IN THE EUROPEAN COURT OF HUMAN RIGHTS

CASE OF DELFI AS v. ESTONIA

(Application No. 64569/09)

REQUEST FOR REFERRAL TO THE GRAND CHAMBER ON BEHALF OF THE APPLICANT

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08 January 2014

APPLICANT'S LEGAL REPRESENTATIVES:

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

This referral concerns the issue of unjustified restriction of freedom of expression, namely the imposition of liability to the Applicant, the owner and operator of the website *www.delfi.ee* for allegedly defamatory remarks emanated from third persons on the online commentary.

1. The European Court of Human Rights (hereinafter ***the Court, ECHR***) found on 10.10.2013 that one of Estonia's largest news portals on the internet is liable for insulting remarks in its readers' online comments, regardless of a technical system filtering vulgarity and obscene wordings, regardless of a functioning notice-and-take-down facility, and, most importantly, regardless of an effective and expeditious removal of offensive comments after being notified by the victim about the insulting character of the users' comments. The news portal was found liable for violating the personality rights of the plaintiff, although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. This judgment has created serious issues of legal uncertainty across Europe.

2. The main issue arises from the fact the First Section of the European Court of Human Rights (hereinafter ***the Chamber, the First Section***) accepted the Estonian authorities' approach that the operator and the owner of Delfi's news portal's commentarium is to be considered as a publisher, rather than as an internet service provider. The consequence is that as a publisher, the Applicant is barred from relying on the specific provisions of the EU Directive 2001/31 on Electronic Commerce (Art. 14 and 15) and the Estonian Information Society Services Act (Section 10 and 11), and the jurisprudence of the Council of Europe exempting internet service providers, including host-providers, from liability in cases where they expeditiously remove or disable access to content emanating from third parties, as soon as they obtain knowledge or become aware of the illegal nature of the information. This jurisprudence also guarantees that no general obligation to monitor should be imposed on the internet service providers, or a general obligation to seek facts or circumstances indicating illegal activity. Referred law, as well as other international reports and policy documents of the Council of Europe (see paragraphs 25till 30 below) reflect the principle that in order to safeguard the right to freedom of expression and information on the internet, there should be no obligation for internet service providers to proactively monitor user generated content.

3. Article 43 § 2 of the Convention, which provides that a request for referral should be accepted "*if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance*". This case is exceptional, since it necessitates the referral to the Grand Chamber by fulfilling all criteria set forth in Article 43 § 2 in the meaning, that:

   a. **firstly, it raises a "serious question affecting the interpretation of the Convention"** (see paras 39 till 62 below);

      The decision of the Chamber has created substantial uncertainty as regards the interpretation of the law. The assertion regards the Chamber judgment aims to create "*new law*" by obliging hosts to ensure, through pre-monitoring or registration of users, that no harm can come to third persons' rights. However, this "new law" is created in a legal landscape where there already is a "law" stating contrary – i.e. that there is no obligation to control hosted material or actively seek for infringing material and this is a well-established principle *expressly* stressed by the Council of Europe's declaration of freedom of communication on the Internet requesting Member States not to impose

such monitoring obligation to the service providers. Furthermore, the interpretation of the Convention is in direct opposition with the existing jurisprudence of the Contracting Parties as well as the Council of Europe.

b. **secondly, it raises "serious question affecting the application of the Convention"** (see paras 63 till 89 below);

There is a need for the Grand Chamber to provide legal certainty as to the application of the Convention of the criterion "necessity". Applicant reiterates that, since it has systems in place, which enable the expeditious removal of infringing comments and there are remedies available against the authors of the comments – there exists no necessity for "strict" or "contributory" liability for the host of the material.

c. **thirdly, however most importantly, a "serious issue of general importance" is involved** (see paras 91 till 98 below)**;**

The importance of the case is far from being confined to Estonia or having only *inter partes* effect. The case is of general importance for the whole Europe, i.e. 47 Member States to the Convention. Furthermore – it has significant importance for everyone who makes it possible to publicly express opinion on the internet forums, including all global and regional news outlets (such as Fo*rbes, News Corp, Conde Nast Inc., Dow Jones*, U.S. media such as *New York Times*, European-wide media such as *Guardian*, *Thomson Reuters*). Named news corporations, and numerous other associations of publishers, journalists and media-experts are supporting this application to the Court.

The First Section's inclination toward the losing of anonymity for user-generated content; dilution of opinions and ideas in internet and the direct contradiction with the existing legislation and case law of Contracting Parties to the Convention as well as acceding member, the European Union, has caused this judgement of First Section to be the subject theme of articles and papers of many scholars, activists and politicians since its publication.[1]

[1] See e.g.: ARTICLE 19, *European Court strikes serious blow to free speech online*, available, here; DIRK VOORHOOF, *Qualification of news portal as publisher of users' comment may have far-reaching consequences for online freedom of expression: Delfi AS v. Estonia* - Strasbourg Observers, available here; TIM WORSTALL, *Every Website that Accepts Comments Now Has a European Problem* – Forbes, available: here; DAVID BANKS, *Online comments: why websites should be worried by court ruling* – The Guardian, available: here; DAVID COCHRANE, *European ruling raises questions over liability and online comment* - The Irish Times, available: here; JENNIFER GARNETT, *European Court Finds Liability for Defamatory Comments by Anonymous Users* – Harvard Journal of Law & Technology, available: here; KARMEN TURK, *Delfi vs Estonia in the Court of Human Rights* – Triniti legal blog, available here etc.

II. STATEMENT OF THE CASE

A. Introduction

4. In today's world, the internet does not only contain regulated and static information which is intended for the user. Its contents are increasingly created by the users themselves without permission or guidance from, or moderation by, anyone else. Due to this "*from many-to many*" communication environment, the material posted on the internet by users may sometimes be or appear to be unlawful. The greatest challenge for the legal system is to react and regulate this new environment justly and reasonably with the purpose of holding the infringers of the rights of others accountable, while avoiding private or public censorship of legal material and honouring the Convention principle that restriction on freedom of communication must be prescribed by law and be necessary.

5. One type of user-generated internet content is text posted on various public forums, commentary rooms, blogs, social media as status updates and shares. User-generated content has an important part to play in the European press – 62 per cent of the published media welcome the content created by readers as part of the narrative of their stories, and more than 70 per cent of publishers encourage the addition of comments to their on-line stories.[2] If one wants to estimate the total amount of third party opinions posted in the form of commentaries per year in Europe, the number would be overwhelming – the number of comments in Europe per year would reach almost 5 000 000 000? per year.[3] These comments cannot be considered "empty and irrelevant" bits of expressions. Even if just 1% of these have value, this would mean 50 000 000 valuable public thoughts, ideas, and opinions per year in Europe from within the general public that the technological development has released from *fourth power* restraint. Therefore, the importance of comments cannot be underestimated. The decision regarding public expressions in internet come down to whether it is allowed for users to freely create content on internet and be responsible for its' substance or is the only allowable content on internet the content edited by journalists, confining the portal operator's responsibility for all material – the material that they publish, as well as the material which is posted by the users and of which the portal owner has no knowledge.

6. The European Court of Human Rights has emphasised that the right to expression guaranteed by Article 10(1) is one of the foundations of a democratic society and that the Convention must be interpreted in such a way that the rights which it guarantees are practical and effective. The exchange of ideas as it takes place in internet is critical to a modern, vibrant democratic society. The web of digital media that now connects us has heralded a new age of communications, and presents new ways to convey and receive speech.

7. The comments around the web to news stories and articles often raise serious debates in the society and even inform journalists of issues not publicly known, thus contributing to initiation of journalistic investigations. Thus the opportunity of "everyone" to contribute to

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[2] EUROPEAN DIGITAL JOURNALISM, *'How the Digital Age has affected journalism – and the impact for PR'*, available online at: here, 06.06.2011, Foreword.

