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INDRĖ JURGELEVIČIŪTĖ

(INTERNATIONAL LAW MASTER STUDY PROGRAMME)

FREEDOM OF EXPRESSION ONLINE: PROBLEMATIC ASPECTS

Master thesis

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Vilnius, 2018

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INTRODUCTION

Relevance of the final thesis. Freedom of expression is without any doubts one of the cornerstones in a free and democratic society. No one could argue about its importance in whole human rights system. This freedom sets the strong basis for the enjoyment of other human rights, while non-ability to exercise it can lead to very serious consequences. Since the adoption of core international and European legal instruments, which contained provisions on freedom of expression, a countless number of judicial interpretations and legal scholars' analyses have been made with reference to this right, its content, limitations and related issues. For a long time, the researches were addressed to traditional press, TV, radio and other offline spheres. Relatively recently, the world has changed, with the Internet and its components, such as online news media, social networks, blogs and other platforms becoming the central point for the prosperity of expression.

Due to easy accessibility and number of users growing by every year, the impact made for freedom of expression is undeniable. "The Internet provides an unprecedented platform for the exercise of freedom of expression. […] However, alongside these benefits, certain dangers may also arise"[1]. Such statement clearly presents the complexity of freedom of expression online. On the one hand, Internet platforms have been created at the time of major human rights legislation unforeseen and unprecedented environment, where every person can spread and receive ideas without any substantial restrictions or costs, to unimaginably wide audience. On the other hand, possibilities emerged not only for the exercise of freedom of expression in a good faith, but also for various violations, which may appear and spread more fast than the legal regulation and practice can catch up.

When the possibility of Internet users to write comments and express their opinions, ideas and perceptions about particular matters could be considered as a perfect example of enjoyment of freedom of expression online, the same could not be said about situations when such, often anonymous, comments threaten the rights of others or cross the legitimate boundaries of free speech. The question of proper way to tackle such posted content is present, and the answer in the international and European legal community is still not settled.

Analogically, when news is widely spread online, that fulfills the role of press in disseminating information and public's right to know to the greater levels than ever before. However, while manifestly false news publications are disseminated virally on the Internet and are

[1] ECtHR, Delfi v. Estonia [GC], no. 64569/09, 16 June 2015, para 110.

able to affect negatively some other important rights or elements, the doubts about their legitimacy arise.

Thus, there is a necessity to analyze peculiarities of the impugned online comments and fake news in the frame of freedom of expression online. Additionally, it is relevant to find ways, how the problems arising from these aspects should be possibly targeted, so both rights of disseminators of content and subjects who are adversely affected by such expressions would be properly balanced. Even though the topic could be considered as broad and of global nature, in addition to discussion of general aspects of the problems, the author seeks to draw a special attention to existing regional European legal practices and approaches aimed at regulation of unlawful user-generated comments and fake news and considerations of the European Court of Human Rights (ECtHR). As it will be reflected in this thesis, dealing with impugned matters online is subject to controversies and big debates in European context. To make the analysis even more complex, the author subsequently goes into the matter deeper by invoking and analyzing concrete examples of domestic Lithuanian legal practice. Having in regard presented preface of the problem and chosen manner to organize the research, it leaves no doubt that this final thesis is to some extent unique and genuinely relevant in the nowadays context.

Problem of the research. Main international and European legal instruments containing provisions on freedom of expression were adopted long before the emergence and risen popularity of the Internet. That calls into question how newly appearing issues of freedom of expression in this environment, such as injurious virtual comments and fake news shall be interpreted and addressed. As it will be reflected in this thesis, the first ECtHR's attempts to tackle questions related to freedom of expression online attracted more debates than approval. Separate legal measures invoked in the European context to tackle unlawful expressions online were also received critically. There is still an absence of uniform consensus amongst legal researchers and experts what legal standards shall be adopted to deal with injurious user-generated comments and fake news circulating online, so it would correspond to long-standing perception and jurisprudence on freedom of expression. Intermediary liability in the light of freedom of expression is subject to debates for a while already, nevertheless, the issue still needs more clarifications. As regards fake news in general and specific online comments, there is also a lack of uniform understanding when they form part of allowed freedom of expression and when constitute violations of this right. Thus, quite complex problematics is apparent, which is in need to be targeted by the research, which would encompass analysis from a general, European and domestic regulation prospective.

Scientific novelty and overview of the research on the selected topic. While general concept and scope of freedom of expression offline has been widely analyzed throughout decades and is more or less clear, the same could not be said about freedom of expression in online environment. Given the relatively recent widespread trend of social networking sites, online news media and other types of websites, as well the fact that legal framework can hardly keep up with all the new legal issues, the topic could be considered as a novelty. As the nature of the Internet and constant changes there leads to a situation that dynamic legal responses are needed, certain specific recent responses, which will be discussed in this Master thesis, have not been covered by other researches yet.

In general, the problematics of unlawful comments has become a topic for massive discussions amongst human rights and media law experts after initial controversial judgment of the ECtHR in *Delfi AS v. Estonia* case. To name a few, E. Weinert, R. Caddel, R. Spano, M.E. Griffith, L. Brunner presented their views and arguments regarding the topic. Nevertheless, no uniform conclusion has been made yet with regard to when holding online sites liable for expressions, which are written by others, is compatible with freedom of expression.

At the same time, the attention to fake news online is very newly emerged. Hence, the matter is lacking of consistent analysis. Several legal scholars, for instance, L. de Lima Carvalho, T. McGonagle, D.O. Klein, J. R. Wueller, O. Pollicino, A.Gonzalez, examined fake news from a general perspective. Even though their publications undoubtedly contributed to a better understanding of fake news concept, they still did not cover all the aspects, which are relevant to discuss when determining the legitimacy of fake news and did not involve a thorough analysis of related judgements of the ECtHR.

The author seeks to give a special attention to these two issues and analyze them not only from international and European perspective, but also to support her research by demonstrating the examples of one domestic jurisdiction, the Republic of Lithuania, making the research to some extent exclusive. Provided that there is still an absence of uniform legal approach with regard to problematic aspects this Master thesis is focused on, the author seeks to contribute to the ongoing debates and present the material which would be useful for legal scholars, practitioners and students who are interested in freedom of expression issues online.

The aim of research. This research aims to provide a profound analysis of the legal problematics arising from two distinguished issues, impugned comments and fake news online, in

the light of freedom of expression on the Internet, and analyze how these issues are addressed in international, European, ECtHR's and Lithuanian legal practice.

The objectives of the research. In order to achieve the aim of the research, the following objectives are established:

1) Characterize the scope of freedom of expression and its limits in International and European Law, as well as extension of freedom of expression application online.
2) Examine the legal problematics of unlawful comments in online platforms, such as social networking sites, online news media, Internet blogs and other websites, and related liability issues in the frame of freedom of expression, taking into account findings of legal scholars specializing in the relevant field, the existing jurisprudence of the ECtHR and domestic courts of Lithuania.
3) By taking into account the newest regulatory attempts, researches of legal scholars, long standing ECtHR's jurisprudence and related legal practice in Lithuania, determine the position of fake news online between the legitimate boundaries of freedom of expression and identify the situations when the issue should be regarded as falling outside the scope of this right and subject to regulation.

Research methodology. In order to achieve the aim of this research, the following methods are invoked:

1) Comparative method is invoked to compare diverse approaches of scholars related to impugned comments and fake news online, as well as different international, European and Lithuanian legal rules and practices related to online fake news and comments, which fall outside the scope of freedom of expression.
2) Legislative analysis method is used to examine legal provisions on freedom of expression and its violations laid down in the relevant international, European and national legal acts.
3) Teleological method is applied to explain the reasons why certain legal measures to target the possibly unlawful content online should be employed or avoided.
4) Analytical method enables to assess different legal regulations, approaches of scholars and courts, as well as to draw conclusions.

Structure of the research. The research paper is composed of introduction, general part, special part and conclusions, as well as the list of bibliography, abstract and summary (English and Lithuanian languages). General and special parts are divided into chapters and subchapters. The research starts with a general analysis, which encompasses the core instruments, components and

restrictions related to freedom of expression and discusses main aspects regarding exercise of this right on the Internet. The special part is split into two sections, which focus on two problems, unlawful comments and fake news online. As analysis of both elements relies on general, European (the EU and the ECtHR) and Lithuanian prospective, the layout of subchapters is almost analogous. Honesty declaration is attached in the end.

Defence statements.

1. The approach taken by the ECtHR to avoid imposition of liability on online intermediaries for unlawful comments, which appeared on their platforms, is more in line with its former jurisprudence on freedom of expression and European legal instruments establishing rules on liability, and is partly reflected in the jurisprudence of Lithuanian courts.
2. Fake news online could not be considered as an illegal expression *per se*, however, the forms of such news which threaten national security, territorial integrity or public order, shall be subject to proportionate restrictions.

