IN THE EUROPEAN COURT OF HUMAN RIGHTS **Application no. 3877/14**

FIRST SECTION

BETWEEN:

TAMIZ

Applicant

and

THE UNITED KINGDOM

Respondent

WRITTEN COMMENTS ON BEHALF OF THE THIRD PARTY INTERVENERS*

I. Introduction

1. These written comments are made pursuant to rule 44(3) of the Rules of the Court and on the basis of the President of the First Section granting the below-mentioned organisations ("the Interveners") leave to intervene on 18 March 2016. These submissions address the following issues:

   a) Article 10 and protecting intermediaries from liability for content posted by users.

   b) Safeguards to protect intermediaries from such liability.

   c) Jurisdictional thresholds for the protection of the freedom of expression.

2. For the purposes of these written submissions, the term "intermediary" refers to a body, operating for profit or otherwise, which hosts, stores, caches and/or transmits information created or published by users/third parties. Intermediaries are variously referred to as internet service providers and internet society services. Since this case relates to the hosting of information, references to intermediaries are focussed upon the provision of such facilities.

3. The Court considered the issue of intermediary liability in the recent cases of *Delfi v. Estonia* ('*Delfi*')[1] and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* ('*MTE*').[2] The present application offers the opportunity to revisit and refine Convention law on this issue, albeit in a different context of liability for comments on a hosted blog, as opposed to comments posted in response to an article by an online news portal. This case also gives the Court the occasion to consider the question of jurisdictional thresholds in article 8 claims based on harm to reputation.

4. The interveners urge the Court to take account of the international principles,[3] and national legal standards, and best practices on intermediary liability set out in this submission.

II. Article 10 rights and protecting intermediaries from liability for content posted by users

5. As this Court has acknowledged: *"the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing*

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* Media Legal Defence Initiative; Media Law Resource Centre; Association of American Publishers; Dutch Association of Journalists; European Publishers Council; Greenpeace International; Lorna Woods; NRC Media; Persgroep Nederland; and the World Association of Newspapers and News Publishers. See Annex for further information on these organisations.

1 European Court of Human Rights ('ECtHR'), *Delfi v. Estonia*, Application No. 64569/09 (GC) (16 June 2015).

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

3 As the Court has made clear, the non-binding instruments of the Council of Europe organs are important tools in interpreting the Convention: ECtHR, *Demir and Baykara v. Turkey*, Application No. 34503/97 (GC) (12 November 2008), par. 74.

as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest."[4]

6. Intermediaries that host third-party content play a pivotal role in this process because they provide the digital "space" in which the freedom of expression and the concomitant right to receive information are exercised. In this sense, the most apposite analogy in the non-digital world is that of a cafe owner who provides the physical space in which people interact. The provision of this space enables individuals to express their opinions and share factual information in a space that is unmediated by editorial intervention. Accordingly, intermediaries are the facilitators of the exercise of freedom of expression by their users;[5] without them, the exercise of article 10 rights online would be limited or even non-existent. It is the promotion and preservation of this digital space that is the primary rationale for restricting intermediary liability.

7. Due to the prominence of many intermediaries and the anonymity of many people who exercise their rights to freedom of expression using their services, intermediaries are highly vulnerable to attempts to stifle freedom of expression online and easy targets for persons who are aggrieved about information published online.

8. Appropriate safeguards and strict limitations on intermediary liability are essential if intermediaries are to keep digital spaces open and if they are to avoid engaging in censorship of their users. The following warning from the US Court of Appeals Fourth Circuit is salutary: *"[I]t would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted."*[6]

9. The Interveners emphasise the importance of considering the article 10 rights of not only the intermediaries but also the end users of the services they provide. In its Declaration on freedom of communication on the internet, the Council of Europe's Committee of Ministers ('the Committee of Ministers') has stated that, when defining obligations of service providers relating to removing or disabling content, *"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."*[7] Consideration of these rights is especially significant given that intermediaries and users will often have different interests. An intermediary may have a general interest in the untrammelled use of its services by users, particularly where use of the service generates revenue, but it is unlikely to have an interest in keeping specific content online. By contrast, specific users have an obvious interest in ensuring that material they have posted or communicated is available and/or in reading material imparted by others. Without protection being afforded to intermediaries, there is a threat to end-users' right to freedom of expression because intermediaries may act as censors – to pre-empt the risk of liability and/or the financial risks associated with legal proceedings – or they may be discouraged from entering the market at all.[8]

10. Under article 10 of the Convention, member states are under a positive obligation to safeguard the right to freedom of expression, which includes the right to receive information.[9] This incorporates an obligation to foster a favourable environment for public debate.[10] It is submitted that this includes the digital environment; protections for

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4 ECtHR, *Ahmet Yildirim v. Turkey*, Application No. 3111/10 (18 December 2012), par. 48 and 54.

