CONFERENCE

"Europe After Delfi"

Friday 8 September 2017, University of Tallinn

"Don‘t Kill the Messenger – Delfi and Its Progeny in the Case-Law of the European Court of Human Rights

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Preliminary Remarks and Structure of the Intervention

1. Ladies and gentlemen.

   We‘ve come along way since that fateful day, October 29th, 1969, almost 48 years ago, when a message was sent from UCLA to Stanford, on the West Coast of America, signalling the first use of the Internet as a communications platform. The UCLA programmers typed „log“ to begin logging into the Stanford computer, the computer then crashed after the second letter, making „lo“ the first Internet message.[1]

2. As I recently commented in a published article, the Internet has since transformed modern society, including the law. The Internet’s influence on the development of existing legal rules is currently being extensively

[1] Kal Raustiala, Governing the Internet, 110 Am. J. Int‘L 491, at 493, citing Jonathan Zittrain, The Future of the Internet – And How To Stop It, 2008, 27.

analysed and examined, including in the field of human rights law. Due to the advent of the Internet, numerous conceptual and practical problems have arisen in connection with the right to privacy, freedom of expression and the right to property.[2]

3. As a serving judge of the Strasbourg Court, I view my role here today as first and foremost consisting of providing some insights, to the extent possible, into the legal issues and conceptual problems implicated by the Delfi case-law of my Court. I am not a policy analyst, a technical expert nor a particularly avid enthusiast when it comes to the day-to-day use of the Internet, in particular social media, as I am neither on Facebook nor Twitter to my children's perennial consternation. All in all you might be justified in calling me a cybersceptic, but, as a judge, it is my role to deal with the difficult legal questions that arise in the elusive and ever fluctuating paradigm of the Internet and Human Rights. Having made these caveats, I will however attempt to situate the debate on these issues in a larger theoretical context in the field of human rights which, to some extent, is inevitably infused with policy based arguments.

4. So, today, I intend to proceed in three parts:

First, allow me to say a few general words about the way in which the debate on intermediary liability seems often in my view to be overly unitary in focus, a concept I will explain in a moment. In this first part I will make the claim that intermediary liability must be examined within a holistic analytical framework of Internet governance where certain higher order values are defined and elaborated.

[2] Robert Spano, Intermediary Liability for Online User Comments under the European Convention on Human Rights, Human Rights Law Review, 2017, 1-15, at 1.

5. In my second part, I will discuss three conceptual elements of the Delfi-case-law, firstly, the nature and scope of the claim made by intermediaries on the basis of free speech provisions like Article 10 of the Convention, secondly, the concepts of control and constructive knowledge manifested in the distinction between passive and active intermediaries and thirdly explain the principle of graduated content responsibility which lies at the core of the Delfi-case law and its progeny of cases, *Magyar TE and Index v Hungary* and the recent inadmissibility decision in *Pihl v. Sweden*.

6. In my third part, I will conclude with some very brief reflections on the notice-and-take-down system and the current framework of self-regulation and resolution of such requests by the global players, such as Google, Facebook and Twitter.

The Need for a Holistic Analytical Framework

7. Now, on to my first part.

8. When one reviews the academic litterature and many policy papers on the issue of intermediary liability one often gets the sense that the perspectives adopted are overly unitary and sector-specific, in the sense that the policy debate is for example viewed through one lens for the purposes of EU Law, in particular the EC Commerce Directive and the Data Protection Directive and through another lens when the debate concerns the clash between freedom of speech and privacy, the human rights problems. Often, the issue of copyright and intellectual property is pigeon-holed into still another and separate discussion.

9. As a European human rights judge, examining and deciding issues of rights and duties on the Internet under the Convention, it is important to realise that the human rights dimension of the problems the Court faces must be

informed as much as possible by a holistic analytical framework on Internet governance. It is after all impossible in my view to divorce the human rights problems on the Internet, such as free speech and association and privacy, with other high-order values or goals on the Internet which have been identified, namely, security, including cybersecurity, economic incentives and growth and social order or *ordre publique*.

10. Hence, as has been argued elsewhere, to preserve the Internet's unique value as an engine for a range of socioeconomic benefits and human rights, the goal must be to defend a careful balance among governments, businesses and users. [3] It is of course difficult to elaborate in detail on how this holistic and balanced view of Internet Governance translates into the European Convention on Human Rights, but it is clear I submit that under a Convention system which explicitly recognises that limitations of human rights may be justified in the public interest, there can be no question of taking a unitary, absolutist view of the rights of free speech of internet intermediaries akin to Article 230 of the US Communications Decency Act. It is through this lens that one should view the Delfi case-law, the main elements of which I now turn in my second part.