1. FREEDOM OF EXPRESSION IN THE INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

1.1 The scope of freedom of expression

Nowadays freedom of expression without any doubts could be considered as one of the core human rights in a democratic society. The legal literature is full of sonorous statements, referring freedom of expression to "accelerator of the human development"[2], "the landmark freedom of modernity"[3] or "one of the pillars of democracy, afforded an enviable position on a particularly high pedestal within many fundamental rights frameworks"[4]. Indeed, in the modern societies the importance of this right is unquestionable. Accordingly, it is enshrined in the main international legal documents, which are ratified by numerous countries.

To begin with, the core legal document for international human rights law, Universal Declaration of Human Rights (UDHR) in Article 19 provides the legal basis for freedom of expression. It declares that "everyone has the right to freedom of opinion and expression", as components of this rights mentioning "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[5] Even though officially the UDHR is not legally binding, it is widely recognized that this document worked as an inspiration for provisions in other important human rights legal acts and national law.

In addition, almost repeating the provision of the UDHR, a legally binding international human rights instrument, International Covenant on Civil and Political Rights (ICCPR) in Article 19 guarantees freedom of expression, including "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"[6].

Moreover, freedom of expression is embedded in the almost analogical provisions of major regional legal human rights instruments. Such documents as Charter of Fundamental Rights of the European Union[7], African Charter on Human and Peoples' Rights[8], American Convention on

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[2] Elvin Abbasli, "The Protection of the Freedom of Expression in Europe: Analysis of Article 10 of the ECHR", *2 Baku St. U.L. Rev. 18* (2015): 18.
[3] Elisabeth Zoller, "Foreword: Freedom of Expression: Precious Right in Europe, Sacred Right in the United States", *84 Ind. L.J.* 803 (2009): 803.
[4] Aoife O'Reilly, "In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights", 19 *Trinity C.L. Rev*. 234 (2016): 235.
[5] "Universal declaration of human rights," UN General Assembly (1948).
[6] "International covenant on economic, social and cultural rights,"*United Nations, Treaty Series* 993, 3 (1966).
[7] See Article 11; Charter of Fundamental Rights of the European Union. *Official Journal of the European Union C83. Vol. 53*. Brussels, 2010.
[8] See Article 9; "African Charter on Human and Peoples' Rights ("Banjul Charter")," 27 June 1981, *CAB/LEG/67/3 rev.* 5, 21 *I.L.M*. 58 (1982).

Human Rights[9], Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms[10] contain almost analogical definitions of the right to freedom of expression.

When it comes to Europe, the essential document in the human rights field is European Convention on Human Rights (ECHR), whose Article 10 provides that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".[11] Thus, considering mentioned legal instruments, it can be noted that the general understanding what is freedom of expression, in terms of provisions of these documents, is quite homogeneous.

Speaking about freedom of expression in the context of European human rights law it is impossible not to mention the contribution of the European Court of Human Rights (hereinafter referred to as the ECtHR or the Court) which has given many important interpretations to Article 10 of the ECHR in its judgments. The Court for decades has been consistently emphasizing that freedom of expression is "one of the preconditions for a functioning democracy"[12] and "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment"[13]. It is unequivocal that in vast amount of its judgments, the ECtHR formed many principles related to freedom of expression and determined the place of this right amongst other human rights. The Court also gave importance to protection of freedom of expression stating that, "in some cases, the state has a positive obligation to protect the right to freedom of expression against violations".[14] In other words, the ECtHR recognized that the state has not only the duty not to interfere with freedom of expression. Subsequently, "positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned"[15]. Thus, the Court empowered states as bodies, which have a certain duty to ensure that freedom of expression in their jurisdictions would be exercised freely, without unjustified restrictions and, when it is necessary, to take relevant measures that enjoyment of freedom of expression of individuals would be facilitated or unhindered.

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[9] See Article 13, 14; "American Convention on Human Rights," available at: http://www.refworld.org/docid/3ae6b36510.html

[10] See Article 11; "Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms," *Regional Treaties, Agreements, Declarations and Related*, 26 May 1995, available at: http://www.refworld.org/docid/49997ae32c.html

[11] "European Convention for the Protection of Human Rights and Fundamental Freedoms," as amended *by* Protocols Nos. 11 and 14, Council of Europe, *ETS* 5, 4 November 1950, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm

[12] ECtHR, Özgür Gündem v. Turkey, no. 23144/93, 16 March 2000, para. 43.

[13] ECtHR, Lingens v. Austria, no. 9815/82, 08 July 1986, para. 41.

[14] ECtHR, Fuentes Bobo v. Spain, no. 6694/74, 29 February 2000, para. 38.

[15] ECtHR, Huseynova v. Azerbaijan, no. 10653/10, 13 April 2017, para. 120.

Such recognition supports the view, that this right takes a genuinely important place in a democratic state.

As it can be noticed from the provisions cited above, freedom of expression is comprised of three core components.

First, freedom to hold opinions, is recognized as an absolute right basically, because traditional restrictions applicable to other two forms of enjoying freedom of expression are not applicable here.[16] The ECtHR has also described this right as fundamental part of Article 10.[17] Accordingly, no one can be required to prove the truth of value judgments expressed.[18] It follows, that every individual is able to hold his own opinions without any interference.

Second, freedom to receive information and ideas covers seeking of information in lawful sources and "basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him or her"[19]. It is important to mention that in a landmark case of *Handyside v. UK* the ECtHR established that freedom of expression is "applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[20] Thus, it means that the content of the expression does not necessarily have to be always nice and pleasant for all the members of society in order to be protected under Article 10. Additionally, freedom to receive information also involves freedom to access it.[21] That is to say, by accessing a particular content, individuals are able to receive necessary information and thus, enjoy their right to receive. Having in mind, that some information nowadays is only available online[22], it was recognized that freedom to receive information generally goes in hand with freedom to access the Internet.[23] Moreover, this right cannot be separated from individual's truth seeking, which flows from the ECtHR interpretations, for example, consideration that it is "an integral part of freedom of expression to seek historical truth"[24]. It does not provide that information received shall be always

[16] Dominika Bychawska-Siniarska, *Protecting the right to freedom of expression under the European Convention on Human Rights* (Council of Europe, 2017), 13.
[17] ECtHR, Redaktsiya Gazety Zemlyaki v. Russia, no. 16224/05, 21 November 2017, para. 37.
[18] ECtHR, Radio France and Others v. France, no. 53984/00, 30 March 2004, para 40.
[19] ECtHR, Gillberg v. Sweden , no. 41723/06, 03 April 2012, para. 83.
[20] ECtHR, Handyside v. the United Kingdom, no. 5493/72, 07 December 1976, para. 49.
[21] ECtHR, Leander v. Sweden, no. 9248/81, 26 March 1987, para. 74.
[22] ECtHR, Kalda v. Estonia, no. 17429/10, 19 January 2016, para. 52.
[23] ECtHR, Jankovskis v. Lithuania, no. 21575/08, 17 January 2017, para. 62.
[24] ECtHR, Bedat v. Switzerland, no. 56925/08, 29 March 2016, para 49; also ECtHR, Falzon v. Malta, no. 45791/13, 20 March 2018, para. 58.

true, but instead "legitimize a claim to receive information".[25] Thus, it can be seen that the scope of the right to receive information is sufficiently wide, encompassing various elements and not narrowed to reception of only truthful, reliable and positive information.

Third, freedom to impart information and ideas comprises a wide range of content, which can be spread. That can take not only the form of words, but also pictures, images and actions.[26] However, not all the disseminated information enjoys the same protection. According to the ECtHR jurisprudence, in general, a high level of protection of freedom of expression will be applied to certain speeches. Namely, "there is little scope under Article 10 of the Convention for restrictions on political speech or on debate on matters of public interest"[27]. Nevertheless, it will be seen in the next subchapter, that that right to impart information may be a subject to more restrictions than other two freedoms.

When speaking about freedoms to impart and receive information, the press deserves a special attention. In addition to the three-part division of freedom of expression discussed above, it could be also agreed that this right "comprises within its content three other freedoms: freedom of opinion, freedom of information and freedom of the press, these three liberties being interdependent and unable to manifest one in the absence of the other."[28] Such distinction reveals the recognition that freedom of press takes a particular place in terms of freedom of expression. The ECtHR emphasized its importance in many judgments throughout decades.