5 See: Court of Justice of the European Union ('CJEU'), *Kabel Deutschland Vertrieb und Service GmbH & Co. KG* v. *Niedersächsische Landesmedienanstalt für privaten Rundfunk*, Case C-336/07, par. 33.

6 United States Court of Appeals for the Fourth Circuit, *Zeran v. America Online*, 129 F. 3d 327 (12 November 1997), par. 330.

7 Committee of Ministers of the Council of Europe, *Declaration on freedom of communication on the internet*, adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies, principle 6.

8 The CJEU recognised this concern in CJEU, *eDate Advertising GmbH v. XI*, Case C-509/09; see also, Advocate General Szpunar (CJEU), *Tobias McFadden* v. *Sony Music Entertainment Germany GmbH*, Case C-484/14, Opinion (16 March 2016), par. 77.

9 ECtHR, *Palomo Sánchez and Others v. Spain*, Application Nos. 28955/06, 28957/06, 28959/06 and 28964/06 (12 September 2011) (GC), par. 58 to 62; see also: UN Human Rights Committee, *General Comment No. 34*, UN Doc. CCPR/C/GC/34 (12 September 2011), par. 7.

10 ECtHR, *Dink v. Turkey* (2010), application nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, par. 106 and 137.

intermediaries fall to be considered within this context. Having regard to these considerations, states, international organisations and NGOs have recognised that all intermediaries require protection – these safeguards are discussed below.

III. Safeguards to protect intermediaries from liability

11. National laws and international principles on intermediary liability contain a range of safeguards that serve to protect intermediaries from liability for content posted or transmitted by their users. These range from forms of conditional immunity to absolute immunity. This discussion of these safeguards assumes that intermediaries have not edited, manipulated or endorsed the content in relation to which the question of liability arises.

Absolute immunity for intermediaries

12. The United States has provided a strong safeguard for freedom of expression online by providing what is effectively absolute immunity to intermediaries. Section 230(c)(1) of the Communications Decency Act ('section 230') provides that: *"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."*[11] US courts have interpreted this immunity broadly: "*By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service*." [12]

13. Intermediaries are largely insulated from the effect of removal orders in the United States. Doubt remains as to whether injunctive relief is appropriate in defamation actions; even in US jurisdictions where such orders are permitted, removal orders may only be issued following a full adjudication of the merits.[13] Moreover, Section 230 generally results in the dismissal of intermediaries from defamation cases long before final judgment; awareness of illegality is not enough to hold an intermediary responsible for user content.[14] As a result, post-trial removal orders are generally directed at the person who posted the material rather than the intermediary, because United States courts have limited authority to direct orders at non-parties.[15] In the United States, the general position is that only the user that generated liability-creating content, and not the service that hosts that content, can be liable.[16]

14. The policy considerations underpinning section 230 were expounded by the Fourth Circuit in *Zeran v. America Online*: *"Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. […] Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. […] Congress recognized the Internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'"* [17]

Requiring that courts and not intermediaries arbitrate on the lawfulness of material posted by users

15. The Interveners are concerned that this Court's recent jurisprudence suggests that intermediary liability may flow from a failure to remove material that is "clearly unlawful," with the implication being that it is for the intermediary to make such a determination.[18]

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11 United States Congress, Communications Decency Act 1996, 47 U.S.C., section 230.

12 United States Court of Appeals for the Fourth Circuit, *Zeran v. America Online*, 129 F. 3d 327 (12 November 1997), par. 330.

13 See for example: Supreme Court of Texas, *Kinney v. Barnes*, 443 S.W.3d 87 (Tex 2014).

14 United States District Court for the District of Arizona, *Global Royalties Ltd v. Xcentric Ventures LLC,* 544 F. Supp 2d 929 (D. Ariz 2008), p. 933.

15 United States Court of Appeals for the Seventh Circuit, *Blockowitz v. Williams,* 630 F. 3d 563, 568 (7th Cir. 2010).

16 See for example: United States Court of Appeals for the Ninth Circuit, *Fair Housing Council of San Fernando Valley v. Roommates.com*; *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011), p. 987; United States District Court for the Northern District of Georgia, *Hopkins v. Doe #1*, No. 2:11-CV-100-RWS, 2011 WL 5921446 (N.D. Ga. Nov. 28, 2011), p. 2.