Three Conceptual Elements in the Delfi case-law

11. *Delfi v Estonia* was a landmark judgment, but not because it was perfect in any shape or form or that it set a clear and forceful precedent for all future cases on intermediary liability under Article 10 of the Convention. No, it was a landmark only because it was the first of its kind. And, as I have stated elsewhere, as it was the first of its kind, in a very complex and fluctuating field where many judges, some born in the 1940's and 50's

[3] M. Christopher Riley, Anarchy, State, or Utopia? Checks and Balances of Power in Internet Governance, available at: http://ssrn.com/abstract=2262055, visited last on 1 September 2017.

mind you, may have felt ill at ease for obvious reasons, one should not draw grand and catastrophic conclusions as to Delfi's precedential value.

12. But, *quand même*, as the French would say, there are certain conceptual elements of the judgment that merit a discussion and have been the source of, well yes, sustained criticism. I want to reflect on three of them.

13. The first element is the nature and scope of the free speech claim made by intermediaries in cases where they face liability for UGC, or *User Generated Content*. In other words, as they are not the authors of the content, what is the rationale or the reasoning upon which they base their claim on having a right to impart the information provided by the users? The reason that this is important is that one of the criticism of Delfi is directed at its reliance on the distinction between the commercial and non-commercial or economic nature of the intermediary in question. It has been argued that this distinction is not a „pertinent one"; that it is wrong to reserve the traditional high level of freedom of expression and information only for social media, personal and hobby blogs.[4] Arguments along these lines were also expressed in the joint dissenting opinion of my colleagues Judges Sajó and Tsotsoria in Delfi.

14. At the outset, I think it is useful to make a distinction between the commercial/non-commercial dichotomy at the level of principle, on the one hand, and, on the other, at the level of application. Of course it may be difficult on the facts to ascertain whether an intermediary falls into one or the other category. However, as we can see from the follow up cases to Delfi, namely Magyar T.E. and Index and Pihl, that difference is not an insurmountable obstacle, not at all. The more interesting question is the one of principle: Why make the distinction at all when assessing the rights of

[4] Dick Voorhof, Delfi v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers, 18 June 2015.

intermediaries to impart information in the form of user generated content? Here I'll make two points.

15. Firstly, when an economic operator asserts a right to impart information provided by third parties, there is a somewhat different rationale for that particular freedom of expression claim it seems to me than when the same claim is made by an Internet intermediary being run on pure, non-profit, public interest or civic engagement grounds, like in the Magyar TE and Pihl cases. Of course, there is no reason to exclude the possibility that an economic intermediary like Delfi will assert its Convention right to impart unlawful comments uploaded anonymously on its website on the basis of sound principle. However, I submit that it is also not without justification for the Strasbourg Court, an international court having to assess the margin of deference to be afforded to the national judge, to accept that an online business enterprise is also, and perhaps even largely, motivated by the revenue-creating nature of the commenting system. Let me be clear. My point is not that economic operators exercising free speech rights should, because of that status, enjoy lower free speech protections as a matter of principle, but only that the economic nature of their activities may often justify imposing on them duties and responsibilities which are of a more stringent nature than can be made applicable to non-profit entities.

16. My second point is related to the first. Ascribing to intermediaries the status of „economic operators", which is in fact what the Strasbourg Court does to the applicant in the Delfi case, is by no means a novel legal concept, neither under Convention law nor for example under EU Law as can be seen from the case-law of the ECJ in EC Commerce Directive cases, and its use of the concept of a „diligent economic operator", for example in the *L'Oreal* Case of 2011. As Professor Lorna Woods of the University of Essex has correctly stated in a published piece, „there are arguably parallels between the ECJ and ECtHR approaches in that both courts seem to think that those

acting in the course of their business are in better place to assess where and when the problems might arise".[5] In other words, the economic nature of the intermediary activity in question is closely correlated to the concepts of control and constructive knowledge of user generated content.

17. This then brings me to my second conceptual element flowing from the Delfi case-law. The distinction between passive and active intermediaries is, still, whether we like it or not, a crucial one in the law, not just EU Law under the Commerce Directive, which only affords the liability exception in principle to the former, but also under Convention law as can be seen from the Delfi judgment.