For instance, the Court has consistently underlined the importance of the public's right to receive information from press and the task of the latter to spread it.[29] "Freedom of the press and other news media afford the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders"[30]. With relation to the fact, that dissemination of information and forming of opinions exercised by press is of crucial importance in a democratic society, the ECtHR dedicated it the role of "public watchdog"[31]. Regarding journalists, it has been also consistently reiterated in the ECtHR's jurisprudence that their sources are strongly protected,

[25] Sarah Eskens, Natali Helberger, and Judith Moeller, "Challenged by news personalisation: five perspectives on the right to receive information." *Journal of Media Law* 9.2 (2017): 267.
[26] Elvin Abbasli, "The Protection of the Freedom of Expression in Europe: Analysis of Article 10 of the ECHR", 2 *Baku St. U.L. Rev.* 1*8* (2015): 20.
[27] See ECtHR, Sekmadienis Ltd. v. Lithuania, no. 69317/14, 30 January 2018, para 73.
[28] Daniela Valeria Iancu, "Freedom of the Press – A Component of Freedom of Expression", *Acta U. Danubius Jur*. (2010): 59.
[29] ECtHR, Bedat v. Switzerland, no. 56925/08, 29 March 2016, para. 51.
[30] ECtHR, Manole and Others v. Moldova, no. 13936/02, 13 July 2010, para. 96.
[31] See, for example, ECtHR, Redaktsiya Gazety Zemlyaki v. Russia, no. 16224/05, 21 November 2017, para. 35.

considering such protection to be one of the basis for freedom of press and public's right to know.[32] As one more element to guarantee the free expression of journalists, the Court pointed out that some level of stylistic exaggeration is also allowed in their publications.[33] Finally, the protection of press, as it was held by the ECtHR, is a "concept which in modern society undoubtedly encompasses the electronic media including the Internet"[34]. Therefore, such findings clearly demonstrate that freedom of press is a very important component of the freedom of expression in a democratic society, regardless the fact whether press takes the paper or online form.

Moreover, some attention should be drawn to the second part of Article 10 of the ECHR, which also included a permission to states to require the licensing of broadcasting, television or cinema enterprises. This principle was elaborated in *Groppera v. Switerland* case, declaring by the ECtHR that "the purpose of the third sentence of Article 10 § 1 of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects"[35]. It was also reiterated in other cases, that in the circumstances, where the decision is made to deny a broadcasting license, the relevant authority shall give appropriate reasons for such refusal.[36] In other words, the state cannot refuse to provide a broadcasting license without any proper reasoning. As it was interpreted by scholars, "national authorities have the competence to settle the system of authorisation in the audio-visual field without this competence hindering the freedom of expression"[37]. Thus, the licensing and authorization could be considered as a prerogative of states, as long as they go in line with the main principles related to freedom of expression.

Due to the growth of information and communication technologies, most of society life moved online and transferred human rights along there, making freedom of expression one the rights influenced by this growth the most. "Internet has become almost synonymous with freedom of expression"[38]. It can be agreed to this statement or not, but no doubt that less regulated nature of Internet has given a significant freedom for persons to express themselves.[39] The principle of network neutrality suggests that no discrimination by Internet service providers should appear on content uploaded online, considering it to be one of the starting points for freedom of expression

[32] ECtHR, Roemen and Schmit v. Luxembourg , no. 51772/9, 25 February 2003, para 46.
[33] ECtHR, Falzon v. Malta, no. 45791/13, , 20 March 2018, para. 62
[34] ECtHR, Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, no. 22947/13, 2 May 2016, para. 87.
[35] ECtHR, Groppera Radio AG and Others v. Switzerland, no. 10890/84, 28 March 1990, para 61.
[36] ECtHR, Meltex Ltd and Mesrop Movsesyan v. Armenia, no. 32283/04, 17 June 2008, para. 81.
[37] Daniela Valeria Iancu, *supra* note 28, 65.
[38] Alan Sears, "Protecting Freedom of Expression over the Internet: An International Approach," *Notre Dame Journal of International & Comparative Law* 5, no. 1 (2015): 172.
[39] *Ibid.*

online.[40] Thus, such implications indeed facilitate individuals enjoying their right to express themselves online. It could be also certainly agreed that the Internet and social networks particularly allow people to actively participate in public discourse and spread the information.[41] UN Human Rights Council Special Rapporteur recognized that "Internet provides access to information that was previously unobtainable, and therefore contributes to the discovery of truth and the progress of society"[42]. Hence, the correlation between Internet and free expression is undeniable.

Going in line with such approach, there is a universal acknowledgment nowadays that application and protection of the freedom of expression is not limited to offline world. In general, the ECHR is regarded as a "living instrument which must be interpreted in the light of present-day conditions"[43]. It flows from the term "frontiers" in before cited provisions, that drafters of the treaty did not intend to confine the scope of application of this right, and extended it to all the possible future innovations.[44] That is to say, the online environment is one of the frontiers, where freedom of expression is protected. Joint Declaration on Freedom of Expression and Internet stated that "freedom of expression applies to the Internet, as it does to all means of communication"[45]. It was further acknowledged by the United Nations Human Rights Council that "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice"[46].

That sets the basis for common perception that nowadays the society's life is inherent from Internet, the Convention's provisions extend to it. The ECtHR also recognized in its judgments that "the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information"[47]. Emphasizing the accessibility and amounts of communication, which can be performed via Internet, the Court said that it "plays an important role in enhancing the public's access to news and facilitating the dissemination of information in

[40] Jack M. Balkin, "The future of free expression in a digital age," *Pepp. Law Review* 36 (2008): 103.
[41] Aimei Yang, and Rong Wang, "The Value of Freedom of Expression and Information on Countries' Human Rights Performance: A Cross-National Longitudinal Study," *Mass Communication and Society* 19, 3 (2016): 357.
[42] UN General Assembly Human Rights Council Resolution No. A/HRC/RES/20/8, "The promotion, protection and enjoyment of human rights on the Internet," 29 June 2012.
[43] See ECtHR, Mitzinger v. Germany, no. 29762/10, 25 January 2018, para 41.
[44] Patrick Ford, "Freedom of Expression through Technological Networks: Accessing the Internet as a Fundamental Human Right", *Wisconsin International Law Journal* 32, 1 (2014): 163.
[45] Joint declaration on freedom of expression and the Internet, Organization for Security and Co-operation in Europe, 1 June 2011, available at https://www.osce.org/fom/78309
[46] UN General Assembly Human Rights Council Resolution No. A/HRC/RES/32/13, "The promotion, protection and enjoyment of human rights on the Internet", 18 July 2016.
[47] ECtHR, Ahmet Yıldırım v. Turkey, no. 3111/10, 18 December 2012, para. 54.

general"[48]. Thus, social media platforms and various Internet websites are part of the spheres where freedom of expression is protected to the same extent as it is any other platform or medium.

Due to particularities of Internet, and social media especially, it would not be a mistake to claim that nowadays everyone who has an access to Internet can become a journalist. Unlike in the past, when professional journalists were responsible for spreading the news, nowadays technologies and unprecedented popularity of social media allows for every single individual online to create the content and spread it.[49] Also, as Peter Coe notes, social media "has borne millions of 'publishers' who are able to circumvent the traditional mass media"[50]. Having in mind that more content can be shared and received in these platforms, as well as possibilities of instantaneous access and absence of editorial control applicable to other types of media, it could be agreed to the scholar that these factors have permanently changed the landscape of traditional media.[51] Thus, it can be pointed out that freedom of expression related to press has been particularly upgraded by the evolution of the Internet.

To sum up, it leaves no doubt that the intention to make freedom of expression universally recognized and legally protected right is really strong and widespread: the right is broadly embraced in international and European law. That recognition is developed by the ECtHR decisions, where it has specified the content of this right, such as the scope of rights to hold opinions, spread and receive news, or importance of particular elements, such as freedom of press. Emergence of the Internet has significantly enhanced individuals' opportunities to exercise freedom of expression. Latest legal and jurisprudential developments show that the scope of freedom of expression extends to the online sphere, meaning that all the principles related to this right are applicable to the same extent online.

1.2 Restrictions to freedom of expression

Despite being one of the cornerstones in international human rights system, freedom of expression still can be limited. The fact, that it belongs to the human rights system with the other rights and freedoms, requires drawing some boundaries, in order that the balance between the

[48] ECtHR, Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom, nos. 3002/03 and 23676/03, 10 March 2009, para. 27.
[49] Oreste Pollicino, "Fake News, Internet and Metaphors (to Be Handled Carefully)," *Italian Journal of Public Law* 9, 1 (2017): 24.
[50] Peter Coe, "The social media paradox: an intersection with freedom of expression and the criminal law", *Information & Communications Technology Law* 24, 1 (2015): 28.
[51] *Ibid*., 24-25.

freedom of expression and the other right could be stroke. International legal instruments, cited in the previous subchapter, include several restrictions with regard to freedom of expression.