17 United States Court of Appeals for the Fourth Circuit, *Zeran v. America Online*, 129 F. 3d 327 (12 November 1997)*;* See also: Supreme Court of California, *Barrett v. Rosenthal*, 146 P. 3d 510 (Cal 2006).

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

16. For the reasons set out below, the Interveners consider that article 10 rights cannot be effectively safeguarded through a requirement that intermediaries assess the lawfulness of material, either through a system of notice and takedown or on the basis of an obligation to identify such content on their own initiative. The Interveners respectfully submit that it is inappropriate to require that intermediaries are the arbiters of what is lawful.

    a) Consideration of whether a given posting or communication is lawful may involve evaluating complex causes of action including libel, privacy, data protection, breach of confidence and copyright. These causes of action encompass a variety of defences and the balancing of competing interests designed to preserve an appropriate equilibrium between articles 8 and 10 of the Convention. Whether such defences are available and the outcomes of these balancing exercises are central to an assessment of the legality of a comment. Further complexity may arise from the fact that material which is lawful in some states in the Council of Europe may be unlawful in others, particularly in the area of defamation and reputational rights. This raises difficulties in an increasingly interconnected digital world in which the publication of, for example, comments on a social media site may have footprints and implications in various jurisdictions. Recognising these complexities, the Committee of Ministers has stated that "*questions about whether certain material is illegal are often complicated and best dealt with by the courts*"[19]

    b) These assessments cannot be considered properly in a perfunctory manner on the basis of incomplete information. As the Committee of Ministers has stated, "*if service providers act too quickly after a complaint is received this might be dangerous from the point of view of freedom of expression and information*."[20] Yet the Court's decision in *Delfi* suggests that any such assessment would have to be immediate in order for an intermediary to escape liability.[21]

    c) Intermediaries may receive multiple notifications of content that is purported to be illegal; it is unsustainable to expect an intermediary to investigate and conduct legal assessments with respect to all such notifications. Placed in such a position, an intermediary is more likely accede to take-down requests, particularly where: (i) the intermediary is a large service provider faced with numerous requests; and (ii) the impugned material represents a small fraction of the information available on or transmitted through its service.

    d) There is a clear risk of intermediaries over-censoring potentially illegal content. Requiring intermediaries to arbitrate on what is lawful will inevitably lead to their erring on the side of caution and removing content and/or foreclosing forums for debate that may represent lawful exercises of article 10 rights.[22] An important consideration in this regard is the aforementioned divergence of interests between intermediaries and their users: an intermediary may have no interest in upholding the article 10 rights of an individual user or group, and particularly not when faced with potential legal liability. Accordingly, intermediaries may act in a way that stifles the freedom of expression.[23]

    e) There is also the risk of intermediaries not being properly informed of the article 10 rights and interests of third party users that are potentially at stake. An intermediary may have no interest in informing the third party, who originally provided the content, that they have

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19 Committee of Ministers of the Council of Europe, *Declaration on freedom of communication on the internet*, adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies, explanatory memorandum; See also: United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression ('UN Special Rapporteur'), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n, UN Doc. A/HRC/17/27 (16 May 2011), par. 42.

20 Committee of Ministers of the Council of Europe, *Declaration on freedom of communication on the internet*, adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies, explanatory memorandum; See also: Advocate General Cruz Villalón (CJEU), *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, Opinion, par. 82.

21 ECtHR, *Delfi v. Estonia*, Application No. 64569/09 (GC) (16 June 2015), par.153

22 This concern has been emphasised by the UN Special Rapporteur: UN Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n, UN Doc. A/HRC/17/27 (16 May 2011), par. 47.

23 See also: UN Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n, UN Doc. A/HRC/17/27 (16 May 2011), par. 47.

received notice for the removal of that third party's content. As a result, the third party would not be provided with the opportunity to be heard before a decision is reached by the intermediary as to whether to remove that content. Furthermore, the third party often has little recourse to appeal or otherwise challenge the removal of content by an intermediary.[24]

f) Smaller intermediaries are unlikely to have the financial resources to obtain ongoing legal advice on such matters. This exacerbates the risks highlighted above.

17. In view of these considerations, there is growing recognition that an order of a court or other competent body compelling the taking down or blocking information should be required (and not complied with) before an intermediary may be held liable for information that it hosts. For the reasons set out below, the Interveners submit that this approach offers the most appropriate protection for the article 10 rights of intermediaries and provides a mechanism through which these rights can be balanced with the article 8 rights of persons affected by material published online.

