IN THE EUROPEAN COURT OF HUMAN RIGHTS **APP NO. 31955/11**
BETWEEN:-

JEZIOR **Applicant**

- v -

POLAND **Respondent Government**

THIRD-PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19

INTRODUCTION

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It takes its name from Article 19 of the Universal Declaration on Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.

2. ARTICLE 19 welcomes the opportunity to intervene in this case, by the leave of the President of the Court from 28 January 2013 pursuant to Rule 44(3) of the Rules of Court. These submissions do not address the facts or merits of the applicant's case.

3. In ARTICLE 19's view, the core issue raised by the present case is the compatibility of notice-and-takedown procedures with Article 10 of the Convention. As with *Delfi AS v Estonia* (no. 64569/09), ARTICLE 19 believes that this case presents the Court with an important opportunity to address the rules governing intermediary liability, which have a major impact on freedom of expression online. In these submissions, ARTICLE 19 addresses the following: (i) general considerations about blogs and liability online; (ii) relevant international standards and comparative law material on notice and takedown procedures; (iii) the proper approach to liability of bloggers for third-party comments consistent with the right to freedom of expression; and (iv) factors that should be taken into account in online defamation cases.

I. GENERAL CONSIDERATIONS ABOUT BLOGS AND LIABILITY ONLINE

4. It is commonplace to observe that recent technological advances have made the worldwide dissemination of information on a near-instantaneous basis easier than ever before. In particular, the advent of the Internet has had two important consequences. First, as the UN Special Rapporteur on Freedom of Expression has noted, "*the way in which information is transmitted largely depends on intermediaries, or private corporations which provide services and platforms that facilitate online communication or transactions between third parties*".[1] Secondly, it has made it possible for anyone with access to a computer to publish his or her opinions and ideas via a blog or social media network to the entire world.

5. One of the key features of blogs is that they allow anyone (bloggers) to self-publish online *without prior editing* by an intermediary such as a newspaper editor. Moreover, blogs are usually posted *without pre-publication legal advice*, as would be the case for most major newspapers or TV stations. For this reason, private individuals have become much more amenable to liability on the basis of defamation law or other speech-related laws than in the past.

6. Another feature of blogs, which has made liability a much more practical concern for most bloggers, is the fact that they normally allow readers to post comments. The question therefore arises whether bloggers should be held liable for comments posted by their users, sometimes referred to as user-generated content (UGC). In the European Union (EU), including Poland, this question has been addressed in the E-commerce Directive (ECD),[2] which sets out a general framework for the liability of intermediaries in relation to all types of content. Later in these submissions, ARTICLE 19 argues that the framework put in place under the ECD is seriously flawed and fails to comply with the requirements of Article 10 of the Convention.

II. INTERNATIONAL & COMPARATIVE LAW STANDARDS ON INTERMEDIARY LIABILITY AND NOTICE AND TAKEDOWN PROCEDURES

International standards

7. Given the vast amount of information that is available on the Internet, and that could potentially be unlawful - e.g. copyright law, defamation laws, hate speech laws, criminal laws for the protection of children against child pornography, etc - intermediaries have had a strong interest in seeking immunity from liability. Whilst in a large number of countries, this immunity has been granted, it is generally not absolute. In the EU, for example, the ECD grants different levels of immunity depending on the type of activity at issue. In particular, Article 12 of the ECD provides almost complete immunity to intermediaries who merely provide technical access to the Internet such as telecommunications service providers or Internet service providers (ISPs). By contrast, under Article 14 of the ECD, hosts may lose their immunity if they fail to act 'expeditiously' to remove or disable access to 'illegal' information upon obtaining actual knowledge of the same. This provision effectively provides the basis for what is known as a 'notice-and-takedown' regime. This is especially relevant here as bloggers may be regarded as providing hosting services, i.e. the storage of information, in relation to third-party comments.

