

# ONLINE COMMENTS AND DEFAMATION: THE EUROPEAN PERSPECTIVE

Dušan V. POPOVIĆ<sup>1</sup>

## ABSTRACT

*A defamatory statement is a false or untrue statement that harms the reputation of a living person. In the digital environment, defamatory content can be easily shared and may remain available online for a very long period. At first, anonymous Internet communication was predominantly seen as a value in itself – a mechanism that advances the public debate, protects political dissension, and furthers due process. However, the rapid growth of social networks and digital platforms has transformed the content and tone of online interactions. This paper analyzes online comments that may threaten the reputation of a person from a freedom of speech and within the auspices of European law. These comments typically appear as anonymous statements, signed only with a ‘nickname’ not allowing for identification of a poster. The European Union has adopted several pieces of legislation that set the legal status of defamatory online comments. The Directive on Electronic Commerce is of utmost importance given that it regulates the dissemination of online content. However, the European approach to defamation cannot be understood unless the European Union’s system is combined with that of the European Convention on Human Rights. The European Court of Human Rights’ approach towards defamatory online comments is best demonstrated in its decision on *Delfi v. Estonia* and *MTE v. Hungary*.*

## KEYWORDS

*freedom of expression  
speech  
Internet  
comments  
hosting service operators  
defamation*

## 1. Introduction

The Internet supports the global ecosystem of social interaction. Since the end of the 20<sup>th</sup> century, modern lifestyles have revolved around networks, news feeds, online comments, reviews, and rankings. Initially, the online world was idealized as an unrestricted

1 | Professor, Faculty of Law, University of Belgrade, Serbia, dusan.popovic@ius.bg.ac.rs, ORCID: 0000-0001-8044-1823.



civic forum in which divergent views and conversations could coexist. Anonymous Internet communication was predominantly seen as a value in itself—a mechanism that advances the public debate, protects political dissension, and furthers due process. However, the rapid growth of social networks and digital platforms has transformed the content and tone of online interactions. People started increasingly using the protection afforded by online anonymity to attack others or engage in other kinds of misbehavior. Anonymity can encourage irresponsible writing—offensive or even violent language, as well as inaccurate, deceptive, or false information. Readers are interested in knowing the identity of writers to better assess their credibility.<sup>2</sup> This paper analyzes online comments that may threaten the reputation of a person from a freedom of speech perspective, and within the auspices of European law. These comments typically appear as anonymous statements, signed only with a 'nickname' not allowing for identification of a poster. Comments may be moderated or unmoderated. In the case of unmoderated comments, the platform provider is not aware that the comment has been posted, unless somebody informs it. In contrast, moderation of comments may be exercised either *ex ante* or *ex post*. Prior moderation consists of the approval of the comment before allowing it to be visible to other users, while *ex post* moderation consists of the removal of unsuitable comments that were already posted by the users.

The paper commences with a brief analysis of the European approach to freedom of expression protection (Section 2) and a presentation of the main principles of defamation law (Section 3). The European Union has adopted several pieces of legislation that set the legal status of defamatory online comments. The Directive on Electronic Commerce is of utmost importance given that it regulates the dissemination of online content. The Court of Justice of the European Union provided some useful interpretative guidance with respect to the safe harbor regime and the prohibition of general monitoring obligations on the side of the hosting providers (Section 4). However, the European approach to defamation cannot be understood unless the European Union's system is combined with that of the European Convention on Human Rights. The European Court of Human Rights's approach towards defamatory online comments is best demonstrated in *Delfi v. Estonia* and *MTE v. Hungary* (Section 5).

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## 2. Freedom of expression in the European legal framework

The United States is commonly perceived as the 'cradle' of freedom of speech protection. In that jurisdiction, freedom of speech can be limited only when it represents a clear and immediate danger. With respect to defamation specifically, the US Supreme Court pointed out in the leading case *New York Times v. Sullivan* that statements made with actual malice or reckless disregard are beyond the protection of freedom of speech and can therefore trigger liability for the author of such statements.<sup>3</sup> Otherwise, where these criteria are not met, no limit can be imposed on the public debate. The First Amendment to the US Constitution, as well as the US court decisions, has established a broad scope of protection of freedom of speech, even when other fundamental rights are at stake. This broad protection of freedom of speech in the non-digital context has been transposed into the digital environment as well.