[3] This estimation is calculated as follows. There are about 650 000 comments in news portals, blogs per month in Estonia. There are about 1,3 million people in Estonia. Thus the ratio is about ½ comments per a person in the country. In the 47 countries that are Members to the Convention, live 820 million people. If the aforementioned ratio is applied, there are about 410 million comments to news portals, blogs etc per month in Europe. That would make 4 920 000 000 comments per year. This number is not reflective of social media statistics, since e.g. in Facebook alone are 2.7 billion likes/comments per day (out of which approx. 800 000 000 per day are from Europe, i.e. 292 000 000 000 per year), available here, 5.12.2013.

public debate advances democracy and fulfils the purposes of freedom of expression in the best possible way. Restricting this new mode of expressing our opinions must be done carefully and prudently to avoid chilling the motivation and volition to post one's opinions and ideas regarding the issues of public debate.

8. Highly respected scholar and advocate, late Karol Jakubowicz, in his keynote speech at the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services in Reykjavik stated:

> "with citizen journalism, community, social and other new forms of media, audiences may have access to a lot more public-spirited content than in the past … That is why some people say we should no longer speak of "mass media", but of "media of the masses" … [W]e should … reconsider the practical meaning Article 10 and develop an interpretation in keeping with what is possible today, and was not possible when the Convention was being adopted."[4]

9. The issue of permissibility of user-generated content in internet, including frank or unpopular opinions, is the question of whether only "*good and valuable*" opinion is protected or whether "*all*" expression is protected under article 10 of the Convention. The Court has always protected the view that the Convention guarantees the right of individuals to express their views freely and to "*offend, shock or disturb*" others.[5] Regarding internet, the following reference to the Court's case law is relevant: "*the Internet has now become one of the principal means of exercising the 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*"[6].

10. The current case concerning the Applicant's news portal and its commentarium that consist of vast array of comments of different substance and value. However, this cannot and should not be seen as the basis for preclusion of the applicability of Article 10. Freedom to expression should not differentiate between different forms of expression. This understanding is also expressed in the case law of the Court held that the expression protected embodies the critical judgements as well as untrue assertions.[7]

11. The proactive pre-monitoring obligation for the hosts of complexes of user generated content is the question of freedom of expression. This is asserted by the Council of Europe declaration of freedom of communication on the Internet that *expressis verbis* ties the providers of internet services and Article 10. More explicitly, it states that even if "*the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible* ***if*** *they do not act expeditiously to remove or disable access to information or services as soon as they become aware, […] of their illegal nature […]*.". If acting expeditiously is deemed by the Court to be insufficient to avoid liability for actions of others, this could only have two possible consequences, either:

    a. anonymous public speech shall be prohibited. This will *de facto* lead to a restriction on freedom of communication, the necessity and proportionality of which has not been assessed by the court; or

    b. there will be arbitrary restrictions on the freedom of communication of the commenter by the intermediary. The reason: the latter will be impelled to "*err on the side of caution and the complainer*" to avoid possible subsequent liability.

    This described reality would lead to numerous legal uncertainties. To name just a few: creating unclear obligations for all internet service providers; the creation of chilling effects for media (through reporting less sharp subjects) and commenters (registration and de-

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[4] Available: here.

[5] Case no 5493/72, *Handyside v. the United Kingdom,* 7.12.1976, § 49.

[6] Case no 3111/10, *Yıldırım v. Turkey*, 18.12.2013 § 54.

[7] Case no 28114/95, *Dalbani v Romania*, 28.09.1999; case no. 13778/88) *Thorgeir Thorgeirsoni v Island*, 25.06.1992.

anonymization); probable breaches of the freedom to conduct its business without undue restrictions and right to fair trial pursuant to Article 6; the incompatibility with international obligations of the states.

B. Factual Background

Portal and the news story in issue

12. Delfi publishes up to 330 news articles a day and receiving an average 10 000 comments per day. Delfi is one of the largest news portals on the internet in Estonia[8].

13. Applicant's portal includes, in addition to journalistic content, a separate service of user generated message board - a space provided for public to freely express their opinion on current affairs. To enter the message board, the user has to click to enter the separate commenting environment. Thus – there could have been no misconception for anyone that the comments were part of the Applicant's articles. While, the news stories are journalistic content provided by the Applicant, there is no journalistic content in message board. The Applicant's business model uses the technical resources of the internet to offer a service where "*a common man may freely express his opinion online about news stories*" – as "*classically*" this was the monopoly of journalists and only edited commentary was legally possible.[9]

14. Some comments posted on these message boards may be colloquial in tone, opinionated, speculative, and caustic. The comments may resemble informal spoken conversation more than formal written communication, and anyone who frequents the message boards interprets what is posted accordingly. The Applicant's message boards are a forum where every man may voice his opinion, however silly or brilliant it may be.

15. The Applicant has a system of notify-and-take-down. Furthermore, the Applicant has a system of automatic deletion of comments that include certain stems of vulgar words. In addition, a victim of a defamatory comment may directly notify the Applicant and the comment will be immediately removed. The proportion of illegal comments is approx. 1%.

16. On 24th January 2006 the Applicant published an article on the website under the heading "*SLK Destroys Planned Ice Route*". Relevant background information:

    a. The ice-roads are public roads. SLK (*i.e. AS Saaremaa Laevakompanii, eng: PLC Saaremaa Shipping Company*) provides a public service of ferry-transport. Thus the article concerned a public activity and service of vital importance to islanders of Estonia.

    b. MR. V.L. was the member of the supervisory board of the enterprise SLK and also has majority holding of this undertaking.

17. On March 9th 2006, Mr. V.L submitted a claim to the Applicant concerning 20 comments published as a reply to the article by users. The Applicant expeditiously removed the comments and answered to the claim, amongst other informed Mr. V.L about the fact that the comments have been removed according to the notice-and-take-down obligation.

18. Estonian courts decided, and the Court agreed, that the Applicant is liable for the content posted in the message boards, since it is able to control, supervise and remove the content.

Proceedings against the Applicant

19. On 25th June 2007 Harju County Court decided that Applicant's activity of operating the

[8] In addition it is operated in Estonia in Russian and also in Latvia, Lithuania and Ukraine

[9] Since communication technology did not avail possibilities for media democratization. Available: here, p 4.

message board is mechanical and passive in nature, thus it should be considered to be an intermediary internet service provider. Furthermore, the court stated that the law prescribes that there is no obligation to pre-control the comments.

20. The proceedings ended in the Supreme Court. The court in the judgement concluded:

> Interference of the Internet portal administrator with the freedom of expression of persons posting comments is, however, justified with the obligation of the portal administrator-entrepreneur to respect the honour and good name of third parties arising from the Constitution (§ 17) and law (the Law of Obligations Act § 1046) and to avoid causing harm to them (the Law of Obligations Act § 1045 (1) 4)).[10]

21. The Supreme Court imposed on the Applicant, an internet service provider, analogously with the printed media, a general obligation to preventively monitor content and to decide whether to publish withdraw, postpone or alter the content and to actively seek facts or circumstances indicating illegal activity within the content on the Internet to which it gives access, that it transmits and stores.

22. None of the courts addressed the Applicants claims that the internet differs from the traditional media, since the editing is not compulsory nor realistically possible; the business model was to use the technical possibilities of internet to enhance the exercise of the freedom to expression via user-generated content; and, that the liability for the substance of that content lies with the author of that comment.

C. Relevant Domestic law

i) The law referred to by the Supreme Court

23. § 1046 of the Law of Obligations:

> **§ 1046. Unlawfulness of damaging personality rights**
>
> (1) The defamation of a person, inter alia by passing undue judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person is unlawful unless otherwise provided by law.
>
> **§ 1045. Unlawfulness of causing of damage**
>
> (1) The causing of damage is unlawful if, above all, the damage is caused by:
>
> 4) violation of a personality right of the victim;

ii) The Information Society Services Act[11]

24. The Information Society Services Act has relevant stipulations in paras 10 and 11:

> **§ 10. Restricted liability upon provision of information storage service**[12]
>
> (1) Where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition that the provider:
>
> 1) does not have actual knowledge of the contents of the information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;
>
> 2) upon obtaining knowledge or awareness of the facts specified in clause 1) of this section, acts expeditiously to remove or to disable access to the information.

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[10] The Supreme Court decision of 10th June 2009, No 3-2-1-43-09, § 15.

[11] Information Society Services Act, RT I 2004, 29, 191, entered into force 1 May 2004 with what the EU 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 (hereinafter *E-Commerce Directive*) was transposed into the domestic legal order.