18. The special mandate holders[25] endorsed this position in their Joint Declaration on Freedom of Expression on the Internet, stating: "*intermediaries […] should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression,*" there should be no liability for content generated by others as long as the intermediary does not *"specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so*."[26] The Committee of Ministers' Declaration on freedom of communication on the internet expresses a similar view.[27] Additionally, the recently-adopted Manila Principles on Intermediary Liability, developed by a global coalition of civil society organisations, provide that: *"[a]ny liability imposed on an intermediary must be proportionate and directly correlated to the intermediary's wrongful behavior in failing to appropriately comply with the content restriction order*."[28]

19. On a national level, the Brazilian Internet Bill of Rights protects internet application providers from liability for third party content except where the provider has failed to comply with a specific court order requiring the removal of the content;[29] such orders may be made following the balancing of constitutional rights to freedom of expression and the right of honour and intimacy. Accordingly, no liability may arise in relation to content of which an application provider has notice but has not been ordered to remove by a court.[30] Following a court order, application providers have 24 hours to take down or block any content.[31] The Internet Bill of Rights makes clear that this protection is provided for the purposes of ensuring freedom of expression and preventing censorship.[32]

20. In India, the Supreme Court has read down similar requirements into legislation governing intermediaries. It held that an intermediary is only to be regarded as having "actual knowledge" of "*a computer resource […] being used to commit the unlawful act" following the receipt of a court order or being notified by a government agency*."[33] Accordingly, the intermediary may only be held liable if it fails to expeditiously remove the material/disable access after being directed to do so by an official body.

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[24] *Id*., par. 42.

[25] The UN Special Rapporteur, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information ('special mandate holders').

[26] Special mandate holders, *Joint Declaration on Freedom of Expression and the internet* (1 June 2011), par. 2a and 2b; See also*:* UN Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n, UN Doc. A/HRC/17/27 (16 May 2011), par. 43.

[27] Committee of Ministers of the Council of Europe, *Declaration on freedom of communication on the internet*, adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies, principle 3.

[28] Electronic Frontier Foundation and others, *Manila Principles for Intermediary Liability*, available at https://www.manilaprinciples.org/, principle 2c.

[29] Presidency of the Republic of Brazil, *Marco Civil da Internet No 12.965*, Brazil (23 April 2014), article 19.

[30] *Id*., article 18.

[31] Superior Tribunal de Justiça*, Special Appeal 1.512.647* (13 May 2015).

[32] Presidency of the Republic of Brazil, *Marco Civil da Internet No 12.965*, Brazil (23 April 2014), article 19.

[33] Supreme Court of India, *Shreya Singhal v. Union of India*, W.P. (Crim.) No 167 of 2012 (24 March 2015), par. 117 and 119.

21. Finally, in a case concerning Google search engine liability, the Argentinian Supreme Court held that, with most forms of content, a judicial decision that the content is unlawful is required before the intermediary could be held liable. The exception to this is what is described as "ostensible infringing content"[34] in relation to which notification by anyone would suffice.[35]

22. The Interveners respectfully endorse the approach of requiring that intermediaries may only be held liable for the content they host/transmit/store if they fail to comply with a court order directing the removal/blocking of that content. As compared to liability following notification by a private party or identification by the intermediary itself, this approach offers the following advantages.

    a) It ensures that the lawfulness of information published is subject to a proper legal assessment, which is important given that conflicting human rights are at stake.

    b) It provides greater legal certainty. An intermediary is not required to assess the adequacy or accuracy of a notice given by a private party.

    c) It ensures that any restriction on the article 10 rights of a service user, who has posted information on an intermediary's platform, are better protected and only restricted where there is an appropriate legal basis. Accordingly, it provides a safeguard against the de facto censorship (caused by the fear of legal risk) by an intermediary and/or erroneous take-downs.

    d) Requiring an aggrieved party to seek a court order may serve to deter unmeritorious or frivolous requests which may be not forestalled through a notice-and-take-down system.

    e) It avoids the imposition of any monitoring or filtering requirements.

    f) As compared to take-down decisions by intermediaries, it injects greater transparency into the decision-making process, thereby reducing the risk that decisions may be made on the basis of, for example, discrimination against particular political or religious groups; or on the basis of pressure from government to supress particular speech.[36]

A requirement for actual knowledge of illegality based on appropriate notice

23. While the Interveners advocate a requirement for non-compliance with a court order before liability may arise, it is submitted that, as a minimum, intermediaries should be required to have actual knowledge on the basis of notification before any liability may arise from a failure to take down or block impugned content.