2 | Veliz, 2019, p. 646.

3 | US Supreme Court, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Although legal provisions declare freedom of expression as a human right (fundamental right)<sup>4</sup> in both the United States and Europe, there are some important differences between the two jurisdictions. In Europe, the exercise of freedom of expression must be balanced with protecting other fundamental rights (for example, national security). Owing to the complexity of the constitutional landscape, there is no European counterpart to the US First Amendment. In Europe, the protection of freedom of expression stems from a variety of sources, particularly from the European Convention on Human Rights (ECHR)<sup>5</sup>, the EU Charter of Fundamental Rights<sup>6</sup>, several national constitutions, and the case law of the European courts. Under Art. 10 of the ECHR, the freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, to prevent the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary. From the very structure of this provision, it emerges that Art. 10 of the ECHR, contrary to the US First Amendment, does not regard freedom of expression as an absolute. Therefore, the contracting parties may legitimately impose restrictions on freedom of expression, provided that the criteria set forth under Art. 10 of the ECHR are respected.

Before the coming into force of the Treaty of Lisbon in 2009, there was no explicit acknowledgment of freedom of expression as a fundamental right in EU law. It is through the incorporation of the EU Charter of Fundamental Rights into the EU primary law that freedom of expression has started to be regarded as a fundamental right in the European Union.<sup>7</sup> Under Art. 11 of the Charter, everyone has the right to freedom of expression and information. To comprehend the European approach to freedom of expression, it is of the utmost importance to analyze the interplay between the case law of the Court of Justice of the European Union (CJEU) and that of the European Court of Human Rights (ECtHR). As the European Union is primarily an economic community, the European Court of Human Rights, which is part of the Council of Europe structure, still plays a fundamental role in determining the scope of protection of freedom of expression in Europe.

### 3. Main principles of defamation law

A defamatory statement is a false or untrue statement that harms a living person's reputation.<sup>8</sup> The purpose of defamation laws is to protect the reputations of individuals

4 | Rights derived from international law are referred to as human rights, while rights derived from domestic constitutional law, as well as from European law, are referred to as fundamental rights.

5 | The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in 1950 within the auspices of the Council of Europe. It entered into force in 1953.

6 | The Charter of Fundamental Rights of the European Union has become the primary source of fundamental rights in the EU under the Lisbon Treaty.

7 | Pollicino and Bassini, 2014, p. 521.

8 | In US law, the terms 'libel' and 'slander' are also employed. Libel is a written defamation; slander is a spoken defamation.

from injury. In the digital environment, defamatory content can be easily shared and may remain available online for a very long period. Remedies for defamation, including an award of damages, must be proportionate to the injury to reputation suffered. In *Tolstoy Miloslavsky v. the United Kingdom*, the ECtHR found that a disproportionately large award may violate the applicant's right to freedom of expression.<sup>9</sup> The availability of other civil remedies as alternatives to damages, such as apologies or correction orders, could provide a proportionate response to defamation. Any remedies that are already provided, such as voluntary or self-regulatory basis, should be taken into account when assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a decrease in any pecuniary damages. However, in the case of online comments, these instruments do not always represent an appropriate alternative.

Public officials are required to tolerate more criticism, in part because of public interest in open debate about public figures and institutions. In *Lingens v. Austria*, the very first defamation case heard before the ECtHR, the court emphasized that

“the limits of acceptable criticism are (...) wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance”.<sup>10</sup>

This principle is not limited to the criticism of politicians acting in their public capacity, but also covers matters of public interest relating to private or business interests. However, an important distinction must be made between what is of interest to the public and what interests the public. Insofar as the latter only concern the trivial and indelicate interests of the public, they are of less democratic value for the public as a whole.<sup>11</sup>

Under the ECtHR case law, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to proof.<sup>12</sup> A requirement to prove the truth of a value judgment infringes on the right to freedom of opinion. Defamation laws typically include several defenses that safeguard the right to freedom of expressions, such as the truth or accuracy of a statement, the public interest in the topic treated, or the good faith in publishing a statement. Given that placing the burden of proof with the defendant can have a significant negative effect on the right to freedom of expression, the ECtHR held that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it would be unfair to require them to prove the truth of their statements. This is particularly the case in which the publication relates to a matter of public concern.<sup>13</sup>

The conduct of defamation proceedings can raise serious questions under Art. 6 of the ECHR, which guarantees fairness in both civil and criminal proceedings. This means that defamation defendants should be given adequate time to prepare their defense, that the proceedings should be conducted before an impartial tribunal established by law, that proceedings should be open to the public and that, in criminal cases, a defendant must be

9 | ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, para. 49.