[12] Equal to article 14 of the E-commerce directive.

(2) Subsection (1) of this section shall not apply when the recipient of the service is acting under the authority or the control of the provider.

§ 11. No obligation to monitor[13]

(1) A service provider specified in §§ 8–10 of this Act is not obligated to monitor information upon the […]storage thereof at the request of the recipient of the service, nor is the service provider obligated to actively seek facts or circumstances indicating illegal activity.

D. Relevant Council of Europe Instruments

i) A declaration of freedom of communication on the Internet[14]

25. The Committee of Ministers of the Council of Europe enacted on 28th May 2003 at the 840th meeting of Ministers' Deputies a declaration of freedom of communication on the Internet (hereinafter – *Declaration of freedom of communication*). The declaration originates from the Council of Europe's desire to recall the commitment of member states to the fundamental right to freedom of expression, as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

26. The relevant part of the Declaration of freedom of communication is principle 6 laying down the principle of limited liability of service providers:

Principle 6: Limited liability of service providers for Internet content

Member states should not impose on service providers a general obligation to monitor content on the Internet to which they give access that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

Member states should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to *respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information*.

Principle 7: Anonymity

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity.

ii) Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media[15]

27. In the Recommendation the Committee of Ministers recommends that member states:

review regulatory needs in respect of all actors delivering services or products in the media ecosystem so as to guarantee people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship;

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[13] Equal to article 15 of the E-commerce directive.

[14] The Committee of Ministers of the Council of Europe, A Declaration on freedom of communication on the Internet, 28th May 2003.

[15] Adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies.

28. It further states:

> 8. It should also be recalled that newer or emerging modes of mass dissemination of and access to content, and the associated retention, processing and exploitation of data, may well affect the rights protected under Article 10 of the European Convention on Human Rights.
>
> 15. Intermediaries and auxiliaries in the media ecosystem can be distinguished from media as they may meet certain of the criteria or indicators below, but they usually do not meet some of the core criteria such as editorial control (criterion 3) or purpose (criterion 2). However, they often play an essential role, which can give them considerable power as regards outreach and control or oversight over content. As a result, intermediaries and auxiliaries can easily assume an active role in mass communication editorial processes. Member states should therefore consider them carefully in media-related policy making and should be particularly attentive to their own positive and negative obligations stemming from Article 10 […].
>
> 36. Consequently, a provider of an intermediary or auxiliary service which contributes to the functioning or accessing of a media but does not – or should not – itself exercise editorial control, and therefore has limited or no editorial responsibility, should not be considered to be media. However, their action may be relevant in a media context. Nonetheless, action taken by providers of intermediary or auxiliary services as a result of legal obligations (for example take down of content in response to a judicial order) should not be considered as editorial control in the sense of the above.

iii) Resolution No 2 of Council of Europe in the Conference of Ministers on 7 and 8 November 2013[16]

29. Due to understanding that the access to the Internet is inextricably linked to human rights, in particular to the exercise of the right to freedom of expression and acknowledgment of the fundamental importance for people to be able to express themselves and access information on the internet without undue restrictions, thus enabling them to effectively exercise their rights under Article 10 of the Convention, the Ministers adopted Resolution No 2 (Preserving the essential role of media in the digital age):

> 2. We are committed to creating the necessary conditions to maintain the essential role that media play in a democratic society also in the digital environment; the provision of information, the nurturing of public debate, the enhancement of the transparency and accountability in respect of public affairs and other matters of public interest or concern – the "public watchdog" function – justify media's special status and protection in societies based on pluralism and democracy.
>
> In view of the above, we invite the Council of Europe to:
> (iii)propose measures to preserve and strengthen media's watchdog function by creating a favourable legal environment for vigorous investigative journalism and critical scrutiny of all matters of public interest;
> (iv) explore means of promoting professional and ethical journalism effectively, taking due account of the expanded range and number of actors in the digital age.

iv) Resolution 2 of the Mass Media Policy on Rethinking the Regulatory Framework for the Media[17]

30. The resolution 2 of the Mass Media Policy on rethinking the regulatory framework for the media in its general principle (clause 7) states the following:

> [T]he Member States are to monitor to what extent their national regulatory framework in the media sector needs to be adapted to the development of the new technologies and new communications and information services so as to guarantee freedom of expression and information and the free circulation of information and opinions.

E. European Union documents

i) Directive 2000/31/EC

31. 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

[16] Council of Europe Conference of Ministers responsible for media and information society, held in Belgrade, Serbia, on 7 and 8 November 2013

[17] 5th European Ministerial Conference on Mass Media Policy, Thessaloniki, 11-12 December 1997.

the Internal Market (Directive on electronic commerce) provides as follows:

> (46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.
>
> (47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

32. Article 14 (hosting) and article 15 (no general obligation to monitor) correspond to the paragraphs 10 and 11 of the Informational Society Services Act of Estonia as referred to 24 hereinabove and thus are not repeated here.

ii) Case-law of the Court of Justice of the European Union

33. In a judgment of 23 March 2010 (Joined **Cases C-236/08 to C-238/08 *Google France and Google*** [2010] ECR I-2417) the Court of Justice of the European Union considered that in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is 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. Article 14 of the Directive 2000/31 must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the event that that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned. It is appropriate to cite the paragraphs 116 and 117 of the ruling:

> "It must be pointed out that the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31. Likewise, concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server."

34. In a judgment of 12 July 2011 (**Case C-324/09 *L'Oréal and Others*** [2011]) the Court of Justice of the European Union ruled that Article 14(1) of Directive 2000/31 was to be interpreted as applying to the operator of an online marketplace where that operator had not played an active role allowing it to have knowledge or control of the data stored. The operator played such a role when it provided assistance which entailed, in particular, optimising the presentation of the offers for sale in question or promoting them. Where the operator of the online marketplace had not played such an active role and the service provided fell, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less could not, in a case which could result in an order to pay damages, rely on the exemption from liability provided for under that Article if it had been aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question had been unlawful and, in the event of it being so aware, had failed to act expeditiously.

35. In a judgment of 24 November 2011 (**Case C-70/10 *Scarlet Extended*** [2011]) the Court of Justice of the European Union ruled that an injunction may not be made against an Internet service provider which required it to install a system for filtering all electronic

communications passing via its services, in particular those involving the use of peer-to-peer software, which applied indiscriminately to all its customers, as a preventive measure, exclusively at its expense and for an unlimited period, which was capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claimed to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which would infringe copyright.

36. In a judgment of 16 February 2012 (**Case C-360/10 *SABAM*** [2012]) the court ruled that the implementation of general filtering systems collides with the prohibition contained in the E-Commerce Directive to Member States to impose a general obligation to monitor on service providers conducting activities of mere conduit, caching and hosting. In addition, general filtering systems intended to protect copyright challenge several fundamental rights protected under the Charter of Fundamental Rights of the European Union. The Court acknowledges that:

> **first**, it would affect Netlog's freedom to conduct its business as it would require Netlog to install a complicated, costly, permanent computer system at its own expense;
>
> **second**, it would affect users' right to the protection of their personal data as it would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network;
>
> **finally**, such a system would put at risk the freedom to receive or impart information, as the system might not have been always able to distinguish between unlawful content and lawful content, eventually blocking lawful communications. The ECJ recalls in that sense that it is not sufficient for a file exchange to be declared unlawful because it is protected under copyright. Whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned.

F. Other international documents

i) Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[18]

37. The report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, focussing on the Internet was presented to the Human Rights Council of UN on 3.06.2011. It explores key trends and challenges to the freedom to seek, receive and information and ideas of all kinds through the Internet:

> 43. The Special Rapporteur believes 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.
>
> 74. Intermediaries play a fundamental role in enabling Internet users to enjoy their right to freedom of expression and access to information. Given their unprecedented influence over how and what is circulated on the Internet, States have increasingly sought to exert control over them and to hold them legally liable for failing to prevent access to content deemed to be illegal.

ii) Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression[19]

> 32. The growing importance of the Internet as a vehicle for facilitating in practice the free flow of information and ideas was also recognised in the Joint Declaration […] stressed the need for strict application of international guarantees of freedom of expression to the Internet. In that context, it was stated that no one should be liable for content on the Internet of which they were not the author, unless they had either adopted that content as their own or refused to obey a court order to remove that content.

