IN THE EUROPEAN COURT OF HUMAN RIGHTS

App No. 45581/15

BETWEEN:

SANCHEZ

Applicant

v

FRANCE

Respondent

WRITTEN COMMENTS OF THE THIRD PARTY INTERVENERS

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8 April 2022

Introduction

1. These written comments are submitted by Media Defence and the Electronic Frontier Foundation (the 'Interveners'), pursuant to leave granted by the President of the Court in accordance with Rules 44(3) and (4) of the Rules of Court.[1]

2. The events the subject matter of the present case took place in 2011 and 2012. The applicant, a politician, was charged with the offence of incitement to hatred or violence against a group of people or an individual on account of their religion following comments posted on the 'wall' of his Facebook account by third parties. He was found to have failed to take prompt action in deleting those comments and was convicted of that offence. At the time the comments were posted, the applicant was running for elected office. The third parties who posted the offending comments were convicted of the same criminal offence. A Chamber of the Fifth Section found no violation of the applicant's Article 10 rights.

3. Article 10 requires member states to safeguard the right to freedom of expression including the right to receive information. Connected to this, states are required to create a favourable environment for public debate and for the expression of opinions and ideas.[2] This includes online expression, and the protection afforded to intermediaries such as the applicant should be considered in that context. Appropriate safeguards and strict limitations on intermediary liability are essential to keep online spaces open and to avoid censorship of users.

4. This Court considered the issue of intermediary liability for the first time in 2015, in the case of *Delfi AS v Estonia* ('*Delfi*').[3] The principles that were developed in *Delfi* for determining intermediary liability were subsequently applied in the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* ('*MTE*').[4] In both of those cases the applicants were Internet news portals, the second applicant in *MTE* being a self-regulatory body of Internet content providers.[5] The applicant in this case is a politician who uses a social media platform. The Court must decide on the question of whether, and in what circumstances, intermediaries such as the applicant can be held criminally liable for comments posted by third parties on social media platforms they use, and what factors should be part of the assessment to determine where the appropriate balance lies between his Article 10 rights and the personality rights of those taking issue with online user comments.

5. For the reasons set out below, the Interveners submit that it is not axiomatic that the *Delfi* principles should apply in cases such as the present one. Imposing liability on a social media user for third party content is likely to have a serious impact on the use of social media platforms by, among others, journalists, human rights defenders, and civil society actors. They are currently among those most impacted by erroneous moderation[6] and through targeting by governments seeking to suppress speech.[7] Imposing liability on social media users for third party content would be more likely to

[1] The President of the Court granted the Interveners leave to submit written comments by way of letter dated 25 March 2022. As stipulated in that letter, these written comments do not include any comments on the facts or merits of the case, addressing only the general principles applicable to the determination of the case.
[2] ECtHR, *Dink v Turkey*, Application Nos. 2668/07, (14 September 2010)
[3] ECtHR *Delfi v. Estonia* [GC], Application No. 64569/09, (16 June 2015)
[4] ECtHR *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Application No. 22947/13 (2 February 2016)
[5] For the purposes of these written comments the term 'intermediary' encompasses a wide range of entities and individuals, operating for profit or otherwise, that host, store, cache and/or transmit information created or published by other users. An intermediary can, therefore, range from users of social media where comments are posted online, to news portals and social media platforms. References to a 'social media user' means, in broad terms, a member of the public using a social media platform for non-commercial purposes.
[6] Jillian York, *The global impact of content moderation* (2020), available at: https://www.article19.org/resources/the-global-impact-of-content-moderation/.
[7] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Doc No. A/HRC/38/35, (6 April 2018), §13

expose them to coordinated attack on forums or pages they administer in order to trigger their liability. This is particularly the case where those users are public figures such as politicians.

6. These written comments seek to assist the Court in its determination of the issues raised in this case by addressing the following matters: (1) the extent to which the Court's case law on intermediary liability is relevant to determining the liability of social media users as intermediaries for third party content; (2) relevant comparative and international law on the liability of social media users as intermediaries; (3) whether criminal liability should be applied to social media users for third party content.