8. Notice-and-takedown procedures have been sharply criticized by international institutions as falling below international standards of freedom of expression for several reasons. First, they often *lack a clear legal basis*. For example, a recent OSCE report on Freedom of Expression on the Internet highlights that:[3]

> Liability provisions for service providers are not always clear and complex notice and takedown provisions exist for content removal from the Internet within a number of participating States. Approximately 30 participating States have laws based on the EU E-Commerce Directive. **However, the EU Directive provisions rather than aligning state level policies, created differences in interpretation during the national implementation process.** These differences emerged once the provisions were applied by the national courts. Aware of such issues, the European Commission launched a consultation during 2010 on the interpretation of the intermediary liability provisions. A review report is expected during 2011.

9. Secondly, these procedures frequently *fall well below the standards of fairness* that could be expected of even the most basic summary procedure. Intermediaries, especially hosts, are effectively given an *incentive* to remove content promptly on the basis of allegations made by a private party or public body without a judicial determination of the question whether the content at issue is unlawful. Moreover, the maker of the statement at issue is usually not given an opportunity to consider the complaint.[4]

10. Thirdly, since intermediaries tend to err on the side of caution and take down material which may be perfectly legitimate and lawful, notice-and-takedown procedures have an overall *chilling effect* on freedom of expression. As the UN Special Rapporteur on freedom of expression recently noted:[5]

> 42. [W]hile a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, **they are inclined to err on the side of safety by overcensoring potentially illegal content**. Lack of transparency in the intermediaries' decision-making process also often obscures discriminatory practices or political pressure affecting the companies' decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.

11. In dealing with the question of intermediary liability, the four special rapporteurs on freedom of expression thus recommended in their 2011 Joint Declaration on Freedom of Expression and the Internet that: [6]

    (i) No one should be liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information;

    (ii) Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online;

(iii) ISPs and other intermediaries should only be required to take down content following a court order, contrary to the practice of notice and takedown.

12. Similarly, the UN Special Rapporteur on freedom of expression has stated "*no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf*".[7]He has further recommended that in order to avoid infringing the right to freedom of expression and the right to privacy, intermediaries should:[8]

> [O]nly implement restrictions to these rights **after judicial intervention**; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved. (Our emphasis)

13. Whilst the above standards refer to 'intermediaries', ARTICLE 19 reiterates that they apply in principle with equal force to bloggers. Moreover, in our view, the chilling effect of notice-and-takedown rules on bloggers is likely to be especially acute since the vast majority of bloggers are unlikely to have the financial means necessary to challenge a defamatory claim made, for example, by a prominent politician or a copyright infringement claim brought by a Hollywood studio.

European standards and the implementation of the E-commerce Directive

14. The Council of Europe has yet to adopt any specific standards in relation to notice-and-takedown procedures although it has generally called for respect of due process rights in relation to de-indexing and filtering by search engines and self-regulatory mechanisms put in place by social media platforms.[9] At the same time, several studies commissioned by the European Commission (EC) on the implementation of the ECD provide ample evidence that the provisions concerning intermediary liability, especially notice-and-takedown procedures, lack the level of clarity required under Article 10 of the Convention.[10]

15. This level of regulatory uncertainty regarding the application of the ECD, among other things, led the EC to conduct a consultation on the impact of the ECD between April and August 2011.[11] The outcome of the consultation process was the publication of a Communication Document published on 11 January 2012.[12] In considering the issues and obstacles to the success of the ECD, the document concluded that '*a wide variety of stakeholders face a high degree of regulatory uncertainty about the application of the intermediary liability regime of the E- Commerce Directive*.'

16. In particular, the Communication Document identified the following areas of uncertainty: **(i)** the material conditions for benefiting from the 'safe harbour' provisions in Articles 12 to 14, in particular the lack of clarity around the interpretation of 'actual knowledge' and 'expeditious' removal of 'illegal' information; **(ii)** notice and takedown procedures, especially the fact that in practice a '*multitude of often very different procedures'* exist, creating confusion for both intermediaries and victims of illegal content as to which one applies in what way; **(iii)** who may qualify as hosting provider.