The UDHR, even though does not explicitly distinguish the ways in which freedom of expression could be limited, includes a provision by which all the individuals are protected from any discrimination and incitement to it. It can be understood from that norm that expression, which is inciting to discrimination, should not fall within the boundaries of freedom of expression.

Alternatively, Article 19 (3) of the ICCPR mentions such components as respect of the rights or reputations of others, protection of national security or of public order or public health or morals, which may limit freedom of expression. However, restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[52] Thus, the scope of restrictions is limited. ICCPR in Article 20 explicitly distinguishes propaganda of war, which is forbidden and thus, cannot be justified by freedom of expression. Therefore, in terms of the ICCPR, the enjoyment of freedom of expression is allowed to be restrained when there is a reasonable concern that some of mentioned rights can be infringed or it amounts to clearly unlawful speech, such as war propaganda.

Provided that freedom of expression comes with some duties and responsibilities, the ECHR extends the list with restrictions stipulated in Article 10(2). Firstly, it allows the freedom of expression to be restricted when "prescribed by law" which means, as the ECtHR repeatedly interpreted, that restriction should contain a legal basis in domestic law and the law shall be accessible, precise and its effects foreseeable to a reasonable degree.[53] Second requirement for restriction involves being "necessary in a democratic society" which, as has been reiterated by the ECtHR, refers to the existence of pressing social need.[54] Moreover, the third condition requires to examine the restrictions "in the light of the case as a whole and determine whether they were 'proportionate to the legitimate aim pursued and determine whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'"[55]. Such possible legitimate aims are enlisted in the same legal provision. Namely, they encompass interests of national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in

[52] UN Human Rights Committee, General Comment No. CCPR/C/GC/34, Article 19: Freedoms of opinion and expression, 12 September 2011, para 22.
[53] ECtHR, Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina, no. 17224/11, 27 June 2017, para. 70-71.
[54] See ECtHR, Sekmadienis Ltd. v. Lithuania, no. 69317/14, 30 January 2018, para. 71.
[55] ECtHR, Frisk and Jensen v. Denmark, no. 19657/12, 05 December 2017, para. 51.

confidence, or maintaining the authority and impartiality of the judiciary. Consequently, all these discussed aspects turned into the three-part test, which is implied when there is a need to determine whether interference with freedom of expression could be justified. Therefore, whenever there is a question, whether restriction to freedom of expression has been applied appropriately, there is a necessity to take into account the particular circumstances of each case and analyze it through these three points.

Nevertheless, it follows from the ECtHR's jurisprudence that restrictions to freedom of expression should be considered only as exceptions[56]. Respectively, they must be narrowly interpreted, defined precisely, and the necessity for any restriction "must be established convincingly"[57]. Also, the list of exceptions provided in the article is exhaustive.[58] Therefore, it is evident that the Court reveals a strict and accurate attitude towards protection of rights of individuals to spread and receive information and ideas, intending to prevent possible situation that interferences to these rights become as a rule. Agreeing to the point of view that controlling freedom of expression too much would make this right meaningless at the end[59], such approach seems logical and relevant.

The Court sometimes very clearly establishes the conditions, which have to be assessed and satisfied, in order to restrict the freedom of expression. For example, denial of access to information is only possible taken into account the purpose and nature of information requested, the role of the applicant and whether the information was "ready and available"[60]. Nevertheless, it is important to mention, that in some cases states have a "margin of appreciation in assessing whether and to what extent an interference with the right to freedom of expression is necessary"[61], which "goes in hand with European supervision".[62] Thus, when it would be reasonable to believe that the state is in better position to be aware of particular situation and level of interference required there, the ECtHR entitles them to take actions, in the sense that this discretion is exercised in line with other established principles related to freedom of expression in the Court's jurisprudence.

Concerning the possible limits to freedom of expression in the European legal framework, not only the circumstances mentioned in Article 10(2) play an important role. Article 17 of the

[56] ECtHR, The Sunday Times v. the United Kingdom, no. 6538/74, 26 April 1979, para 65.
[57] ECtHR, Falzon v. Malta, *supra* note 33, para. 51
[58] ECtHR, Magyar Kétfarkú Kutya Párt v. Hungary, no. 201/17, 23 January 2018, para. 40.
[59] Onder Bakircioglu, "Freedom of Expression and Hate Speech," *Tulsa Journal of Comparative & International Law* 16, 1 (2008):42.
[60] ECtHR Magyar Helsinki Bizottság v. Hungary, no. 18030/11, 08 November 2016, para. 158-170.
[61] ECtHR, Perinçek v. Switzerland, no. 27510/08, 15 October 2015, para. 196
[62] *Ibid.*

ECHR prohibits an abuse of any rights set in the convention. In the landmark *Lawless v. Ireland* case the ECtHR set the principle that "no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms"[63], which is followed in the nowadays jurisprudence related to freedom of expression. This provision, the same as Article 20 of ICCPR, prohibiting hatred that constitutes incitement to discrimination or violence", and Article 30 of UDHR disallowing persons to behave in a way that leads to destruction of any of the rights and freedoms enshrined in the document, got the name of hate speech.

Nonetheless, there is no precise global definition, nor universal approach towards hate speech. The ECtHR in in its case law many times sought to set the boundaries between allowed expression and hate speech. It followed the definition provided by Committee of Ministers of the Council of Europe, which refers hate speech to "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin"[64]. Having in mind such concept of hate speech, it would be reasonable to hold that such speech is the harshest way of exercise of freedom of expression. Thus, it is relevant to award some more attention to it.

This term was firstly adopted by the ECtHR in *Surek v. Turkey* case in 1999, where the Court drew the boundary between the speech which might shock and speech which is glorifying violence.[65] Further, in *Gündüz v. Turkey* the ECtHR emphasized the importance of "tolerance and respect for the equal dignity of all human beings"[66], hereafter stating that it is necessary to prevent all forms of expression, which "spread, incite, promote or justify hatred based on intolerance".[67] Also, "individual self-fulfilment argument might also justify legitimate restrictions of hate speech to protect the safety, honour or reputation of the potential targets of hate speech"[68]. Thus, in the view of the Court, hate speech phenomenon is not compatible with the values on which freedom of expression is based. Context, intention, status of perpetrator and impact of the speech are

[63] ECtHR, Lawless v. Ireland (No. 3), no. 332/57, 01 July 1961, para. 7.
[64] "Recommendation No. R (97) 20 of the Committee of Ministers to member states on "hate speech", 30 October 1997, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b
[65] ECtHR, Sürek v. Turkey (no. 1), no. 26682/95, 08 July 1999, para. 62
[66] ECtHR, Gündüz v. Turkey, no. 35071/97, 04 December 2003, para. 40.
[67] *Ibid.*
[68] Onder Bakircioglu, *supra* note 59.

distinguished as elements, taken into account when considering whether the expression constituted a hate speech.[69]

In *Pavel Ivanov v. Russia,* the ECtHR considered applicant's expression as attack of general nature on one particular ethnic group with "markedly anti-Semitic tenor"[70]. In *M'Bala M'Bala v. France,* the Court held the applicant's expression to be no longer satirical or entertaining, but rather a clear "demonstration of hatred and anti-Semitism and support for Holocaust denial"[71]. In *Garaudy v. France,* the Court held that the speech, which denies crimes against humanity, is equated to grave racial defamation and hatred.[72] In *Vejdeland v. Sweden,* the ECtHR recognized the possibility of homophobic hate speech considering serious and prejudicial allegations made against homosexuals, even if they "did not directly recommend individuals to commit hateful acts". In *Belkacem v Belgium,* the ECtHR recognized applicant's remarks against religious group as provoking violence and incompatible with Article 10.[73] In all these examples, the expression was considered as hate speech.

By contrast, in *Dink v. Turkey* the content was recognized as expressed opinions, which were important for public debate and seek of historical truth in a democratic society and not "gratuitously offensive or insulting"[74]. In *Perincek v. Switzerland,* the Court found that bare denial of historical facts, even if that can be a sensitive matter, did not amount to incitement to hatred due to the lack of aim. It followed from the judgment that it is not sufficient that ideas shock, they need to be inciting.[75] In *Mac TV s.r.o. v. Slovakia* sarcastic tone of political speech still fell within the scope of free expression, as it was neither insulting, nor a "gratuitous personal attack"[76]. Thus, in these cases the Court found speeches as not overstepping the threshold of illegal speech.

