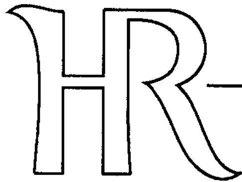

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DELFI V. ESTONIA
(Application No. 64569/09)

WRITTEN COMMENTS

BY

HELSINKI FOUNDATION FOR HUMAN RIGHTS

29 APRIL 2011

I. INTRODUCTION

1. These written comments are submitted by the Helsinki Foundation for Human Rights (hereinafter referred to as **"HFHR"**) with its seat in Warsaw, Poland at Zgoda Str. 11, pursuant to a leave granted to HFHR by the President of the Chamber of the European Court of Human Rights (the **"Court"**) under Rule 44 § 2 of the Rules of the Court.

2. These comments are limited only to the points of law and, in particular, to the interpretation of the Convention requirements, as well as Polish practice in respect to the liability of intermediary service providers (hereinafter referred as "ISP") for the so-called "user generated content" on the Internet . These submissions do not include any comments on the facts or merits of the case of *Delfi v. Estonia*, but address only the general principles involved in the case.

II. INTEREST OF THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

3. The HFHR is a non-governmental organization established in 1989 by members of the Helsinki Committee in Poland, in order to promote human rights and rule of law in Poland as well as to contribute to the development of an open society in Poland. One of the activities of the HFHR includes legal actions undertaken in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals. The aim of such submissions is to influence the process of changing laws and practices that we find contrary to human rights. Since November 2008 the HFHR has run a project devoted to freedom of expression in Polish media. In the scope of the project we analyze regulations relating to all sorts of media and are involve in numerous strategic cases, mostly relating to Internet regulations.

4. Since its establishment, the HFHR has been promoting the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the **"Convention"**) among the judiciary and executive administration. One of the fields that HFHR is particularly interested in are human rights aspects on the Internet both in national and ECHR jurisprudence (we filed an *amicus curiae* with the ECHR concerning K.U. v. Finland, Application no. 2872/02). Since 2008 the HFHR runs a program dealing specifically with the freedom of expression in the media called 'The Observatory of Media Freedom in Poland'. The main goal of the Program is to develop the legal standards related to freedom of expression in both traditional media and on the Internet. Therefore, the case of *Delfi v. Estonia* is crucially important for the HFHR. We hope that our

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written comments may be of some assistance to the European Court of Human Rights when deciding on the following case dealing with the problem of liability of ISPs for "user generated content on the Internet".

5. The case became even more important because of the recent report produced by Freedom House[1]. Estonia ranks among the most wired and technologically advanced countries in the world. The internet is regularly accessed by two-thirds of Estonia's population, or approximately 852,000 people; 58% of households have internet access, and virtually all of them (90%) have a broadband connection. Moreover, "limits on internet content and communication in Estonia are among the lowest in the world. Nevertheless, due in part to Estonia's thorough privacy laws, there are some instances of content removal". Most of these cases are related to civil court orders concerning cases where inappropriate comments or comments unrelated to the posted article were made. Based on the above information the Freedom House rated Estonian Internet as the most free of all 15 countries examined.

6. The Polish law on ISPs' liability, as far as the ISPs' obligations regarding the 'notice-and-take-down-procedure' are concerned, was created as a result of the implementation of the EU 'E-commerce Directive'.[2] Therefore it includes similar provisions to Estonian law, described in the communication. Still, the current regulations leave the courts with a significant margin of appreciation and cause many dilemmas as to the interpretation.

7. The problem raised in the application may be compared to a bill-post on which people stick their advertisements, comments or graffiti. Who should be responsible for the content of people's comments or posts – the owner of the bill-post or the person sticking comments on it? In the first case, the responsibility is easy to prove, as the responsibility to remove eventually disrespectful comments lies with the person owning the bill-post. However, managing and removing comments from several hundred bill-posts may be time consuming, costly or simply unfeasible. On the other hand, making the person who posted the comment responsible might be a burden for state authorities. Large amount of comments, posts and expanded anonymity may cause problems with an investigation. The third option might be delegation by the State authorities of their powers to an independent regulation authority, which would control the content of comments[3].

