topic, provided me with useful knowledge and material and has been supportive throughout the drafting of this thesis and Mr. Komninos Komnios who also helped me with the choice of the thesis topic. Moreover I would like to thank my family, friends and colleagues for the support and understanding.
Keywords: freedom of expression; right to privacy; Delfi v. Estonia; liability of intermediaries;

Stefanidou Dimitra

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Preface

This dissertation is original, unpublished, independent work by the author, Dimitra Stefanidou.
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Introduction

On 16 June 2015, the Grand Chamber of the European Court of Human Rights handed down its judgment on the Delfi AS v. Estonia Case, according to which, Internet Service Providers who have commercial interest should be responsible for defamatory, inappropriate or unlawful comments posted on their website by their users. Particularly, the Grand Chamber decided that the Estonian courts’ finding of liability of Delfi AS had been a justified and proportionate restriction of the news portal’s freedom of expression (article 10 of the European Convention on Human Rights and article 11 of the EU Charter on Fundamental Rights of the European Union) as the comments posted by Delfi’s users to the portal’s platform, in response to an article published by Delfi, had been inappropriate and aggressively defamatory.

Despite the fact that Delfi removed the defamatory comments immediately when it became aware of them, the Grand Chamber’s opinion was that Delfi failed to monitor successfully the offensive comments by the means of a sufficient filtering system and that the 320 euro award in non-pecuniary damages which the portal was obliged to pay to the plaintiff wasn’t excessive for Delfi. Moreover the Grand Chamber found that Delfi’s activity was similar to those of a publisher of printed media and not this of a passive, purely technical service provider and for that reason it couldn’t enjoy the limited liability awarded to Internet Service Providers by the Articles 12-15 of Directive 2000/31/EC on Electronic Commerce.

The facts of the case Delfi AS v. Estonia rely on the European Law, as it concerns the non-application of the Directive 2000/31/EC on e-Commerce, the freedom of expression and the right to privacy, which are protected by article 8 and 10 of the European Convention on Human Rights and by articles 7 and 11 of the EU Charter on Fundamental rights respectively. Therefore, this thesis will approach the subject matter of the liability of internet service providers, that provide hosting services where users can publish their own comments on the content published, from a European Law perspective. Firstly, I will try to clarify how the liability of intermediaries influences the extent of control they exercise over user-generated content. In addition, I will describe
the current EU regime and more specifically the provisions of the e-Commerce directive which regulate the liability of internet intermediaries. In addition I will indicatively describe the implementation of the Directive by the national law of some Member States, in order to introduce some differences and deviations at the way Member States harmonized the e-Commerce Directive into their national law. Moreover, I will present the facts and the decisions of the several national courts of Estonia and of the European Court of the Human Right and my assessment on whether the judgment of the Grand Chamber was correct. Finally, I will present my view on the changes that should be made in the current legal EU regime in order to be up-to-date with the fast and continuous development of the Internet.
1. The interaction between the liability of intermediaries on user-generated content and the extent of the control they exercise

This thesis is focused on the category of internet intermediaries that are described under Article 14 of the e-Commerce Directive, which are the intermediaries acting as hosts and on the kind of liability they have for user-generated content posted on their websites. The liability of the websites owners affects significantly the control they are obliged to exercise over the user-generated content and thus the publication of such content as well.

a. “Hosting” under Article 14 of the e-Commerce Directive

As described above, Article 14 of the e-Commerce Directive provides protection from liability only for intermediaries which offer space for storage of information by third parties (Hosting) and on condition that (a) the provider does not have actual knowledge or information of any illegal activity and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent and (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.\(^1\)

Moreover, Recital 42 of the e-Commerce Directive provides that “The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.\(^2\)”.

\(^1\) E-Commerce directive, Article 14

\(^2\) Ibid., Recital 42
If we analyze the exact wording of Recital 42 in a way that it excludes the exemption from liability for any websites that are not limited to the technical process of operating and giving access to a communication network, then such websites wouldn’t have the ability to enjoy the hosting defence towards user-generated content, such as comments or other material posted to their platforms. Much more if the websites expected to gain commercial profit out of these publications (the comments users post amount to visits in the website, which enhance advertising and therefore financial profit for the website). In those occasions websites would be exposed to any kind of liability for any inappropriate user-generated content posted to their websites\(^3\).

**b. Web 2.0. and user-generated content**

i. The notion of Web 2.0

Web 2.0 describes pretty much the internet environment we all enjoy these days. More specifically, it describes most of the familiar websites, such as social media, Youtube, applications and generally the ability that users have to be more interactive with the World Wide Web and exercise control over the internet together with the owners of websites\(^4\). This technology has allowed users to upload their own content (photographs, videos, podcasts, articles, comments, blogs etc) that can be viewed and downloaded by other users. Hence, Web 2.0 technology has increased the user-generated content that can be found on the Internet and can be defined as “*the network as platform, spanning all connected devices; Web 2.0 applications are those that make the most of the intrinsic advantages of that platform: delivering software as a continually-updated service that gets better the more people use it, consuming and remixing data from multiple sources, including individual users, while providing their own data and services in a form that allows remixing by others, creating network*”

\(^3\) T. Pinto et. al., *Liability of Online Publishers for User-generated Content: A European Perspective*, Communications Lawyer, Volume 27, Number 1, April 2010, p. 6

effects through an “architecture of participation” and going beyond the page metaphor of Web 1.0 to deliver rich user experiences⁵”.

What is important in Web 2.0, is that the user has the ability to be a publisher, a critic, a journalist, an interviewer, a public performer and broadcaster at the same time⁶. However, this power that the user has nowadays, has caused a lot of concerns regarding the law, as far as it concerns violations of intellectual property, privacy, hate speech, pornography and other inappropriate or unlawful content or behavior. For the purpose of this thesis, I will focus on the violations of privacy (including the right not to be insulted, defamated, threatened etc) in contrast with freedom of expression, both protected by Articles 8 and 10 accordingly of the European Convention of Human rights. This section will be further analyzed below.

ii. Web 2.0 and e-Commerce Directive

It must be stressed that e-Commerce Directive was introduced in 2000, whereas Web 2.0 started to develop in the first Web 2.0 conference, in October 2004, by John Battelle and Tim O’ Reilly⁷. Therefore, the whole idea of users of the internet interacting and sharing information online couldn’t be taken into consideration during the drafting of the e-Commerce Directive and thus there couldn’t be a special provision about those intermediaries that allow user-generated content posted to their websites.

In order for such intermediaries to be able to be exempted from liability under Article 14 of the Directive, they must not exercise any prior control to the user-generated content, to have an appropriately set-up website where users can post their own material, the website owner must not be aware of any inappropriate content posted on the website and in case the owner receives any notice about the existence

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⁵ T. O’ Reilly, Web 2.0. compact definition, 2005, as cited in Dr. G. Carlisle and Dr. J Scerri, Web 2.0 and User-Generated Content, Journal of Law, Information and Technology, 2007, p. 3
⁶ Ibid. p. 4
of such content he must act expeditiously and remove it immediately\textsuperscript{8}. Moreover, intermediaries must have the appropriate technical infrastructure that will be able to detect any obviously inappropriate content before it is published, in order to prevent the consequences from the undesirable event that a user posts unlawful content.

iii. The role of intermediaries and the notion of the “publisher” of user-generated content

Internet intermediaries which have a passive, technical nature and simply provide the platform where users can post their material can’t be considered to be publishers. The same regime applies to intermediaries, such as news portals, blogs etc, which allow for publication on their websites of user-generated content, such as comments or other material and therefore, they can’t be considered to be publishers, as far as they don’t play any active role in the posting of material or comments by third parties on their website.