The applicability of the Court's case law on intermediary liability to social media users

7. This Court has described the Internet as "one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest".[8] Increasingly, online content comes from individuals who use social media platforms such as Facebook to express themselves. These platforms facilitate public interest journalism, where views can be expressed unmediated by traditional publishing institutions. Commentary on these platforms differentiates itself from those institutions through the facilitation, for example, of an instant right of reply, where large scale, dynamic conversations, often involving informal modes of expression, take place, and where a single comment rarely exists outside of a more extensive conversation. In the Interveners respectful submission, the question of intermediary liability in that context cannot properly be resolved through the application of the principles developed in the *Delfi* case for the reasons set out below.

Delfi should not apply to users of social media platforms acting as intermediaries

8. In *Delfi* the question of attribution of liability for third party comments online was considered for the first time.[9] In holding that the domestic courts' findings that Delfi was liable for third party comments on its website did not violate its Article 10 rights, the Grand Chamber emphasised the following factors –

   (i) the commercial nature of Delfi, and that it was one of the biggest media companies in Estonia with a wide readership.[10]
   (ii) that it encouraged posting of comments, and that this encouragement formed part of its business model as engagement of readers would contribute to its overall revenue.[11]
   (iii) that it had editorial control over comments once they had been posted.[12]
   (iv) that it was a "professional publisher" that should be familiar with the relevant laws and could also have sought legal advice.[13]

9. The Grand Chamber identified four elements that required analysis when determining liability for third party comments – a. the context of the comments; b. the measures applied by the applicant company to prevent or remove defamatory comments; c. the liability of the actual authors of the comments as an alternative to the intermediary's liability; and d. the consequences of the domestic proceedings for the applicant company. The Interveners submit that there are three important aspects of the Grand Chamber's analysis of these elements that are relevant to the determination of the present case.

[8] ECtHR, *Ahmet Yildirim v Turkey*, Application No. 3111/10 (18 December 2012), §§48 and 54
[9] ECtHR, *Delfi AS v Estonia* [GC], Application No. 64569/09 (16 June 2015), §111: "… the first case in which the Court has been called upon to examine a complaint of this type [regarding the liability of Internet providers for the contents of comments]"
[10] *Id.*,§160
[11] *Id.*,§65
[12] *Id.*
[13] *Id.*,§129

10. First, the Grand Chamber was concerned with "the 'duties and responsibilities' of Internet news portals … when they provide for economic purposes a platform for user-generated comments" and it expressly disapplied its findings to "other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby".[14] This differentiation between news portals and members of the public who use a social media account is stated clearly, and in unqualified terms. The President of the Court has explained that this distinction is made not on the basis "that economic operators exercising free speech rights should, because of that status, enjoy lower free speech protections as a matter of principle, but only that the economic nature of their activities may often justify imposing on them duties and responsibilities which are of a more stringent nature than can be made applicable to non-profit entities".[15] The Grand Chamber's clarification on this point alone would seem to exclude a user of a social media account from liability for failing to monitor and remove third party comments.

11. The Interveners would note that, relevant to this aspect of the Grand Chamber's analysis in *Delfi*, the Chamber in the present case, in its judgment, relied on what it considered to be a "shared responsibility" between the holder of a social media account and the operator of the platform, referring to the Court of Justice of the European Union's (CJEU) decision in *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein*.[16] However that case concerned the owner of a Facebook Fan Page,[17] which is administered on a professional, or commercial, basis, and is markedly different to the type of social media account being considered in the present case.

12. Second, the Grand Chamber placed particular weight on whether the identity of the authors of the third party comments could be established.[18] It started out by asking whether "the liability of the actual authors of the comments could serve as a sensible alternative to the liability of the Internet news portal".[19] In noting that the parties disagreed as to the 'feasibility' of establishing the identity of the authors,[20] the Grand Chamber then held that the "uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose with a view to making it possible for a victim of hate speech to bring a claim effectively against the authors of the comments" were relevant factors supporting its finding of no violation of Article 10.[21] The Interveners submit that the Grand Chamber's judgment implicitly recognises that where the authors of impugned third

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[14] ECtHR, *Delfi AS v Estonia* [GC], Application No. 64569/09 (16 June 2015), §§115 - 116

[15] Judge Spano, *Don't Kill the Messenger – Delfi and Its Progeny in the Case Law of the European Court of Human Rights*, University of Tallinn Friday, (8 September 2017), available at: https://www.ivir.nl/publicaties/download/Speech_Spano.pdf

[16] ECtHR, *Sanchez v France*, Application No. 45581/15, (2 September 2021), §98; See CJEU, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH. Request for a preliminary ruling from the Bundesverwaltungsgericht*, Case No. C-210/16, (5 June 2018), §§39 and 42.