8. The cases which have been observed in Poland concerning ISP liability have been recognized by the courts on the basis of the Press Law or (rarely) on the E-services Law. In that respect, we will first analyze the potential responsibility within Press regulations and the attempts to regulate the Internet on the basis of the press laws. Secondly, we will refer to deficiencies of the Electronic Commerce Directive from a Polish perspective. Thirdly, we will describe the amendment proposals of the Polish government to the E- services law which is now discussed in Poland.

III. PRESS LAW REGULATIONS

9. The case of *DELFI against Estonia* reflects a very problematic issue in the Polish legal system. As a part of the Observatory's program, we have dealt with a number of cases related to the **liability of the ISPs** for so-called 'user-generated content' on the Internet (i.e. entries on blogs or Internet

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[1] The report was published in April 2011 and is available at:
http://www.freedomhouse.org/template.cfm?page=383&report=79

[2] Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[3] The different types of Internet regulation regimes are discussed in Meryem Marzouki, *European Internet Policies Between Regulation and Governance: Issues with Content Regulation* in Wolfgang Benedek, Veronika Bauer and Matthias C. Kettemann, *Internet Governance and the Information Society: Global Perspective and European Dimension*, p. 127-140.

forums, as well as the reader's personal comments published in relation to specific articles). One of the problems we have come across is that Polish courts do not always apply the E-services Law to such cases, but attempt to regulate the liability for Internet content based on the Press Law[4].

10. Many complaints introduced before the Polish courts because of Internet comments treat Internet news portals as 'press materials' according to art. 7 par. 2 pt 4 of the Press Law[5]. According to this article, the press is "any periodic publications, which do not constitute a closed, uniform entity, appearing no less frequently than once a year, having a regular title or name, current number and date, and in particular: journals, periodicals, news services, regular fax transmissions, bulletins, radio and television programs and film chronicles; as press are considered also any means of mass media, existing or appearing as a result of technical progress, including broadcasting stations and public television and radio address systems that broadcast publications periodically as print, picture, sound or using any other broadcasting technique; press includes also groups of people and particular persons engaged in the journalistic activity".

11. Another example of using Press Law in the Internet sphere is the obligation to register some web pages. According to recent Supreme Court jurisprudence,[6] for reasons of responsibility for content, Internet web pages that conform to the broad definition of the press[7] (periodic publications, which are published at least once a year, having a title or a name, a registration number and date, particularly dailies and weeklies, but also news services, TV bulletins and radio auditions or other material transmitted in press, by sound or vision) should be registered with registration courts. Running a general information web-page that provides information through sound and vision (e.g. a video-blog) makes it a press, requiring registration, with all duties and obligations bound therewith, such as e.g. the responsibility of the editor-in-chief for the published press material. Failure to accomplish this obligation may cause a criminal responsibility. However, the registration courts are inconsistent in their jurisprudence and we have seen also denials of web page registration[8].

12. The HFHR experience shows that the Polish case-law is inconsistent with respect to this matter. In addition, there are cases where the lack of stable, reliable jurisprudence is used both by private persons and public authorities as a tool to limit the freedom of expression on the Internet. The attempts to limit comments are usually based on criminal defamation (art. 212 of the Criminal Code[9]), or civil defamation (personal rights protection – reputation protection, art. 23-24 of the Civil Code[10]) combined with Press Law regulations. The "victim" of a comment needs to identify the person responsible for the offence. The identification of the author of a comment is often difficult. In such a situation the "victim" may address a request to the ISP to reveal the personal

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[4] Polish Press Law from 26 January 1984 (Official Journal 1984 No 5, item 24, as amended).

[5] "(M)aterialem prasowym jest każdy opublikowany lub przekazany do opublikowania w prasie tekst albo obraz o charakterze informacyjnym, publicystycznym, dokumentalnym lub innym, niezależnie od środków przekazu, rodzaju, formy, przeznaczenia czy autorstwa".

[6] Decision of the Supreme Court from 15 December 2011 in the case of Leszek Szymczak – GazetaBytowska.pl (case no. VI Ka 202/09).

[7] Art. 7 par. 2 pt 4 of the Press Law: „prasa oznacza publikacje periodyczne, które nie tworzą zamkniętej, jednorodnej całości, ukazujące się nie rzadziej niż raz do roku, opatrzone stałym tytułem albo nazwą, numerem bieżącym i datą, a w szczególności: dzienniki i czasopisma, serwisy agencyjne, stałe przekazy teleksowe, biuletyny, programy radiowe i telewizyjne oraz kroniki filmowe; prasą są także wszelkie istniejące i powstające w wyniku postępu technicznego środki masowego przekazywania, w tym także rozgłośnie oraz tele - i radiowęzły zakładowe, upowszechniające publikacje periodyczne za pomocą druku, wizji, fonii lub innej techniki rozpowszechniania; prasa obejmuje również zespoły ludzi i poszczególne osoby zajmujące się działalnością dziennikarską".