10 | ECtHR, *Lingens v. Austria*, 8 July 1986, para. 42.

11 | McGonagle, 2019, p. 14.

12 | See for example: ECtHR, *Lingens v. Austria*, para. 46.

13 | ECtHR, *Colombani v. France*, 25 June 2002, para. 65.

presumed innocent until proven guilty. Although the ECtHR has not ruled out criminal defamation, it recognizes that there may be serious problems. The Court has frequently reiterated the following statement:

"The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."<sup>14</sup>

## 4. Court of Justice of the European Union and defamatory online comments

The European Union has adopted several pieces of legislation that set the legal status of defamatory online comments. These are, *inter alia*, the Directive on Electronic Commerce<sup>15</sup>, the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>16</sup>, and the EU Charter of Fundamental Rights<sup>17</sup>. Given the limited scope of this paper, we will focus on the Directive on Electronic Commerce, which sets the rules related to the dissemination of online content, including safe harbors for mere conduits, caching, and hosting.

Under the Directive, the intermediaries that serve as hosting providers would ordinarily benefit from an exemption for liability for illegal content, as long as they maintain a neutral or passive approach towards that content. A service provider that hosts third-party content may avail of this exemption on the condition that it does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, and that upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.<sup>18</sup> However, 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 the national level.<sup>19</sup> Although the EU rules were modeled on the US Digital Millennium Copyright Act (DMCA), they differ from the US safe harbor in two ways. First and most important, the Directive's hosting provision governs all claims related to user-generated content, not just copyright. These claims may be derived from private law, in the form of copyright infringement or defamation, and from criminal law, in the form of incitement to violence, or hate speech. Second, the notice-and-takedown mechanism is prescribed by a directive, which allowed for a certain flexibility of the national legislators and resulted in 27 harmonized, yet not identical, national

14 | See for example: ECtHR, *Castells v. Spain*, 23 April 1992, para 46.

15 | Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *Official Journal L 178*, 17.7.2000.

16 | Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *Official Journal L351/1*, 20.12.2012.

17 | Already analyzed in Section 2 of this paper.

18 | See arts. 12-14 of the Directive on electronic commerce.

19 | Recital 46, Preamble of the Directive on electronic commerce.

legal regimes in EU member states.<sup>20</sup> The Directive on Electronic Commerce additionally prohibits the imposition of general obligations on hosts that are protected by a safe harbor to monitor the information they transmit or store, or to actively seek out facts or circumstances indicating illegal activity.<sup>21</sup>

#### | 4.1. *Eva Glawischnig-Piesczek case*

In the *Eva Glawischnig-Piesczek* case, the Court of Justice of the European Union provided some useful interpretative guidance with respect to the safe harbor regime and the prohibition of general monitoring obligations.<sup>22</sup> The case arose in 2016 when an anonymous Facebook user in Austria shared an article and a defamatory comment against the applicant Eva Glawischnig-Piesczek, an Austrian politician. Ms. Glawischnig-Piesczek obtained an injunction from the Vienna Commercial Court to remove the infringing content as well as text with equivalent meaning, after which Facebook disabled access to the impugned content in Austria. The Vienna Higher Regional Court upheld this injunction but limited the blocking of equivalent content upon notice given by Ms. Glawischnig-Piesczek or a third party to Facebook. Both parties appealed to the Austrian Supreme Court, which referred to the CJEU the question of the scope of content to be removed as well as the territorial scope of the removal. The Court considered that while Art. 15(1) of the Directive on Electronic Commerce prohibits general monitoring of online content, which includes actively seeking facts or circumstances indicating illegal activity, recital 47 allows for monitoring in a specific case where content has been declared illegal. In the present case, Facebook Ireland had been notified of illegal content but failed to expeditiously remove or disable the impugned content. Recital 52 of the Directive states that the harm from the information flows on social media sites results from the rapidity and geographic extent to which it spreads to others through sharing and reproduction. In light of the above, the Court held that the Directive did not preclude a member state from ordering a hosting provider to remove information that has been held to be unlawful, as well as information that is identical or equivalent to such unlawful information posted by any user. Monitoring for identical content to that which was found to be illegal would fall within the allowance for monitoring in a 'specific case' and thus not violate the general monitoring prohibition. The Court reasoned that this allowance could extend to 'information with an equivalent meaning'<sup>23</sup>, providing the host was not required to 'carry out an independent assessment of that content'<sup>24</sup> and employed automated search tools for the elements specified in the injunction<sup>25</sup>.