24. It is of serious concern to the Interveners that, in its two judgments on intermediary liability, the Court appears to have accepted that something short of actual knowledge based on notice may suffice to render an intermediary liable for content posted by users. In *Delfi* the Court stated that, in some circumstances, intermediaries must remove unlawful content without notification from the person concerned or any third party.[37] This may amount to an imposition of strict liability for content posted by a user.

25. The European Union's E-Commerce Directive 2000/31/EC, adopted to ensure the free movement of information society services, exempts so-called "internet society services" ('ISS') from liability when engaged in caching, hosting or acting as a mere conduit of information online. Exemption from liability is conditional upon the ISS having neither knowledge nor control over the information that is transmitted or stored[38] as well as meeting activity-specific conditions. The provisions in the national law of Member States giving effect

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[34] This includes child pornography, data that might be useful to commit a crime, that might endanger people's lives, that promotes genocide, racism or any other discriminatory or violent action, that might trump crime investigations, that are a serious offense to honor, obviously faked pictures, or any serious invasion to privacy, publishing images that because of its nature are intended to be private, even if not sexual.

[35] Supreme Court of Argentina, *R.M.B c/Google y ot. s/ Ds y Ps,* Fallo R.522.XLIX, (29 October 2014).

[36] UN Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expressio*n, UN Doc. A/HRC/17/27 (16 May 2011), para. 42.

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

[38] European Parliament and the Council of the European Union, *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*, OJ L 178 (17July 2000), Recital 42.

to the European Union's E-Commerce Directive 2000/31/EC can be relied on in civil actions between private parties, including actions in defamation.[39]

26. The most relevant provision in relation to the hosting of service users' material is article 14, which requires that member states do not impose liability on an ISS if 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; or upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*

27. Given that the Directive proscribes member states from imposing monitoring requirements, such knowledge is only likely to be obtained through the receipt of notice.[40] However, the Court of Justice of the European Union has emphasised that notification of allegedly illegal information/activities does not automatically connote actual knowledge (and thus preclude an intermediary from benefiting from an exemption from liability) because notification: *"may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality."*[41]

28. The Interveners submit that if, contrary to these submissions, actual knowledge followed by a failure to take down is sufficient to render an intermediary liable, this is the appropriate approach to notice. Notice should not automatically trigger a requirement to take down material on pain of liability; there is a need to consider all factors relevant to actual knowledge.

No obligation to monitor

29. The Interveners are concerned that this Court's decision in *Delfi* implies that intermediaries should conduct ongoing monitoring because they will be fixed with constructive knowledge of and thus liability for users' comments if they fail to prevent their dissemination.[42] This is evident from the Court's indication that intermediaries may be required to remove clearly unlawful material without notice being given – this obligation could only be met through constant monitoring. Similarly, in *MTE* the Court appears to have considered that the applicants' approach to moderation and filtering was relevant to the imposition of liability violating its article 10 rights[43] – these are forms of monitoring.

30. It is submitted that this reasoning is at odds with international and member state best practice on intermediary liability. In *MTE,* the Court cautioned against "*requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet*" on the part of intermediaries.[44] This remark was made in response to the domestic court's criticism of an intermediary allowing unfiltered comments; it is respectfully submitted that this reasoning should be extended to any form of monitoring.

31. The Committee of Ministers has stated that member states should not impose on service providers a general obligation to monitor (or seek facts or circumstances indicating illegal activity relating to) content on the internet to which they give access, transmit or store.[45] The Committee emphasised that the reason for this is to prevent potential "curbing of the freedom of expression" that may result therefrom.[46] These sentiments were echoed by the

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39 CJEU, *Pappasavvas v. O Filelefttheros Dimosia Etairia Ltd*, Case C‑291/13 (11 September 2014), par. 50 and 57.

40 European Parliament and the Council of the European Union, *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*, OJ L 178 (17July 2000), Article 15.

41 CJEU, *L'Oreal v. eBay*, Case C-234/09 (12 July 2011), par. 122.

42 ECtHR, *Delfi v. Estonia*, Application No. 64569/09 (GC) (16 June 2015), par.157 to 159; See also Dissenting Judgment of Judges Sajo and Tsotoria, par. 1 and par. 33 to 38.