[8] According to the amendments to the Press Law (draft proposal of the Ministry of Culture from 8 December 2011) registration of Internet portals would be mandatory and would relate to the protection guaranteed by the Press Law and would impose obligations resulting from the Law.

[9] Polish Criminal Code from 6 June 1997 (Official journal No. 88, item 553, as amended).

[10] Polish Civil Code from 18 May 1964 (Official journal from 1964, No. 16, Item 93, as amended).

data of the author of the "post". However, the ISP has no obligation to reveal the author or the IP address. The ISP is legally bound to reveal the data only on the request of police or prosecution authorities[11].

13. Within the works of the "Observatory of Media Freedom in Poland" of the Helsinki Foundation for Human Rights, we have dealt with cases in which intermediaries' liability was excluded. In the first case, mayor of Kalwaria Zebrzydowska v. T. Baluś (case no. I C 1532/09), a local mayor felt offended by comments (e.g. "moron", "stupid goose") posted under articles of Tomasz Baluś, published on his local news portal. The mayor brought a civil complaint for personal rights protection against T. Baluś. On 11 March 2010, the Kraków Regional Court (*Sąd Okręgowy*) dismissed the mayor's complaint. The court found that the T. Baluś Internet news portal could not be considered as a press. If it would be considered as press than, the editor-in-chief (administrator of the web page) would be held responsible. An Internet portal may not be considered as a press. The court also analyzed the nature of the comments and found that even if they were provocative or offensive, the language used on the Internet is different and may not be compared to the printed press. The court highlighted that a single person being the web page owner, administrator and editor may not control all content. Making the ISP responsible for comments would put him/her in the position of a judge deciding whether the content may or may not hinder personal rights. An ISP, however, has no competences to decide whether a post is in violation of personal rights or not, in breach of law or not.

14. Another case litigated within the "Observatory of Media Freedom in Poland" concerned a local entrepreneur who lodged a complaint for personal rights protection because of a movie posted on Paweł Wodniak's information portal, www.faktyoswiecim.pl (case no. I C 1050/09). In one of the videos an interviewed person refers to the unethical businesses of the entrepreneur. The plaintiff relied on art. 23-24 of the Civil Code and on art. 13 of the Press Law (responsibility for publication of information about the commitment of a crime by a given person). On 15 June 2010, the Kraków Regional Court found that given the nature of the material – an instant reportage from a demonstration – the ISP could not in any way control and erase comments of recorded persons. This case was different from the facts described in the DELFI case, as the ISP generated the content himself. However, the court's findings might be also applied in the case of user-generated content.

15. In the case of GazetaBytowska.pl (case no. II K 367/08) a complaint based on art. 49a of the Press Law[12] was introduced against the web page administrator. The Regional Court in Słupsk (*Sąd Rejonowy*) stated that an ISP may not be attributed automatically with the status of an editor-in-chief as defined by the Press Law. Therefore, an ISP may not be held responsible for comments because they may not be considered as press material, as defined in art. 7 par. 2 pt 7 of the Press Law. The court found that the ISP may not be found guilty because of art. 14 of the E-services Law[13].

16. Polish courts did not make any distinctions between the character of the material published on the web page. While assessing the responsibility of the ISP it should be scrutinized, particularly, whether he/she had any input in the content. The French courts[14] found that "editing" is when an ISP is choosing the materials to be published. The limitation of the size of files or its thematic segregation may not be considered as editing. The fact that the ISP is selling advertising space

[11] See Article 217 § 1 of Polish Criminal Procedure Code from 6 June 1997 (Official journal No. 88, item 553, as amended).

[12] This regulation stipulates that the editor in chief might be sentence for a fine or restriction of liberty if the material published constitutes an offence. In the given case one of the comments posted on GazetaBytowska.pl was a "call for a lynch".