The Court further established that recital 41 of the Directive required a balance to be struck between the parties' interests when issuing an injunction, which in the present case consisted of protecting the claimant's reputation and honor without imposing an excessive burden on the host provider. On the territorial applicability of such an injunction, the Court observed that Art. 18(1) of the Directive<sup>26</sup> notably does not provide any

20 | Before Brexit – 28.

21 | Art. 15 of the Directive on electronic commerce.

22 | CJEU, case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, 3.10.2019.

23 | *Ibid*, para. 39.

24 | *Ibid*, para 45.

25 | *Ibid*, para 46.

26 | Art. 18.1 of the Directive on electronic commerce: 'Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

territorial limitation for the effects of such injunctions.<sup>27</sup> Therefore, the Court held that it is up to the Member State to determine the geographic scope of the restriction, as long as it is within the framework of the relevant international law.<sup>28</sup>

## 5. European Court of Human Rights and defamatory online comments

The European approach to defamation cannot be understood unless the system of the European Union is combined with that of the European Convention on Human Rights, and the decisions of the respective courts are read in light of their reciprocal influence.<sup>29</sup> The Court of Justice of the European Union in case *Promusicae*<sup>30</sup> clarified that in transposing the directives and implementing the transposing measures “the Member States must (...) take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order”.<sup>31</sup> This ‘fair balance’ doctrine was also accepted and further developed by the European Court of Human Rights, particularly in decisions *Delfi v. Estonia*<sup>32</sup> and *MTE v. Hungary*<sup>33</sup>. Both cases concerned the liability of online hosts for allegedly defamatory content posted by anonymous users in the comment sections below news articles published by the platforms.

### | 5.1. *Delfi v. Estonia* case

In *Delfi v. Estonia*, the ECtHR decided on the liability of Delfi, a high-volume Estonian online news outlet, for defamation based on offensive comments posted by its readers below one of its online news articles. Delfi published a story concerning ice bridges that generated several responses. Some of these contained offensive material, including threats directed against an individual designated as L. A few weeks later, L requested that around 20 comments be deleted and damages were paid. Delfi removed the offensive comments on the same day but refused to pay damages. The matter then went to Court, and L was awarded damages. Delfi’s claim to be a neutral intermediary and, therefore, immune from liability under the EU Directive on electronic commerce was rejected. The news organizations brought the matter to the ECtHR, which had found no violation of the right to freedom of expression in this case.<sup>34</sup> Delfi then requested a referral of the case to the Grand Chamber because of the concern that the First Section judgment would have serious adverse repercussions for freedom of expression and democratic openness in the

27 | CJEU, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, para. 49.

28 | *Ibid*, para. 52.

29 | Pollicino and Bassini, 2014, p. 521.

30 | CJEU, case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, 29.1.2008.

31 | *Ibid*, para 68.

32 | ECtHR, *Delfi v. Estonia*, 16 June 2015.

33 | ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (hereinafter: *MTE v. Hungary*), 2 February 2016.

34 | The First Section of the ECtHR rendered its judgment on 10 October 2013.

digital era. The judgment of the Grand Chamber confirmed, however, that the imposition of publisher liability on Delfi did not constitute a violation of Art. 10 of the ECHR.

The Estonian domestic courts had classified Delfi as a traditional publisher and not as an intermediary within the meaning of Art. 14 of the Directive on Electronic Commerce. Based on this classification, the Estonian domestic courts applied the Civil Code and the Obligations Act, rather than the Estonian Information Society Services Act. The classification resulted in denying Delfi the protection of the safe harbor foreseen in Art. 14 of the Directive on Electronic Commerce. The Estonian Supreme Court recognized a difference between traditional publishers and online media, underlying that it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for printed media publications. In line with the distinction made by the Estonian Supreme Court, the ECtHR Grand Chamber referred to the Council of Europe Recommendation on a new notion of media<sup>35</sup>. The Recommendation promotes a 'differentiated and graduated approach,' which requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form and the appropriate level of protection. Therefore, the Court considered that because of the particular nature of the Internet, the 'duties and responsibilities' that are to be conferred on an Internet news portal for the purposes of Art. 10 may differ to some degree from those of a traditional publisher as regards third-party content.<sup>36</sup>