[17] The CJEU described a Facebook Fan Page in the following terms at §15 "Fan pages are user accounts that can be set up on Facebook by individuals or businesses. To do so, the author of the fan page, after registering with Facebook, can use the platform designed by Facebook to introduce himself to the users of that social network and to persons visiting the fan page, and to post any kind of communication in the media and opinion market. Administrators of fan pages can obtain anonymous statistical information on visitors to the fan pages via a function called 'Facebook Insights' which Facebook makes available to them free of charge under non-negotiable conditions of use. That information is collected by means of evidence files ('cookies'), each containing a unique user code, which are active for two years and are stored by Facebook on the hard disk of the computer or on other media of visitors to fan pages. The user code, which can be matched with the connection data of users registered on Facebook, is collected and processed when the fan pages are opened."

[18] ECtHR, *Delfi AS v Estonia* [GC], Application No. 64569/09, (16 June 2015), §77

[19] *Id.*, §147

[20] *Id.*, §150 "As regards the establishment of the identity of the authors of the comments in civil proceedings, the Court notes that the parties' positions differed as to its feasibility."

[21] *Id.*,§151

party comments are known or can be readily identified, and therefore can be subject to legal action, taking legal action against the intermediary, especially where that intermediary is a social media user, can amount to an unduly disproportionate interference with their right to freedom of expression, in violation of Article 10. The Interveners submit that this principled approach is consistent with the Court's well established case law on the important role of the Internet in facilitating the dissemination of information.[22]

13. Third, it was an important part of the government's case in *Delfi* that the third party commenters had "lost control of their comments as soon as they had entered them and they could not change or delete them".[23] The Court agreed that this detail was a factor in determining liability, stating that because *Delfi* "exercised a substantial degree of control over the comments published on its portal, the Court does not consider that the imposition on the applicant company of an obligation to remove from its website, without delay after publication, comments that amounted to hate speech and incitements to violence, and were thus clearly unlawful on their face, amounted, in principle, to a disproportionate interference with its freedom of expression".[24] This can be contrasted with comments made on social media platforms such as Facebook, where a commenter can still exercise control by withdrawing a comment after it has been posted, as happened in the present case when one of the commenters later deleted the allegedly unlawful online speech.[25]

14. In *MTE*, the Court applied the principles developed in *Delfi* to determine liability for third party comments, carrying out a close analysis of the four elements outlined above.[26] In that case the Court found a violation of Article 10. The key difference between *MTE* and *Delfi* lies in the nature of the third-party comments in issue.[27] The Court in *MTE* noted that, unlike in *Delfi*, the comments did not amount to hate speech or incitement to violence. The domestic courts had held the applicants, a news portal and a self-regulatory body of Internet content providers, liable for the harm to the reputation of a business by 'false and offensive' statements by online users, noting that they should have expected that some 'unfiltered comments' might be in breach of the law. In finding a violation of Article 10, the Court held that a requirement that an online platform search for and take down unlawful user comments "amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet".[28] In *Pihl v Sweden* the Court referenced *MTE* in noting that it had "previously found that liability for third party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via internet. This effect could be particularly detrimental for a non-commercial website."[29]

15. The Interveners submit that, taking into account the extent to which the Chamber in this case relied on the reasoning in *Delfi*, the Court now has an opportunity to clarify its findings in *Delfi* in the context of the factual circumstances of this case. In particular, in relation to the apparent requirement that intermediaries determine what amounts to unlawful speech and monitor content,