[13] Ustawa o świadczeniu usług drogą elektroniczną from 18 July 2002 (Official Journal from 2002 no. 144, item 1204) implementing the Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[14] Judgment of the District Court in Paris from 15 April 2008 in the case of Lafesse v. Dailymotion.

does not make him an editor. At the EU level, the distinction between the editor and the ISP and, therefore, the possibility to be protected by Article 14 of the E-Commerce Directive was not made clear. In the case *Google v. Louis Vuitton,*[15] the Court of Justice of the EU clarified that "in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores".

IV. E-SERVICES LAW AND THE RESPONSIBILITY OF ADMINISTRATORS

17. The responsibility of an ISP is regulated by the E-services Law based on the E-commerce Directive. Both the Polish Law and the EU Directive distinguishes the responsibility of the ISP according to the activity which he/she conducts. The responsibility is different as for the "editing" part of the portal (ISP acting as content provider) and different as for the forum (hosting provider). This distinction remains the same when the comments posted by readers constitute a reply to an article posted by the editor. The management of a social forum, where the content is created by the authors of comments, is called hosting (art. 14 of the E-services Law and the Directive[16]). The content of such a forum, as was mentioned in the chapter before, is regulated and limited by the provisions of the Civil Code, Criminal Code and the Press Law. However, in case of hosting, the above-mentioned acts are applicable only if the protection under the E-services law is excluded. According to art. 14 par. 1 of the Law, an ISP may not be held responsible for the content produced by another person, when he/she is not aware of its illegality. Moreover, according to art. 14 par. 2 and 3, the ISP may not be held responsible by the client for removing comments that he has been notified about by a State authority or upon receiving a "credible message". According to art. 15, the ISP is not bound to exercise the preventive control and check the stored data or the posted comments.

18. Notice and takedown (NTD) procedure is a peculiar kind of Internet content self-regulatory measure. The EU E-Commerce Directive and the Polish regulation provide a limited and notice-based liability with takedown procedures for illegal content. The major advantage of the NTD procedure is that it reduces the high costs of litigation by providing a quick way to address consumers' complaints. In theory it consists of a scheme that sets forth that the parties hosting content agree to remove content in case of a legitimate notice by the consumer, without having to prove the legality of the content before a court of law. However, it seems that this is exactly the potential shortcoming: ISPs have to determine whether or not a complaint is legitimate[17].

19. The E-Commerce Directive and the Polish E-Services Law do not contain a standard NTD procedure, even though a framework is established for self-regulation. The relevant reference to the scheme can be found in Articles 14.3, 21.2 and Article 46 of the Directive, which stipulates: "In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does

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[15] European Court of Justice Judgment Joined cases C-236/08, C-237/08, C-238/08 Google France and Google (Intellectual property), par. 114.

[16] Where ISPs provide hosting services, under Article 14 they are protected from liability, in two ways:

[a] the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity is apparent; or

[b] the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disrupt access of the information.

[17] Christian Ahlert, Chris Marsden and Chester Yung, *How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation.* http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf

not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information." The key concept that remains undefined is the "actual knowledge".

20. The lack of clear concepts in the NTD procedure, both at the EU and national level, causes several problems. ISPs are not able to know whether they are properly informed, whether the complaint received is correct or not and whether they can face liability claims by content editors when their comments were removed. Further, it is only established *ex post* that the content was neither illegal nor harmful. Consequently there is a potential shortcoming in the protection of freedom of expression and may even enhance unfair competition, where companies engage in a form of commercial war through advancing bad faith claims against competing ISPs. Both the EU Directive and the Polish E-services Law do not specify what information should be included in the NTD. Therefore, the ISP is bound to act in an uncertain legal environment. The current regulations give a stronger incentive to take down material, rather to leave it, as the benefits for the ISP are higher to block access to content of an alleged illegal nature than to maintain it and to investigate a complaint thoroughly and to act only afterwards[18].

21. The concept of "credible message," present in the E-services Law, raises serious concerns, as it is not legally defined. Moreover, no jurisprudence has been established in this respect yet. The entity requesting the takedown should be easily identifiable. Moreover, the request should enable the clear identification of illicit comments or part of the comments. The request would need to be accompanied by a brief justification.[19] Because of the lack of precise rules ISPs often introduce their own statutory provisions, on the basis of which they have the possibility to limit access to data, independently of whether they received a "credible message" or not and independently of whether the message was sent by a machine or by a "victim" acting in good faith.