In essence, it could be agreed with the view that in the ECtHR case law there is a "thin line between the permitted freedom of expression and hate speech"[77]. Avoiding authoritative generalizations in the case law, what is hate speech seem to depend on specific context.[78] It also

[69] Françoise Tulkens, "When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights," *European Judicial Training Network Seminar on Human Rights for European Judicial Trainers*, 7 July 2015.
[70] ECtHR, Pavel Ivanov v. Russia, no. 35222/04, 20 February 2007, para. 1.
[71] ECtHR, M'bala M'Bala v. France, no. 25239/13, 20 October 2015.
[72] ECtHR, Garaudy v. France, no. 65831/01, 24 June 2003.
[73] ECtHR, Belkacem v. Belgium, no. 34367/14, 27 June 2017.
[74] ECtHR, Dink v. Turkey, 2668/07, 14 September 2010, para.135.
[75] ECtHR, Perinçek v. Switzerland *supra* note 61.
[76] ECtHR, MAC TV s.r.o. v. Slovakia, no. 13466/12, 28 November 2017, para. 49.
[77] Tarlach McGonagle,"The Council of Europe against online hate speech: Conundrums and challenges," Expert paper, doc. no 1900 (2013): 15.
[78] Antoine Buyse, "Dangerous expressions: The ECHR, violence and free speech." *International & Comparative Law Quarterly* 63, 2 (2014): 494.

follows, that there can be many types of hate speech, including ethnic, racial, religious, homophobic speech. As there is no exhaustive list of possible types provided, it is possible that some other types of hate speech will also be recognized by the court in the future.[79] Extending to online cases, frequently the term *cyber hate* is employed when it comes to hate speech performed in social media networks and other Internet-based sites.

The main document with regard to manifestly unlawful speech online, Additional Protocol to the Convention on Cybercrime was signed to complement the Convention on Cybercrime, which, despite aiming to pursue a common policy towards protection against cybercrime, skipped the provisions related to freedom of expression. Thus, the Additional Protocol aimed to encourage state parties to adopt legislative measures to tackle insult racist and xenophobic material distributed in computer systems.[80] This document was criticized, as it applied only to one particular field – race and xenophobic material – leaving all other grounds behind and being ineffective treated the issue of online hate basically disregarding the very specific nature of the Internet.[81] Thus, it can be seen that specific regulation intended to target unlawful speech on the Internet at the moment is not capable of replacing long existing international documents aimed at all at the spheres where such speech may appear.

It should be also noted that due to the concept of duties and responsibilities in exercising freedom of expression, some specific limitations might arise in the freedom of expression of the press. To confirm this, the ECtHR held that "Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern"[82]. From this point follows the requirement that journalists should act in a good faith.[83] Also, the Court requires some responsibility from journalists in order that they would be careful enough when providing information to the society and check information to a moderate and reasonable extent.[84] Indeed, it would be irrelevant to call the mentioned conditions as restrictions on freedom of expression, however, these are requirements which need to be respected in order that violation of Article 10 would not appear. As it was also noted by the Court, journalists should behave in this way in order "to provide accurate and reliable information in accordance with the

[79] Tarlach McGonagle, *supra* note 77, 11.
[80] "Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems," Council of Europe, *European Treaty Series* 189, (2003).
[81] Natalie Alkiviadou, "Regulating Internet Hate: A Flying Pig," *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 7, 3 (2016): 227.
[82] ECtHR, Savitchi v. Moldova, no. 11039/02, 11 October 2005, para. 46.
[83] *Ibid.*
[84] ECtHR, Kącki v. Poland, no. 10947/11, 04 July 2017, para 52.

ethics of journalism"[85]. Thus, requirements of performance in *bona fides*, guided by the ethics and due diligence are raised for journalism. It should be also added that requirements of particular caution are established regarding publication of contents in the media, in which incitement to violence against the State is present.[86] Thus, even the journalists' freedom to exaggerate some matters should be exercised in a way that would be in accordance with these discussed aspects.

Indeed, as right to freedom of expression is applicable online, that also includes the restrictions. Nevertheless, the UN Human Rights Committee declared that "regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge"[87]. Thus, from this statement a suggestion follows that cases related to restrictions on freedom of expression should be regarded taking into account the peculiarities of the each sphere they are spread in.

Having in regard such approach, it should be briefly pointed out that the content subject to restrictions on freedom of expression online may be related to diverse aspects than offline. As regards social networks, huge number of users who are generating content, easy accessibility and lack of pre-screening of posts are considered to be the factors increasing the possibility of unlawful speech appearance in these platforms.[88] As for websites in general, Alexander Brown distinguishes possibility to use anonymous identities, physical invisibility, facilitated circumstances to gather with like-minded people, possibility to choose the audience for speech, instantaneousness related to response, as the factors that characterize transmission of unlawful speech online.[89] Other authors attribute such things as proliferation, which lets the speeches stay for a long time and itinerancy, meaning that even after the removal of content, it could be found elsewhere on the same or different social platform[90], or be duplicated in any place of the Internet.[91] Therefore, it could be generally stated that mentioned circumstances may encourage the appearance of content which may require interference in order that legitimate boundaries of freedom of speech and rights of others would be respected. Accordingly, it can be presumed that such aspects may bring diverse consequences for the parties injured by speeches performed online. Thus, the approach that peculiarities of online

[85] ECtHR, Cumpănă and Mazăre v. Romania, no. 33348/96, 17 December 2004, para. 102.
[86] ECtHR, Şener v. Turkey, no. 26680/95, 18 July 2000, para 42.
[87] UN HRC General Comment No. CCPR/C/GC/34, *supra* note, para 39.
[88] Natalie Alkiviadou,, *supra* note 81, 216.
[89] Alexander Brown, "What is so special about online (as compared to offline) hate speech?," *Ethnicities 18, 3* (2017): 299-309.
[90] Richard Delgado; Jean Stefancic, "Hate Speech in Cyberspace", *Wake Forest Law. Rev*iew 49, 2 (2014): 323.
[91] Gail Mason; Natalie Czapski, "Regulating Cyber-Racism," *Melbourne University Law Review* 41, 1 (2017): 295.

environment should be taken into account when solving questions of violations of Article 10 on the Internet seems relevant.

All things considered, the right to freedom of expression, enshrined in the UDHR, the ICCPR and the ECHR, despite its importance, is not regarded as an absolute human right. It flows from the provisions of these international documents, that freedom of expression belongs to the human rights system together with the other rights. Also, the concept of duties and responsibilities with regard to freedom of expression gives a basis for some requirements and limitations which individuals and journalists imparting information and ideas may be subject to. Thus, the balanced approach is necessary in order that the enjoyment of freedom of expression would not undermine the other important individual's rights. To ensure this, the ECtHR evaluates legal basis for such restriction, necessity in the society and proportionality to legitimate aim pursued and at time leaves some discretion for states to decide on the latter aspect. Diverse outcomes in the cases related to hate speech demonstrate that by evaluation of particular context almost analogical speech can bring different legal outcomes in determining its unlawfulness. The discussion also indicated that particularities of the Internet can influence not only the performance of freedom of expression there, but also increase the possibilities for violations of Article 10, that providing the necessity for specific solutions which would take into account the unique nature of the Internet.

2. LEGAL PROBLEMATICS OF UNLAWFUL COMMENTS ONLINE

As it was demonstrated in the first chapter, information and communication technologies with the Internet ahead provided unquestionably greater possibilities for individuals to disseminate and receive information and ideas. Anonymity, which often covers the authors of online comments, is recognized as one of the incentive factors for disseminating information online.[92] As a result, among all the content, which due to every Internet users' enjoyment of freedom of expression appears online, obviously some hateful or defamatory speeches can arise too. The legal framework related to such speeches in offline spheres, is more or less settled. However, peculiarities of Internet environment raise the new questions how cases of injurious comments taking place here should be addressed. Indeed, legal regulation of websites and social networks "is challenging because it doesn't fit with the paradigms on which laws relating to freedom of expression have been built"[93]. Therefore, in the subchapters below, the issue of unlawful comments and remarks in different online platforms and liability for these actions will be analyzed.

2.1 General considerations regarding regulation of unlawful comments online

"Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence can be disseminated like never before, worldwide, in a matter of seconds and sometimes remain persistently available on line"[94], says the ECtHR when assuring that increased possibilities of exercising freedom of expression potentially lead to considerable amounts of unlawful speech performances online. That, indeed, requires a proper approach that the rights which may be infringed by such defamatory content, would be protected.