17. ***Lack of clarity of 'actual knowledge'****:* the EC noted that this term had been transposed, defined or interpreted in widely different ways in various national legislations and by the courts.[13] Essentially, the EC concluded that actual knowledge could be obtained in one of three different ways: *(a)* court order; *(b)* notice ranging from an 'informal' notice from a user, such as a red flag under a video to formal notification by a public authority; *(c)* absence of notice but 'general awareness' that the site hosts illegal content.[14]

18. In ARTICLE 19's view, in order to achieve the highest level of legal certainty and compliance with Article 10, actual knowledge should only be obtained by a court order since actual knowledge must relate to 'illicit' information. The question whether the information at issue is lawful can in principle only be answered by a court or other independent adjudicatory body. For example, simply because a host is put on notice that a defamatory statement has been posted by a third party does not mean that the statement is unlawful since a number of defences could be applicable. [15] The idea that a host or blogger should feel compelled to remove material on the basis of mere allegations is deeply problematic.[16] As one of the abovementioned studies highlighted, *'simple notification would invite anyone to inform providers of contents or activities, regardless of reliability, of the quality, and of the correctness of the notification'.*[17] The study concluded that the probability of abuse is too high.

19. Even if actual knowledge could be obtained by notification, it is submitted that it should contain at least some minimum formal requirements (which may vary depending on the type of content at issue) such as: name and contact details of the sender of the notice; details of the location of the content at issue; and details of the unlawful nature of the information of allegedly unlawful content. In cases of defamation, for example, a complainant could be asked if he is aware of any potential defences to his claim.

20. ***Lack of clarity of 'expeditiously'****:* similarly, there has been some uncertainty in relation to what is meant by 'expeditiously'. According to the EC, by and large, Member States have not clarified the term 'expeditious' when transposing the ECD.[18] Nonetheless, specific timeframes have been adopted in some countries for specific types of illegal content.[19] In ARTICLE 19's view, concerns over the lack of clarity of 'expeditiously' should not be exaggerated. It is a fairly common legal term whose meaning is generally developed by judicial interpretation. Moreover, it is important that the term 'expeditiously' be applied sufficiently flexibly to meet the circumstances of the host at issue, e.g. to the extent that a blogger qualifies as a host for the purposes of third-party comments (see paragraph 22 further below), the situation of an individual blogger blogging on an irregular basis in his or her spare time should be treated differently from that of private companies with more resources.

21. ***Lack of clarity of the law underlying notice and takedown procedures****:* Article 14 of the ECD generally forms the basis for notice-and-takedown procedures by referring to notions such as 'actual knowledge' or 'expeditious' removal of content. However, most Member States did not attempt to flesh out the details of that procedure when transposing the ECD, for example by introducing a right of counter notice, or minimum requirements for a notice as suggested above, or a remedy against abusive notices. The rationale behind the absence of a detailed procedure under the ECD was also to encourage self-regulation and co-regulation mechanisms.[20] However, this has contributed to creating an incredibly complex regulatory environment which can make it extremely difficult for Internet users to challenge wrongful removal of their content.[21]

22. ***Inconsistent interpretation of who qualifies as hosting provider:*** first, it should be noted that the ECD in principle applies to information society services provided for 'remuneration'. It is therefore questionable that 'free' blogs qualify as an information society service under the ECD, which in itself is problematic since bloggers may not benefit from liability exemptions at all.[22] Secondly, to the extent that the ECD is applicable, the case-law regarding the question whether blogs, discussion fora and social networks should benefit from the liability exemption as hosts under Article 14 of the Directive is widely regarded as fragmented.[23] In general, this question has been determined by reference to the defendant's level of editorial control.[24] For instance, in *Kaschke v. Gray Hilton*, the High Court of England and Wales refused to apply the liability exemption for hosting to a blog owner, even for those parts posted by third parties, on the ground that the defendant's involvement in the pages exceeded mere storage as he exercised some editorial control on parts of the website.[25]

23. In this regard, the relationship between the ECD and Press Laws has also caused a certain degree of uncertainty. For example, in countries such as France,[26] the Netherlands[27] and Poland,[28] the courts have favoured the application of traditional publisher's liability rules over the special regime of intermediary liability under the ECD to decide defamation cases, which seems to have created an even greater degree of confusion.[29]

24. Following the publication of the Communication Document, the EC launched an initiative on notice-and-action procedures, which is expected to provide greater clarity in relation to the issues identified above.[30] A further consultation on the initiative was initiated on 4 June 2012. However, at the time of writing, the results of the consultation had not been made public. It remains to be seen what course of action the Commission will decide to take in this area.