22. Also the approaches of EU Member States are different. Some of them consider that the notification is only valid when it is made by authorities, other consider that formalized proceedings of notification is sufficient, and the last group of States relies on the national standards on possessed knowledge[20]. In Austrian law a special clause has been introduced that stipulates that the illegal nature of a comment should be clear for a "non-lawyer"[21].

23. The ability to remove posts and comments by ISPs before they reach the public might be perceived as a prior restraint or censorship, in which one is prevented, in advance, from communicating certain material, rather than made answerable afterwards. Prior restraint is particularly restrictive because it prevents the forbidden material from being heard or distributed at all. Other restrictions on expression provide sanctions only after the offending material has been communicated, such as suits for slander or libel. In the well established case law of the Court, all prior restraints should be treated with precaution and should be accompanied by legal restrictions, which would enable speedy decision making. If the case is different, it would be contrary to article 10 of the European Convention on Human Rights (*Observer and Guardian v. United Kingdom*, application no. 13585/88 and *Sunday Times v. United Kingdom* (no. 2), application no. 13166/87, judgment of 26 November 1991 r., Series A. 216 and 217, par. 60).

24. More loopholes might be observed in applying the NTD procedure in the EU and Poland. It seems that there are no effective safeguards to protect ISPs from acting on wrongful takedown.

[18] Please see the OSCE Preliminary Report, *Study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in the OSCE participating States*, 26 November 2010.

[19] G. Pacek, *Wybrane zagadnienia związane z odpowiedzialnością dostawców usług hostingowych*, available on: http://cbke.prawo.uni.wroc.pl/files/ebiuletyn/Wybrane_zagadnienia_zwiazane_z_odpowiedzialnoscia.pdf

[20] T. Verbiest, G. Spindler, G.M. Riccio, A. Van der Perr, *Study on the liability of Internet Intermediaries*, 12 of November 2007. http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf

[21] Please see http://wwww.internet4jurists.at/entscheidungen/olgi_114_05i.htm

Moreover, no rules have been introduced for responses involving prioritization for copyright infringement and other claims of differing degrees of seriousness. It is also worth considering what type of liability is and should be imposed on a sender of unfounded notices to ISPs which lead to a takedown. Moreover, what is often highlighted in practice, the procedure does not refer to the protection of copyrights. The ISP has no liability *vis a vis* them. The commentators have no possibility to protest against the takedown of a post, no mechanism of warning that a comment would be deleted have been established.

25. These inconsistencies in NTD proceedings and the jurisprudence lead to legal uncertainty among the intermediaries and may result in their 'self-censorship' due to a fear of being held liable. This "chilling effect" could be clearly observed during the last self-government elections in Poland in November 2010. During this period, the HFHR lawyers acting within the Observatory were approached by many ISPs reporting 'threats' made by local politicians to start legal action against the intermediaries because of critical comments appearing on several forums and websites as a part of the public debate before the elections[22]. The HFHR came across cases where the special character of Internet communication and the provisions concerning the 'notice-and-take-down-procedure' were not taken into consideration at all. As a consequence, the several courts held a number of ISPs responsible for the infringements undertaken by the users of their services. In the case A. Jezior v. the mayor of Ryglice (case no. I Ns 162/10) a local politician held a blog containing posts on the current situation in local politics. Before the elections, under one of his articles, he detected an offensive comment about the local mayor. A. Jezior deleted the comment. The comment reappeared several times and was deleted instantly by the blogger. The blogger's son blocked the commentators. However, after couple of days the comment reappeared and was taken down only after a notice from the mayor's friend. Despite the deletion of the comment the mayor of Ryglice brought a civil complaint for personal protection against the blogger in an election procedure. On 15 November 2011 the Regional Court in Tarnów (*Sąd Okręgowy*) found that the mayor's reputation was harmed. The court failed to take into consideration the provisions of art. 14 of the E-services Law. It stated that A. Jezior asked his son to control the content, and therefore it should be assumed that he was aware that the unlawful content may be potentially published by the blog users which, according to the court, obliged the blogger to run a constant control over the comments appearing with a reference to his articles. He had a technical tool for the preventive control of comments. Moreover, the court found that editing a blog that enables the posting of offensive comments is illegal, especially in the context of the election. The owner of the blog was held responsible for the comments posted in his blog. The appellate court upheld the first instance judgment and reasoning.