On the contrary, internet intermediaries can’t be exempted from liability when they provide access to user-generated content, but they also monitor or make any kind of intervention, such as editorial control and they are fully aware or ought to be aware by the exercise of reasonable care that the user-generated material is likely to contain inappropriate contents\textsuperscript{9}.

In conclusion an internet intermediary can enjoy the hosting defense given by Article 14 of the e-Commerce directive, on condition that it doesn’t play any active role in the publication of the user-generated content other than simply providing their platform. If they obtain knowledge upon any inappropriate, unlawful content on their websites and fail to remove it expeditiously or disable access to it in due time, then they might be considered to have responsibility over that content.

\textsuperscript{8} op. cit., Pinto et. al., p. 5
\textsuperscript{9} T. K. Leng, Internet defamation and the online intermediary, Computer law & Security review, 2015, p. 3
c. Ways of acting “expeditiously”

The e-Commerce Directive does not describe what is considered to be expeditious removal by the intermediary of inappropriate content. Particularly, it does not regulate which way is considered to be adequate in order to ensure that the intermediary will be immune from liability for the inappropriate content that it removed. The notice-and-take-down system is not sufficiently described either. Article 21(2) of the Directive mentions that: “In examining the need for an adaptation of this Directive the report [(on the application of the directive described in par (2)] shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and tool services, ‘notice and take down’ procedures and the attribution of liability following the taking down of content”. Basically it is left to the Member-States to expand the ways under which the notice-and-take down system could work. Moreover, Article 16 and Recital 40 encouraged the Member States to regulate the notice-and-take-down system on their own initiative\(^\text{10}\). However, when the abovementioned report was published in 2003, only Finland\(^\text{11}\) had Lithuania\(^\text{12}\) self regulated a notice-and-take-down system.

Intermediaries can be informed about inappropriate content either by individuals or private entities that happen to read or learn about the comments, by courts or administrative bodies. Upon notice by the private entities or individuals the intermediary that hosts the inappropriate user-generated content must decide whether that content is to be removed or not, according to the degree that the notice is true, justified and valid.

\(^{10}\) A. Kuczerawy, Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative, Computer Law and Security review, 2015, p. 48


\(^{12}\) T. Verbiest et. al., Study on the Liability of Internet Intermediaries, November 2007, p. 16
Another way of obtaining knowledge of unlawful content posted by its users to the website of an intermediary is by “pre-moderating” the comments before they are published. This would eliminate the possibility of unlawful content on their websites and liability for it as well. However, this procedure would be costly and time consuming, as it requires an organized group of people reading every single posting and deciding whether it will be published or not. Moreover, that kind of control would be considered to be intervention or moderation by the intermediary and could render it liable as a publisher or editor.\textsuperscript{13}

Finally, another way of obtaining knowledge is the “post-moderation” of the content, which practically means that intermediaries have to check the content after it is uploaded and before it is publicly available to the rest of the users of the site. This way of knowledge would be useful if the intermediary managed to prevent the publication of unlawful content so that it can avoid being held liable for unlawful content. However, similar to “pre-moderation”, no intervention could be made to the comments, as the intermediary could be considered as the publisher of the comment. In addition, the “post-moderation” leaves little space for intermediaries to claim that they didn’t have actual knowledge of unlawful content that was eventually uploaded, despite the post-moderation. Accordingly if the intermediary leaves a comment, or other user-generated content posted to its website that it was claimed to be unlawful, it might again be held liable, as an editor or a publisher or be accused that as a diligent economic operator, it should have removed the unlawful content expeditiously.

\textit{d. Impact of Intermediary Liability on freedom of expression and innovation}

If intermediaries are obliged to exercise any kind of the types of control described in the previous section and monitor the content that the users post to their websites, they will most probably remove content, even if it is not manifestly unlawful, in order to prevent being held liable for acting expeditiously. Thus, they will not spend much time in investigating if the content is actually inappropriate and they will remove it without even informing the user that published the content about it, due to the legal

\textsuperscript{13} op.cit. Pinto et.al., p.6
uncertainty that exists on what can be unlawful or not. This situation can provoke private censorship and consequently a “chilling effect” on freedom of expression, which is protected under Article 10 of European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union. Moreover, such arbitrary removals are not complying with the principle of proportionality, when there might be less strict ways to prevent the alleged unlawful content rather than instantly being removed by the intermediary in order to avoid liability\textsuperscript{14}.

Intermediary liability is a disincentive for natural or legal persons who wish to develop new products and services. Start-ups companies will also fail to continue their activity as the means of monitoring a website (filtering system, staff e.t.c) can be costly. Moreover existing companies will choose to exercise their activity in countries where they can be protected more easily by the liability defence of Article 14 of the e-Commerce Directive. Strict legislation on the liability of intermediaries can be a major obstacle to the free exchange of any kind of information available to the public, which in the past has proven to be time saving and much more inexpensive\textsuperscript{15}.

\section*{2. Liability of Internet Service Providers under the current European Legislation and specifically the Directive 2000/31/EC on E-Commerce}

Currently, liability of Internet Service Providers for the member states of the EU is regulated under the Directive 2000/31/EC on E-Commerce, national law of Member States and the case-law of the Court of Justice of the European Union.

\subsection*{a. Scope and purpose of the Directive}

The E-Commerce Directive was introduced in order to preserve the free movement of information society services between the EU Member States and consequent-

\textsuperscript{14} op.cit, A. Kuczerawy, p. 48-49

\textsuperscript{15} Center for Democracy & Technology, Intermediary Liability: Protecting internet platforms for expression and innovation, April 2010, p.5-6
ly the proper function of the internal EU market\textsuperscript{16}. It applies on Internet service providers, which are defined by the \textit{Directive as any natural or legal person providing an information society service}\textsuperscript{17}. An information society service is a service that is provided by the Internet Service Providers for commercial purposes, with the expectation of gaining profit, without the simultaneous presence of the customer and the service provider, by electronic means (i.e. a personal computer, telephone e.t.c) and after the request of the customer\textsuperscript{18}.

\textit{b. Types of intermediaries}

It is widely known that Internet and its possibilities are vast. For the facilitation of its use by the internet users there are a number of different types of internet intermediaries. The most relevant and well known are internet service providers (ISPs), web hosting providers, social media platforms and search engines\textsuperscript{19}. The types of intermediaries that are described in the e-Commerce Directive are the

- Mere conduits, which are the intermediaries that provide the cables, routers, and other technical infrastructure of the Internet\textsuperscript{20}.