The question, concerning the regulation injurious remarks taking place in online comments, starts from the point whether online environment, which is, as already noted, based on net neutrality principle, should be regulated at all. It is distinguished that generally there are two approaches towards regulation on Internet: while one refers Internet to a liberal and unrestricted environment, which shall not be subject to any strict regulatory frameworks, another point of view instead suggests that no exception compared to the other offline spheres should be applied to the Internet.[95]

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[92] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 147.
[93] Dominic McGoldrick, "The limits of freedom of expression on Facebook and social networking sites: A UK perspective," *Human Rights Law Review* 13, 1 (2013): 151.
[94] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 110
[95] Robert Spano, "Intermediary Liability for Online User Comments under the European Convention on Human Rights," *Human Rights Law Review* 17, 4 (2017): 667.

The approach enshrined in European legal documents related to online intermediary liability demonstrates that no regulatory measures shall be applied as long as there is no awareness that unlawful speech is present in the platform. Principle 6 of Declaration on Freedom of Communication on the Internet consolidates the limited liability of Internet service providers, stating that there is no general obligation for them to monitor the content which they give access to, transmit or store, nor actively seek for proves of unlawful activities there.[96] Article 15 of Directive 2000/31/EC of the European Parliament and of the Council (E-Commerce Directive) analogically states that there is no general obligation to monitor the content for online subjects, which are providing Internet services of mere conduit, hosting or caching.[97] According to these two legal instruments, only upon obtaining "actual knowledge" or awareness of relevant unlawful activities, they must "act expeditiously to remove or to disable access to the information concerned"[98]. As follows from Article 14 of the Directive, some intermediaries may become liable if they know about illegal act on their platform, but do not take any relevant measures. Thus, only staying passive after having received the knowledge about the wrongful act may be a legal basis for the national authorities of Member States to impose liability. Accordingly, online platforms which fall within what is considered to be service providers, are not required to monitor in advance whether the content uploaded was lawful or not. The approach, which is lied down in mentioned provisions, could be certainly considered as protecting freedom of expression and preventing the possible censorship in websites.

Special Rapporteur reconfirmed principles stated out in above mentioned legal instruments emphasizing that "holding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship".[99] Accordingly, given the fact that most of the online matters are subject to private bodies, there was a suggestion that censorship measures should never be assigned to them, and that liability should not be imposed on anyone who is not the

[96] See Principle 6; "Declaration on Freedom of Communication on the Internet," Council of Europe Committee of Ministers, 28 May 2003, accessed at https://www.osce.org/fom/31507?download=true

[97] See Article 15, "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 ('Directive on electronic commerce')," accessed at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031

[98] See Article 13, 14 of "Directive on electronic commerce"; Principle 6 of "Declaration on Freedom of Communication on the Internet".

[99] Frank La Rue, "Report of the Special Rapporteur on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet," Human Rights Council. Seventeenth session: A/HRC/17/27 (2011), para. 40.

author of published content online.[100] It could be reasonable to agree with the considerations that positive obligations to create a supportive environment for freedom of expression mean that private websites and online platforms should be enabled to permit all kinds of expressions happening there, as long as they are not forbidden by law.[101]

Thus, it can be confirmed that European legal framework chooses as if the middle ground between two mentioned approaches of Internet regulations and is not contradictory to guidelines provided by the UN. Current regulation leaves the right for online platforms to store all the possible content, without making any binding requirements to monitor and determine which comments could be posted there or not in every case. However, upon the knowledge of illegal and someone's rights infringing comment, they are required to take the relevant actions to stop the infringement.

It is true that most of the times unlawful content online falls primarily within the regulation of the platforms conditions of use. For instance, all the major social media platforms have their terms of use, which explain what content is unwelcomed in their spheres. In Facebook Community standards, the network expresses what it considers to be unlawful speech and leaves it on its users to report such content, while not revealing the procedures by which decision to leave or remove the post is made.[102] Another popular network, Twitter, analogically asks users to report the posts, which users consider to be hateful.[103] Video-sharing network YouTube in its Community guidelines confirms that abusive comments are not permitted in the platform, giving an opportunity for users to report the content via special reporting tool.[104] Thus, as it can be noted, the notice and take down procedures are invoked. These are only a few landmark examples to mention, but having in mind their size and influence, it can be said that most of the other online platforms which care about their reputation, are likely to introduce similar rules and tools in order to make a positive environment for freedom of expression.

Leaving the primary task for users to report the content is seen as online platforms' attempts to give the priority for freedom of expression of their users.[105] Further, it shows the compatibility with the mentioned requirements for online intermediaries. That is to say, if websites

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[100] Frank La Rue, *supra* note 99, p. 43.

[101] Aleksandra Kuczerawy, "The Power of Positive Thinking," J*ournal of Intellectual Property, Information Technology and Electronic Commerce Law* 8, 3 (2017): 230.

[102] "Facebook Community Standards", accessed accessed February 17 2018, at https://www.facebook.com/communitystandards#hate-speech

[103] "The Twitter Rules", accessed accessed February 17 2018, at https://help.twitter.com/en/rules-and-policies/twitter-rules

[104] "Youtube Community Guidelines", accessed accessed February 17 2018, at https://www.youtube.com/intl/en-GB/yt/about/policies/#community-guidelines

[105] Emily Laidlaw, "What is a Joke? Mapping the Path of a Speech Complaint on Social Networks," David Mangan and Lorna E Gillies, eds, The Legal Challenges of Social Media. *Elgar Law, Technology and Society* (2017).

adopt similar type of internal regulation regarding unlawful, it means that they are not exercising monitoring and primarily rely on their users informing about unfavorable content, that being in line with principles of Declaration on Freedom of Communication on the Internet and provisions of E-Commerce Directive.

Nevertheless, some criticism towards such private regulations is apparent. The fact that decisions whether to leave or remove possibly injurious posts and comments are not revealed to users, leads to the lack of transparence.[106] Also, in the research published by UNESCO, the example of social networking sites was demonstrated stating that up to now they bypassed introduction of strict rules and procedures to determine what content should be eliminated.[107] That relates with the issue of "vagueness in the terminology used"[108] in the conditions of use, which subsequently may make confusion amongst users what comment is right in the light of allowed freedom of expression, and what is not. Above all, despite the entire set of established rules, platforms have been criticized for having still big amounts of unlawful posts.[109] There are claims that unlawful expression regulations done by online websites and social media platforms would not replace the regulation done by independent judicial bodies.[110] Thus, having in regard these raised concerns, it can be reasonably said that websites' terms of use and regulations do not necessarily deal adequately with unlawful comments which appear within their spheres. If it happens that freedom of expression by users is exercised in a way that it amounts to hate speech or infringes rights of others, and the comment stays there causing a harm, the question of liability for such comment arises.

While in the most of the offline cases the real perpetrator can be held accountable, the matter is obviously more complicated online. As it is very difficult or sometimes nearly impossible to hold the person who expressed unlawful speech online liable, the attention is brought towards the online platforms where the messages were posted. Accordingly, it could be agreed that the imposition of liability on websites or social media platforms for unlawful user-generated content there becomes "one of the most complex and intriguing legal questions"[111]. In general, concurrent liability, that type of liability when it is imposed on providers, is seen as advantageous bearing in

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[106] Sara Abbasi, "Internet as a Public Space for Freedom of Expression: Myth or Reality?" (2017). Available at SSRN: https://ssrn.com/abstract=3064175 or http://dx.doi.org/10.2139/ssrn.3064175
[107] Iginio Gagliardone, et al, *Countering online hate speech* (UNESCO Publishing, 2015), 53.
[108] Alexander Brown, *supra* note 89, 316.
[109] Caitlin Elizabeth Ring, "Hate speech in social media: An exploration of the problem and its proposed solutions (Diss. University of Colorado at Boulder, 2013), 120.
[110] Ben-David Anat, and Ariadna Matamoros-Fernandez, "Hate speech and covert discrimination on social media: monitoring the Facebook pages of extreme-right political parties in Spain," *International Journal of Communication* 10 (2016): 1170.
[111] Robert Spano. *supra* note 95, 667.

mind that the costs and procedures in order to identify the anonymous speaker are avoided.[112] It is tempting to hold online intermediaries liable, as they, unlike anonymous authors of the comments, are identifiable and well financially standing.[113] Therefore, the concept of intermediary liability comes along with the circumstances, when the content, for example commentaries or remarks, made online cross the boundaries of legitimate free speech and thus require a legal response. Despite the advantages of concurrent liability, freedom of expression is more likely to be restrained when intermediaries face the possibility of becoming liable and, consequently, become more cautious of posted content than in direct liability.[114] The author of this thesis agrees with such approach, as imposition of high requirements on online platforms may not only protect users from the harms arising from unlawful speeches, but also lead to excessive restriction of speeches, which may not have overstepped the boundary of being against the law.