26. Another example of the misuse of the E-services Law is the case of 'Academic Forum' *(Froum Akademickie)* monthly v. X (case no. I ACa 544/10). In 2004, the Forum published an article about an academic from Opole ("X."). Under the article some negative comments were posted, which were immediately taken down by the ISP moderator. After a while, a new offensive comment was posted under the article, the post was removed the same day. X. lodged a civil complaint to defend his reputation. The Regional Court in Lublin (*Sąd Okręgowy*) dismissed the complaint on the basis of art. 14 and 15 of the E-services Law. The Court stated that the ISP is not bound to monitor all content of his service and that his responsibility in that respect should be excluded. The Lublin Appellate Court (*Sąd Apelacyjny*) quashed the first instance judgment and gave reasons to X. The Appellate Court stated that the Forum contained the terms and conditions of use in which users were informed that all offensive comments would be deleted. Moreover, the Forum employed a moderator, which was obliged to react immediately to any offensive comments and in the given case he failed to. The court ordered ISP to publish official apologies and to pay just satisfaction of 5,000 PLN (approx. 1,200 EUR).

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[22] See our 'Guide for the ISPs on how to resist the attacks of the candidates for local elections' (in Polish), http://www.obserwatorium.org/index.php?option=com_content&view=article&id=3336:jak-broni-si-przed-atakami-kandydatow-w-wyborach-samorzdowych-poradnik-dla-administratorow-portali-&catid=47:aktualnosciprog&Itemid=66

27. The HFHR supports the current regime in the Directive under Article 15 that ISP are not required to actively monitor user activity to identify possible violations. It is inappropriate and unfeasible for the ISP to monitor millions or even more messages, posts, and comments generated daily. The only possibility would be to create or to develop a potentially costly system of monitoring, which, however, due to the wide range of possible materials, would still need to be reviewed by ISP moderators or subjected to mass removals of information, which would violate the freedom of expression. However, the courts' jurisprudence in cases concerning ISP responsibilities remains inconsistent. The judgment in the DELFI case may be of assistance for Polish courts in finding the right balance between privacy and freedom of expression protection and encourage judges to address human rights issues with regard to Internet content regulation.

V. E-SERVICES LAW AMENDMENTS

28. The HFHR considers the resolution of this case important due to the fact that Polish government has recently undertaken steps to reform the ISPs liability regime in Poland and other Member States.[23] Hopefully, the ECHR's guidelines, expressed in the future judgment, shall affect this process. The government in Poland has been trying to amend the e-services law for the last few years. So far, these attempts have not been successful. The recent draft of the new e-services regulations contains certain improvements, but still is not fully satisfactory.

29. The new draft law introduces provisions allowing ISPs' to avoid liability if they comply with certain conditions, known from American law as the so-called „Notice and takedown procedure". First of all, the new project precisely enumerates the elements of a „credible message". It will have to include the full name, address and other data of the sender, a precise indication of the unlawful content, as well as a thorough justification. This provision will minimalize the risk of 'manifestly ill-founded' messages. Secondly, the draft law stipulates the time limits for the removal of an unlawful content. At the moment unlawful content has to be removed 'promptly' after receiving the 'credible message' (or acknowledging the infringement otherwise), which has raised many interpretational disputes. According to the new draft law, the ISP will have to remove the content within 3 days.

30. The new law will improve the protection of the rights of the author posting the unlawful content. At the moment, the authors do not even have to be informed by the ISPs' if they decide to remove their entries, and they have no grounds to 'defend' it if they believe it is lawful. The project supports the obligation for the ISP to inform the author and to enable him to express his 'objection' within 3 days. Furthermore, the ISP will be obliged to transfer the 'objection' to the person whose rights were allegedly infringed and to inform them that the content will reappear on the web page unless they take 'appropriate action to defend their rights'.

31. Unfortunately, the new draft law does not explicitly define the 'appropriate action', leaving it unresolved whether filing a complaint with a court would be necessary or perhaps some other measures shall be sufficient. For example it could be arbitration or some temporary measures which would help to resolve the dispute sooner. Please note that in Poland civil cases may last for a few years, therefore the content blocked throughout that time may lose its value according to the 'perishable commodity' theory. Such a regulation may "discriminate" authors publishing in the Internet as opposed to those who publish news in traditional media. In order to block the publication or distribution of a book, press material or movie the complainant must refer to measures for claim safeguarding (which usually is a lengthy procedure before the courts). In order

[23] In April 2011 the government published the new project of e-services law (Ustawa o świadczeniu usług drogą elektroniczną) implementing the E-commerce directive. Another important project in this matter is the new Press Law which includes regulations on the on-line press. http://www.bip.mswia.gov.pl/portal/bip/218/19543/

to block an Internet comment an non-defined "action" is sufficient and there is no court control over it. Moreover, the ISP is not bound to verify the message received.