Comparative law – beyond Europe

25. The flaws in the European approach to notice and takedown procedures become even more apparent when examining the US regulatory regime in this area. This is important since the US are well-known for providing strong protection to freedom of expression. In the US, liability for third-party generated content is governed by: (i) section 230 of the Communication Decency Act (CDA) 1996 which provides almost absolute immunity to Internet intermediaries, including bloggers, for a variety of liability claims; and (ii) the Digital Millenium Copyright Act (DMCA) 1998, which lays down a specific notice-and-takedown procedure in copyright infringement cases

26. In particular, section 230 of the CDA provides "*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.*" It is also worth noting that, although section 230 provides almost an absolute shield against liability for third-party content, US case law has generally developed so that intermediaries may be held liable if they moderate or otherwise monitor content.[31] In other words, they are encouraged to take no action at all.

27. Section 230 also applies to bloggers. According to leading digital rights group Electronic Frontier Foundation (EFF), section 230 has been interpreted by the courts so that bloggers remain in principle immune from liability as long as they exercise the usual prerogative of publishers to edit the material they publish. Liability may, however, be

incurred, if the blogger goes beyond editing to become an 'information content provider'.[32]

28. By contrast to section 230 CDA, the DMCA lays down a specific notice and takedown procedure for copyright infringement complaints.[33] Under section 512 of the DMCA, intermediaries are required to remove allegedly infringing content expeditiously upon receipt of a compliant takedown notice. They must then take reasonable steps to inform the alleged infringer that the material has been removed. The alleged infringer is then given a set period of time within which to make a counter claim, which must be forwarded to the complainant by the intermediary. If a counter-claim is filed, the intermediary must reinstate the allegedly infringing material if the complainant has not filed a lawsuit against the alleged infringer within 10-14 days. In addition, section 512 f) imposes liability on those who demand the removal of information knowing that it is not unlawful.

29. Although the above provisions provide a greater degree of protection to freedom of expression than is common in Europe, it should be borne in mind that they also provide a far greater degree of legal certainty. While ARTICLE 19 has reservations about aspects of the notice and takedown procedures under the DCMA,[34] section 512 nonetheless provides greater protection to intermediaries and their users than the ECD, for example by providing a right of counter notice and a system of accountability for those making accusations of violations. ARTICLE 19 would respectfully invite the Court to bear these elements in mind when examining the present cases and future cases involving notice-and-takedown procedures.

III. THE PROPER APPROACH TO THE LIABILITY OF BLOGGERS FOR THIRD-PARTY COMMENTS

The ideal approach: no liability for third-party content

30. In light of the above international standards, ARTICLE 19 submits that bloggers should in principle be immune from liability for third-party content in circumstances where they have not been involved in modifying the content at issue. In particular, bloggers should only be required to remove content following a court order that the material at issue is unlawful.

31. Equally, ARTICLE 19 emphasises that the fact that bloggers should only be required to remove material following a court order does not prevent them from removing material in accordance with their Terms & Conditions. Indeed, it is important to remember that it is always for each individual blogger to decide for himself or herself the content they wish to publish, includes whether to allow readers or users of the site to post comments. The decision of a blogger to enable third party comments on their blog merely reflects their willingness to engage in online conversation. While desirable, it is not an obligation and is not recognised as such under international law.

32. Just as bloggers are free to decide for themselves whether to allow comments or not, bloggers are entitled to moderate any comments on their blog as they see fit, including removing any comments they dislike or which fall short of the terms and conditions, or community standards they have decided to impose. Similarly, they are free to require users to provide them with an email address in order to post comments such as in the

Jezior case.[35] With the caveat that we would generally recommend that bloggers follow international standards of freedom of expression when considering the removal of content, we consider that immunity from liability coupled with the liberty to set their own rules is generally consistent with a higher level of protection for freedom of expression online than notice and takedown mechanisms.