[18] United Nations, 16 May 2011, No A/HRC/17/27

[19] adopted on 21 December 2005.

III. REASONS FOR REFERRING THE CASE TO THE GRAND CHAMBER

38. As stated in Executive Summary (see para 3 above), Article 43 § 2 of the Convention provides that a request for referral should be accepted "*if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto or a serious issue of general importance*" and these criteria is fulfilled:

a. **firstly**, a "serious question affecting the interpretation of the Convention" is raised.

The Applicant asserts that the Grand Chamber is not a regular level of the Court's system. In contrary – the cases can be relinquished there or referred there in exceptional circumstances only. Thus the Grand Chamber is reserved for pronouncing upon more "*constitutionalist*" issues. One of "consititutional" court's functions is to provide legal certainty where the certainty has not existed or has been lost. The First Section judgment has created unclear situation not just in terms of obligations set for the internet service provider, but also in terms of the absence of consideration of the predictable consequences of the ruling for the internet-related business sector and freedom of expression as a whole.

b. **secondly**, it raises" serious question affecting the application of the Convention".

There is a need for the Grand Chamber to provide legal certainty as to the application of the Convention of the criteria "necessity". Applicant reiterates that, since it has systems in place which enable the expeditious removal of infringing comments and there are remedies available against the authors of the comments – there exists no necessity for "strict" or "contributory" liability for the host of the material. If such notion of liability is affirmed the subsequent is true as well: no average users is allowed freely create content on internet and be responsible for its' substance, but only allowable content on internet is the content edited by journalists and traditional mass media. However this would mean, at least in Europe, that Karol Jakubowicz erred in saying:

> Web 2.0, based on an implicit "architecture of participation", a built-in ethic of cooperation, in which the service acts primarily as an intelligent broker, connecting the edges to each other and harnessing the power of the users themselves. All this, according to Stark, amounts to a revolution based on a simple concept: semiotic democracy, or the ability of users to produce and disseminate new creations and to take part in public cultural discourse. Users are by and large developing and posting their own original creations. Anyone can now – with access to the right technology and appropriate communication and information literacy – become a creator, a publisher, an author via this new form of cultural discourse, a platform to publish to the world at large that grants near instant publication and access

c. **thirdly, however most importantly**, a "serious issue of general importance" is involved.

The First Section case is already understood in Europe as the one having *ergo omnes* effects (see Executive Summary, para 3.c).

In addition, the reasons for this are firstly, that legalizing liability "*without act or knowledge*" means transferring of "strict" liability into the conflict situations of human rights and secondly, that the effect of this kind of liability regime would lead to too servile removal of user contents – all sensitive comments would be removed, all discussion would be moderated to least controversial issues.

A. Firstly, the Grand Chamber should provide guidance concerning the test whether an interference with publishers right to freedom of expression is "prescribed by law"

39. The Applicant states that the limitations on the Applicant's freedom to expression, including right to store and able users to impart their expressions are not "prescribed by law" and the opposite finding of the First Section, raises serious questions affecting the uniform interpretation of the Convention. Namely for two reasons – **firstly**, there is no law prescribing the obligation and **secondly**, there is a law prescribing the prohibition of such law.

i). There is no law prescribing the obligation

40. It is a well-established jurisprudence of the Court and also reiterated by the First Section in this case that the norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

41. In the given case, it is remarkable that the First Section noted that interference was prescribed by law, since::

> 76 […] [A]s a professional publisher, the applicant company must at least have been familiar with the legislation and case-law, and could also have sought legal advice. […] Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail..

42. The Applicant hereby stresses that there was no legislation, nor case-law stating that the intermediary, even the one that does more than merely hosting of the comments, was to be assessed as a professional publisher regarding the comments. The Council of Europe 2003 declaration of freedom of communication on the Internet was in place; the European Union E-Commerce Directive was in place; Estonian legislation transposing the latter was in place. Thus, there was legislation indeed with which the Applicant was familiar; however this legislation did not suggest liability for comments if the infringing comments are expeditiously removed upon learning of them.

43. The Court has repeatedly held that one of the requirements flowing from the expression "prescribed by law" is foreseeability. The norms cannot be regarded as a "law" unless these are formulated with sufficient precision to enable the citizen to regulate his conduct.[20]

44. **Thus, since it cannot have been apparent to the Applicant, what he was required to actively do to observe the "law", i.e. to guarantee the non-infringement of third party rights, there is no obligation prescribed by law.**

ii). The applicable law and Council of Europe standards restrict imposing liability of intermediaries for third party content

45. It is not only a question about whether there is a law to be found that prescribes liability for third party content unknown to the host. It is the question of the applicable law that expressly prescribes the prohibition of any law that would impose liability on service providers for third party content.

46. The EU Directive (and Estonia's Information Society Services Act) provides a limited and notice based liability with takedown procedures for illegal content (i.e. *safe harbors*). The service providers are protected from liability, in case they fulfil the requirements – the need

[20] *Hashman and Harrup v The United Kingdom*, No. 255949/94, 25.11.1999, § 31.

to act expeditiously "upon obtaining actual knowledge" of illegal activity or content "to remove or to disable access to the information concerned". Such removal or disabling of access "has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level"[21] according to the Directive. This law is definitely "*formulated with sufficient precision to enable the citizen to regulate his conduct*".

47. The First Section regrettably took a stance that:

> "it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention".

48. This position of the First Section is in direct opposite of the Courts earlier positions, i.e the Court has stated: "*The Court reiterates that its task in exercising its supervisory function under Article 10 of the Convention is to look at the interference complained of in the light of the case as a whole and, in particular, to determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient*".[22]

49. In this case, there can be no "*looking at the case as a whole*" without resolving the problems of interpretation of domestic law in the light of the Convention, since only the legal qualification of the Applicant regarding its service of availing commentary space for third parties sets the boundaries in which the assessment regarding the Article 10 of the Convention can be made. If the qualification would be, that the Applicant is the traditional publisher of third party content, there is no further analysis under Convention necessary – since the publisher most definitely carries with it duties and responsibilities as set forth in Article 10(2) of the Convention. However, if the Applicant does not qualify as a traditional publisher, the assessment of its obligations as "prescribed by law" becomes essential for the Court's role to "*ascertaining whether the effects of such an interpretation are compatible with the Convention*".

50. This role of the Court can be deduced from different documents of the Council of Europe, whose one of the most profound documents during last few years concentrates on qualifying notion of media and appropriate responses to different forms of it in the paradigm of digital age (see para 29). The Applicant is of position that there cannot be effective role for the Court, if it restrains itself to the domestic court's legal assessment essential for the application of the Convention and in doing so, this has risen an serious issue of interpretation of the Convention – uniform interpretation would incapacitate the Court in future cases, where there is a need to assess the national legislation in the light of the Convention.

51. **The Grand Chamber should reassess whether it is the Court's task to look at the case as a whole (and thus qualify the Applicant in legal terms either as a traditional publisher or intermediary) or is it confined to ascertaining the effects of interpretations, however erroneous these may be.**

52. In case the Grand Chamber finds in contrary to the First Section that it is entitled to look at the case as a whole and reassess the qualification of the Applicant, the Applicant submits that it should be regarded as an intermediary, it was entitled to follow the specific and foreseeable law negating the obligation to monitor the third party comments.

53. The First Section concluded that it was

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[21] see reference to recital 46 of the Directive in footnote 11 above.

[22] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Judgment of 5 May 2011, para 49. *see, among many other authorities also, Fressoz and Roire v. France [GC], no. 29183/95, § 45, ECHR 1999-I).*

> "satisfied that they (i.e. the provisions of the Constitution, the Civil Code Act and the Obligations Act – Applicants remark), along with the pertinent case-law, made it clear that a media publisher was liable for any defamatory statements made in its media publication.".

Furthermore the fact, that publication of articles and comments on an Internet portal by an entrepreneur was deemed to be a publishing was in the Court's view, an application of the existing tort law to a novel area related to new technologies.

