

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 1847/21

BETWEEN

PATRASCU

Applicant

- and -

ROMANIA

Respondent Government

WRITTEN COMMENTS OF

**Digital Security Lab Ukraine
ARTICLE 19: Global Campaign for Free Expression**

20 July 2022

INTRODUCTION

1. This third-party intervention is submitted on behalf of Digital Security Lab Ukraine and ARTICLE 19: Global Campaign for Free Expression (jointly the Interveners) pursuant to leave granted on 29 June 2022 by the President of the Fourth Section under Rule 44(3) of the Rules of the Court. The Interveners are grateful for the opportunity to make these interventions. As directed, these submissions do not address the facts or merits of the Applicant's case.
2. In the Interveners' view, the core issue raised by the present case is whether holding an individual user or social media strictly liable for third-party content posted on their social media account is compatible with Article 10 of the Convention. The Applicant, a Facebook user, was held liable by domestic courts for the third-party comments left under his post related to tensions within the Bucharest National Opera. He was ordered to delete the comments and pay the ensuing damages to two Opera employees. This de facto imposed a number of additional content moderation obligations on individuals in relation to their social media accounts. The Interveners believe that this case therefore presents the Court with an important opportunity to address the rules governing intermediary liability, which have a major impact on freedom of expression online, guaranteed by Article 10 of the European Convention of Human Rights (the Convention).
3. In order to assist the Court in its deliberation in this case, in the submission, the Interveners provide comments on the following matters:
 - (a) The extent of the current and prospective regime of liability for third-party comments and its applicability to individual social media users;
 - (b) The possible criteria for determining the persons' liability for third-party comments online;
 - (c) The impact of social media users' liability for third-party comments on freedom of expression and public discourse online.

SUBMISSIONS

A. The extent of the current and prospective regime of liability for third-party comments and its applicability to individual social media users

4. The Interveners recall that the guarantees of the right to freedom of expression under Article 10 of the European Convention enables individuals to seek and receive information and express themselves freely without undue restrictions imposed by the States. It also protects individuals and entities that provide the means to disseminate information to others on the Internet, such as Internet news portals, blogging platforms, and social media platforms.
5. Social media platforms play an important role in enabling individuals to communicate, and access the wide variety of services available, online and to exercise their right to freedom of expression. Without social media, ordinary internet users would lose a valuable way of publishing their opinions and instantaneously sharing information. For these reasons, many countries, including in the European Union and the Council of Europe, have adopted special legal frameworks that limit the criminal and civil liabilities of intermediaries for infringements committed by their users. Immunity from liability is

generally considered essential to the survival of Internet intermediaries, given the scale of content that users produce.¹

6. The E-Commerce Directive (ECD)² has been the basis for the intermediary liability regime in the European Union for more than 20 years. Its provisions, providing conditional immunity of intermediaries for third party content, constitute one of the key directions of regulation of online platforms and are implemented in various European States outside the Union, such as Albania,³ Moldova,⁴ North Macedonia,⁵ Serbia,⁶ and Ukraine.⁷ Article 14 of the ECD stipulates that information society service providers which activities consist of the storage of information provided by a recipient of the service (hosting service providers) shall not be held liable for the information stored at the request of a recipient of the service:
 - (a) if the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
 - (b) if the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.⁸
7. The recently finalised EU Digital Services Act preserves the cornerstones of the ECD, conditional immunity from liability; albeit it adopts narrower categories of hosting providers – online platforms and very large online platforms – and imposes additional content moderation obligations on them. At the same time, it preserves the wording of Article 14 of the E-Commerce Directive in relation to hosting service providers and its underpinning rationale.⁹
8. It is notable that the provisions on immunities from the intermediary liability both on the European Union and the mentioned Council of Europe Member States employ similar wording and apply to the information society service providers; these are defined as “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”.¹⁰ Thus, the accentuation on the specific nature of the provided service is a crucial precondition for establishing the immunity from liability.

¹ C.f. DGISM, EU study on the legal analysis of a single market for the information society, New rules for a new age, 2014; available at <https://bit.ly/3cpZz0U>.

² 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') (ECD); available at <https://bit.ly/3obs2oX>.

³ Law of Albania “On Electronic Commerce”, Article 17.