How notice-and-takedown provisions should be interpreted to comply with Article 10

33. At the same time, ARTICLE 19 recognises that domestic courts in Europe are required to apply existing legislation, including notice-and-takedown provisions. To that extent, ARTICLE 19 submits that such provisions should be applied in a way that is maximally compatible with Article 10 of the Convention. In particular, we draw attention to the fact that, insofar as they qualify as hosts, bloggers are in principle *not required* to take down material upon notice. They only lose immunity from liability. In other words, they become more likely to be found liable for failure to act upon receipt of a complaint if a legal action is taken against them.

34. This has two main consequences: *(i) a fortiori,* bloggers should not be held liable when they take all reasonable steps to remove content upon notice, such as in the *Jezior* case; *(ii)* bloggers should not automatically be held liable simply because they decided not to remove a comment upon notice. This is especially so given the lack of clarity surrounding the question of what 'actual knowledge' means. As a bare minimum, the courts should be slow to hold a blogger liable for refusing to remove a comment in circumstances where the removal request was generally unclear and in particular *(a)* failed to identify the location of the content at issue; or *(b)* failed to clearly identify the unlawful nature of the content at issue.

35. Similarly, as noted above, we submit that the term 'expeditiously' should be applied sufficiently flexibly to meet the circumstances of the host at issue. It would be deeply unfair to impose liability on a blogger for failure to act in circumstances where, for instance, the blog is no longer regularly maintained or the blogger's email address has changed and he may therefore not have a received a complaint or may have received it at later date.

The existence of moderation systems should not be used to impose liability

36. ARTICLE 19 further submits that, as a general rule, it would be disproportionate to hold bloggers liable for comments posted by others on the basis that they voluntarily operate a moderation system. Moderation systems can serve useful purposes in certain circumstances. For example, post-moderation may be appropriate if anonymous Internet users start abusing others online. However, if bloggers are fixed with knowledge simply on the ground that they operate such systems – rather than because they specifically intervened in the comments - this is likely to discourage them both from: (i) having a moderation system in place despite their other benefits; or (ii) even enabling comments in the first place, something which would undoubtedly diminish freedom of expression online more generally.

37. Furthermore, ARTICLE 19 notes that under Article 15 of the ECD, Member States are prohibited from imposing a general obligation on providers to monitor their services. Even if the ECD may not be directly applicable to bloggers for the reasons outlined above, we consider that any ruling which would have the effect of requiring bloggers to monitor user-generated content would be both contrary to the spirit of EU law and

constitute a breach of the Convention since it would be tantamount to endorsing a form of private censorship.

IV. DEFAMATION LAW ONLINE

38. As noted above, the advent of the Internet has meant that ordinary individuals, including bloggers, are now at much greater risk of being held liable for their comments than previously (because it was highly unlikely that their comments would be published). The majority of claims against ordinary Internet users usually involve defamation or copyright infringement. In this regard, the *Jezior* case is a paradigmatic example of the growing number of online defamation cases.

39. ARTICLE 19 submits that cases involving online defamation call for a different approach than traditional defamation cases, e.g those involving traditional print and broadcast media. In particular, the Court should bear in mind that one of the key characteristics of defamation online is that the vast majority of allegations made online are often too trivial, or not sufficiently serious, and the extent of publication is too minimal, to have caused any substantial damage to the reputation of the complainant. Accordingly, domestic courts should be required to apply a high threshold in allowing defamation actions to be brought in relation to online publications. In particular, complainants should be required to prove *substantial harm* to their reputation. It is highly unlikely, for instance, that substantial damage could be established in circumstances where an allegedly defamatory comment is rapidly buried by a large number of other comments on a thread.[36] Moreover, the impact of a comment on a blog is likely to be qualitatively different from that of a national newspaper or broadcast.[37]

40. We submit that the same approach should apply in cases involving the liability of bloggers as publishers under defamation law. In particular, bloggers should not be held liable in circumstances where they fail to remove comments of a defamatory but trivial nature. It should also not be forgotten that bloggers are highly unlikely to have sufficient training or the means to obtain legal advice that would help them determine whether the content at issue would be found unlawful by the courts.[38] In this regard, ARTICLE 19 also draws attention to the Court's decision in *Handyside v. the UK*, 7 December 1976, § 49 *in fine*, Series A no. 24, in which the Court stressed that the scope of 'duties and responsibilities' under Article 10 of the Convention depends on the person's situation and their technical means.