54. However, the Applicant hereby submits that even the existing tort law does not qualify disseminators (postmen, libraries, bookstores etc) as publishers. For example, it is impossible to hold those (*innocent*) disseminators liable for the infringement of persons' rights with an offending book/newspaper. The library is entitled to make the book available to the public. Thus it remains entirely unclear, how existing tort law was applied to a "*novel area related to new technologies*", i.e. to an online news portal operator, whose service in question, was to enable users to interact with the journalist, each other and provide valuable ideas to the discussions of matters of public interest.

55. The First Section continues that:

> "as a professional publisher, the applicant company must at least have been familiar with the legislation and case-law, and could also have sought legal advice.".

56. The Council of Europe has referred to the abovementioned E-Commerce Directive in its Declaration on freedom of communication on the Internet, in which the Council recognizes both the Internet's incredible potential and the crucial role the Internet intermediaries play in creating forums for free speech. The Council has a clear understanding that the only way to foster these forums is to ensure that service providers remain protected. The centrepiece of the Council of Europe's approach is principle 6 of the Declaration on freedom of communication on the Internet, which explicitly states that:

> Member states should not impose on service providers a general obligation to monitor content on the Internet.

57. Furthermore, the Declaration lays down the conditions to hold a service provider liable. According to these conditions, even if the functions of the service provider are wider than mere storing of the third party content, the safe harbours still apply (i.e. the knowledge and expeditious removal criteria).[23]

58. Thus the preconditions for any liability issue to rise are clear for service providers such as the Applicant – whose functions are wider than storing the content. According to these preconditions the State may hold the service provider liable, if and only if the latter acts as follows:

    a. if the service provider becomes aware, as defined by national law, of the illegal nature of the content OR in the event of a claim for damage;

    b. it does not act expeditiously to remove or disable access to information.

59. In the matter before us, it is established in domestic proceedings that the Applicant removed the defamatory comments from the message board at the same day the Applicant received corresponding notification from Mr V.L.[24]

60. Thus, the Applicants behaviour was in full compliance with the applicable law (incl Declaration on freedom of communication on the Internet) thus it is "prescribed by law" that the Applicant cannot be considered liable.

61. While the Applicant recognizes, that it might be convenient for a State to deduce an obligation from general civil law, it cannot be done, in case there is a special law denying

[23] See paragraph 17 above in "relavant law"

[24] AS described in paragraph 17 above.

such obligation. Furthermore, there is no law and there cannot be any law prescribing the obligation to the Applicant to proactively monitor the comments of the users and First Section's contrary judgment is distinct from all earlier Court case law regarding "*prescribed by law*".

62. For these reasons, the first chamber judgment has created considerable uncertainty as regards the state of the law and therefore needs to be referred to the Grand Chamber.

B. Secondly, the Grand Chamber should correct the First Section's judgment application of the test whether interferences with Applicant's right to impart information created by third parties are necessary in democratic society

63. There is a serious concern flowing from the judgement under consideration regarding the application of the Convention.

64. In sum, faced up with the prospect of flow of numerous claims due to the judgment of the First Section, the Applicant is put in a position, where he essentially has two choices:

a. to employ an army of highly trained monitors to patrol (in real time) each message board (for each news article) to screen any message that one could label defamatory (and also that could infringe someone's intellectual property), or

b. simply avoid such massive risk and shut down these *fora*, Either way, the business idea to give a common man a possibility to freely comment daily news in internet and independently be responsible for his comments, is to be given up.

65. The second alternative is in evident conflict with the idea of the Convention. The Supreme Court's decision has a "chilling effect"[25] upon the freedom of expression and restricts the freedom to impart information by the Applicant. Moreover, the principle 6 of the Declaration on freedom of communication on the Internet lays down a principle that Member states should "*not impose on service providers a general obligation to monitor content on the Internet to which they give access that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity*".

66. However the State, through the Supreme Court, has introduced an institution of a private person censorship obligation into the legal order of Estonia. And this has been upheld by the Chamber. The principle of that the freedom of expression is a negative freedom (i.e. that it is freedom to act or not pursuant to one's free will and choice) has been nullified. The freedom of expression in internet in Estonia's young democracy is now a positive freedom, meaning that the (right) choice has been made for a person by someone else. The Applicant hereby recalls that positive freedoms are inherent to non-democratic societies.

67. The Chamber was in position that:

> 83. The Court has considered that where the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria in the balancing exercise include the following elements: contribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed (see *Axel Springer AG*, cited above, §§ 89-95, and *Von Hannover (no. 2)*, cited above, §§ 108-113).
>
> 85. In order to resolve this question, the Court will proceed to analyse in turn a number of factors which it considers to be of importance in the circumstances of the present case.
>
> - [f]irstly, the Court will examine the context of the comments,

[25] As described in numerous cases, e.g. *Tønsbergs Blad As and Haukom v Norway*, No 510/04, 01.06.2007, § 102; *Times Newspapers Ltd (NOs 1 and 2) v The United Kingdom*, Nos 3002/03 and 23676/03, 10.06.2009, § 29.

- secondly, the measures applied by the applicant in order to prevent or remove defamatory comments,
- thirdly, the liability of the actual authors of the comments as an alternative to the applicant's liability, and
- fourthly the consequences of the domestic proceedings for the applicant company.

68. Applicant agrees to the aforementioned, however the application of the law to the circumstances of the case is where the Applicant asks the Grand Chamber to correct the First Section's judgments application of the test of whether interference was necessary in democratic society. **The seriousness of this question regarding the interpretation of the Convention is evident – the legalization of the positive obligation of a private person to carry out the censorship over third persons exercises of constitutionally protected freedom of expression cannot be correct interpretation of the Convention – "constitution" of human rights in Europe.**

i) Context of comments

69. The Chamber states in this regards:

> 1. The Court notes that the news article published on the Delfi news portal addressed a topic of a certain degree of public interest. […]The article itself was a balanced one […]. Nevertheless, the article dealt with the shipping company's activities that negatively affected a large number of people. Therefore, the Court considers that the applicant company, by publishing the article in question, could have realised that it might cause negative reactions against the shipping company and its managers and that, considering the general reputation of comments on the Delfi news portal, there was a higher-than-average risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech. It also appears that the number of comments posted on the article in question was above average and indicated a great deal of interest in the matter among the readers and those who posted their comments. Thus, the Court concludes that the applicant company was expected to exercise a degree of caution in the circumstances of the present case in order to avoid being held liable for an infringement of other persons' reputations.

70. The applicant submits that the article did not merely address a topic of a "*certain degree of public interest*", but that it addressed on issue of great importance to the residents of the biggest island of Estonia[26]. The obligation of each news reporter/journalist is not to just publish "jewel" achievements of investigative journalism, but to also neutrally impart information to public of issues of importance. The examples are reports on weather forecast, the conditions of roads and in Estonia – the condition of ice roads. Such reporting is of major importance since it affects the everyday lives and decisions of readers.

71. In this case, the shipping company, who had been granted an exclusive right to operate ferry-transport between mainland and the islands was moving its ferries from one route to another and in doing so breaking the ice at potential locations of ice roads, as a result of which the opening of such roads – a free and fast connection to the islands compared to the company's ferry services – was postponed for several weeks. The same had happened during preceding winters. Thus – the readers did have negative emotions, however – these were not caused by the Applicant, but the breaker of the ice-roads, the shipping company. If the Chamber's conclusion was correct, then the news portal would need to foresee negative emotions for weather forecast as well and pre-monitor the comments to "avoid damage to other persons' reputation".

72. The Applicant furthermore explains that the Chamber seems to have applied an legal institute known in as "*wilful blindness*" on this case.[27] However, the institute cannot be

[26] The residents of the biggest island Saaremaa (and Muhumaa that is connected to Saaremaa by road) alone form almost 3% of Estonia's population.