43 ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Application No. 22947/13 (2 February 2016), par. 81.

44 *Id*., par. 82.

45 Committee of Ministers of the Council of Europe, *Declaration on freedom of communication on the internet*, adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies, principle 6.

46 *Id*., explanatory memorandum.

special mandate holders in their Joint Declaration on Freedom of Expression on the Internet[47] as well as in the Manila Principles on Intermediary Liability.[48]

32. In the European Union, article 15(1) of the E-Commerce Directive 2000/31/EC precludes member states from imposing a general obligation on service providers to monitor or actively seek facts or circumstances indicating illegal activity with respect to information that they transmit or store for the purposes of serving as a mere conduit, caching or hosting.

IV. Jurisdictional thresholds for the protection of freedom of expression

33. This case raises important questions regarding the appropriate jurisdictional thresholds that should apply to defamation claims in order to ensure that article 10 rights of intermediaries and their users are protected. Jurisdictional thresholds are especially relevant to intermediaries because they operate across many countries and the use of their services may create "legal footprints" in several jurisdictions.[49] To the extent that intermediaries may be regarded as the publishers of information alleged to be defamatory, this exposes them to legal proceedings. There is a clear risk that would-be claimants may seek to bring claims against them in one or more jurisdictions in which protections for intermediaries are lower due to the increased likelihood of obtaining a favourable judgment. This general phenomenon has been referred to as libel tourism or forum shopping.[50]

34. Exposure to the risk of litigation and the associated costs may have a chilling effect on the exercise of article 10 rights online because intermediaries may pre-emptively remove content or cease to operate altogether. This is particularly true of smaller intermediaries, which may have limited capacity or means to engage in legal proceedings. The Interveners submit that this is an important reason for the Court to ensure that the Convention provides robust, pan-Council of Europe area protection for intermediaries. The Interveners' submissions on this issue focus on jurisdictional thresholds in two interrelated areas:

    a) Jurisdictional thresholds preventing the courts from hearing defamation claims that are frivolous or where there has been no substantial harm to a person's reputation.

    b) Jurisdictional thresholds preventing persons who do not have a sufficient connection with a given jurisdiction from bringing defamation claims in its courts.

Harm threshold

35. A requirement that the publication of defamatory material must have a sufficiently serious impact upon a would-be claimant's reputation in the jurisdiction is an important safeguard of article 10 rights. The starting point is the jurisprudence of this Court, which has made it clear that a minimum threshold of seriousness is required in order for the publication of material to engage article 8 on the basis of harm to reputation. As the Grand Chamber stated in *Axel Springer v. Germany*: *"In order for Article 8 to come into play […] an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life."* [51]

36. In their 2011 Joint Declaration on Freedom of Expression on the Internet, the Special Mandate Holders emphasised the importance of jurisdictional thresholds in protecting freedom of expression: *"Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm."*[52]

37. At the national level, in *Jameel v. Dow Jones & Co Inc*, the English Court of Appeal held: *"[W]here a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom*

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47 Special mandate holders, *Joint Declaration on Freedom of Expression and the internet* (1 June 2011), par. 2a.

48 *Id*., par. 1d.

49 See also: Committee of Ministers of the Council of Europe, *Recommendation CM/Rec (2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet*, adopted on 1 April 2015 at the 1224th meeting of the Ministers' Deputies, par. 4.

50 Committee of Ministers of the Council of Europe, *Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression*, adopted on 4 July 2012 at the 1147th meeting of the Ministers' Deputies, par. 5.

51 ECtHR, *Axel Springer AG v. Germany*, Application No. 39954/08 (7 February 2012) (GC), par. 83; See also: ECtHR, *Bedat v. Switzerland*, Application No. 56925/08 (29 March 2016) (GC), par. 72.

52 Special mandate holders, *Joint Declaration on Freedom of Expression and the internet* (1 June 2011), par. 4a.

of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process."[53] The Court of Appeal went on to hold: *"We do not consider that […] Article [6] requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial."*[54]

38. In *Bleyer v. Google*, the Supreme Court of New South Wales in Australia recognised that the domestic courts have the power, in an appropriate cases, *"to stay or dismiss an action on the grounds that the resources of the court and the parties that will have to be expended to determine the claim are out of all proportion to the interest at stake."*[55] Thus recognising the power of the courts to stay or dismiss actions for abuse of process where the costs of determining the claim are disproportionate to the interest in vindicating the alleged harm to reputation.