[22] See ECtHR, *Jersild v Denmark,* Application No. 15890/89, (23 September 1994), §35; ECtHR, *Thoma v Luxembourg*, Application No. 38432/97, (29 March 2001), §62; and, mutatis mutandis, ECtHR, *Verlagsgruppe News GmbH v Austria*, Application No. 76918/01, (14 December 2006), §31; ECtHR, *Print Zeitungsverlag GmbH v Austria,* Application No. 26547/07, (10 October 2013), §39
[23] *Id.,* §85
[24] *Id.,* §153
[25] See ECtHR, *Sanchez v France,* Application No. 45581/15, (2 September 2021), §11
[26] ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary,* Application No. 22947/13, (2 February 2016), §§60 – 88.
[27] *Id.,* See Concurring Opinion of Judge Kuris §2
[28] ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary,* Application No. 22947/13, (2 February 2016), §82
[29] ECtHR, *Pihl v Sweden,* Application No. 74742/14, (7 February 2017), §35

having regard to the legitimate concerns that the prospect of being held criminally liable for third party content will lead to over-censorship and prior restraint.[30]

Social media users as intermediaries should not have to determine whether material posted by other users is lawful

16. The Court's findings in both *Delfi* and *MTE* hold that where an intermediary fails to remove material that is "clearly unlawful", it may be held liable for that failure.[31] The implication here is that the intermediary is required to determine the lawfulness or otherwise of the online content. The Interveners submit that this requirement fails to properly safeguard their Article 10 rights. This is *a fortiori* the case when the intermediary is a member of the public using a social media platform.

17. The Grand Chamber in *Delfi* held that the intermediary must act "without delay" to remove unlawful speech.[32] Applying this standard, even the most sophisticated intermediary would find it difficult to carry out an assessment as to whether a comment qualifies as unlawful speech to an appropriate legal standard, and in any event would feel compelled to remove that comment almost immediately to avoid liability.[33] Assessing whether material posted online is lawful or unlawful is complex and would amount to an excessively burdensome standard where applied, for example, to the user of a social media platform acting as an intermediary.[34] It can involve an examination of the appropriate balance to be struck between the right to respect for private life and the right to freedom of expression. It might involve questions relating to defamation, privacy rights, or breach of data protection, and their relationship to the criminal law. A proper assessment of lawfulness might require consideration of whether certain legal defences are available. A further level of complexity stems from the fact that states within the Council of Europe classify certain offences differently, for example, where defamation is an offence under criminal law.[35] Where intermediaries do remove content without properly assessing its lawfulness, they are likely to do so without informing the author and where the author has no prospect of appealing the decision to remove their content. In addition, as this case amply demonstrates, matters relating to the removal of online speech are often not yet settled law.[36]

18. Ultimately, a requirement that intermediaries should determine whether online material is unlawful will invariably lead to lawful content being removed.[37] Moderation is already a challenge for social media companies who are best placed to apply resources to this issue. Facebook itself has admitted that their moderators "make the wrong call in more than one out of every 10 cases", which was calculated by the NYU Stern Centre for Business and Human Rights as approximately 300,000

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[30] The Court has had to grapple with the question of whether speech amounted to unlawful speech several important cases. In many of those cases the Court was split as to the meaning of the speech in issue. See: ECtHR, *Vejdeland and others v Sweden*, Application No. 1813/03, (5 September 2012); ECtHR, *Perincek v Switzerland* [GC], Application No. 2751/08, (15 October 2015); ECtHR, *Feret v Belgium*, Application No. 15615/70, (16 July 2009)

[31] ECtHR, *Delfi v. Estonia* [GC], Application No. 64569/09, (16 June 2015), §153; ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, Application No. 22947/13 (2 February 2016), §§64 and 91.

[32] ECtHR, *Delfi v. Estonia* [GC], Application No. 64569/09, (16 June 2015), §159

[33] See for example: ECtHR, *I.A. v. Turkey*, Application No. 42571/98, (13 September 2005); ECtHR, *Lindon, Otchakovsky-Laurens and July v. France* [GC], Application Nos. 21279/02 and 36448/02, (22 October 2007)

[34] According to the Council of Europe Committee of Ministers, "questions about whether certain material is illegal are often complicated and best dealt with by the courts". See Committee of Ministers of the Council of Europe, *Declaration on freedom of communication on the Internet,* Adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies p.7

[35] See for example: Council of Europe, *European Commission for Democracy Through Law (Venice Commission) – Opinion on the Legislation on Defamation*, Opinion No. 715/2013, (9 December 2013)

[36] In addition to intermediary liability this Court has also recently dealt with issues relating to 'the right to be forgotten', ECtHR, *Hurbain v Belgium*, Application No. 57292/16, (22 June 2021)