41. Furthermore, since most 'defamation' online is trivial in nature, a self-regulatory right of reply is likely to be the most proportionate way to deal with defamatory content in the vast majority of cases. Indeed, new Web 2.0 types of applications such as blogs have made it possible to respond to online derogatory comments almost immediately at no cost. For this reason, the UN Special Rapporteur on freedom of expression has stressed that the sanctions available for offline defamation are highly likely to be both unnecessary and disproportionate.[39]

42. If, despite the availability of a right of reply - or indeed the removal of allegedly defamatory material - an application is made to court and the allegations are not sufficiently serious, ARTICLE 19 submits that the Court should pay close attention to the question whether the application should have been struck out as an abuse of process in the domestic courts.[40]

CONCLUSION

43. With the advent of the Internet, the risk of liability is particularly high as millions of Internet users post comments online on a daily basis which others may consider to be defamatory or otherwise unlawful. Equally, bloggers may be liable for hosting or making available content owned by third parties, e.g. allegedly copyrighted material or defamatory statements, under notice-and-takedown regimes.

44. In common with the European Commission's own assessment, ARTICLE 19 submits that notice-and-takedown provisions fail to provide the level of legal certainty and procedural fairness required under Article 10 ECHR.

45. In ARTICLE 19's view, bloggers should not be considered responsible for third-party comments as publishers in circumstances where they have not specifically intervened in the content at issue. This is equally true when bloggers put in place a moderation system. To hold otherwise would have a serious chilling effect on freedom of expression.

46. Nonetheless, insofar as courts are required to apply notice-and-takedown provisions, we submit that as a minimum, the courts should be slow to hold bloggers liable for third-party comments in circumstances where the complainant has (a) failed to identify the location of the content at issue; or *(b)* failed to clearly identify the unlawful nature of the content at issue. Moreover, we consider that the term 'expeditiously' should be applied sufficiently flexibly to meet the circumstances of the particular blogger at issue.

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ARTICLE 19
18 March 2013

[1] See UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, A/HRC/17/27, 16/05/2011, available at: http://bit.ly/ViQKVF.
[2] 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, the 'E-commerce directive' in the EU.
[3] OSCE report, Freedom of Expression and the Internet, July 2011, p. 30, available at http://www.osce.org/fom/80723
[4] This is at least how the ECD has been applied in practice in several Member States, see ARTICLE 19, Response to EU consultation on the E-Commerce Directive, November 2010, available at: http://www.article19.org/data/files/pdfs/submissions/response-to-eu-consultation.pdf
[5] See UN Special Rapporteur on Freedom of Expression report, *op.cit.*, para. 42.
[6] See Joint Declaration on Freedom of Expression and the Internet, June 2011, available at http://www.osce.org/fom/78309
[7] UN Special Rapporteur on FOE report, *op.cit*, para. 43.
[8] *Ibid.* para 47.
[9] Recommendation CM/Rec(2012)3 on the protection of human rights with regards to search engines, available here: https://wcd.coe.int/ViewDoc.jsp?id=1929429&Site=CM and Recommendation CM/Rec (2012)4 on the protection of human rights with regards to social networks; available at https://wcd.coe.int/ViewDoc.jsp?id=1929453&Site=CM; European Commissioner for Human Rights report on Social Media and Human Rights, February 2012; available at https://wcd.coe.int/ViewDoc.jsp?id=1904319
[10] A number of studies on the impact of the ECD are available at http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm; see also Conseil superieur de la propriete litteraire et artistique,

Commission specialisee sur les prestataires de l'Internet, Rapport , 15 Septembre 2008, p. 38-73, available at http://ec.europa.eu/internal_market/e-commerce/docs/expert/20080915_report_en.pdf; DLA Piper, *EU Study on the Legal Analysis of a Single Market for the Information Society*, Chapter 6 'Liability of Online Intermediaries', 2009, available upon request.

[11] A Summary of Consultation Responses is available at http://bit.ly/Zjrik3.

[12] Communication on e-commerce and other online services, SEC (2011) 1641 Final, available at http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf

[13] *Ibid*, p. 32 ff.