39. More recently, in *CPA Australia Limited v. New Zealand Institute of Chartered Accountants*, Dobson J of the Wellington High Court in New Zealand endorsed a minimum threshold of seriousness for defamation claims. Dobson J opined that such a threshold could benefit both claimants and defendants to such claims. Firstly, he noted that *"a seriousness threshold would provide some objective considerations helping potential claimants decide whether to sue, in circumstances where they are likely to be highly incensed and consider themselves seriously slighted when relying on an otherwise subjective assessment."*[56] Secondly, he went on to observe that applying a threshold of seriousness would also *"be one way to protect against unjustified infringements of the right to freedom of expression."*[57]

40. The Interveners respectfully agree with the approach adopted in *Jameel v. Dow Jones & Co Inc* and submit that it is entirely consistent with the approach that has been taken by this Court (set out above).

Connection-to-the-jurisdiction threshold

41. Alongside jurisdictional thresholds relating to the seriousness of harm to reputation, it is submitted that limitations should also be placed on the courts' ability to exercise jurisdiction over defamation claims relating to persons who are not sufficiently linked to the forum state. In this regard, the special mandate holders have stated that, in addition to the requirement that a claimant show that she/he has suffered substantial harm in the jurisdiction, the courts' *"[j]urisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State."*[58]

42. In England and Wales, section 9(2) of the Defamation Act 2013[59] provides that the English courts do not have jurisdiction to hear a defamation claim brought by persons who are not domiciled in the European Union (or a Lugano Convention state), *"unless […] satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement."*[60] Such a limitation serves to prevent a would-be claimant from selecting favourable (and potentially multiple) jurisdictions to bring defamation claims.

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53 Court of Appeal of England and Wales, *Jameel v. Dow Jones & Co Inc*, [2005] EWCA Civ 75, par. 40. This approach has now been given statutory recognition in section 1 of the UK Defamation Act 2013, which came into force in January 2014. It provides: *"A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. […] harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."*

54 *Id*., par. 71.

55 Supreme Court of New South Wales, *Bleyer v. Google*, [2014] NSWSC 897 (12 August 2014), par. 62.

56 Wellington High Court (New Zealand), *CPA Australia Limited v. New Zealand Institute of Chartered Accountants*, [2015] NZHC 1854 (6 August 2015), par. 114.

57 *Id*., par. 115.

58 Special mandate holders, *Joint Declaration on Freedom of Expression and the internet* (1 June 2011), par. 4a.

59 The Explanatory Notes record that *"this section aims to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction)"*.

60 The compatibility of this provision with article 6 of the Convention was upheld by the High Court of England and Wales in *Ahuja v. Politika Novine I Magazini* [2015] EWHC 3380 (QB) (23 November 2015), par. 39 to 40.

43. US courts have adopted a similar approach by declining jurisdiction where limited publication would make it unreasonable for a claimant to expect that the "brunt of the injury" from a defamatory statement would be felt in the forum state.[61]

V. Conclusions

44. This case offers the Court an opportunity to strengthen protections afforded by the Convention to the article 10 rights of intermediaries and their users. The Interveners consider that the Court's nascent jurisprudence on intermediary liability fails to provide adequate protection for these rights. They are concerned the principles set out in *Delfi* and *MTE* may have a chilling effect on the freedom of expression and the right to information online. As it stands, Convention case law has placed Europe behind other parts of the world, including three of the world's largest democracies, in protecting article 10 rights online.

45. For the reasons expounded above, the Court is respectfully urged to adopt the following principles, which are derived from best practices in national legislation, the views of the Committee of Ministers and the special mandate holders:

    a) Intermediaries should not be the arbiters of the lawfulness of content posted, stored or transferred by the users of their services.

    b) Assuming that they have not contributed to/manipulated content, intermediaries should not be liable for content posted, stored or transferred using their services unless and until they have failed to comply with an order of a court or other competent body to remove or block specific content.

    c) Regardless of whether the Court accepts this position, intermediaries should in no circumstances be liable for content unless it has been brought to their attention in such a way that the intermediary can be deemed to have actual knowledge of the illegality of that content.

    d) A requirement to monitor content on an ongoing basis is incompatible with article 10 rights.

46. To the extent that the Court considers that the adoption of these principles would represent a departure from the Court's case law that could only be undertaken by the Grand Chamber, the Interveners respectfully invite the Court to consider relinquishing this case.

47. Finally, the Interveners further urge the Court to embrace the position set out on jurisdictional thresholds as part of its existing line of jurisprudence on the need for reputational harm to be sufficiently serious before article 8 is engaged.