- The intermediaries that have caching as their basic activity and which facilitate the use of websites by speeding up Internet\textsuperscript{21}.

- Hosts which are usually companies that provide the customers with space, usually by renting it, in order to build their website. Nowadays though, the term ‘host’

\begin{itemize}
\item \textsuperscript{16} 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 (Directive on electronic commerce), Article 1(1)
\item \textsuperscript{17} Ibid. Article 2(b)
\item \textsuperscript{18} 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 as amended by Directive 98/48/EC, Article 1(2)
\item \textsuperscript{19} Article 19, \textit{Internet intermediaries: Dilemma of Liability}, 2013, p. 6
\item \textsuperscript{20} Op.cit., T. Pinto et. al, p. 6
\item \textsuperscript{21} Ibid.
\end{itemize}
has usually the meaning of any person or company who controls a website where users can upload or post content of their own (user-generated content). Thus, in the category of ‘hosts’ we usually include social media platforms (also known as web 2.0 applications, which will be further analyzed below), blog owners, video- and photo sharing services etc.\textsuperscript{22}

This thesis will be about Internet Service Providers acting as intermediaries who provide services as hosts, by running a website or internet portal where users are free to post content of their own.

\textit{c. Exemption from liability under the e-Commerce Directive}

The e-Commerce Directive regulates the exemption of liability for internet intermediaries and has been implemented by the national law of all the EU Member States\textsuperscript{23}.

The e-Commerce Directive introduced the so called, safe harbors\textsuperscript{24}. Under the safe harbors, internet intermediaries are excluded from liability in specific cases which are described in Articles 12-Article 15 of the Directive.

\textit{i. Article 12}

More specifically, Article 12 of the directive provides that a “mere conduit” which is an internet access provider (e.g., an entity that provides the cables, routers, and other essential infrastructure of the Internet\textsuperscript{25}), is exempted from liability for the information provided by a user of the service on condition that the service provider (a)

\begin{itemize}
  \item \textsuperscript{22} Op.cit. Article 19, p. 6
  \item \textsuperscript{23} T. Pinto et. al., \textit{Liability of Online Publishers for User-generated Content: A European Perspective}, Communications Lawyer, Volume 27, Number 1, April 2010, p. 5-6
  \item \textsuperscript{25} Op.cit. T. Pinto. p. 6
\end{itemize}
does not initiate the transmission, (b) does not select the receiver of the transmission and (c) does not select or modify the information contained in the transmission.\(^{26}\)

Article 12 deals with mere conduits and exempts from liability, both civil and criminal, the intermediaries that their single role is to transfer the information through the network or facilitate the access to a network. During these procedures mere conduits do not intervene by any means in the content of the information that they transfer. More specifically, mere conduits will be exempted from liability for the transferred content on condition that it is upon request from the recipient of the service; they do not start the transmission, choose who receives the information and intervene in the content of the information transmitted by means of editing it, modifying or selecting it, active solely as a passive intermediary. The only intervention that mere conduits are allowed to do is technical interventions that are necessary for the efficient transmission of the information.

In addition, mere conduits are allowed to store information again for the facilitation of the network transmission and only for the time duration that is needed in order to complete the transmission.

Internet access providers, wireless hotspots, backbone operators etc are some well-known examples of mere conduits.\(^{27}\)

ii. Article 13

Article 13 provides that an internet service provider which solely offers the service of the transmission in a communication network of information provided by the user of the service and has as a sole purpose the facilitation of the transmission to other recipients of the service upon their request (“caching”), is exempted from liability for the automatic, intermediate and temporary storage of the information when (a) the provider does not modify the information; (b) the provider complies with condi-

\(^{26}\) E-Commerce Directive, Article 12

\(^{27}\) P. Van Eecke, B. Ooms, the E-Commerce Directive: A Growing Trend Toward Greater Responsibility for ISPs, Journal of Internet Law, 2007, p.4
tions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement\textsuperscript{28}.

Briefly, intermediaries who offer caching services basically provide the automatic, intermediate and temporary storing of the most highly demanded information throughout the internet on remote servers and then they copy it to local servers. In that way the information needs less distance and consequently time in order to reach to its final destination, the recipient of the service\textsuperscript{29}. Hence the kind of liability that is exempted under the e-Commerce Directive is the so-called- proxy caching\textsuperscript{30}.

Intermediaries that provide caching services are exempted from liability if they meet the conditions described above. The most important condition that must be met is that the information that they temporarily store in local servers must be the same with the original information and that they must comply with the conditions regarding access to the information stores. A simple example for the access condition is cases when a website needs a password in order for the information to be available to the user. The intermediary must protect that information from other users who do not have an authority to view the content. Another condition that such intermediaries have to meet is the consistency in updating the stored information in the local server

\begin{footnotesize}
\begin{enumerate}
\item E-Commerce Directive, Article 13
\item Ibid. P. Van Eecke, B. Ooms, p.4
\end{enumerate}
\end{footnotesize}
and also removing or blocking that information when they obtain the knowledge that the original information was removed or the access to it was blocked\textsuperscript{31}.

iii. Article 14

Article 14 provides that when an internet service provider offers the storage of information deriving from the user of the service (Hosting), the internet service provider is exempted from liability for that information when (a) the provider does not have actual knowledge or information of any illegal activity and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent and (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information\textsuperscript{32}.

Hosting describes the service provided by websites which basically consists of the storing of user-generated-content, which is information posted by its users. The users are the ones who choose the content of the information that they will upload and they have the knowledge that this information will be available online for an unspecified amount of time. This kind of intermediaries can only be exempted from liability under the e-Commerce directive if they are not aware of the facts or circumstances that reveal that there has been illegal activity or information stored in their websites, regarding civil claims for damages, or they do not have actual knowledge of illegal activity or information stored, regarding other claims. What is different in that Article in comparison to the previous discussed is the degree of knowledge which is dependent on the kind of claim that is made by the injured party against the intermediary. Another obligation that hosts have to be consistent with is the expeditious upon notice, removal or blocking to access of any unlawful information\textsuperscript{33}.


\textsuperscript{32} E-Commerce Directive, Article 14

\textsuperscript{33} Op. Cit., EU study on the Legal analysis of a Single Market for the Information Society online intermediaries, p. 8
iv. Article 15

Finally, Article 15 provides that Member States are not allowed to impose the obligation to internet service providers to exercise control over the information described in Articles 12-14, by monitoring it. Moreover, they are not obliged to actively search for facts or circumstances that may prove the existence of illegal activity by the user of the service. It must be noted that the Directive doesn’t provide immunity from liability for internet portals that include links which redirect the user to another website. However, in the stage of implementation into their national law, some Member States have recognized such immunity for portals as well due to their significance in the way internet works.

In addition to Article 15, Recital 47 of the e-Commerce Directive confirms that Member States are not allowed to impose a general monitoring obligation on service providers. However, according to Recital 45, courts can order injunctions against intermediaries in order to terminate or prevent any infringement, including the removal of illegal information or the disabling of access to it. Moreover, Recital 48 provides that Member States can demand that hosts should apply duties of care in order to detect and prevent certain types of illegal activities.