⁴ Law of the Republic of Moldova “On Electronic Commerce”, Article 17.

⁵ Law of the Republic of North Macedonia “On Electronic Commerce”, Article 17.

⁶ Law of Serbia “On Electronic Commerce”, Article 18.

⁷ Law of Ukraine “On Electronic Commerce”, Article 9 (4).

⁸ ECD, Article 14.

⁹ Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (Digital Services Act, DSA), Article 5; available at <https://bit.ly/3yNDbpL>.

¹⁰ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, Article 1; available at <https://bit.ly/3yQaBnD>.

9. While the ECD exemplifies the variety of information society services,¹¹ it fails to convincingly place them into the typology of intermediaries provided therein. This gap became evident with the emergence of different online services during the two decades after the Directive's adoption and confused this legislation's interpretation. The Digital Services Act fills this gap by directly mentioning the types of hosting services it covers. Under its provisions, the examples of hosting services include categories of services such as cloud computing, web hosting, paid referencing services or services enabling sharing information and content online, including file storage and sharing.¹² The same status is attributed to the comments section in an online newspaper, where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher.¹³
10. The Council of Europe framework on intermediary liability also supports this approach. Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the roles and responsibilities of Internet intermediaries defines the scope of actors falling into the Internet intermediary categories outlining the actors similar to the ones mentioned in the Digital Services Act.¹⁴
11. Another important soft-law instrument in this regard are the Manila Principles on Intermediary Liability, developed by a consortium of civil society organisations with the aim of protecting freedom of expression and creating an enabling environment for innovation, which balances the needs of governments and other stakeholders.¹⁵ The Background paper to the Principles defines Internet intermediaries as those who "*bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based infrastructure to third parties.*"¹⁶ It also suggests that this definition should not expand to individuals except for those running open Wi-Fi hotspots and Tor nodes.¹⁷
12. The Interveners submit that none of the European and soft-law standards outlined above show an intention of drafters to consider individual social media users as publishers among intermediaries (and consequently, apply the rules on intermediary liability to such individuals). This distinction stems from the fact that social media users have to operate within the limits - that is the Terms and Conditions and community guidelines - imposed on them by social media platforms. It is social media platforms that enforce the community guidelines on the content on their platforms. In general, users are receivers of the services and in general, do not perform content moderation functions.
13. The Interveners also note that in practice, social media users have only a limited control over the functionality of their personal profile pages and their privacy settings. For instance, on Facebook accounts, individuals can adjust their privacy settings (e.g. allow their content to be accessed by their "friends"), limit who can post content on their

¹¹ ECD, *op.cit.*, Recital 18

¹² ECD, Recital 27a.

¹³ ECD, Recital 13.

¹⁴ Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of Internet intermediaries, Preamble, paras 4-5.

¹⁵ The Manila Principles on Intermediary Liability, 2015, Preamble, available at <https://manilaprinciples.org/principles.html>.

¹⁶ See The Manila Principles on Intermediary Liability Background Paper, 30 May 2014, citing OECD, The Economic and Social Role of Internet Intermediaries, April 2010, p.9; available at <https://bit.ly/3uXyys5>.

¹⁷ *Ibid.*, p 6.

timeline or switch on ‘profanity filter’.¹⁸ However, considering the ability to limit what others can post on their social media as a form of content moderation would be a mistake. The individuals are not expected to exercise the same degree of caution towards their content and the comments sections. Hence, the Interveners submit that online comments on social media accounts of other users should be correctly understood as an expression of the debate on various issues and mere discussion online. For these reasons, Judge Mourou-Vikstrom noted in her dissenting opinion in *Sanchez v France*, “the same liability cannot be attributed to the holder of a Facebook account as to a news portal, which invites its readers to make comments that are accessible to the general public and incidentally have commercial repercussions for the website”, since it would lead to an “invitation to self-censorship at its worst”.¹⁹