32. As highlighted by a non-governmental organization Article 19[24] there is a growing trend in Europe (and in Poland) that intermediaries are being required to intervene on behalf of the governments or corporations to block access to or remove information without any due process of law. In most cases, the removal decision of an ISP is not taken on the basis of an investigation on merits of the case. Therefore, the burden of protection of freedom of expression which lies with the States is being transmitted to private entities. Such a practice is contrary to the positive obligation of the State, resulting from article 10 of the European Convention on Human Rights, to take action where a threat to freedom of expression comes from a private source[25]. The removal of a comment by an ISP should only be possible after a proper legal process. This would require processing before an independent tribunal, such as the court. Some expedited proceedings could be established in that respect.

33. While European regulation is based on a limited liability regime, it needs to be mentioned that a contrasting approach has been adopted in the United States. The US has limited the liability of companies acting as hosts to cases where they are actively involved in creating the Internet content. Par. 230 of the Communications Decency Act states "No provider (...) of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"[26]. The ISP should not be held liable for the content produced by users any more than the postal service should be held responsible for delivering the mail or telephone companies for the content of calls made by their clients.

VI. CONCLUSIONS

34. Taking into consideration our practical experience with ISPs' liability cases in Poland, we believe that the problem of *on-line* content regulation is of fundamental significance to the freedom of expression on the Internet. On the other hand, we acknowledge the need to protect privacy and personal rights on the web. The procedures enabling protection of privacy and reputation should not hinder and limit the freedom of expression. Therefore, there is a need to establish clear rules of liability exemption at the national level. The Court's judgment in the Delfi case may have a significant impact on the national practice in Poland and other EU Member States.

35. The legal regulations and lack of clear jurisprudence provoke wrong interpretation by courts (as in the Delfi case). The applicant company was acting according to the E-Commerce Directive and the Estonian Law, nevertheless it was held responsible. The judgment of the Court would play a leading interpretational role to the national courts, which should interpret the existing regulation in conformity with their aim – the protection and limitation of ISP's responsibility. The judgment in the present case might constitute a clarification of the responsibilities of ISPs in the scope of a preventive monitoring of comments, even if the law does not require the preventive control. The HFHR also believe that the issue would be soon clarified by the Polish Supreme Court in the case of "Academic Forum" (*Forum Akademickie*) which is planning to appeal against the sentences delivered by the lower courts.

36. The access to Internet is a fundamental prerequisite to the freedom of expression and to receive and impart information regardless of frontiers. Regulations and practice concerning E-commerce should respect Internet neutrality and the fundamental rights and freedoms guaranteed in International human rights documents, particularly the freedom of expression. Therefore, any

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[24] Article 19 Response to EU Consultation on E-Commerce Directive (November 2010), available on www.article19.org.

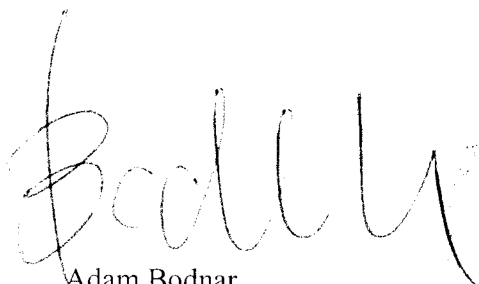
[25] As regards the positive obligations of the State concept see also K.U. v. Finland (Application no. 2872/02, Judgement from 2 December 2008, Fourth Section)

[26] 47 U.S.C. par. 230 (c).

attempts (legal or through jurisprudence) to regulate the Internet by shifting the liability burden to the ISP would inevitably infringe the provisions of art. 10 of the European Convention on Human Rights.

The written comments were prepared by HFHR lawyers Dominika Bychawska-Siniarska and Dorota Głowacka acting within the 'Observatory of Media Freedom in Poland ' programme.

On behalf of the Helsinki Foundation for Human Rights,



Adam Bodnar
Secretary of the Board