**d. Lacunae in the Directive**

However the e-Commerce Directive does not provide for specific measures that the hosts have to take in order to detect and prevent illegal activity. Article 14 (3) leaves it to Member States to establish a notice-and-take-down system, without further clarifications or explanations. This lacunae in the e-Commerce Directive creates several problems, the most important of which is that intermediaries cannot be confident that they have taken the appropriate measures in order to detect and remove expeditiously the unlawful content posted in their websites and thus to be able not to be held liable for it. Hence a broad margin of appreciation is left to national courts to decide on the matters above. As it will be discussed below, this lacunae was also one

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34 E-Commerce Directive, Article 15
reasons why the European Court of Human Rights, in Delfi v. Estonia case, ruled that despite the fact that Delfi removed instantly upon notice the inappropriate comments posted in their website and had notice-and-take-down system established it didn’t take adequate measures in order to remove the comments that amounted to hate speech and speech inciting violence without delay after the publication.\(^{35}\)

**e. Relevant Case law**

Since the e-Commerce Directive has in practice lacunae on its application on Hosting websites that allow for the publication of user-generated content, their liability is left for the Court of Justice of the European Union through case-law to fill the gap that exists. In that way, there could be a harmonization between the different ways that national law applies the e-Commerce Directive, which would enhance the sense of security for intermediaries acting as hosts.

In Google France (joint cases C-236/08 to C-238/08), the ECJ held than an intermediary can enjoy the hosting defense of Article 14 of the e-Commerce Directive, only when it was neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.\(^{36}\)

In L’Oréal v. eBay (Case C-324/09)\(^ {37}\), however, the CJEU ruled that Article 14 applies to an intermediary that hasn’t played an active role which would allow it to have knowledge or control of the data stored. Such control can be considered to have been exercised by the intermediary when it promotes or presents the offers for sale posted by its users so as to make them known to the rest of the users. The kind of knowledge that the intermediary should have is that of a “diligent economic operator”, who, upon notice, would immediately take measures in order to remove any inappro-

\(^{35}\) Delfi AS V. Estonia, (2015), JUDGMENT, ECHR, p. 60

\(^{36}\) Judgment of the Court (Grand Chamber) in Joined Cases C-236/08 to C-238/08, 23 March 2010, par. 114

\(^{37}\) Judgment of the Court (Grand Chamber) in Case C-324/09, 12 July 2011, 145[6]
appropriate content and could, thus, be exempted from liability, under the hosting defense of Article 14 of the Directive\textsuperscript{38}.

In SABAM v. Netlog (Case 360/10) a Belgian copyright society, SABAM, asked to Netlog, a social networking site to implement a general filtering system in order to prevent the unlawful use of musical and audio-visual work by the users of Netlog’s site. The ECJ ruled that such a filter couldn’t be applied because it would have the intermediary monitor the content stored at its site, which is forbidden by Article 15 of the e-Commerce Directive. Moreover, this filtering system would be very expensive and complicated for the intermediary to apply and it would thus infringe its freedom to conduct its business. Also, it could infringe the fundamental rights of privacy, freedom of expression and undermine freedom of information, because the filtering system might not make an adequate distinction between lawful and unlawful comments\textsuperscript{39}. At the same direction was the judgment of the ECJ in Scarlet extended S.A. (Case 70/10)\textsuperscript{40}.

In Papasavvas v. O Fileleftheros case (C-291/13), Mr. Papasavvas brought an action before a newspaper company seeking damages for harm caused to him considered to be defamation, by an article published in the newspaper. The ECJ ruled that “The limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31 do not apply to the case of a newspaper publishing company which operates a website on which the online version of a newspaper is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, since it has knowledge of the information posted and exercises control over that information, whether or not access to that website is free of charge”\textsuperscript{41}. This decision leads created a binding or persuasive precedent that intermediaries that publish new online can be held liable for unlawful content posted by their users, as they are

\textsuperscript{38} L Woods., Delfi v. Estonia: Curtailing online freedom of expression?, EU Law Analysis, June 2015

\textsuperscript{39} Judgment of the Court (Grand Chamber) In Case C-360/10, 16 February 2012, par. 45-50, 53

\textsuperscript{40} Judgment of the Court (Grand Chamber) In Case C-70/10, 24 November 2011, par. 55

\textsuperscript{41} Judgment of the Court (Grand Chamber) In Case C-291/13, 11 September 2014, par. 58[3]
deemed to have knowledge about the content that is being posted. Thus the exemption from liability under the e-Commerce Directive cannot generally be enjoyed by online newspapers which are available to users and are remunerated by income generated by advertising.42

**f. Implementation of the e-Commerce Directive by Member States**

An important issue arising out of the implementation of the e-Commerce Directive by the Member States is the assuming of actual knowledge of intermediaries about the unlawful content, as it is described in Article 14 of the Directive. Although most of the Members States have made almost actual transposition of Article 14 into their national law, national implementation is much different between the Member States. Some of them require a formal procedure and official notification by authorities in order for actual knowledge of an intermediary to be assumed, whereas other Member States leave it to the margin of appreciation of the national courts. A third group of Member States provides two means of determination of actual knowledge, the notice-and-take-down procedure and the notification of the intermediary in accordance with the national legal standards of knowledge.43

Moreover, some Member States, distinguish between the notion of actual knowledge in relation to civil liability for damages and awareness of facts or circumstances from which illegal activity or information is apparent. Austria, Belgium, Cyprus, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Slovenia, Sweden and United Kingdom belong to those Member States. In all those Member States intermediaries must have actual knowledge in order to be considered as criminally liable. Civil liability of intermediaries can be established when

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they are aware of facts or circumstances from which the illegal activity or information is apparent.

However some Member States did not stick to the exact words of the Directive but changed it slightly in the process of transposition. For example in Dutch law provides that an intermediary can’t be held liable for damages when it “cannot reasonably be expected to know of the illegal nature of an activity or information” (Article 6:196c (4) Civil Code). In Portuguese law, however, intermediaries are held liable for damages in cases when they should have been aware of the illegal character of the information (§ 16 Law – Decree No. 7/2003 of 7 January 2004). German law Telemedia Act (Telemediengesetz, 2007), requires that intermediaries have knowledge and not actual knowledge as the e-Commerce directive has it. Moreover, in Czech Act no. 480/2004 Sb (Certain Services of Information Society Act), in case of illegal content intermediaries must have been provided with proofs on the content and unlawfulness of information posted on their website.

A differentiated approach has been taken from a group Member States like Czech Republic, Hungary, Latvia, Malta, Poland, Slovak Republic and Spain, which do not distinct between the notion of actual knowledge and awareness of facts circumstances and also in relation to civil or criminal liability. For example Latvia exempts from liability an intermediary which doesn’t have access to data which may indicate illegal activities or information whereas Malta excludes criminal liability of intermediaries which they can only be held liable for civil damages. Hungarian excludes only civil liability, but criminal and administrative as well.