[37] Daphne Keller, *Empirical Evidence of "Over-Removal" by Internet Companies under Intermediary Liability Laws* (last updated May 8, 2020), available at: http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws.

cases per day.[38] These errors result in wrongful takedowns and leave unlawful content online.[39] The chilling effect is obvious and is simply a case of risk avoidance on the part of intermediaries.[40] The extent of this chilling effect was neatly set out in a recent study by the French Ministry of Culture, and was described in the following terms, "[B]ased on a survey conducted among a representative sample of French internet users above 15, the report shows that 33% of all French internet users have shared audio or video material from third parties on platforms. Of these 13% have had at least one upload blocked. 58% of those who have had an upload blocked have challenged the last blocking decision and 56% of these challenges have been successful and have led to the reinstatement of the uploaded content. In absolute numbers this means that more than 700,000 French internet users (1.4% of the total) have been at the receiving end of an unjustified blocking decision."[41]

19. The Interveners position is that, as a general rule, court orders should be required for removal of content. In the context of this case the Interveners submit that liability should only arise where a social media user acting as an intermediary fails or refuses to comply with a court order compelling them to remove or block information.[42] This approach would safeguard Article 10 rights while providing an appropriate mechanism through which an individual's personality rights can be vindicated. The Interveners submit that this is a more principled approach than the imposition of liability following notification of the content to the intermediary by a private party, or where the intermediary identified the content itself.[43]

20. The reasons for this include that a court will be able to carry out a proper legal assessment of whether the content in issue is lawful. In so doing, it will provide a level of certainty and comfort that the proper balancing exercise has been carried out. Taking into account the principle of open justice, this ensures greater transparency in respect of decision-making on removal or blocking of content. It will mean that intermediaries can avoid over-censorship, through removing lawful content in order to avoid liability, and will not be compelled to establish monitoring systems

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[38] NYU Stern Center for Business and Human Rights – Paul M. Barrett, *Who Moderates the Social Media Giants? A Call to End Outsourcing*, (June 2020), available at: https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/5ed9854bf618c710cb55be98/1591313740497/NYU+Content+Moderation+Report_June+8+2020.pdf.

[39] Pro Publica, *Facebook's Uneven Enforcement of Hate Speech Rules Allows Vile Posts to Stay Up*, (28 December 2017), available at: https://www.propublica.org/article/facebook-enforcement-hate-speech-rules-mistakes

[40] According to one study on how intermediaries deal with requests for the removal of content, many participants, regarded as 'smaller intermediaries', noted that they had opted "to take down content even when they are uncertain about the strength of the underlying claim" in order to avoid exposure to liability. The study also notes that requests were often made in bad faith, "including to harass competitors, to resolve personal disputes, to silence a critic, or to threaten" the platform - Urban, Karaganis and Schofield, *Notice and Takedown in Everyday Practice* (26 March 2016), UC Berkeley Public Law Research Paper No. 2755628 p. 40 -41

[41] Ministere De La Culture, *CSPLA mission on tools for recognizing content protected by online sharing platforms: state of the art and proposals*, (30 January 2020), available at: https://www.culture.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-proteges-par-les-plateformes-de-partage-en-ligne-etat-de-l-art-et-propositions

[42] In that regard, the Court should note that it is not always possible for such intermediaries to remove or block content, for example where they lack the technical capacity to do so.

[43] This is the position taken by several institutions and activists engaged in protecting the right to freedom of expression. For example, see *Joint Declaration on Freedom of Expression and the Internet* (1 June 2011), §§2a and 2b; See also*:* UN Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n, UN Doc. A/HRC/17/27 (16 May 2011), §43. The special mandate holders in their Joint Declaration on Freedom of Expression on the Internet, state that: "intermediaries […] should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression," there should be no liability for content generated by others as long as the intermediary does not "specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so." See also the Manila Principles on Intermediary Liability, Electronic Frontier Foundation and others, *Manila Principles for Intermediary Liability*, available at: https://www.manilaprinciples.org/.

"capable of undermining freedom of the right to impart information on the Internet".[44] In addition, it safeguards the right to freedom of expression of the third-party commenter as well as the right of the public to receive information. Taking into account that requests for removal of online content are often made in bad faith, as noted above, requiring a court order for removal or blocking of content is more likely to deter frivolous and vexatious requests.