14. Similar conclusions can be derived from the decision of this Court in *Delfi AS v Estonia*, in which the Grand Chamber established the criteria for examining the proportionality of the interference with the freedom of expression on an intermediary, a large Internet news portal, which did not promptly remove the infringing comments underneath its article.²⁰ The Grand Chamber clearly stated that “the case does not concern 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 topic 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 blog as a hobby”.²¹ In the Interveners’ opinion, this wording provided the Court with the opportunity to differentiate the standards for assessing various Internet intermediaries’ liability for third-party content.
15. Although the Interveners are aware that the application of *Delfi* criteria has not been consistent,²² we believe that the carve-out set by the Grand Chamber in *Delfi* should guide the future Court’s jurisprudence. In particular, we note with a concern the Chamber decision in *Sanchez v France*,²³ in which the Chamber significantly departed from the norms governing intermediary liability in Europe, and treated social media users as intermediaries with respect to third-party comments on their social media accounts. We consider this a dangerous direction, not aligned with the understanding of a difference between different types of intermediaries and the users of the services that intermediaries provide.

B. The possible criteria for determining the persons’ liability for third-party comments online

16. The Interveners note that in *Delfi AS v Estonia*, the Grand Chamber emphasized the following factors to support the findings that Delfi was liable for third-party comments on its website:

¹⁸ See Meta, How can I moderate my account, available at <https://bit.ly/3aJMq2p>.

¹⁹ Judge Mourou-Vikstrom, Dissenting Opinion in *Sanchez v. France*, App.No. 45581/15, 2 September 2021.

²⁰ *Delfi AS v. Estonia [GC]*, App. No. 64569/09, 16 June 2015, para 142.

²¹ *Ibid.*, para 116.

²² *C.f.*, *Pihl v. Sweden*, App. No. 74742/14, 7 February 2017; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, App. No. 22947/13, 2 February 2016 (*MTE and Index.hu v. Hungary*); *Hoiness v. Norway*, App. no. 43624/14, 19 March 2019; *Sanchez v. France*, *op.cit.*

²³ *Sanchez v. France*, *op.cit.*

- (a) the commercial nature of Delfi, and that it was one of the biggest media companies in the country with a wide readership;²⁴
 - (b) it encouraged posting of comments, and this encouragement formed part of its business model as engagement of readers would contribute to its overall revenue;²⁵
 - (c) it had editorial control over comments once they had been posted;²⁶ and
 - (d) it was a “professional publisher” that should be familiar with the relevant laws and could also have sought legal advice.²⁷
17. The Grand Chamber then established four criteria to analyse the proportionality of the interference with the online intermediaries’ free speech rights:
- (a) the context of the comments;
 - (b) the measures applied by the applicant in order to prevent or remove the comments;
 - (c) the liability of the actual authors of the comments as an alternative to the applicant’s liability;
 - (d) the consequences of the domestic proceedings for the applicant.²⁸
18. Even though the Court did not engage in such a detailed analysis of the intermediaries’ nature in the cases that followed, it still did not apply the liability for third-party comments to ordinary users. Most notably, in *Jeziór v Poland*, the Court upheld the blogger’s rights in a defamation case involving the applicant’s liability for third-party comments criticising his political opponent, which were removed swiftly. The Court noted the blog’s importance to the local community and analysed the degree of editorial control over the users’ comments.²⁹ In other cases, the entities were some forms of organisations, for instance, a news portal and a self-regulatory body of Internet content providers,³⁰ a non-profit association,³¹ or a large, commercially run news portal.³²
19. The Interveners also wish to stress the importance of the nature of the notice received (if any) which triggers the intermediaries’ obligation to review certain comments. In its jurisprudence, the Court took into account the expeditiousness in which the comments were removed. However, we note that the fact whether the intermediary obtained actual knowledge of comments’ illegality is a key precondition for an obligation to remove content under the established intermediary liability framework on the European level.
20. In both *Delfi* and *MTE and Index.hu*, the content in question concerned, in the Court’s assessment, “clearly unlawful content”. The Court deemed it proportionate to require the applicant to remove the content from the comment section on its website that amounted to hate speech and incitements to violence without delay after their publication.³³ The Court

²⁴ *Delfi AS v. Estonia [GC]*, *op.cit.*, para 160.

²⁵ *Ibid.*, para 65.

²⁶ *Ibid.*

²⁷ *Ibid.*, para 129.

²⁸ *Delfi AS v. Estonia*, *op.cit.*, para 142.

²⁹ *Jeziór v. Poland*, *op.cit.*, paras 55-56.

³⁰ *MTE and Index.hu v. Hungary*, *op.cit.*, para 64.