Regarding the obligation of removing or disabling access to the unlawful content, that is imposed by the e-Commerce Directive Lithuanian law imposes the obligation on intermediaries only to block the access to any unlawful content and not re-

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44 Ibid., p. 34
45 Ibid.
46 Ibid. p. 35
move it. The same applies for Poland and Finland whereas the Slovak Republic law imposes the obligation only to remove the unlawful content and not block access to it\textsuperscript{48}.

**g. Liability of the user publishing the content**

Under the e-Commerce Directive, exemption from liability can be granted only to intermediaries and under the prerequisites described above. The users that originally write and publish the unlawful content continue to have liability for it and the alleged victims can legally turn against them. However, this is actually very difficult in practice, as users most of the times use pseudonyms or no name at all when they post their material\textsuperscript{49}. Therefore, it is hard to find their real identity. However, there are ways in order to trace a user that has posted unlawful content, through the IP address of the computer that the user has used. This part of liability is not studied in the current thesis and thus it needn’t be further analyzed.

3. **Liability of intermediaries regarding personal data**

Liability of intermediaries and data protection are closely related to each other. On the one hand, intermediaries may be held liable for the content posted on their websites by third parties, which may include personal data of another individual. On the other hand intermediaries can be considered as data processors when they collect data from the users of its website for statistic, security and other reasons (i.e. control of the behavior of users, investigation of illegal activity etc).

**a. Regulation of Data protection**

Processing of personal data of individuals is governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement

\textsuperscript{48}Op.cit., T. Verbiest, p. 35

\textsuperscript{49}Center for Democracy & Technology, *Intermediary Liability: Protecting internet platforms for expression and innovation*, April 2010, p.15
of such data, Regulation (EC) No. 45/2001 on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community and on the free movement of such data (EU Institutions Data Protection Regulation), the Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and the Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (Data Retention Directive, invalidated on 8 April)\(^{50}\).

The legislative instruments above entail detailed provisions regarding the data protection and specific prerequisites in order for the processing of personal data to be complying with the European Union legislative regime. The compliance with the directive is being controlled and enforced by national Data Protection Agencies\(^{51}\).

Moreover, protection of data is also protected by Article 8 of the EU Charter of Fundamental Rights and includes all data relating to an individual, including data that are related with the privacy the individual which (privacy) is also separately protected by Article 7 of the EU Charter.

### b. Exclusion of data protection by the e-Commerce directive

According to recital 14 and article 1(5)(b) of the e-Commerce Directive matters of liability of intermediaries that have to do with data processing, are solely governed by the Data protection directive. E-commerce directive suggests that the legislative instruments that already existed at the time of its publication on data protection provided sufficient protection of data of individuals and therefore there was no need to cover this issue under the e-Commerce Directive. The reason for that exclusion was to


avoid making the movement of personal data between Member States more difficult which could prevent the smooth functioning of the EU internal market. Of course, it provides that the e-Commerce should comply with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries.

Recital 14 and Article 1(5) the e-Commerce Directive suggest that subject matters that have to do with the protection of individuals regarding the processing of personal data are covered by the legislative instruments described above. However, in the first report on the application of e-Commerce directive, the European Commission mentions that “The Directive applies horizontally across all areas of law which touch on the provision of information society services, regardless of whether it is a matter of public, private, or criminal law” and that “The limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties.”

Moreover, the Article 29 Working Party deemed users that publish personal data on a website to become data controllers and therefore subject to the restrictions of the data protection legislation. As a result they must have the prior consent from those, whose information they are posting online. Hence, intermediaries that receive

53 Ibid., p.12
28 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2011, p.13
http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (last accessed July 18, 2011),
this information are obliged to inform users about their obligation to conform to the regulations of the data protection and the danger that exists with the interference with privacy of others when posting that information. If intermediaries provide that information to users then they should be exempted from liability for any violations that have been made by user-generated content on their website regarding data of third parties. This was also the opinion of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression where he states that "censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author."55

From all the remarks above, it should be considered that the exemption of application of data protection directive that is provided in Article 1(5)(b) of the eCommerce directive and Recital 14, refers to the processing of personal data made by the intermediary regarding the information that users provide to it and not for user-generated content. In case that an intermediary collect, transmit or in any way process personal information of their users without their consent or in an unlawful way, the EU data protection regime should apply and intermediaries should be held liable for the illegal process of data under the provisions of the data protection law.56

Most of the issues analyzed above are points that were raised by the judgment of the Grand Chamber of the European Court of Human Rights on Delfi v. Estonia Case, handed down on 16 June 2015 and the precedent decisions of the Estonian Courts, as it will be further discussed below.

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4. The facts of the case

Delfi is a very well known Internet news portal in Estonia, which publishes news both in Russian and Estonian and exercises its activity in Latvia and Lithuania as well. Delfi was law suited by L. for one of the articles it published, due to the fact that it caused a lot of negative and inappropriate comments by users towards L.

a. Delfi’s profile

Delfi, at the time when the dispute began, used to publish up to 330 news articles a day. Under each article, Delfi gave the opportunity to the users of its website, to post their comments by signing with their names and e-mail addresses if they wished to or unanimously under a nickname. Every user could read under each article the comments that had been posted, which were uploaded automatically without any intervention or modification by Delfi. At that time, the average of the comments that Delfi got for its articles was about 10,000 comments per day, most of them signed by the users who wrote them, with pseudonyms.

Although the comments were uploaded in the website without any intervention by Delfi, the website had a notice-and-take-down system (which is a technical feature added in websites, where user-generated content is allowed, and which actually detects and removes any abusive, defamatory or degrading comments that are published in a website\(^57\)) in order to prevent the publication of such comments. Moreover, to advance the protection of the website, in case users did post such comments, they included a “Rules of comment” feature, where the following were mentioned: “The Delfi message board is a technical medium allowing users to publish comments. Delfi does not edit comments. An author of a comment is liable for his or her comment. It is

worth noting that there have been cases in the Estonian courts where authors have been punished for the contents of a comment...

Delfi prohibits comments whose content does not comply with good practice.

These are comments that:

- contain threats;
- contain insults;
- incite hostility and violence;
- incite illegal activities...
- contain off-topic links, spam or advertisements;
- are without substance and/or off-topic;
- contain obscene expressions and vulgarities...

Delfi has the right to remove such comments and restrict their authors’ access to the writing of the comments.

Hence, it is obvious that Delfi had provided proper notification to its users that any comment that they post is under their responsibility and that none of them reflected the opinion/point of view of Delfi in the subject matter.

b. The article that caused the dispute

On 24 January 2006 Delfi published an article on its website about ice roads, which are being used by the public over the frozen sea and connect the mainland with few islands around. The title of the article was “SLK Destroyed Planned Ice Road”, where SLK stands for AS Saaremaa Laevakompanii, active as a limited liability company who provided public ferry transport service to the Estonian citizens, connecting the mainland with some islands around.