Despite its support for a nuanced approach, the ECtHR declared that qualification of Delfi as a publisher was foreseeable: '*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 that these could entail (...)*'.<sup>37</sup> The Grand Chamber agreed with the definition of Delfi as a publisher, but deemed it crucial to delineate the scope of the judgment in light of the facts of the case.<sup>38</sup> In view of the Grand Chamber, the case only concerned the duties and responsibilities of online news portals when they provided a platform for user-generated comments on a commercial basis and when some users on this platform engage in clearly unlawful speech, which infringes on the personality rights of others and amounts to hate speech.<sup>39</sup> The ECtHR highlighted that the controversial comments in the present case were not disputed as being hate speech, thus manifestly unlawful. The Court concluded that hate speech does not enjoy the protection of Art. 10 of the ECHR.<sup>40</sup> In reaching its decision, the Court also took into account the nature of the Delfi news portal. Delfi actively called for comments that, after publication, could only be modified or deleted by Delfi, but not by the actual authors of the comments. Consequently, the Court found that the applicant company's involvement in making public comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider.<sup>41</sup> The Court highlighted that the Delfi case did not concern 'other fora on the Internet' where third-party comments can be disseminated, for example, an online discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channeled by any

35 | Recommendation CM/Rec(2011)7, 21 September 2011.

36 | ECtHR, *Delfi v. Estonia*, para. 113.

37 | *Ibid*, para. 129.

38 | *Ibid*, para. 111.

39 | *Ibid*, para 115.

40 | *Ibid*, paras. 117-118.

41 | *Ibid*, para. 146.



input from the forum's manager. The Grand Chamber's finding is not applicable to a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby.<sup>42</sup>

In view of the foregoing, the Grand Chamber considered that the rights and interests of others and society as a whole may entitle contracting states to impose liability on Internet news portals if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.<sup>43</sup>

### | 5.2. *MTE v. Hungary case*

In 2016, less than a year after its *Delfi v. Estonia* decision, the European Court of Human Rights delivered a judgement in case *MTE v. Hungary*. The case also concerns the liability of online intermediaries for user comments. The problem arose in 2010 when MTE, a self-regulatory body of Hungarian Internet content providers, published an opinion about two real estate management websites owned by the same company. In the opinion entitled "Another unethical commercial conduct on the net" MTE denounced the company's business strategies and customer treatment. Shortly after, a number of offensive pseudonymous comments were posted. The same type of comments appeared when the full text of the opinion was reproduced by the online portals *vg.hu* and *Index.hu*. The company operating the real estate management websites brought a civil action before the Budapest Regional Court, claiming that both the opinion and comments infringed its right to a good reputation. The Budapest Regional Court found that the comments went beyond the limits of freedom of expression. The Regional Court and later the Court of Appeal rejected the applicants' argument that they were mere passive intermediaries within the meaning of the EU Directive on Electronic Commerce and the Hungarian Electronic Commercial Services Act. The Hungarian Supreme Court shared the Court of Appeal's view in finding that the comments could harm the plaintiff's good reputation and that the applicants' liability consisted of having allowed their publication. MTE and *Index.hu* appealed to the ECtHR, arguing that by effectively requiring them to moderate the content of comments made by readers on their websites, the domestic courts unduly restricted their freedom of expression and thus the liberty of online commenting.

The European Court of Human Rights observed that there was interference with the applicant's freedom of expression in the present case. The interference at hand was prescribed by law and had the legitimate aim of protecting the rights of others.<sup>44</sup> The Court had to determine whether the interference was 'necessary in a democratic society', that is, to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the ECHR, which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Art. 10, and on the other, the right to respect for private life enshrined in Art. 8.<sup>45</sup> The Court has found that the rights guaranteed under Articles 8 and 10 ECHR deserve equal respect. The outcome of an application should not vary according to whether it has been lodged with the Court under Art. 10 ECHR by the publisher of an offending article or under Art. 8 ECHR by the person who has been the subject of that article.<sup>46</sup>

42 | *Ibid*, para. 116.