While not touching the actual question of liability, recently stricter approaches towards dealing with unlawful content, including comments, emerged in the European Union level. Code of Conduct, signed by European Commission and Facebook, Twitter and YouTube in 2016 attempted to tackle the acts, which qualify as hate speech.[115] Council Framework Decision 2008/913 on combating racism and xenophobia[116] was a legal base for this Code. Thus, it can be seen that it was basically focused on racist and xenophobic content. Nevertheless, in the Code of Conduct it was clearly stated that illegal speech has a negative effect on freedom of expression and public discourse in these platforms.[117] Online platforms, which were considered to be responsible for freedom of expression in their spheres, committed themselves to remove hate speech upon users notifications "in less than 24 hours and remove or disable access to such content, if necessary"[118]. Thus, theoretically, this Code intended to specify the provisions of E-Commerce Directive related to the removal of the injurious content.

Despite the Code was generally recognized as a relatively good step towards better targeting of illegal speech online and showed the willingness of major online platforms to engage in

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[112] Ronen Perry; Tal Z. Zarsky, "Who Should Be Liable for Online Anonymous Defamation," *University of Chicago Law Review Dialogue* 82 (2015-2016): 171.
[113] Pelagio Palma Jr, "Protecting online intermediaries, threatening free speech," *Ateneo Law Journal* 60 (2015): 465.
[114] Ronen Perry; Tal Z. Zarsky, *supra* note 112, 170-172.
[115] "Code of Conduct on Countering Illegal Hate Speech Online", "European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech", Press Release, 31 May 2016, http://europa.eu/rapid/press-release_IP-16-1937_en.htm
[116] "EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law," accessed at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33178
[117] Code of Conduct on Countering Illegal Hate Speech Online, *supra* note 115.
[118] *Ibid.*

tackling the issue, its drawbacks were not dismissed. According to Natalie Alkiviadou, it has been a hasty solution, which applies only to the EU member states, only to those particular websites and only particular forms of hate speech.[119]. Thus, the scope of application was limited. The scholar also questioned the nature of agreement, considering that it might have been more effective to rely on international and European law which have been setting guidelines for hate speech regulation without such special separate agreement with several online platforms.[120] As it can be seen, the scholar critically evaluated such separate, not from international and European human rights framework directly flowing imposition of duties on websites.

Furthermore, the European Commission by some observers was called "an initiator of the interference"[121], because no safeguards for freedom of expression were provided. Another author agreed that this was simply a voluntary agreement, which did not undergo all the procedures and scrutinize that laws normally do and, consequently, did not leave any possibilities for the court review and users' appellation.[122] It was suggested that the basis for removal of such content should be provided by law and it should be also clearly stated that notice and take down procedure applies to certain content.[123] Some contributed to the debates about lack of remedies and appeals, further stating that this Code might lead to violation of international human rights law, as responsibility to deal with and ability to censor is left to social networks decisions, contributing to restraints on free expression which may not necessarily be provided by law.[124] These arguments of legal scholars proposed in the analysis of the Code of Conduct demonstrate that tools which are being used towards target of unlawful comments online in order to protect the rights which have been infringed by them, can easily lead not only to infringements of the authors of comments, but freedom of expression of the whole platform.

Having discussed that, it is evident that the question of unlawful comments, their removal or accountability for them is really complex. While on the one hand, the freedom of individuals to impart ideas and information in online platforms shall be ensured, the suitable way to deal with comments, which are likely to have negative consequences for others should be found. However,

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[119] Natalie Alkiviadou, "The Hierarchy of Hate: Mixed Signals in the Combat against Hate Speech," *Verfassungsblog on Constitutional Matters*, 6 February 2018, accessed at https://verfassungsblog.de/the-hierarchy-of-hatemixed-signals-in-the-combat-against-hate-speech/

[120] *Ibid*.

[121] Aleksandra Kuczerawy, "The Power of Positive Thinking," *Journal of Intellectual Property, Information Technology and Electronic Commerce 8*, 3 (2017): 235.

[122] Alexander Brown, *supra* note 89, 318.

[123] Aleksandra Kuczerawy, *supra* note 121, 235-236.

[124] Adina Portaru, "Freedom of Expression Online: The Code of Conduct on Countering Illegal Hate Speech Online," *Revista Romana de Drept European*, no. 4 (2017): 85-86.

nor Article 10, neither analogical provisions in other international instruments, do not provide precise answers what should be done in such cases. Separate efforts to target the issue, such as mentioned Code of Conduct, raised concerns that putting pressure on online intermediaries can have an adverse effect towards freedom of expression in these platforms. Thus, it is necessary to further look at practical aspects of the matter in cases, which evolved in the ECtHR's jurisprudence.

2.2 The approach of the ECtHR

"Users of telecommunications and Internet must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yeld on occasion to other legitimate imperatives, such as the prevention of disorder of crime or the protection of the rights and freedoms of others"[125]. This founding reveals that the Court does not justify the illegal performance of freedom of expression online and implicitly indicates that cases of violations should receive some level of handling.

After such recognition, the Court already had several opportunities to deal with issues of comments, which raised doubts to fall within the scope of allowed freedom of expression in online websites. As the case law demonstrated, the question of allegedly unlawful comments is inextricably linked with the analysis who shall be held liable for them.

Until the moment, there have been four ECtHR cases, which concentrated on the issues of intermediary liability for comments written in the online platform. In the landmark *Delfi v. Estonia* (hereinafter referred to as *Delfi*) judgment, which was the first to deal with intermediary liability for the comments posted in the online platform, the Court adopted four elements necessary to figure out when solving the question of intermediary liability. Namely, these are the context of the comments, the measures applied by the platform in order to prevent or remove defamatory comments, the liability of the actual authors as an alternative and the consequences for the platform of the domestic proceedings.[126] It means that the outcome of the overall analysis of these components leads to decision whether it is relevant and consistent with freedom of expression to hold intermediaries liable. These four factors provided precise guidelines for analysis in further cases. Thus, in order to understand completely the ECtHR's rationale in the circumstances of injurious comments and liability issues, it is relevant to analyze and compare through these points the Court's main considerations in each case.

[125] ECtHR, K.U. v. Finland, no. 2872/02, 02 December 2008, para. 49.
[126] ECtHR Delfi AS v. Estonia, *supra* note 1.

As for the factual circumstances, *Delfi* case concentrated on the major news portal of Estonia, where were comments under the article about a ferry company, which was considered to have attracted more than average number of readers. In *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* (hereinafter referred to as *MTE*) the case concerned the impugned comments below the MTE portal publication which was criticizing the business practice of a couple of real estate websites, and Index's subsequent writing about the latter content. *Pihl v. Sweden* (hereinafter referred to as *Pihl*) and *Tamiz v. United Kingdom* (hereinafter referred to as *Tamiz*) contained very similar circumstances related to blog posts and some comments beneath, which were likely to infringe the reputation of the applicants and attracted smaller audience than in the first two cases.

Subsequently, as regards the context, primarily it is relevant to scrutinize and compare how the nature of impugned comments was evaluated. In *Delfi* case, the court stated that comments had been "tantamount to an incitement to hatred or to violence", while in *MTE* case the comments "although offensive and vulgar […] did not constitute clearly unlawful speech"[127]. Thus, the latter were "not of the same gravity"[128] as in the previous case. In the latter case, it considered the expressions not amounting to hate speech, because they were "the specificities of the style of communication on certain Internet portals […] albeit belonging to a low register of style, are common in communication on many Internet portals"[129]. At this point, it should be noted that the latter concept has been widely criticized, because it is not clear exactly what is considered to fall within that "style of communication" that is less dangerous and accordingly, whether such "style of communication" is attributable to whole online sphere, or differs from one type of online platform to another.

After comparing these two judgments, legal scholar Richard Caddell was left unsure, where the boundary for lawful and unlawful speech in such internet platforms is. He admitted that in *Delfi* case words invoked were more vigorous than in the second one, "but by a relatively limited degree and there was little evidence that the commentators actively sought to visit physical harm upon the initial claimant"[130]. It has been also argued that operators of online platforms may be in a difficult position to distinguish which speech is lawful and which already amounts to defamation or hate

[127] ECtHR MTE v. Hungary, *supra* note 24, para 64.
[128] Robert Spano, *supra* note 95, 677.
[129] ECtHR MTEv. Hungary, *supra* note 24, para.77.
[130] Richard Caddell, "Third party Internet liability and the European Court of Human Rights," *Communications Law* 21, 3 (2016): 88–91.

speech.[131] Thus, after the first two cases the ECtHR left more doubts rather than clarity towards the qualification of impugned comments.

