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Rethinking the notion of hosting in the aftermath of Delfi: Shifting from liability to responsibility?

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ABSTRACT

Liability of Internet intermediaries for a third-party content is a complex topic, especially with regards to the storage of illegal or harmful postings offered by portals. The E-Commerce Directive offered a liberal framework for handling such cases, provided that a hosting service provider has not played an active role in content management. Being passive turned out to be the key precondition for immunity under safe harbour provisions. Yet, after the Delfi ruling the legal landscape has changed radically. Although the judgment of the Strasbourg tribunal has been dismissed in some jurisdictions as an error or one-off case, the truth is that it took into account *acquis communautaire* and imposed liability on the news portal, which followed the guidelines of *Google France* and *eBay* rulings. Given the lack of predictability of the current legal framework, the aim of this contribution is to offer a deep-dive into the notion of hosting from a technical perspective in order to better understand why Articles 14–15 of the E-Commerce Directive may require a re-examination. It is also submitted that portals and other online service providers relying on a broad construction of safe harbours should be entitled to Good Samaritan protection akin to section 230 of the American Communications Decency Act in order not to hold them liable for being active in fighting hate speech and other forms of illegal and harmful conduct.

1. Introduction

Online content is read more often and circulates longer than traditional media content, yet it is subject to less restrictive rules. Internet portals, file sharing sites and social media continue to publish and make available news and comment not only 24 h a day but also 365 days a year. What is even more relevant from the legal perspective is that this content is accessible after potentially many years, leading to unknown hitherto problems associated with unrestricted access to a mass of illegal content.

In January 2018, the EU Commission called for greater effort and faster progress from all sides with respect to removing violent and extremist content, including through automated removal. Although this is starting to achieve results, as the Commission noticed:

> *"… even if tens of thousands of pieces of illegal content have been taken down, there are still hundreds of thousands more out there. And removal needs to be speedy: the longer illegal material stays online, the greater its reach, the more it can spread and grow. Building on the current voluntary approach, more efforts and progress have to be made."*[1]

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[1] Brussels, 8 Jan 2018, http://europa.eu/rapid/press-release_STATEMENT-18-63_en.htm, last access: 15.05.2018.

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In this article, it will be argued that this goal might be difficult to attain due to deep legal uncertainty surrounding the liability of intermediaries for third party content. The core of uncertainty results from conflicting judgments of the European courts concerning preconditions for avoiding liability under the EU law. A Luxembourg Tribunal has consequently maintained that hosting service providers who are intermediaries will not be held liable for content posted by subscribers of its services, provided that they are technical, passive and act in an automated manner and did not know or were aware of the illegality of the content.[2] Being passive, therefore, was a precondition for avoiding liability.[3]

In the Strasbourg judgment, better known as the '*Delfi case*', the situation has changed radically. The ECHR held a news portal liable for conduct that was passive and involved immediate removal of illegal content upon receiving notification. The Strasbourg Tribunal maintained that adopted measures were not effective and that the portal should be more active. It should not have waited for weeks to receive a notice to block illegal content, but acted upon its own initiative to remove offending posts. This judgment has been echoed in Polish case law, namely in the verdict of the Supreme Court of Poland in the case CSK 598/15 of 20 September 2016[4] and is likely to be followed in similar cases going forward.

The key provision is Article 14 of Directive 2000/31/EC, which was drafted exactly two decades ago and has not been revised since. It offers "safe harbour" to online service providers who carry out hosting activities, understood as a storage of content provided by subscribers of the service. The directive has used, but not defined the term hosting. As a result, it has been interpreted broadly and applied to such online service providers as search engines, online marketplaces, social networks, peer-to-peer networks, discussion forums, and blogs etc.

The main thrust of the solution officially adopted in 2000 was to relieve hosting service providers from a duty actively to monitor illegal activities taking place on their servers. Not only would such hosting service providers not have actively to seek facts indicating illegal activity, they would also be granted exclusion from liability as long as did not know of any illegal activity or, upon obtaining such knowledge, would not unduly delay or block access to the illegal content. The drafters of the directive had been inspired by the American Digital Millennium Copyright Act, which, two years earlier, had adopted quite similar rules in respect to copyright infringements committed with respect to copyrighted works.

The rules proposed two decades ago turned out to be remarkably stable despite continuous changes in the online world. There were attempts to review them as well as public consultations on notice and takedown provisions, which had not been enacted in the original version of the directive 2000/31/EC. However, whereas two decades ago the World Wide Web and the Internet itself was used by around 100 million users worldwide, this can be compared at the end of 2017 with more than 4 billion users. Websites hosted 20 years earlier were very simple and relied primarily on content being created by service providers themselves.[5] This changed fundamentally around a decade ago with the movement towards social networks and the shift towards user-generated content.

2. Goal of the article

Article 14 of E-Commerce Directive requires re-examination, re-consideration and careful delineation of its sphere of application as today it is being applied to fundamentally different types of hosting services. In this paper I am going to argue that, firstly, the reading of articles 14–15 of the E-Commerce directive could be improved if we offered rewards to service providers who actively seek out illegal content, as opposed to passive ones who are similarly treated today. Acceptance of this argument would lead to the modification of the scope of Google France and eBay rulings, which required that the hosting service provider "*has not played an active role of such a kind as to give it knowledge of, or control over, the data stored*".

Secondly, in order to reach this goal we need to differentiate between hosting *sensu stricto* and *sensu largo*. The former shall cover only service providers who offer infrastructure that enables recipients to make publicly available independent online services under their own domain name. Service providers who merely enable their users to store their own content under a service providers' domain, shall be classified as online service providers or hosting *sensu largo*.[6]

Thirdly, the main aim of this article is to argue that the EU lawgiver or European courts should develop distinct rules for hosting service providers. Rules akin to the American 'Good Samaritan' principle should be elaborated in order to encourage hosting service providers to adopt a more active stance against harmful content, without being held liable for remaining non-neutral with respect to content provided by their clients.

[2] Judgment of CJEU (Grand Chamber) of 23 March 2010 in Joined Cases C-236/08 to C-238/08, Google France SARL, Google Inc. V Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08) [Google France case].

[3] Judgment of CJEU (Grand Chamber) of 12 July 2011 in case C–324/09 L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi [eBay case].

[4] The case concerned a well-known politician who was offended on public forums of fakt.pl - one of the biggest news portals in Poland. The news portal has not been notified about the infringment via email or a web form but blocked access to offending comments immediately upon receiving plaintiff's claim. The Supreme Court followed the Delfi case and argued that the news portal is liable for third-party content hosted on its platform.

[5] 70 millions in December 1997 and 4,157 millions in December 2017. https://www.internetworldstats.com/emarketing.htm, last access: 27.2.2018.

[6] The term hosting sensu largo is used interchangeably with the term online service providers or Web 2.0 applications.

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