Actual knowledge vs constructive knowledge

21. In both *Delfi* and *MTE* the Court seems to accept that 'actual knowledge' of third-party content is not strictly required in order to impose liability on an intermediary.[45] The Interveners maintain that for social media users acting as intermediaries, liability should only flow from failure to comply with a court order. At a minimum, intermediaries should be required to have 'actual knowledge' on the basis of notice before liability can arise from any failure to remove content. Only requiring 'constructive knowledge' of third-party content would impose an excessive, strict liability standard on intermediaries. In that regard, and relevant to the assessment of liability in this case, the Court should consider the specific circumstances of the social media user acting as an intermediary. In *Delfi* and *MTE* the Court placed particular weight on the 'economic' nature of the applicants. Connected to that, the President of the Court has noted that "the economic nature of the intermediary activity in question is closely correlated to the concepts of control and constructive knowledge of user generated content".[46] In the Interveners submission, it would follow that where that level of 'economic' activity is absent, imposing a 'strict liability' standard on a social media user acting as an intermediary would be disproportionate.

Social media users as intermediaries should not have to monitor content

22. Where liability arises because of 'constructive knowledge', in order to avoid liability an intermediary would be forced to put in place systems to monitor incoming content that might be unlawful and prevent it from being posted online. This may not be a viable option for all intermediaries and so many will, instead, decide not to allow comments. In addition, where the intermediary is a social media user who has created a forum for discussion on a social media platform, they may not be able to put those systems in place because they are not in control of the platform.

23. Imposing this type of requirement will lead to prior restraint and can therefore be considered a serious interference with the right to freedom of expression. In this regard, the Interveners would emphasise that this interference would affect not only the rights of intermediaries, but also the rights of the general public to receive information. The Court in *MTE* expressly recognised this. This Court has always required the most serious justification, supported by 'relevant sufficient reasons', for restricting speech and has noted that special regard should be had to the nature and the context of the speech. The Interveners submit that this would be a wholly unsuitable standard to apply to online comments on a social media platform, since they involve individuals expressing personal views in a dynamic and informal environment.

Relevant comparative law on liability of online intermediaries

Caselaw from the CJEU on intermediary liability

24. A recent decision of the Court of Justice of the European Union (CJEU) is instructive on the question of the level of knowledge required to establish intermediary liability for unlawful content.

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[44] ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, Application No. 22947/13, (2 February 2016), §82

[45] ECtHR, *Delfi v. Estonia* [GC], Application No. 64569/09, (16 June 2015), §159 and confirmed in ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, Application No. 22947/13 (2 February 2016), §91.

[46] Judge Spano, *Don't Kill the Messenger – Delfi and Its Progeny in the Case Law of the European Court of Human Rights*, University of Tallinn, (8 September 2017), available at: https://www.ivir.nl/publicaties/download/Speech_Spano.pdf

In *Peterson v Google LLC,* the CJEU considered the E-Commerce Directive in the context of allegations of copyright infringement.[47] While the Directive provides an exemption from liability for intermediaries engaged in 'services' and with respect to the "mere conduit" of content, "caching" of content, and "hosting", and the case concerns copyright, its relevance lies in its consideration of the protections available to online intermediaries. The Interveners would note here that the standards of protection afforded to intermediaries under the Directive would reflect the minimum standards of protection that should be available to a social media user acting as an intermediary.

25. In *Peterson* the CJEU was required to decide whether Google could be subject to an injunction and held liable in damages where it was found to be hosting videos that contained material breaching copyright. It held that an intermediary hosting material would only lose the protections it enjoys under the Directive where it had "knowledge of specific illegal acts committed by its users".[48] In that case, the intermediary would be considered to have 'knowledge' where it was put on notice that particular material was being hosted unlawfully,[49] or where the purpose of the platform was to allow access to unlawful material, such as where unlawful content was being shared.[50]

26. However, the CJEU held that an intermediary cannot be considered to have knowledge of the unlawful content just because it has put in place 'technological measures' aimed at detecting and thereby reducing the amount of unlawful material that it hosts[51] or because it is aware that the social media platform it is operating on might be used for unlawful purposes.[52] The CJEU expressly held that in order to lose the protections afforded to online intermediaries by the Directive the intermediary "must have knowledge of or awareness of specific illegal acts committed by its users relating to protected content that was uploaded to its platform".[53] This approach is consistent with the core focus of the Directive, which is to ensure that online intermediaries are not subject to an excessive burden in terms of how they intermediate content online.