43 | *Ibid*, para. 159.

44 | ECtHR, *MTE v. Hungary*, para. 52.

45 | *Ibid*, para. 58.

46 | *Ibid*, para 59.

The ECtHR's judgment makes a direct comparison between this case and its judgment on *Delfi v. Estonia*. Although the Court explicitly stated that 'the present case is different'<sup>47</sup>, it nevertheless deemed it appropriate to re-use the same criteria developed in the *Delfi v. Estonia* case to assess the interference in question. In *Delfi v. Estonia*, the ECtHR listed four specific factors to guide the balancing process: (1) the context of the comments; (2) the measures applied by the platform to prevent or remove the comments; (3) the liability of the actual authors of the comments as an alternative to the platform's liability; and (4) the consequences of the domestic proceedings for the platform.<sup>48</sup> In *MTE v. Hungary*, the Court added the fifth factor—the consequences of the comments for the victim.<sup>49</sup> When applying these factors to the two cases, ECtHR came to two opposite conclusions. In *Delfi v. Estonia*, the comments were qualified as hate speech and incitement of violence. Thus, the imposition of liability on the hosting provider struck a fair balance, and it did not entail a violation of the right to freedom of expression. However, in *MTE v. Hungary*, the Court characterized the comments as merely offensive and concluded that the liability imposed on the intermediaries for their dissemination violated the right to freedom of expression.

With respect to the first criterion, the context of the comments, the Court regarded the comments published under the MTE's statement as relating to a matter of public interest. The business conduct of online real estate companies has already generated numerous complaints to consumer protection groups. For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals—a consideration that reduces the impact attributed to those expressions.<sup>50</sup> Regarding the second criterion – measures applied by the platform, the Hungarian courts decided that by allowing unfiltered comments, the applicants should have expected that some of the comments would be unlawful. Both MTE and *index.hu* had a notice-and-take down system in place and both provided a disclaimer in terms and conditions that prohibited unlawful comments. Further, *index.hu* had a team of moderators in place. The domestic courts ruled that these measures were insufficient, but the ECtHR disagreed.<sup>51</sup> The ECtHR also observed that the injured company never requested the applicants to remove the comments but opted to seek justice directly in court.<sup>52</sup> With respect to the third criterion, the liability of the actual authors of the comments, the ECtHR noted that the Hungarian domestic courts did not examine the feasibility of identifying the actual authors of the comments, nor did they analyze the proportionality of the division of liability between the actual authors and the web portals.<sup>53</sup> With respect to the fourth criterion, the consequences of the domestic proceedings for the applicants, the ECtHR observed that the applicants were obliged to pay court fees, including the fee paid by the injured party for its legal representation, but no awards were made for non-pecuniary damage. However, the ECtHR was of the view that the decisive question when assessing the consequences for the applicants is not the absence of damages payable but how Internet portals can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example, by compelling it

47 | *Ibid*, para. 64.

48 | ECtHR, *Delfi v. Estonia*, para. 142.

49 | ECtHR, *MTE v. Hungary*, paras. 68-69.

50 | *Ibid*, para. 77.

51 | *Ibid*, para. 82.

52 | *Ibid*, para. 83.

53 | *Ibid*, paras. 78-79.

to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet.<sup>54</sup>

In *MTE v. Hungary*, the Court added the fifth criterion to assess the consequences of the comments for the victim. The Court observed that at the time of the publication of the article and the impugned comments, there were already ongoing inquiries into the plaintiff company's business conduct. For that reason, the Court was not convinced that the comments in question could make any additional and significant impact on the attitude of the consumers concerned.<sup>55</sup>

After applying these five criteria to the case at hand, the ECtHR concluded that the interference with the applicant's freedom of expression was a violation of Art. 10 ECHR, as the Hungarian domestic Court did not balance the interests of the online real estate company, on the one hand, and MTE and *index.hu*, on the other.<sup>56</sup> The Court found that the impugned comments did not constitute hate speech, as was the case in *Delfi v. Estonia*.<sup>57</sup> It seems that the Court used this opportunity to clarify that the *Delfi v. Estonia* judgment was limited in scope to 'manifestly unlawful' comments consisting of hate speech and incitement to violence. In the *MTE v. Hungary* case, where the comments were merely vulgar and offensive, implementing a notice-and-take down mechanism was considered sufficient to balance the rights and interests of the parties involved.