18. Here it is important to ponder the following questions: Why is control so important in the field of intermediary liability? In other words, why is the passive/active distinction crucial for liability purposes?

19. In answering these questions, it is useful to recall the nature of the axis of legal relationships we are dealing with in this area. We have, number one, the creators/authors of online content, and, secondly, in defamation cases, the injured party or in hate speech cases particular groups or even the public at large as in glorification of terrorism cases. And then, along comes the intermediary, the conduit or third party messenger, who provides a platform online for the content to be disseminated from the author to the recipient or recipients.

20. The creation of a legal duty of care for third parties like Internet intermediaries has always been deeply attached to moral culpability and the concept of blameworthiness, on the one hand, or in a less high-minded sense, the incentives of gain, usually monetary or other financial gain. It is

[5] Lorna Woods, Delfi v Estonia: Curtailing online freedom of Expression?, LSE Media Policy Project blog.

axiomatic, that these theoretical elements of moral culpability, blame and financial gain can only be justified on the basis that the third party has adequate control or knowledge of the illegal activity so as to be able to have an effect on the turn of events. So for example, when Internet companies and private parties started to offer Internet services in the 1980‘s there existed for example two separate doctrines on third party liability for copyright infringements in the United States, *vicarious liability*, which entailed that a third party could be held liable for infringing activities if it had the right and ability to control over and gained financial profits from the activity, and *contributory liability*, which applied to third parties that had knowledge of and contributed to the infringing activity.[6]

21. This passive/active distinction has long been inherent in the Article 14 exemption of liability under the EC Commerce Directive as interpreted by the ECJ in cases such as *Google v Louis Vuitton* and *L‘Oreal*. Interestingly for our purposes, in the recent judgment in *Papasavvas* of 2014 the ECJ determined that an online newspaper could not benefit from the protections of the Directive with regard to content that its journalists authored and its editors published, given that they had knowledge of and control over this content.

22. When it comes to analysing further the parameters of the concept of control, as elaborated in the Delfi judgment, it is I think incorrect to assume, as some commentators have, that EU Law developments are not of direct relevance. For example, I agree with Bart van der Sloot of the Institute of Information Law at the University of Amsterdam, a great institute by the way, who has written a piece arguing that it is useful to compare the requirement of control under Delfi with the position of the

[6] Bart van der Sloot, Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe, JIPITEC, Vol, 6. (urn:nbn:de:0009-29-43183), 2015, at 1.

„controller“ under data protection law[7] in the sense that active internet intermediaries will in principle be considered the controllers of data within the context of the Data Protection Directive because they determine the goal and the means of data processing. As we all know, this also applies to search engines after the *Google Spain* judgment, which was not a foregone conclusion at all. Applying this to the symbiotic relationship between the Article 8 right to privacy, which encapsulates a very broad concept of personal data within its protective scope, and the free speech provision of Article 10, necessarily requires that the control concept applied to intermediaries under the latter provision, as was done in Delfi, adequately takes account of their duties and responsbilities under data protection law. Again, I revert to where I started. The interpretation and application of human rights laws in the Internet field cannot be performed in isolation from other relevant elements included in a holistic analytical framework of Internet governance.

23. So, let me now finally turn to the third conceptual element from the Delfi case-law that is worthy of reflection.

24. It is useful to recall that in Delfi the user comments in question were considered, both by the domestic and the Strasbourg courts, to be clearly unlawful constituting hate speech and incitement to violence. The content of the comments were such as to circumscribe entirely any protection afforded to the authors themselves under Article 10 of the Convention. Thus, had Estonia been able to provide for the effective imposition of liability on the authors at the national level, an element that the Court considered crucial in its evaluation of the proportionality of the interference in question, it seems more likely that the complaint lodged at Strasbourg by the authors would have been dismissed as manifestly ill-founded or even as

[7] Bart van der Sloot, ibid, 6.

incompatible *ratione materiae* with the Convention, if Article 10 would not have been considered applicable in the light of Article 17.

25. This means two things:

First, if the user comments are 'merely defamatory', a balancing exercise has to be performed between the free speech interests claimed by the intermediary and the reputational interests of the defamed person. It thus seems a persuasive proposition to interpret the judgment in Delfi as placing great emphasis on the gravity of the comments in question. This might be termed the *principle of graduated content responsibility* of intermediaries.