[27] The key mental state that is associated with the doctrine of wilful blindness is that of suspicion. Suspicion is legally sufficient to ground a finding of wilful blindness provided the relevant factual matrix warrants such a finding and the accused deliberately decides to turn a blind eye. The suspicion must be "firmly grounded and targeted on specific facts" and mere "untargeted or speculative suspicion" is insufficient. The suspicion must be of a

applied to this case due to the fact that the prerequisite of its application is that the wilfully blind must have "*suspected the fact; realized its probability; but refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness*"[28]. In practice it has been applied in different countries. ECJ Advocate General Niilo Jääskinen, in the case of *L'Oréal SA v eBay*, laid down guidelines for the applicability of the wilful blindness test, stating: "*The requirement of actual knowledge seems to exclude construed knowledge. It is not enough that the service provider ought to have known or has good reasons to suspect illegal activity.*"[29]. In Germany, the awareness criterion has been used in several Supreme Court judgements in cases relating to Internet auctions.[30] According to these decisions, the operators of internet auction sites are deemed to be aware of an infringement where they should have recognised the infringement (for example, where a product is described as a "*counterfeit item*"), where the offender had previously committed a similar infringement, or where an infringement is capable of being identified as illegal (e.g. banned CDs can be identified by their names).[31]

73. Thus, the examples of "wilful blindness" if applied to current case, would be, if the Applicant would have published an unbalanced article, an article with a plea to submit opinions on X or Y etc. However, none of these existed. The Applicant did not (nor had to) suspect the "negative comments", since the article was balanced and neutral reporting of everyday facts.

ii) Measures applied to prevent or remove defamatory comments

74. The Chamber states in this regards:

> 87. As regards the measures applied by the applicant company, the Court notes that, in addition to the disclaimer stating that the writers of the comments – and not the applicant company – were accountable for them, and that it was prohibited to post comments that were contrary to good practice or contained threats, insults, obscene expressions or vulgarities, the applicant company had two general mechanisms in operation. Firstly, it had an automatic system of deletion of comments based on stems of certain vulgar words. Secondly, it had a notice-and-take-down system in place according to which anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose, to bring it to the attention of the portal administrators. In addition, on some occasions the administrators of the portal removed inappropriate comments on their own initiative. Thus, the Court considers that the applicant company cannot be said to have wholly neglected its duty to avoid causing harm to third parties' reputations.
>
> 89. The Court notes […] the prior automatic filtering and notice-and-take-down system used by the applicant company did not ensure sufficient protection for the rights of third persons. The domestic courts attached importance in this context to the fact that the publication of the news articles and making public the readers' comments on these articles was part of the applicant company's professional activity. It was interested in the number of readers as well as comments, on which its advertising revenue depended. The Court considers this argument pertinent in determining the proportionality of the interference with the

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sufficient level to result in a finding that the reason why the offender did not make inquiries was because he was deliberately shutting his eyes to the obvious.

In the past ten years use of the doctrine has expanded rapidly. English courts began to apply the doctrine of wilful blindness to cases ranging from misleading advertising to offences against the environment.

[28] *G.* WILLIAMS, *Criminal Law,* 2nd ed. (London: Stevens & Sons, 1961), at 157, 159. For clarification, in the US *Hard Rock* case, the court reasoned that a person is "wilfully blind" if he should have suspected the existence of an infringement and wilfully chose not to check, see *Hard Rock Cafe Licensing Corporation v. Concession Services Incorporated Hard Rock Cafe Licensing Corporation,* 955 F.2d 1143 (1992), available e.g. at: here, 06.06.2011, at 19-20.

[29] Opinion of Advocate General Niilo Jääskinen of 9 Dec 2010 in Case No. C-324/09. *L'Oréal SA v. eBay*, at 163. ECJ followed the opinion of Advocate General, see para 34 above.

[30] See e.g. Supreme Court of Germany (*Bundesgerichtshof*, BGH), 19.04.2007, *Internet Auction II*, I ZR 35/04.

[31] For further details, see e.g. M. BAGNALL, D. FYFIELD, ET AL., 'Liability of Online Auctioneers: Auction Sites and Brand Owners Hammer It Out'. *International Trademark Association Bulletin* 65(1), 01.01.2010, at 5, 6; and T. HOEREN, 'The European liability and responsibility of providers of online-platforms such as „Second Life"', JILT 1 (2009) at 12. Available on-line at: http://go.warwick.ac.uk/jilt/2009_1/hoeren

> applicant company's freedom of expression. It also finds that publishing defamatory comments on a large Internet news portal, as in the present case, implies a wide audience for the comments. The Court further notes that the applicant company – and not a person whose reputation could be at stake – was in a position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public.

75. It seems from the Chamber's decision that it was appreciated that the Applicant had rules prohibiting the authors of the comments to post defamatory comments; operated an "*easily accessible and convenient*" notice-and-take-down system that only required a "*simple button click*"; had actuated an automatic filtering system for vulgar word stems; allowed take-down notices to be sent to e-mail and for some articles, the Applicant carried out the manual supervision and removed inappropriate comments on its own initiative. However the Chamber still concluded that all this was "*insufficient for preventing harm being caused to third persons*".[32] Furthermore, the Chamber seems to suggest some of the measures that could be undertaken: *"[…] measures such as a requirement of prior registration of users before they were allowed to post comments, monitoring comments by the applicant company before making them public, or speedy review of comments after posting, to name just a few […].*"[33]

76. The Applicant asserts that the Chamber's decision fails to strike a fair balance regarding the facts that the Applicant removed the posting expeditiously (the same day) after receiving a notice from Mr. V.L. This conduct would have fulfilled the conditions of Council of Europe 2003 Declaration (see paras 25 to 30), as well as Estonia's domestic and EU law (see paras 31 to 36).

77. The Applicant stresses that the Court of European Union has ruled, with reference *inter alia* to Article 10 of the Convention, that an internet service provider shall not be required to install a system of filtering of all electronic communication passing via its services, as this would amount to a preventive measure and a disproportionate interference with all customers' freedom of expression and information (see the decisions of *Scarlet Extended* and *SABAM* in paragraphs 35 and 36 above):

> Such an interference with the right to freedom of expression and information cannot be justified as necessary in a democratic society, regardless of the legitimate aim of protecting the rights of others, such as IP and copyright protected by Article 1 of the First Protocol, or the right of privacy or reputation as protected by Article 8 of the Convention. That an intermediary has the technical possibility to pre-monitor or has an economic interest in exploiting the portal should not affect or remove their limited liability (see the decisions *Google* and *L'Oréal/Ebay* in paragraphs 33 and 34 above). The general principle is that expeditious removal upon (notified) knowledge of illegal content exempts the intermediary from liability.

78. Applicant strongly believes, that if the Chamber would have seen itself able "*to look at the interference complained of in the light of the case as a whole*" (see para 48) and to reassess the qualification of the Applicant, the application of relevant material law to the facts of the case would have led to a different overall outcome.

79. **By failing to do so it has produced a perverse outcome, creating a state of legal uncertainty and clear conflict with laws of Contracting Parties on the matter of general importance in contemporary societies, the consequences of this failure are already reverberating around Council of Europe Member States**.

iii) liability of actual authors as an alternative

80. The Chamber states in this regards:

> 91. The Court has taken note of the applicant company's argument that the affected person could have brought a claim against the actual authors of the comments. It attaches more weight, however, to the Government's counter-argument that for the purposes of bringing a civil claim it was very difficult for an

[32] See the decision para 87-88.

[33] See the decision para 90.

individual to establish the identity of the persons to be sued. Indeed, for purely technical reasons it would appear disproportionate to put the onus of identification of the authors of defamatory comments on the injured person in a case like the present one.

81. The Applicant explains that contrary to misleading statements of the Government of Estonia to the First Section, the rights of injured parties would and could be protected through claim only against the authors without any real "difficulties":

a. the proceedings to establish the author of the comment is carried out through a procedure called the pre-trial establishment of facts (under the § 244 of the Act of Civil Procedure), state fee of which is 50 euros and it lasts up to 4 months. As the result, the initiator would be supplied with the name and address of the author of the comment;

b. the next step would be to bring the claim against the comment poster and it is highly probable that proceedings of the claim against the commenter is less time-consuming and cheaper than against the portal.

82. **Thus the Applicant does not agree with the First Section argument that State's positive obligation under Article 8 could only be guaranteed if the portal is considered liable and it is not in keeping with the essence of the Convention to rank one right upwards in hierarchy of rights sue to the premise that it makes civil procedures in the country more lucrative.**

iv) consequences of the domestic proceedings for the applicant company

83. The Chamber states that the interference cannot be considered disproportionate due to the low sum of damages the Applicant was ordered to pay in domestic court system.