## 6. Concluding remarks

Defamatory online comments posted by users may generate significant problems for web portals and social networks. Although the EU Directive on electronic commerce provides for the limitation of liability for intermediaries, its provisions do not fully correspond to recent technical developments and the appearance of new forms of online communication. Twenty years ago, the Directive envisaged three categories of intermediaries: those that are mere conduits, those that offer caching, and those that host content. All three categories of intermediaries are seen as facilitators via technical services rather than contributors to the provision of specific content. However, the proper qualification of the third category, hosting sites, has become quite challenging in the last decade, given the development of a range of new online services. Under the Directive, the protection for hosting services is dependent on a lack of 'actual knowledge' of the offending content. Although the Directive prevents the Member States from imposing on Internet intermediaries a general obligation to monitor the information they transmit or store, or a general obligation to actively seek out facts and circumstances indicating illegal activities, the Directive does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined individual case.<sup>58</sup> Furthermore, the Directive does not affect Member States' freedom to require hosting service providers to apply those duties of care that can reasonably be expected from them and which are specified by national law to detect and prevent certain types of illegal activities.<sup>59</sup> Given the above,

54 | *Ibid*, para. 86.

55 | *Ibid*, para. 85.

56 | *Ibid*, para. 88.

57 | *Ibid*, para. 91.

58 | See: Recital 47 of the Directive on electronic commerce.

59 | See: Recital 48 of the Directive on electronic commerce.

it would be incorrect to assert that ECtHR's decisions in *Delfi v. Estonia* and *MTE v. Hungary* are contrary to the wording and spirit of the Directive.<sup>60</sup>

The Court of Justice of the European Union also interpreted the scope of Articles 14 and 15 of the Directive on Electronic Commerce. In the most notable case, *SABAM v. Netlog*,<sup>61</sup> which concerned a social networking site that received a request from the Belgian copyright society to implement a general filtering system to prevent the unlawful use of musical and audio-visual work by the users of its site, the Court took a balanced stance on the issue of content filtering. The CJEU observed that the EU law precludes a national court to impose a general content monitoring obligation on a hosting service provider: (1) which requires it to install a system for filtering information that is stored on its servers by its service users, (2) which applies indiscriminately to all users, (3) exclusively at its expense, and (4) for an unlimited period. *A contrario*, a specific monitoring system that would be in place for a limited period and would not be entirely at the expense of the hosting operator, would not be *prima facie*, contrary to the Directive on electronic commerce. However, the Court noted that a filter might not distinguish between lawful and illegal content, thus affecting users' freedom of expression.

The Directive on Electronic Commerce does not harmonize the conditions for holding intermediaries liable, but only the conditions for exempting Internet intermediaries from liability.<sup>62</sup> A recent European Commission's proposal of the Digital Services Act (DSA)<sup>63</sup> attempts to rectify certain deficiencies of the existing content removal mechanism. The DSA proposal introduces the obligation for service providers to act when they receive orders in relation to a specific item of illegal content. 'Illegal content' is defined as any information that, in itself or by its reference to an activity, including the sale of products or provision of services, is not in compliance with European Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law.<sup>64</sup> The recitals give us more detail, specifically referring to illegal hate speech or terrorist content and unlawful discriminatory content, or the content that relates to illegal activities, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the non-authorized use of copyright-protected material, or activities involving infringements of consumer protection law.<sup>65</sup> Hosting providers, including online platforms, are subject to additional rules, such as the reporting mechanisms for illegal content or the provision of a statement of reasons in relation to a decision to remove or disable access to specific items of content.<sup>66</sup> Given that the DSA proposal refers to 'illegal content' that may be disabled or removed under certain conditions, it seems that all types of online comments will not be caught under the proposed mechanism. This brings us back again to the complex distinction made by the European Court of Human Rights between 'manifestly illegal comments' and 'merely offensive comments.'

60 | Although it is also true that ECtHR was not deciding on whether the claimant was a neutral intermediary or not, but was rather reviewing the impact of the national court's reasoning.

61 | CJEU, case C-360/10, *SABAM v. Netlog*, 16.1.2012.

62 | Stalla-Bourdillon, 2017, p. 292.

63 | Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

64 | Art. 2(g) of the DSA.

65 | Recital 12 of the DSA.

66 | Art. 15 of the DSA.

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