58 Delfi AS V. Estonia, (2015), JUDGMENT, ECHR, p. 5-6
Immediately and rapidly the article received 185 comments, some of which (around twenty) were degrading, defamatory and insulting towards L. who was at the time a member of the supervisory board of the company mentioned above and the only/majority shareholder of it. It must be mentioned that before that, Delfi already had the fame of publishing articles that attracted defamatory comments by the users and for that reason the Government of Estonia, represented by the Minister of Justice, the Chief Public Prosecutor and the Chancellor of Justice, published and open letter to the weekly newspaper *Eesti Ekspress* on 22 September 2005, a year before the publication of the article of the case, which pictured Delfi “as a source of brutal and arrogant mockery". In the same letter, the Minister of Justice encouraged the citizens that had been victims of such comments in the past to exercise the legitimate rights that were given to them by the national law regarding the freedom of expression, the protection of everyone’s honor and good name and sections 1043 and 1046 of the Obligations Act of Estonian national law.

Therefore, on March 9 2006 L. demanded that Delfi should remove the offensive comments and should pay for a compensation of 320.000 euro for non-pecuniary damage. Immediately, the same day, Delfi removed the comments, that had already been available in the website for six weeks and therefore, it denied to pay the compensation to L., due to the fact that under the notice-and-take-down obligation, which stands for the legal obligation of websites to remove any inappropriate content upon request, it removed the comments instantly.

**c. Civil proceedings brought before Courts**

i. The Harju County Court ruling

After Delfi’s response L. submitted a civil suit in the Harju County Court against Delfi, which was dismissed on 28 May 2007, under the ruling that, under the Information Society Services Act, Delfi couldn’t be considered as the publisher of the com-

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59 Ibid., para. 15, p. 16
60 Ibid.
ments and hence it had no obligation to remove them. Moreover, that the nature of Delfi was mechanic and passive and that the comment environment couldn’t be treated in the same way as the portal’s journalistic area

ii. The first decision of Tallinn Court of Appeal

On October 2007 L. appealed before the Tallinn Court, which quashed the first decision described above and the case was referred back to the first-instance court for a new hearing, as it accepted the claim of L. that the first-instance court submitted a wrong judgment by excluding liability of Delfi for the defamatory comments against L., under the E-Commerce Directive. Delfi appealed that decision, but the appeal wasn’t accepted by the Supreme Court

iii. The fresh ruling by the Harju County Court

The judgment of the Harju County Court, handed down on 27 June 2008 accepted L.’s claims, and considered the Information Society Services Act not to be applicable in the particular case, because Delfi should be considered as publisher of the comments and thus couldn’t be exempted from liability. More specifically, even though it recognized that Delfi had the “Rules of comments” feature on its site and there was a notice-and-take-down feature as well, it considered that those measures were inadequate and did not provide much protection to the people towards whom the comments were referred to. Moreover, it considered Delfi to be actually the publisher of the comments and that the features above could not release it from its responsibility. In addition, it didn’t consider the controversial article to be an offensive one, but it characterized the comments as vulgar in form, humiliating and defamatory and impaired L’s honor, dignity and reputation, beyond justified criticism and simple insults. It also considered the freedom of expression to be inapplicable for the specific

\[61\text{ibid., p. 8-9}\]
\[62\text{ibid.}\]
comments and that L’s personality rights were violated. Finally, it awarded L. the sum of 320 euro as compensation for non-pecuniary damage\textsuperscript{63}.

iv. Second decision of the Tallinn Court of Appeal

Delfi appealed the judgment above but the Tallinn Court of Appeal upheld the judgment. The court supported that Delfi should have taken stricter measures so as such comments would be rapidly removed once they were published by users. It also supported that Delfi acted in bad faith by denying responsibility for any comments posted by its users. In addition that it’s liability wasn’t excluded under the Information Society Services Act, that the nature of Delfi as a news portal wasn’t \textit{passive, automatic and merely technical (technical intermediary)}, since it invited users comment on the published articles. Therefore, the Court said that Delfi was a provider of content services and not a technical intermediary, notions that will be discussed below. Delfi appealed the judgment, but the appeal was not accepted by the Supreme Court\textsuperscript{64}.

v. The Supreme Court’s ruling

The Supreme Court of Estonia found that the ruling of the Court of Appeal was correct and that it should only be amended and supplemented regarding the legal basis of the reasoning that should rely upon Article 693§2 of the Code Of Civil Procedure. Briefly, the Supreme Court accepted the following:

- Delfi didn’t satisfy the conditions under which, its liability for the comments could be excluded under section 10 of the Information Society Services Act.

- That the activity of Delfi was not simply that of a technical, automatic and passive nature and that it is a provider of “content services” instead.

- Pointed out the economic interest of Delfi coming out of such comments, as it earns its profits by the visits at its website; more the visits (and the comments) Delfi’s website has more the earnings for it.

\textsuperscript{63} Ibid.

\textsuperscript{64} Ibid. p. 9-10
- Although Delfi didn’t monitor or intervene in the comments of its users, it could indeed control them, by deleting them, whereas the users that wrote them couldn’t; once they wrote them, they couldn’t take them back. The only authority the user had was to report any offensive comment that he/she might have noticed.

- Delfi should be considered together with the writers of the comments as publishers of the comments, because Delfi claimed that there had been a violation of its freedom of expression. Hence, it was as if it had accepted that it was the publisher of the comments.

- An Internet Portal operator and a publisher of printed media should be both equally considered to be publishers/disclosers due to the economic interest that they both have, despite the fact that a publisher printed media intervenes in the comments/articles by editing them whereas the internet news portal offers the platform and the possibility for a writer to publish a comment.

- The national Constitution gave the possibility for the existence of laws which could interfere with the freedom of expression in order to protect a person’s honour and good name. As defamation was prohibited by section 1046 of the Obligations Act and article 17 of the Constitution it would be unconstitutional for the Court, not to take into consideration the abovementioned provisions. Thus, that any interference with the freedom of expression of the writers of the comments is unlawful but can be accepted and imposed by the Court when there is no other way to protect the honour and good name of third parties, insulted by the comments.

It must be noted that the Court of Appeal considered the removal of unlawful comments as non-interference with the freedom of expression of the writers of the comments.

- Delfi was obliged by law, as an internet portal operator to be aware of the offensive and unlawful nature of the comments as they included value judgments which
“are inappropriate if it is obvious to a sensible reader that the meaning is vulgar and intended to degrade human dignity and ridicule a person”

- Finally, that Delfi failed to remove the offensive, unlawful comments on its own initiative, as it should have done according to the Obligations Act and specifically section 1047 (3) which provided that the publication of comments of a clearly unlawful nature was also unlawful, as they were published solely for the purpose of harming a third person’s honor and good name.

More specifically, the Court found that Delfi should have prevented the publication of the unlawful comments and have removed them in its own initiative from its website, in order to avoid harming L. As Delfi failed to do so, even though it should have been aware of the unlawful content of the comments posted immediately after they were published and remove them, it was liable for the damage caused to L. Under 1047(3) of the Obligations Act, Delfi could have not been held culpable if the content of the unlawful information was thoroughly verified and the users posting it had a legitimate aid in the disclosure of that content. However, the impugned comments were found to be linguistically inappropriate value judgments intending only to harm the honor of L, Delfi didn’t prove the absence of its culpability and thus the publication of the unlawful content couldn’t be justified.