³¹ *Pihl v. Sweden*, *op.cit.*, para 31

³² *Hoiness v. Norway*, *op.cit.*, para 71

³³ *Delfi AS v. Estonia*, *op.cit.*, para 153.

concluded that Delfi should have been aware of the clearly unlawful comments right after they emerged online and no notice was needed. This presumption was later confirmed in *MTE and Index.hu v Hungary*.³⁴ The Court also accepted that in principle the existence of the notice-and-takedown system on the intermediaries' websites might serve an appropriate safeguard.³⁵

21. The Court also unreservedly stated that “*there is, without any doubt, a shared liability between the holder of a social media account and the operator of the network*”.³⁶ It referred to the CJEU judgment in *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, but, however, drew a too far-reaching conclusion that personal and fan pages should be equated in their legal status. As described in the CJEU judgment, “*the creation of a fan page on Facebook involves the definition of parameters by the administrator, depending inter alia on the target audience and the objectives of managing and promoting its activities*”,³⁷ while the use of the ordinary Facebook account does not involve the same features, which might have been potentially evidenced by some kind of an editorial control of its contents.

22. Based on foregoing, the Interveners urge the Court to clarify the application of its jurisprudence on intermediary liability on individual users of social media, by unequivocally confirming that:

- (a) **Delfi criteria do not apply to ordinary users of social media platforms** as they are neither hosts nor publishers for the purposes of the comments sections on their social media accounts. The Interveners believe that the same obligations cannot be imposed on the commercial entities gaining profit from online-traffic generated by the flow of users into the comments section, bloggers running their blogs as hobbies, persons and entities in charge of professional social media pages (often verified) or fan pages, which provide additional instruments that somewhat assimilate their status to the media, and ordinary individuals with social media profiles through which they engage with friends and followers. We believe it would be grossly unfair to hold ordinary users liable for comments posted by others on the basis that they have limited control over their accounts (such as privacy settings on Facebook noted above). The privacy and account setting control that social media platforms give to users serve a completely different function than content moderation. Just because users of social media have some limited technological tools at their disposal to limit the third-party comments does not mean that they have ‘effective control’ over them. Nor does it follow that they should use those tools (e.g. limiting who can comment on their posts, privacy settings) in circumstances where they would be highly detrimental to their ability to use social media and exercise their right to freedom of expression.
- (b) **Individual social media users are in no position to determine whether content posted on their social media by third parties is ‘legal’ or not. They should not be required to determine the lawfulness of these posts.** The Interveners observe that the finding otherwise would put a content moderation obligation on ordinary users of social media, putting them on similar footing as social media platforms. This would be

³⁴ *MTE and Index.hu v Hungary*, *op.cit.*, para 91.

³⁵ *MTE and Index.hu v Hungary*, *op.cit.*, para 91; see also *Hoiness v Norway*, *op.cit.*, para 73; *Jeziar v Poland*, *op.cit.*, para 57; or *Pihl v Sweden*, *op.cit.*, para 32. See also the Chamber decision in *Sanchez v. France*, *op.cit.*, para 95.

³⁶ *Sanchez v. France*, *op.cit.*, para 98.

³⁷ 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, para 36.

deeply problematic as only the courts or independent regulatory bodies can determine illegality and different types of content may well call for different types of assessments. We point out that considerations that major social media companies undertake when moderating content on their platforms are difficult and complex with no easy solutions. Even dominant social media platforms are struggling with consistency and transparency of their content moderation practices. Ordinary members of the public, as users of social media, are typically even more ill-equipped than social media platforms to make determinations of content illegality and requiring them to do so would have serious impacts on their right to freedom of expression.