26. If this understanding of Delfi, as introducing the principle of graduated content responsibility, is correct, Contracting States cannot necessarily rely on that judgment as a basis for the conclusion that they would have the same latitude to impose liability on intermediaries in other situations where the user comments in question do not attain the same level of gravity, but only constitute unlawful speech on the basis of traditional national defamation laws. This understanding conforms to the reasoning in Magyar TE and Index, where the Strasbourg Court explicitly noted that the impugned comments were not of the same gravity as the ones examined in Delfi. Thus in Magyar TE, the margin of deference afforded to the Government was considerably narrower than that granted in Delfi. Subsequently, this view has also been confirmed in Pihl v Sweden. I would finally note that this understanding of Delfi lastly invites a host of questions when one analyses some of the new European Union policy proposals introducing a new notion of „content responsibility" which involve scaling up of intermediary liability in three new fields, namely counter-terrorism, hate speech and protection of minors.[8]

[8] See, Monica Horten, Content „responsibility": The looming cloud of uncertainty for internet intermediaries, Center for Democracy and Technology, September 2016.

27. My second point is that it is important to recall that in Delfi the Court explicitly observed that if accompanied by effective procedures allowing for a rapid response, a notice-and-take-down system can 'function in many cases as an appropriate tool for balancing the rights and interests of all those involved'. On the basis of this reasoning, I have previously argued that the Strasbourg Court was in some sense encouraging Contracting States to consider the beneficial value of the notice-and-take-down system as a suitable mechanism for balancing the implicated interests, although States are not precluded from adopting more stringent forms of intermediary liability when confronted with the gravest forms of negative online comment. This approach of the Court should come as no surprise, considering that, historically, the Strasbourg Court has taken great pains to maintain a fair equilibrium between Article 10 free speech interests on the one hand and Article 8 privacy and reputational interests on the other.

28. Allow me here, before I conclude with my final part, to say a word about the lack in European law of a Good Samaritan Clause, akin to the one provided by Article 230 of the US Communications Decency Act. Such a clause means that if intermediaries take down content which they believe in good faith to be illegal, whether or not it is protected speech or not, they cannot be held liable by the author of the content for their decisions to take it down. It has been reported that in some countries in Europe intermediaries are being pursued over alleged violations of free speech of users by either taking down content or deactivating user accounts. I do not want to enter into a minefield by commenting on whether, at the level of policy, such a Samaritan Clause should be introduced at the European level. Perhaps Marco Pancini will talk about that later. I would only recall that human rights obligations in the European context invariably have both a negative and a positive component. It goes without saying that a notice-and-take down system is in fact a manifestation of an attempt to positively

react to alleged violations of privacy, reputational interests and interests related to the fight against hate speech and terrorism. A Good Samaritan clause at the European level would have to be assessed with that in mind.

The Self-Regulation and Private Adjudication of Internet Disputes

29. I will now conclude this intervention with some very brief remarks on the notice-and-take-down system and the current framework of self-regulation and resolution of such requests.

30. Currently, these kinds of Internet related disputes are decided, almost without exception, by the gigantic social media platforms themselves. For example, it has been widely reported that Facebook, Google and Twitter employ an army of persons to deal with a staggering amount of take-down requests based on internal guidelines and regulations.

31. Therefore, due to the global impact of the Internet on the development of human-to-human interaction, and the absolute dominance of these sites on the Internet, an answer may be needed to the crucial question whether this self-regulatory and private adjudicatory system is acceptable in democratic societies governed by the rule of law. In other words, one might question whether it is acceptable that fundamental issues pertaining to the development of the right to freedom of expression on the Internet, and its impact on an individual's privacy and personality rights, are decided by private economic operators without arguably any safeguards of independence and impartiality or rules of procedural fairness and based on their own substantive rules and guidelines?

32. It goes without saying that many important questions of law and policy arise when one contemplates possible answers to these questions, for example the creation of specially constituted Internet Courts. Complex issues relating to cross-border jurisdiction would need to be negotiated at the international level to allow for the active participation of all relevant stakeholders. It would also be desirable to find common ground internationally on the procedural mechanics of a fast-track procedure as well as for the norms regulating the substantive assessment made by the Internet judge at domestic level, both of which, in the European context, would have to take account of Articles 6, 8 and 10 of the European Convention on Human Rights.

33. However, all of this is certainly possible. As regards the international arena, it should be noted that the Council of Europe is engaged in very important work in the Internet field, as manifested for instance in the Recommendation of the Committee of Ministers to member States on Internet freedom adopted in April 2016. Perhaps the idea of negotiating the *European Convention on Internet Courts* could be an idea worth pursuing in the future.