27. The CJEU has consistently emphasised that the Directive must be interpreted to comply with fundamental principles, including the right to freedom of expression,[54] and that it should be interpreted in the light of its stated purpose.[55] It has further considered that implementation by member states both in law and practice must be consistent with the protection of fundamental rights guaranteed under EU law, including the right to freedom of expression.[56] That right has been a central consideration in decisions of the CJEU. For example, in the *Kabel Deutschland* case the ECJ noted that, "it is appropriate to stress the importance of the fundamental freedom to receive information of which the recipients are end-users and which the Member States must guarantee".[57] This is consistent with the emphasis the Court in *MTE* placed on the right of the public to receive information. In the CJEU's *UPC Wien* case the Advocate-General explained why intermediaries need to be protected as facilitators of the expression rights of others, "Although it is true that, in substance, the expressions of opinion and information in question are those of the ISP's customers,

[47] CJEU, *Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH,* Case No. C-682/18, (22 June 2021)
[48] *Id.,* §103.
[49] *Id.,* §115
[50] *Id.,* §82
[51] *Id.,* §109
[52] *Id.,* §111
[53] *Id.,* §118
[54] CJEU, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, Case No. C-275/06, (29 January 2008), §§66-70.
[55] CJEU, *Google France SARL, Google Inc. v Louis Vuitton Malletier SA and others,* Case Nos. C-236/08 to C-238/08, (23 March 2010), §110.
[56] CJEU, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH,* Case No. C-314/12, (27 March 2014), §§44-46
[57] CJEU, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG v Niedersächsische Landesmedienanstalt für privaten Rundfunk,* Case No. C-336/07, (22 December 2008), §33

the ISP can nevertheless rely on that fundamental right by virtue of its function of publishing its customers' expressions of opinion and providing them with information."[58]

Intermediary liability in the US

28. Intermediaries in the US are subject to a three-part liability scheme. Intellectual property claims are subject to a notice-and-takedown scheme.[59] Intermediaries have no immunity at all with respect to violation of federal criminal law. For substantially all other claims, including all civil claims and claims based on state criminal law, intermediaries are immune. 47 U.S.C. § 230, enacted as part of the Communications Decency Act, provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider". As a result, online intermediaries, both providers and users of interactive computer services, that host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say. The protected intermediaries include not only regular Internet Service Providers (ISPs), but also a range of "interactive computer service providers," including any online service that stands between the original speaker and the publication of their speech online. This naturally includes social media users acting as intermediaries. While the exceptions for federal criminal and intellectual property-based claims are substantial, §230 is recognised as having created a broad protection that has allowed innovation and free speech online to flourish.[60]

Criminal liability for third party content

29. The Court has repeatedly held that "imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 … only in exceptional circumstances, notably where other fundamental rights have been seriously impaired" [emphasis added].[61] It has also noted that when seeking to regulate speech states should use the least intrusive measures and the criminal law should only be used as a last resort.[62] In adopting this approach the Court has clearly recognised the enormous impact criminal sanctions can have on the lives of those prosecuted for their expression.[63]

30. The applicant in the present case was convicted of a criminal offence as a result of comments made by third parties. The third parties, those who authored the comments, were convicted of the same offence. According to the Chamber's judgment in this case, the applicant did not expressly challenge whether the interference with his Article 10 rights was 'provided by law'.[64] The Court is the "master of the characterisation to be given in law to the facts of the case", is not "bound by the characterisation given by an applicant [or] a government" and can therefore raise matters *proprio*

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[58] CJEU, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case No. C-314/12, (27 March 2014), §82, citing ECtHR, *Öztürk v Turkey*, Application No. 22479/93, (28 September 1999) § 49; and ECtHR, *Yildirim v Turkey*, Application No. 3111/10, (18 December 2012)

[59] United States Code, 2006 Edition, Supplement 4, Title 17 – Copyright, § 512 – Limitation on liability relating to material online

[60] Anupam Chander, *How Law Made Silicon Valley*, Emory Law Journal, Vol. 63, (2014): "[T]he Communications Decency Act proved central to the rise of the new breed of Silicon Valley enterprise .... within the statute was a small fateful section, § 230, that would save many corporations—most of them not even dreamed of when the Act was passed—from potentially ruinous legal challenges."