*d. Judgment of the First Chamber of Human Rights*

Briefly the First Chamber of the European Court of Human Rights, in its judgment of 10 October 2013 found that:

-it didn’t went on to determine the exact role of Delfi as a company, but upheld the distinction made by the Supreme Court, that due to the economic interest in the publication of comments, both a publisher of printed media and an intermediary are publishers/disclosers as entrepreneurs.

\[65\] Ibid. par. 15, p. 13
\[66\] Ibid., p. 14
That there was an interference of the freedom of expression of Article 10 of the Convention on Human Rights.

The interference was prescribed by law.

That a media publisher was liable for any defamatory statements made in its publication.

That the interference pursued a legitimate aim, that of protecting the reputation and rights of others.

That the comments posted were defamatory and Delfi could have predicted the reaction that they caused and thus could have removed them instantly.

That the filtering and notice-and-take-down system of Delfi didn’t provide with sufficient protection.

That were had been no realistic opportunity of bringing a civil claim against the actual authors of the comments as their identity couldn’t be easily established.

Due to the face that Delfi was obliged to pay a small amount of money, the restriction on its freedom was justified and proportionate.67

**e. The Grand Chamber Judgment**

As the Chamber found that by holding Delfi liable for the comments posted on its website, there was no violation of Article 10 of the European Convention on Human, on 17 February 2014 the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber, in order to avert the consequences of the Chamber’s judgment on the freedom of expression and the democratic openness in the digital era.68 Finally, the Grand Chamber handed down its

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67 Ibid. p. 34-36

judgment on the case on 16 June 2015 which is final. The Grand Chamber upheld the decision of the Chamber and held that the national courts were right to decide that Delfi was liable for the comments of its users and that imposing liability on Delfi was not a disproportionate restriction on Delfi’s right to freedom of expression and consequently no violation of Article 10 of the European Convention on Human Rights.

More specifically, it ruled that the rights of Articles 10 and 8 of the Convention of Human Rights should be equally respected. Freedom of expression couldn’t be prioritized against the right to privacy despite the important role the former plays in the progress of Internet and the benefits that it offers.

Moreover, the Grand Chamber upheld the opinion of the Supreme Court that intermediaries should be considered as publishers/disclosers as entrepreneurs, together with a publisher of printed media, recognizing that because of the particular nature of Internet, the “duties and responsibilities” [article 10(2) of the Convention] of Intermediaries can be different from those of a publisher of printed media.

The Grand Chamber found that the comments on Delfi’s site mainly constituted hate speech and speech that directly advocated acts of violence and as tantamount to an incitement to hatred or to violence against L. Thus, the unlawful character of the comments could be instantly recognized without the need of further examination.

Moreover, the Chamber considered the case to be about the “duties and responsibilities” a large professionally managed internet news portal which provides space to users where they can post their comments, under a pseudonym or anonymously and is run on a commercial basis with the expectation of profit. It went on to apply a three stage test in order to find out whether the interference with Delfi’s free-

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69 Delfi v. Estonia judgment, para. 115, p.45
70 ibid. para. 117, p.46
dom of expression was lawful, had a legitimate aim and was necessary in a democratic society\textsuperscript{71}.

i. Lawfulness

Regarding the lawfulness of the interference, the Grand Chamber claimed that it was for the national authorities of Estonia to interpret and apply the domestic law in order to determine whether the interference was prescribed by law or not and also if that law was accessible to the person concerned and foreseeable to its effects. The Grand Chamber was satisfied by the fact that the law was accessible and foreseeable and for that reason Delfi should have known, as a professional publisher that the normal rules for publisher should apply in the specific case and therefore the interference with its freedom of expression was lawful\textsuperscript{72}.

ii. Legitimate aid

The legitimate aid was not disputed either by the parties or the Courts and hence the Grand Chamber needn’t express its opinion on that matter\textsuperscript{73}.

iii. Necessary in a democratic society

In relation to the necessity in a democratic society, the Grand Chamber analyzed the general principle of freedom of expression and the adjective necessary within the meaning of Article 10(2) which implies the existence of a “pressing social need” which must be present when there is an interference with an individual’s right\textsuperscript{74}.

The Grand Chamber said that the impugned comments couldn’t have the protection of Article 10 of the European Convention on human rights as their content was obviously unlawful, as it amounted to hate speech and incitement to violence. The question the Grand Chamber had to answer was whether the decision of national

\begin{footnotesize}
\textsuperscript{71} Ibid. para. 115
\textsuperscript{72} Ibid. para. 120-129, p. 46-49
\textsuperscript{73} Ibid. para. 130, p.49
\textsuperscript{74} Ibid. Para 131., p.49
\end{footnotesize}
courts holding Delfi liable for the comments which were posted by its users was in breach of its freedom to impart information (Article 10 of the Convention)\textsuperscript{75}.

The Chamber said that by making the comments of users public, Delfi couldn’t be deemed to be a passive, purely technical service provider since it also earned profit out of this activity, by means of advertisements which the users could watch when visiting the website. Moreover that L had the possibility to turn against both Delfi and the users of comments, but the identity of the users was really difficult to be found. Thus there couldn’t be made an effective claim against them.

In addition the Chamber said that even though Delfi removed the offensive comments immediately after it got noticed by L’s lawyers, six weeks after their were published, and had developed a notice and take down mechanism in its site, those measures proved to be insufficient. Everybody could see their content for the duration of six weeks that the comments remained online. The Chamber also stressed the importance of intermediaries taking sufficient measures in order to protect phenomena like hate speech and inciting violence, which by no means can be deemed to consist “private censorship”. It also recognized the possibility for States to impose liability on intermediaries in case they fail to remove comments of that content, even in cases when they are not even noticed by the victim.

Finally it noted that the sum of 320 euro that Delfi had to pay for non-pecuniary damages was negligible in addition to the fact that it continued its activity normally and continued to be one of the largest portals in Estonia. Thus, the interference with Delfi’s freedom of expression was not disproportionate or unjustified.

For all the reasons above the Grand Chamber found that the national courts had based Delfi’s liability on sufficient and relevant grounds, and that, by fifteen votes to two, \textit{that there had been no violation of Article 10 of the Convention on Human Rights on this case}\textsuperscript{76}.

\textsuperscript{75} Ibid. para. 140, p.53

\textsuperscript{76} Ibid.,p.53-61
5. Criticism of the Grand Chamber Decision

It has been only few months since the Grand Chamber handed down the judgment on Delfi v. Estonia and thus the reactions caused of it were vast. The main reason is the responsibilities that it might impose to internet intermediaries when it comes to the content posted by their users on their websites and the liability they might bare for them.

a. Reflections

i. Threat against freedom of expression and right to privacy

More specifically, the Grand Chamber’s judgment by supporting the ruling of the Supreme Court of Estonia regarding the obligations of intermediaries to remove unlawful comments immediately after they have been published imposed the obligation on intermediaries the responsibility to exercise prior control to the content posted on their website. It is likely that intermediaries will choose to check the content of the comments posted on their websites in order to avoid being held liable in case of inappropriate content. Thus they will not allow for the publication of any comment that has even the slightest possibility of being deemed as unlawful by the judicial or national authorities, in order not to be held liable. This situation can cause a sever harm to the freedom of expression protected under Article 10 of the European Convention on Human Rights.