[14] *Ibid.*

[15] See e.g. *Davison v Habeeb & Others*, [2011] EWHC 3031, para 43, in which the High Court of England & Wales noted the difficulty for an intermediary to determine what is and what is not legally objectionable, and observed that in some instances it may well be that the allegedly defamatory material is true or otherwise properly publishable, its continued publication may well serve a thoroughly beneficial purpose; available at http://www.5rb.com/docs/Davison%20v%20Habeeb.pdf

[16] A possible exception to this is the reference to the concept of 'manifest illegality', although ARTICLE 19 has strong reservations about this notion, which seems overly broad and vague to us. For more information about the concept of 'manifest illegality', see Communication, *op.cit.*.

[17] See Study commissioned by the EC on the Liability of Internet Intermediaries, 12 November 2007, p. 6; available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf

[18] See Communication, *op.cit*, p. 38.

[19] *Ibid.*, see also Annex 2 to the Communication.

[20] *Ibid*, p. 40 ff.

[21] *Ibid.* p. 45.

[22] DLA Piper study, *op.cit.*, p. 35.

[23] Communication, *op.cit.*, p. 29-30.

[24] However, the courts' reliance on the notion of 'editor' in deciding whether web 2.0 services should be considered as hosts has been criticized. In particular, it seems to have created some confusion as to which sets of liability rules should be applied, the ECD exemptions or the general rules of tortuous liability (droit commun): See Conseil superieur de la propriete litteraire et artistique's report, *op.cit.*, p. 53 ff.

[25] High Court of England and Wales, [2010] EWHC 690 (QB); available at: http://www.bailii.org/ew/cases/EWHC/QB/2010/690.html

[26] See Study commissioned by the EC, *op.cit.*, p.ge 47.

[27] See DLA Piper's study, *op.cit.*, p 27.

[28] *Ibid.* See also Helsinki Foundation for Human Rights third-party intervention submissions before this Court in *Delfi AS v Estonia,* available at: http://www.hfhr.org.pl/obserwatorium/images/Delfi_amicus.pdf

[29] See DLA Piper's study, *op.cit.*, p. 27.

[30] For more information on the notice-and-action initiative, see: http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm

[31] See DLA Piper's study, *op.cit.*, p. 33.

[32] See EFF, Section 230 Protections, available at https://www.eff.org/issues/bloggers/legal/liability/230.

[33] See DLA Piper study, *op. cit.,* page 29.

[34] Ibid, pp. 29-31.

[35] Requiring users to provide an email address to the owner of a blog in order to post comments is fairly standard practice. It should be distinguished from real-name registration systems, which the owner of a blog or platform is equally entitled to impose, but which are much more problematic for freedom of expression and the right to privacy: see UN Special Rapporteur's report cited above at n 1, paras 55 and 84.

[36] See for example, *Tamiz v Google*, ([2013] EWCA Civ 68).

[37] For a similar analogy in relation to tweets, see Guardian, The long arm of online libel laws, 7 November 2011, available at http://www.guardian.co.uk/media-tech-law/the-long-arm-of-online-libel-laws

[38] Distinguishing between facts and comment is notoriously difficult in libel actions: see *Waterson v Lloyd* [2013] EWCA Civ 136 and case comment; available at http://inforrm.wordpress.com/2013/03/02/case-law-waterson-v-lloyd-honest-comment-and-political-discussion-edward-craven/

[39] See UN Special Rapporteur on Freedom of Expression, cited above at n 1, para. 28.

[40] In the UK, defendants increasingly seek to strike out trivial claims as an abuse of process with some success: see Ashley Hurst, Internet Libel Part I: What makes it Different?, 26 November 2012, available at http://inforrm.wordpress.com/2012/11/26/internet-libel-part-1-what-makes-it-different-ashley-hurst/; see also *Tamiz v Google, op.cit.*, and *Rana v Google Australia Ltd* ([2013] FCA 60) with related case comment, available at http://inforrm.wordpress.com/2013/03/13/case-law-rana-v-google-australia-google-continues-to-resist-claims-for-publication-gervase-de-wilde/