[61] ECtHR, *Gavrilovici v. Moldova*, Application No. 25464/05, (15 December 2009), §60; ECtHR, *Cumpănă and Mazăre v Romania* [GC], Application No. 33348/96, (17 December 2004), §115, ECtHR, *Mahmudov and Agazade v Azerbaijan*, Application No. 35877/04, (18 December 2008), §50

[62] *Id.*

[63] The Court should also note that the use of criminal laws can allow an unscrupulous state impose other far-reaching measures pending trial, such as imposing a travel ban or freezing assets, see this Court's cases for *Khadija Ismayilova v Azerbaijan*, Application Nos. 65286/13, 57270/14, and 35283/14. In addition, the psychological impact of being subjected to a criminal investigation and a criminal trial, the latent risk of a fine, damage to one's professional reputation, and a potential criminal record which will have implications for future employment also have an impact that should not be underestimated.

[64] ECtHR, *Sanchez v France*, Application No. 45581/15, (2 September 2021), §69

motu.[65] The Interveners submit that the importance of the outcome of this case for freedom of expression online warrants an assessment of whether interference of the kind that took place here can be considered 'in accordance with the law'.

31. While the Court has acknowledged that interpretation of domestic legislation is best left to the domestic authorities, it has also held that criminal law provisions should not be applied to acts that are not covered by them.[66] The Court's case law and the principles it has developed on this topic are clear and consistent. An offence must be clearly defined in law,[67] and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen – if need be with appropriate legal advice – to foresee the consequences which a given course of conduct might entail.[68] The Court has emphasised the law-making function of the courts must remain within reasonable limits.[69] Article 7 precludes the punishment of acts not previously punishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence.[70] The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence,[71] but any development must be consistent with the essence of the offence and be reasonably foreseeable, and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.[72]

32. The Grand Chamber is now being asked to consider whether the imposition of criminal law sanctions on social media users as intermediaries, for the comments of other parties, complies with Article 10 of the Convention. This is a clear indication that a legal adviser would not be able to advise on this question with sufficient certainty. The Interveners make this submission in the context of a case where the Court is considering events that took place a decade ago, in circumstances where policies and guidelines relating to the responsibilities and duties of intermediaries were under-developed. The Interveners submit that imposing criminal law sanctions in those circumstances can only be permitted where this would not contradict the rationale of the offence in question or change the essential constituent elements of the offence to the detriment of the accused. Where the provisions of a criminal law are directed at, for example, the author of comments, and do not make any reference to an intermediary providing a platform, let alone a social media user on whose page those comments are posted, the use of those laws against the intermediary would, the Intervener submits, offend the fundamental principle of the rule of law that the precise nature of the conduct prohibited by a criminal sanction should be readily ascertainable from the definition of the offence.[73]

Conclusion

33. This case provides the Court an opportunity to clarify its developing jurisprudence on intermediary liability, having regard to the novel factual circumstances under consideration in this case. The Interveners submit that the principles developed in *Delfi,* if applied to social media users acting as intermediaries, will have a chilling effect on freedom of expression and the right to information online to the detriment of a diverse, pluralistic, and dynamic internet that enables individuals to express themselves.

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On behalf of the Interveners

[65] ECtHR, Gherghina v. Romania [GC], Application No. 42219/07, (9 July 2015) § 59
[66] ECtHR, *Zaja v Croatia,* Application No. 37462/09, (4 October 2016), §§ 91-92
[67] ECtHR, *SW and CR v United Kingdom,* Application No. 20166/92, (22 November 1995)
[68] ECtHR, *Sunday Times v United Kingdom,* Application No. 6538/74, (26 April 1979), §49
[69] ECtHR, *X Ltd and Y v United Kingdom,* Application No.8710/79, (7 May 1982), §9
[70] *Id.*
[71] *Id.*,§9
[72] ECtHR, *Kokkinakis v Greece*, Application No. 14307/88, (25 May 1993), §52.
[73] See ECtHR, *Delfi v. Estonia* [GC], Application No. 64569/09, (16 June 2015) - dissent of Judges Sajó and Tsotsoria.