84. The applicant is of opinion that the legality or necessity of any interference cannot be justified by reference to the low non-pecuniary damages. In case there is a breach of article 10 of the Convention by the State, the specific sum cannot render the interference justified.

85. The test on *"necessity in a democratic society"* requires the determination of whether the interference corresponds to the "*pressing social need*", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.[34]

86. Firstly, the Applicant submits that depriving the Applicant of the limited liability, accorded to it by the legal acts herein referred, is not necessary, since Mr. V.L. is not left without a remedy. He has sufficient recourse against any individuals who have actually committed the wrongdoing by posting defamatory material that damages his reputation or otherwise harmed his interests – that is the author of the comment. Thus Mr. V.L. is not deprived of access to justice. As England and Wales High Court decided in a similar case of *John Bunt v David Tilley et al*, where the applicant pursued the claim against the author as well as the service provides. The court held that the "*internet service provider cannot be defendant, since the injured person's remedies lie against the authors of the comments*".[35]

87. However, the State has decided that the "social need" in this case is the right to dignity of Mr. V.L. The Court has observed in its earlier case of *Khurshid Mustafa and Tarzibachi v Sweden* that the Contracting Sates have a certain margin of appreciation in assessing whether such a need exist, however, because of the importance of the rights in Article 10, this necessity must be convincingly established.[36] The State must therefore be called upon to demonstrate why, in order to achieve the legitimate aim of ensuring an individual's personal

[34] *Gündüz v Turkey*, No 35071/97, 4.12.2003, § 38; *Sunday Times v UK* (No 1), Series A no. 30, p 30 26.04.1979, § 62.

[35] *John Bunt v David Tilley et al*, [2006] EWHC 407 [QB], 10.03.2006, § 79.

[36] *Khurshid Mustafa and Tarzibachi v Sweden,* No 23883/06, 16.03.2009, p 42; see e.g. *Atronic AG v Switzerland,* 22.05.1990, Series A No. 178, §61.

rights, it is "necessary in a democratic society" to compel an entrepreneur to censor the comments created by other persons and why it is impossible to accommodate the Applicant's position that the liability of the author of the comment suffices to pursue the State's aim. In case of *Sürek v Turkey* judge Maruste, in his partly dissenting opinion stated that if a person should act as a censor, it would mean further removal from the basic ideas and rules of democracy.[37] This effect cannot be considered as an aim of the Convention.

88. The Court has repeatedly emphasised that the press plays the essential role in a democratic society, however the certain bounds must not be overstepped, e.g. in respect of the rights of others.[38] However in this case, the question is not about the press – the question is the content provided by third persons via message boards for news articles. In the Resolution 2 of the Mass Media Policy in Rethinking the Regulatory Framework for the Media, the Council of Europe has stated that "*the object is to guarantee freedom of expression and information and the free circulation of information and opinions in the new communication and information services*"[39]. This is the question here – is it necessary in a democratic society to compel an entrepreneur to restrain the free circulation of information emanating from third persons and obliging one person to exercise wardship over others? The applicant recalls that the Court has been of firm view in earlier case of case of *Társaság a Szabadságjogokért v. Hungary*: "*the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him*".[40]

89. The Applicant believes that it is sufficient and within the limits margin of appreciation to enable the personal rights of individuals to be protected by a two-limb system in case on internet service providers such as the Applicant – firstly by the notice-and-take-down system operated by the service provider and secondly, the option of submitting a claim to the author of the information.

90. The doubling of the responsibility automatically to the internet service provider is not necessary in the democratic society. Thus there is no "*pressing social need*". Any contrary interpretation is a retreat from the idea and purpose of the Convention.

C. Thirdly, this case raises a serious issue of general importance, namely the liability of a host for third party content

91. A final criteria in Article 43 as a ground of referral is that the case involves a "serious issue of general importance". In its former practise the Grand Chamber has accepted cases that touch on "new" fields of law and/or which are socially and politically sensitive; raise an important issue at European or global level; or which concern matters which are at the centre of a sensitive national, European or global debate.

92. In the case of this application for referral, there exist 3 main issues of general importance raised by the Section decision.

i) The collision of obligation

93. **Estonia is a member of European Union. Thus, it is under obligation to follow the laws of the European Union. However, pursuant to Article 53 of the Convention: "*The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties*". Thus Estonia and its' intermediaries are in a**

[37] Partly dissenting opinion of judge Maruste in *Sürek v Turkey* (No. 3), no. 24735/94, 08.07.1999.

[38] e.g *De Haes and Gijsels v. Belgium*, No 7/1996/626/809 , 24.02.1997, Reports 1997-I, § 37

[39] As desccribed in § 30 above.

[40] 14 April 2009 case no 37374/05, *Társaság a Szabadságjogokért v. Hungary*, § 36.

situation, where they have option to breach obligation to one or the other international organization.

94. The principles derived from the Declaration on freedom of communication on the Internet have been adopted and accepted in all major democratic societies in Europe – these principles vis-à-vis have been enacted into the laws and applied by courts throughout Europe (see paras 31 to 36 above). This principle of limited liability of service providers for the third-party content has worked as anticipated in most countries. It has encouraged the growth of the internet by facilitating the free exchange of ideas and information throughout online communities. It has allowed the flourishing of message boards, blogs, online trading and selling websites like eBay and Amazon.com, and message boards such as the one hosted by the Applicant, which allows individuals to share information and opinion about the current news and affairs without placing undue restraints to the facilitators of those *fora*, since it is only rational that intermediaries are not best suited to decide upon the legality of user-generated content. This is especially so for defaming content, since the victim alone can assess which information damages his reputation or is untrue.

95. However, there is another important issue of great importance, namely the double standard the decision of the Section creates in judgement of Delfi.

96. The new article 6(3) of the Lisbon Treaty formally provides that fundamental rights "*as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".[41] Article 6(2) mandates accession of the EU to the Convention. Accession will render Community measures subject to review by the Court for the first time.

97. In the case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, the Court adopted a deferential approach to the autonomy of the European Community legal order by holding that a presumption exists that measures taken by an EU member state in compliance with European Community law are compatible with the Convention, rebuttable only where it has been shown that the protection of Convention rights has been "manifestly deficient.".[42] In the case of Delfi, the First Section however expressly refrained to assess the compliance of the Community law (and explicit jurisprudence of the Court of Justice on analogous cases) and started its assessment at the point, where the national courts had clearly misinterpreted Community law (as well as the jurisprudence of the Council of Europe). This denounces this presumption of rebuttal. Recognizing that the Court's judgments do not have direct or *erga omnes* effect on EU member states, these will be accorded such effect when followed by the Court of Justice in its judgments. The relevance of this for the case at hand is that the Member States of European Union would be put in a place of legal uncertainty – following EU law on the issue of liability for the host would make the state liable in the ECHR system and *vice versa*.

98. Different standards of legal systems that are inner- and interconnected, lead to great uncertainty that needs to be addressed. Especially, since EU courts are reaching opposite conclusion on the same matters by expressly following the jurisprudence of the Court. As an example, on 26th November 2013 Advocate General Villalón, by referring to the European Court, states:

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[41] *Consolidated Version of the Treaty on European Union*, art. 6(3), 2008 O.J. C 115/13, at 19 [hereinafter TEU].

[42] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI Eur. Ct. H.R. §§ 107, 158. The clash in this case was between a European Council Regulation imposing a trade embargo on the Federal Republic of Yugoslavia, which implemented a United Nations sanctions regime, and the right to property in article 1 of Protocol 1 to the Convention. See JOHN L. MURRAY, Chief Justice of Ireland, *The Influence of the European Convention of Fundamental Rights on Community Law*, in 33 Fordham Intl L.J. 1388, 1399; as well asi n *Fundamental Rights in the European Community Legal Order*, Address at the Fifty Years of European Community Law Conference (Feb. 28-Mar. 1, 2008), in 32 Fordham Intl L.J. 531, 545- 47 (2009).