C. The impact of social media users' liability for third-party comments on freedom of expression and public discourse online

23. The Interveners observe that comments sections under social media posts are an important part of online engagement. They enable social media users to share information on the topic, exchange their ideas and opinions, and discuss them with others. Comments also provide an opportunity to expose users to diverse or dissimilar viewpoints. Thus, they serve as both discussion spaces as well as information sources.
24. As the Interveners already highlighted, making ordinary users of social media liable for third-party content under their social media posts, would have an enormous chilling effect on the right to freedom of expression. This would force the users of social media to choose between two unpalatable options: either to take it upon themselves to police potentially hundreds of thousands of comments that others put on their accounts, or simply adopt an account setting that prevents others from commenting on their posts altogether. The former would impose an unacceptable burden on users, whereas the latter would have a devastating effect upon the free and open exchange of ideas. We fear that most likely, individuals would probably cease to enable comments on their social media accounts, given the legal risk they would run in allowing content to be posted in the first place. Alternatively, social media users might be forced to err on the side of caution and delete all the potentially infringing comments, most of it possibly protected speech.
25. Additionally, the Interveners observe that in practice, this would require ordinary members of the public to constantly monitor the third-party comments on their social media. This would be contrary to international standards of freedom of expression since it would be tantamount to endorsing an extra layer of private censorship.³⁸ The Interveners recall that the prohibition of general monitoring of content has been a cornerstone of freedom of expression enshrined in Article 15 of the E-Commerce Directive.³⁹ It is a standard clause in all the main documents governing the area, including the Manila Principles.⁴⁰ The Digital Services Act prohibits both *de jure* and *de facto* monitoring obligation with respect to obligations of a general nature.⁴¹ Putting an obligation of general monitoring of all comments on their social media to ordinary users would result in unbearable financial and other costs.
26. The chilling effect on the freedom of expression posted by intermediary liability and of *de facto* or *de jure* general monitoring obligations has been already recognised by this Court. In *MTE and Index.hu v Hungary*, the Court emphasized that “*expecting the association to assume that some unfiltered comments might be in breach of the law would amount to*

³⁸ See Article 15 of the ECD, *op.cit.*, or DSA, *op.cit.*, Article 7.

³⁹ ECD, *op.cit.*, Article 15.

⁴⁰ Manila Principles, *op.cit.*, Principle 1 (d).

⁴¹ DSA, *op.cit.*, Article 7, recital 28.

requiring excessive and impractical forethought capable of undermining the right to impart information via Internet".⁴² As the Court further noted in *Pihl v Sweden*, "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".⁴³ Similarly, in its dissenting opinion in *Sanchez v France*, Judge Mourou-Vikstrom noted that this would "[place] a very heavy burden on the account holder in terms of monitoring posts".⁴⁴

27. The Interveners also note that liability for third-party comments on their social media would expose certain users to serious forms of online harassment and abuse. For instance, we can imagine that social media accounts of human rights, women's rights or members of minorities would be targeted with the intention to make them liable for hateful comments on their social media. These individuals could be held liable for a single hateful comment they might not even see among hundreds or thousands of comments left by bots or coordinated groups of users. This will be even more problematic for public persons who already have a significant following and gather thousands of comments under the posts on their pages.
28. Further, the Interveners also fear that applying *Delfi* criteria on ordinary users of social media will empower politicians and public figures to block people from accessing and commenting on their public accounts simply based on their views. This would go against the increasing recognition that members of the public have a right to read and reply to these types of communications.⁴⁵ This will hamper and lessen the space for democratic debate, already shrinking in the modern world.

CONCLUSION

29. The Interveners submit that this case provides an opportunity for the Court to clarify its jurisprudence on intermediary liability, developed on the basis of *Delfi*. We believe that from the point of proportionality of restrictions on the freedom of expression, the current standards created an environment marred by a chilling effect. Therefore, in our view, the Court should exclude social media users from this set of rules it applies in intermediary liability cases or to add additional criteria to its analysis of intermediary liability. The risk of liability for third-party content put on ordinary members of the public as users of social media will have an even more detrimental impact on freedom of expression. It would lead to the self-censorship of millions of users and prevent them from using social media for robust discussions and democratic discourse.

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⁴² *MTE and Index.hu v. Hungary*, *op.cit.*, para 82

⁴³ *Pihl v. Sweden*, *op.cit.*, para 35

⁴⁴ Judge Mourou-Vikstrom, Dissenting Opinion in *Sanchez v. France*, *op. cit.*

⁴⁵ For instance, in *Knight Institute v. Trump*, the US Court of Appeals affirmed a lower court ruling that President Donald J. Trump engaged in unconstitutional viewpoint discrimination after he blocked users from his Twitter account for posting comments he disliked. See *Knight First Amendment Institute at Columbia University v. Trump*, No. 18-1691 (2d Cir. 2019).