In order to avoid responsibility, intermediaries may as well require from their users to avoid using pseudonyms or no name at all, so that they can be easily detected. That can be deterrent for users who want to express their opinion online and may not want to be identified by others, harming their freedom of expression. In addition, it is against the right to privacy, protected by Article 8 of the European Convention on Hu-
man rights, as users will be obliged to reveal their personal data if they want to post something online. The Grand Chamber also ruled that the case doesn’t concern other kind of intermediaries where the content provider may be a private person running the website or a blog as a hobby. However, as judges Sajo and Tsotsoria stated in their dissenting opinion of the judgment “freedom of expression cannot be a matter of hobby.

As it was correctly stated by Article 19 at its intervention in the proceedings before the Grand Chamber one of the most important features of the internet is the fact that anyone can freely express its opinion, promoting public debate in its purest form. However holding websites liable for the user-generated content will impose an unacceptable burden on websites. The importance of the facilitation of freedom of expression was also stressed by Media Legal Defence Initiative, which intervened in the court proceedings on behalf of 28 non-governmental and media organizations and companies.

ii. Lawfulness of the interference with freedom of expression

In order for an interference with the freedom of expression to be lawful it must be prescribed by law and that law must be accessible to the person concerned and foreseeable to its effects. Estonian and European legislation provide that intermediaries shouldn’t be held liable for user-generated content. For that reason, Delfi, relying on those provisions, acted as an intermediary under Article 14 of the e-Commerce Directive. However, the Supreme Court ruled that Delfi had the liability of a traditional publisher of printed media and therefore it should be held liable for the comments posted from its users, as authors together with the actual authors of them. The Grand Chamber accepted that the applicable law was the Civil Code, which provides

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77 Ibid. para. 98-99, p. 41-42
78 Ibid., para. 116, p.46
79 Ibid. para. 9, p. 71
80 Ibid., para. 96-97, p.42
81 Ibid. para. 101-105,p. 42
that the liability of Delfi was that publisher and not the Information Society Services Act., which is consistent with the e-Commerce Directive and exempts from liability intermediaries which remove expeditiously any unlawful content upon notice. The Grand Chamber didn’t explain why it chose to apply the more general law (lex generalis), rather than the more special one (lex specialis), which implements the E-Commerce Directive into the Estonian national law. As the dissenting opinion of judges Sajo and Tsotsoria states, “Moreover, the service provider in the present case did not generate the impugned content: that content was user-generated. To argue that the commercial nature of the data storage brings the activity within the liability regime applicable to publishers is not convincing”.

Hence, the applicable law couldn’t be foreseeable in the specific case. In the case of Papasavvas (C-291/13) that was mentioned above, in 2013, there was a preliminary ruling relating to the applicable law in cases of a publisher of printed media that publishes the news online also. As the dissenting opinion correctly states “if there was uncertainty in 2013 in the European Union on a similar but less complicated matter, which was clarified in 2014, “how could learned counsel have been sufficiently certain in 2006?” Moreover, it wasn’t foreseeable under Estonian Law as well, as the Supreme Court itself had one relevant case to refer to, dating from December 2005, which was probably unknown to Delfi by the time the comments were published.

Therefore, the Grand Chamber with his ruling on the matter of foreseeability didn’t expressed its view on the law that should apply, accepting in that manner the choice by the national courts of Estonia to apply the Civil Code of Estonia. The Grand Chamber’s view on the foreseeability was unjustified and therefore, opposing to Article 10(2) of the European Convention on Human Rights.

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82 E. Weinert, Delfi AS v Estonia: Grand Chamber of the European Court of Human Rights hands down its judgment: website liable for user-generated comments, Entertainment Law Review, 2015, p. 4
83 Ibid. Joint Dissenting opinion of Judges Sajo and Tsotsoria, par. 18, p. 75
iii. Equation of publishers with intermediaries

Finally, the Grand Chamber upheld the judgment of the Supreme Court of Estonia that a publisher of printed media and an Internet portal operator are publishers/disclosers as entrepreneurs. However, it didn’t express its opinion directly on whether Delfi was a media publisher or an intermediary and thus failed to exercise properly its supervisory role of Article 10 of the Convention on Human Rights. The only way for interference with Delfi’s freedom of expression to be prescribed by law was to consider it as a media publisher. Sadly, the Grand Chamber didn’t go any further to see that Delfi had a dual role, both that of a publisher when it comes to the articles that it publishes and an active intermediary when it comes to the user-generated-content that can be uploaded in its website.

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84 Ibid. para. 112, p.44
85 Op.cit, E. Weinert, p. 4
Conclusions

Article 14 of the e-Commerce Directive provided till now sufficient protection to internet intermediaries who act as hosts and publish their own content and allow for comments of users beneath them. According to Article 14 an intermediary cannot be held liable for user-generated content if it had no actual knowledge of the content that was published and upon notice it acted expeditiously to remove the inappropriate content.

So far, there has been satisfactory case law from the European Court of Human Justice, exempting such intermediaries for user-generated content. However that did not happen with the Delfi v. Estonia case, where the European Court of Human Rights decided that there wasn’t an interference with freedom of expression of the site when finding it liable as publisher of comments which were posted by its users and not by Delfi. Moreover, despite the fact that the Grand Chamber recognized that internet intermediaries differ from traditional publishers, it stuck to the fact that Delfi was a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited readers to comment on them. For that reason the Grand Chamber held that Delfi should have known in advance, that the article that it published would have caused a lot of reactions and that Delfi itself would be held liable for the comments that were published as a media publisher running an Internet News portal for an economic purpose.

Moreover the Grand Chamber held that Delfi should have known that its liability was tantamount to the one of professional publisher, similar to a printed media publisher, and not that of an intermediary protected under Article 14. Therefore, it accepted that the Civil Code of Estonia should apply in the specific case, despite the fact that it was more general and that the Information Society Services Act which provides a “safe harbor” rule for service providers in the case of storage, under which intermediaries are not held liable for the content they removed expeditiously upon notice of the unlawfulness.
Additionally, the Grand Chamber accepted that the excludes the obligation of intermediaries to monitor or investigate the user-generated content on their website and demanded that Delfi should have known what kind of comments would be written under its article beforehand and should have taken earlier the appropriate measures.

If this decision of the Grand Chamber starts being used by the national courts as established case-law, it will have as a result the interference with the right to privacy of users, that will no longer be able to comment anonymously since the intermediaries will be afraid of being held liable and the freedom of expression for both the users and the intermediaries.

For those reasons, there is an immediate need for legislative changes regarding the e-Commerce Directive which was established in 2000 when Internet was a completely different thing. The new legislative instrument should provide the intermediaries and the users of the internet with safeguards for their freedom of expression which has developed vastly and allow for continuing of the benefitting role that intermediaries play in the Internet environment. This could be done through clean and clear provisions that would entail the new kinds of intermediaries that exist nowadays and the exact circumstances under which they should be held liable.
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