LORNA SKINNER

Matrix Chambers

[61] See for example: United States Court of Appeals for the Second Circuit, *Chaiken v. VV Publishing Corp*, 119 F.3d 1018 (2nd Cir. 1997), p. 1029.

Annex : Descriptions of the Applicants

Media Legal Defence Initiative

The Media Legal Defence Initiative is a non-governmental organisation that provides legal support and helps defend the rights of journalists, bloggers and independent media across the world. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, as well as local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom. To those ends, MLDI maintains close links with bar associations and media freedom organisations in Asia, Africa, Europe and Latin America. MLDI is unique as it is the only organisation that focuses on providing legal defence to journalists and independent media on a global scale. As part of its mandate, MLDI engages in strategic litigation to protect and promote media freedom. MLDI has previously intervened in many cases before the European Court of Human Rights including *Sanoma v. the Netherlands*, *Mosley v. UK, MGN v. UK*, *Axel Springer v. Germany (No.2)*, *Haldimann v. Switzerland, Couderc and Hachette Filipacchi Associés v. France,* and *Delfi v. Estonia*.

Media Law Resource Center

The Media Law Resource Center ("MLRC") is a non-profit membership association for content providers in all media, and for their defence lawyers, providing a wide range of resources on policy issues relating to media law. These include newsletters and analyses of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights. Today MLRC is supported by about 125 media company members, including leading publishers, broadcasters, and cable programmers, internet operations, and media and professional trade associations in America and around the world and 200 law firms specializing in media law also in America, Europe and globally.

Association of American Publishers

The Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of the right to freedom of expression.

Dutch Association of Journalists

The Dutch Association of Journalists ("*Nederlandse Vereniging van Journalisten*", or "*NVJ*"), represents the material and immaterial interests of its 7500 member journalists in the Netherlands. It is an independent, non-political, non-governmental association striving for press freedom and good working conditions for professional journalists.

European Publishers Council

The European Publishers Council is a high level group of Chairmen and CEOs of leading European media corporations. Members are the most senior representatives of European newspaper and magazine publishers. Their companies are involved in multimedia markets spanning newspaper, magazine, book, journal, internet, online database publishers, radio and TV broadcasting.

Greenpeace International

Greenpeace International is a coordinating and enabling body for the network of independent Greenpeace organisations, which acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace. Greenpeace has been campaigning against environmental degradation since 1971, when a small boat of volunteers and journalists sailed into Amchitka, an island in the east of Alaska where the US Government was conducting underground nuclear tests. Today, the organisation includes 26 independent national and regional organisations around the world, sustained by almost 3 million supporters. Greenpeace uses research, lobbying, and quiet diplomacy to pursue its goals, as well as public campaigns and high profile, non-violent conflict to raise the level and quality of public debate. The internet has created important new possibilities for the public to contribute to Greenpeace campaigns, including by submitting user-generated content.

Lorna Woods, University of Essex

Lorna Woods is Professor of Internet Law at the University of Essex. Formerly a practising solicitor in the field of media and communications regulation, she has since written widely in the field of media law from the domestic and EU perspective, and co-authored a leading textbook in EU Law (published by OUP). She has significant experience as country expert in EU Commission studies on media and Internet regulation and has given evidence to Parliament on a number of occasions.

NRC Media

NRC is the publisher of *NRC Handelsblad*, a national, independent Dutch newspaper that prides itself on providing news and opinions from the Netherlands and abroad. NRC is also the publisher of the morning paper *nrc.next* and the website *nrc.nl*.

Persgroep Nederland

Persgroep Nederland is a leading media organisation, active in the field of news, opinion, culture, inspiration, work and leisure. It publishes daily newspapers AD, de Volkskrant, Trouw and Het Parool in print and online. It also publishes several leading websites including *NationaleVacaturebank.nl*, *Intermediair.nl*, *Tweakers.net* and *Autotrack.nl*.

World Association of Newspapers and News Publishers

The World Association of Newspapers and News Publishers (WAN-IFRA) is based in Paris, France, and Frankfurt, Germany, with subsidiaries in Mexico City, Singapore and India. It represents more than 18,000 publications, 15,000 online sites and over 3,000 companies in more than 120 countries. In 2016, WAN-IFRA launched its Public Affairs and Media Policy department, with an aim to voicing the opinion of news media across the various platforms where the debates on regulation and policy take place. The case at hand falls into the scope of our work, which this year is particularly focused on the constraints to the press originating in judicial decisions.