> Finally, it should be considered that the Charter of Fundamental Rights, Article 16 protects freedom of enterprise. Blocking order is in no case proportional, as it puts into question the entrepreneurial freedom of the internet access provider, thus also its economic activity, via which it allows access the internet. In this regard, the internet service provider can rely on the importance of its activities for society. […] The European Court of Human Rights ("ECHR") has stated that the comparative analysis conducted by the Council of Europe in 20 Member States suggests that the right to obtain access to the internet is, in theory, embodied by freedom of speech and freedom of information as fundamental rights. The ECHR considers [in *Yldrim v Turkey*[43]] that internet plays an important role in access to and dissemination of information.[44]

99. **The collision of obligations for Estonia, its entrepreneurs and other Contracting Parties is even more unprecedented and has general importance[45] that should not be left unaddressed by the Grand Chamber.**

ii) prior elimination of opinions

100. **The decision is capable of amputating the public sphere of valuable opinions of the general public regarding the happenings in society, news stories and articles.** These opinions in the form of comments, quite often raise serious debates in the society and even inform journalists of issues not publicly known, thus contributing to initiation of journalistic investigations. For example, during the local elections in Estonia in autumn 2013, on commenter posted a hint regarding the residence of the candidate for the mayor of the capital of Estonia. The articles by the journalists that followed ignited important debate in the society of political honesty, transparency of election system etc. If anonymity would not exist for commenter – this kind of whistle blowing comments would be lost from the public market of ideas and opinions.

101. If even 1% of comments have high value and contribute to the public debate, that would still be 50 000 000 worthy ideas and opinions per year. And the elimination of these 50 000 000 worthy ideas from the market place of ideas and opinions for the advance of other rights raises an issue of the greatest importance in democratic society.

iii) The right to anonymity

102. **The decision has serious impact on the ways and possibilities to expressing views on the current news, topics of interest anonymously and without being pre-registered and pre-monitored.**

103. The court notes:

> 2. The Court is mindful, in this context, of the importance of the wishes of Internet users not to disclose their identity in exercising their freedom of expression. At the same time, the spread of the Internet and the possibility – or for some purposes the danger – that information once made public will remain public and circulate forever, calls for caution. The ease of disclosure of information on the Internet and the substantial amount of information there means that it is a difficult task to detect defamatory statements and remove them. This is so for an Internet news portal operator, as in the present case, but this is an even more onerous task for a potentially injured person, who would be less likely to possess resources for continual monitoring of the Internet.

104. In Applicant's opinion, this consideration of the Chamber embodies the underlying idea of the judgment as a whole – it neglects to take into account the essence and architecture of Internet, as well as the global emerging legal trends in the field of internet law. Namely, that only the attributes of anonymity can encourage robust political speech, provide safety from reprisal, permit the freedom to speak freely. Anonymity encourages the full involvement of all, including marginalized and vulnerable populations, political dissidents, whistle-blowers,

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[43] See footnote 6.

[44] See Attorney General Villalón's 26.11.2013 opinion in case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, para 108.

[45] See Executive Summary and relevant references to the support of this application from the U.S., global and European media and the relevant media coverage.

and other private citizens who wish to participate without surveillance, data retention, repression, or other infringements on personal autonomy, privacy, and freedom of expression.

105. For this reasons, some states in Europe have legalised the right to anonymity on the internet. For example, the German Telemedia Act Sect 13, art 6, which states that "*the service provider must enable the use of telemedia and payment for them to occur anonymously or via a pseudonym where this is technically possible and reasonable. The recipient of the service is to be informed about this possibility.*".[46]

106. Also the courts in European states, with explicit references to the constitution, have repeatedly affirmed the right to anonymity and its necessity for the exercise of the constitutional right to freedom of expression.[47] The German court (*Oberlandesgericht Hamm*) has noted in 2011 that: "*The typical use of the anonymity on the Internet corresponds to the fundamental rights interests, and a restriction […] is not compatible with Article 5 paragraph 1 sentence 1 of the Basic Law. The obligation to confess to a certain opinion, would generally create the risk that that individual's fear of reprisals or other adverse effects would lead to the decision of not to express his opinion. This is danger of self-censorship […]*)[48].

107. Furthermore, losing anonymity, most likely, will not abolish negative comments – in South Korea the real names policy enforced during 2007 and 2012 for news portal commenting areas proved that the overall number of comments dropped drastically, but the number of negative comments decreased from 15,8% to 13,9%.[49]

108. In the light of the above, the Applicant recognizes that the Convention is and should be a "*living instrument*" which must be subject to an evolutive interpretation,[50] however, the context in which the Court operates means that self-restraint is appropriate, particularly with respect to matters of a sensitive nature at a national level. The Chamber seems to be of position that there is a consensus between the Contracting Parties regarding the anonymity on the internet. Consensus however, if it is to be invoked, should at least have the attributes identified of being intergenerational, long-established, and overwhelming, and the Court should be loath to adopt a harmonizing approach where such consensus does not exist.[51] Yet, such self-restraint appears to be lacking in the First Section judgement, since there is no consensus between the understanding of the Court and the Contracting Parties on apprehension of internet as a "*danger*" and the need to deanonymize it. The legitimacy of imposing a novel and different standard from the existing one is particularly questionable where a case involves the balancing of rights rather than a straightforward violation of one right.

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[46] Enacted on 26.02.2007 (Federal Gazette I, p. 179), here

[47] Electronic Frontier Foundation, Germany Report, 2013. Although the Federal Minister of the Interior and some other members of the conservative parties have repeatedly expressed their disapproval of anonymity on the internet,this situation is not likely to change., available: here

[48] Oberlandesgericht Hamm, 03.08.2011, Case No I-3 U 196/10, available at here; see also BGH, judgment of 23.06.2009 - VI ZR 196/08 -, MMR 2009, 608, 612

[49] In 2007, Korea became the first (and so far only) nation in the world to implement a national name verification requirement for online postings. In 2007, Korea became the first (and so far only) nation in the world to implement a national name verification requirement for online postings. Furthermore, the big international Internet companies learned the ways to circumvent the policy (e.g. Google on YouTube made it simple for the South-Koreans to change their country of residence. After 5 years of enforcement, on 23.08.012 the Constitutional Court of South-Korea declared the real name policy to be unconstitutional due to its inefficiency and the fact that it was a pre-censorship measure. See e.g. J. LEITNER, *Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals*, Journal of Korean Law, Vol 9, lk 83-108.

[50] See HON. MR. JOHN L. MURRAY, CHIEF JUSTICE OF IRELAND, *The Influence of the European Convention of Fundamental Rights on Community Law*, in 33 Fordham Intl L.J. 1388, 1419

[51] R. A. POSNER, *The Problems of Jurisprudence*, Harvard University Press, 1993, p 113

109. In addition, the Applicant stresses the 62 per cent of the published media welcome the content created by readers as part of the narrative of their stories, and more than 70 per cent of publishers encourage the addition of comments to their on-line stories.[52] As mentioned already above, the non-anonymity (or pre-registration) would not impact only a "selected few". There are about 650 000 comments in news portals, blogs per month in Estonia. There are about 1,3 million people in Estonia. Thus the ratio is about ½ comments per a person in the country. In the 47 countries that are Members to the Convention, live 820 million people[53]. If this ratio is applied, there are about 410 million comments to news portals, blogs etc per month in Europe. That would make almost 5 billion comments per year. This is a vast amount of expressive-units to be impacted by the First Section judgment.

[52] EUROPEAN DIGITAL JOURNALISM, *How the Digital Age has affected journalism – and the impact for PR*, available: here, 06.06.2011.

[53] See: here.

IV. FINAL REMARKS

110. In the event this case is referred to Grand Chamber, Delfi AS shall wish to further substantiate the case. Applicant reserves the right to submit further documents and Applicant will submit and substantiate a claim for just satisfaction, including a claim for compensation of legal assistance in the domestic proceedings and the proceeding for European Court of Human Rights.

For all the reasons set forth above, Applicant respectfully requests that this case be referred to the Grand Chamber pursuant to Article 43 of the Convention.

We hereby declare that, to the best of our knowledge and belief, the information we have given in the present form is correct.

Place: Tallinn, Estonia Date: 8th January 2014

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