Regarding the subsequent cases, in *Pihl*, the Court considered comments merely offensive, but like in *MTE*, not amounting to hate speech.[132] However, this time no reference to the typical Internet style was made. Instead, in the *Tamiz* case, the Court took into consideration the observations, submitted by human rights organization Article 19, which suggested that online speeches, such as "comments in response to blogs or posts on social media, are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage."[133] Consequently, the ECtHR referred to a "low register of style"[134] which characterizes the majority of online comments and thus is not likely to bring substantial harm.

Therefore, the subsequent cases did not bring more certainty with regard to what impact Internet style has on comments qualification. Taking into account the above stated Court's considerations, it seems that there is still some obscurity what is treated as unlawful remark in the online comment and whether the practice referring to traditional Internet style will be followed in the future judgments. Therefore, it could be agreed to the joint dissenting opinion of judges Sajó and Tsotsoria expressed already in the very first related judgment, where they, by raising questions whether a particular statement expressed in the online environment has the same impact as the same statement made in offline environment, concluded that "the question of the extent to which such comments amount to a real threat deserved a proper analysis"[135].

The role and nature of the intermediaries played a significant role in the ECtHR's considerations about the context of unlawful comments. In *Delfi* case one of the most emphasized elements leading to imposition of liability on news platform was the fact that portal was professionally managed website run on a commercial basis with an aim to receive many comments.[136] A strong emphasis was also put on the fact that such website was inviting readers to share their opinions in the comments, as well as it had established interest to gain economic benefits from the comments below published articles. Accordingly, the Court also found that *Delfi* had a substantial degree of control over the content existing in the platform and its involvement in

[131] Eileen Weinert, "MET v Hungary: the first European Court of Human Rights ruling on liability for user comments after Delfi AS v Estonia," *Entertainment Law Review* 27, 4 (2016).
[132] ECtHR, Pihl v. Sweden, no 74742/14, 07 February 2017, para.25
[133] ECtHR, Tamiz v. the United Kingdom, no. 3877/14, 19 September 2017, para. 75.
[134] *Ibid*, para. 81.
[135]ECtHR Delfi AS v. Estonia, *supra* note 1, Joint dissenting opinion of judges Sajó and Tsotsoria, para.14.
[136] *Ibid*., para. 144.

comments publications was sufficiently active.[137] It follows that by attributing an active role to Delfi news portal, the ECtHR excluded it from the types of protected online intermediaries in the E-Commerce Directive. Meanwhile, in *MTE* case, one of the applicants being a non-profit website was one of the clear motives to avoid imposition of liability.[138] However, the fact that the second applicant, like online news website in *Delfi* case, was one of the major news portals in the country working on commercial basis, was skipped as an argument this time. In *Pihl* and *Tamiz*, online platforms, which contained the impugned comments, were non-profit Internet blogs, not well-known to a wider public and thus, were not attracting huge audiences of readers. That, accordingly, was one of the factors to avoid liability, as the Court generally considered that in its previous cases established requirement to estimate some upcoming unlawful comments would be "excessive and impractical forethought capable of undermining the right to impart information via internet"[139]. It added that such requirement might bring negative effects on the comments ambience there and be "particularly detrimental for non-commercial website"[140]. Therefore, it can be seen that the ECtHR strongly relied on the websites' nature and their role. It follows from the ECtHR's argumentations, that if the website is functioning on commercial basis and seeks to commentators to post comments, the imposition of liability would be a relevant measure for keeping the injurious comment, which they have had to expect appearing. However, no precise arguments were provided regarding the actual impact of commercial or non-commercial nature of the websites on the possible harm of the injured party.

Interestingly, the Court, following in *Delfi* case provided ascertainment that the case "did not concern other fora on the internet where third-party comments can be disseminated, for example, an Internet discussion forum or bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any inputs from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website as a blog as a hobby"[141], in the latter cases consistently held imposition of liability on blogs irrelevant. There is an opinion that the Court has applied double standards for commercial and remaining websites.[142] In the view of the author of this thesis, such division into commercial and non-commercial bodies lacks some additional

[137] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 144.
[138] ECtHR MTE v. Hungary, *supra* note 24.
[139] ECtHR, Pihl v. Sweden, *supra* note 132, para. 31.
[140] *Ibid*.,para 35.
[141] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 116.
[142] Richard Caddell, *supra* note 130, 90.

justification, particularly having in mind that the actual harm the individual is likely to suffer after the injurious comments may not be related with the fact whether that comment was posted in the online platform of commercial, or non-profit nature. Also, prior moderation of comments, as it was suggested in the first case, would be hardly compatible with E-Commerce Directive. Thus, maybe that is one of the reasons why the Court's approach in the further cases became more flexible.

In fact, at this point some discussions were raised amongst legal scholars, who, despite the ECtHR's explicit statement regarding the non-extension of the *Delfi* judgment to social networking sites, discussed their commercial nature as a factor to impose liability. Taking into account that social networks are professional profit-generating units and usually encourage users to post contents, which are integral part of these platforms (for example, Facebook posing questions such as "what's on your mind?" which can be clearly considered as inviting to post content), Megan Elise Griffith took an approach that following such logics social networks could theoretically become liable as well. Richard Caddell contributed to such viewpoint, basing his arguments on the idea that when website is functioning on commercial purposes, there is a higher possibility that the court may require an accordingly greater degree of vigilance.[143]

However, the author of this thesis tends to agree with the opinion that if there will be a similar liability case related to the biggest social media platforms, the ECtHR would take into account their monitoring practices, public interest in promoting these outlets for speech and thus will not hold them liable for user-generated content.[144] Nevertheless, the fact that such discussions are going on, apparently calls for more precise Court's elaboration in the future cases.

Regarding the other criteria established by the ECtHR, namely, possible liability of authors of the comments, in *Delfi* case the Court found that the posting which was happening in the platform, was anonymous, thus it was challenging the situation of possible identification of perpetrators.[145] Accordingly, the direct liability would have been impossible in such case. In other cases, the court also did not focus on this argument too much, as it mainly considered it to be very challenging to identify the real authors of the comments.

As regards the measures taken, in *Delfi* it was recognized that website immediately removed comments upon request, however, that happened after comments had remained below the article for 6 weeks. As it was clearly noted by the Court, the news portal could have possibly

[143] Richard Caddell, *supra* note 130.
[144] Megan Elise Griffith, "Downgraded to Netflix and Chill: Freedom of Expression and the Chilling Effect on User-Generated Content in Europe," *Columbia Journal of European Law* 22, 2 (2016): 371.
[145] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 147-151.

avoided the liability if it had removed them subsequently, without such delay, that being proportionate with the framework of freedom of expression under Article 10.[146] The Court, after recognizing that a number of tools related to the comments the news portal had was not sufficient, held that having more effective measures to filter the publication of obviously hateful comments, would not amount to private censorship.[147] Differently, in *MTE* case, comments were removed instantly after the start of civil proceedings of the other party. This time, the measures, which, very similarly as in *Delfi* judgment, included terms of use stating that authors of comments are liable for their posts and prohibition of insulting content, notice and take down procedure, were considered as relevant and satisfying.[148] What concerns *Pihl* decision, the Court noted that it was clearly stated by the blog platform that comments were not checked before their publications and, accordingly, their authors are responsible for the content they are publishing. As a great difference from *Delfi*, in *Pihl* case the impugned comment was removed one day after it had been stated by the applicant that the comment about him was not correct, following with the issue of the statement with recognition of error and apology by the platform.[149] Therefore, it can be noted that approach taken when dealing with the improper comments was also one of the most important points when considering the possible platform's liability. It suggests that the ECtHR related longer stay of offensive comments with possibly bigger consequences for the party about which the comments were written.

As to the consequences, the fine imposed to *Delfi* news portal was not huge, thus it was considered to be proportionate.[150] In *MTE*, the Court considered the consequences by portal would be faced if decision to apply liability to it would be positive.[151] In *Pihl* and *Tamiz* cases, which were brought against the Court not by online intermediaries like in the first two cases, but by injured parties instead after domestic courts dismissed their applications, it was considered that online blogs did not face any consequences. In general, it appeared that even though this fourth criteria of the Court was important, however, it did not play a major role for the determination of liability's consistence with freedom of expression regulatory framework.

After a broad analysis of all the factors mentioned above, it is evident that the ECtHR the in one case found the imposition of liability right, justified and thus not infringing the freedom of the portal to spread information. In the remaining cases, it took an opposite approach and recognized

[146] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 153
[147] *Ibid*., para. 157.
[148] ECtHR, MTE v. Hungary, *supra* note 24.
[149] ECtHR, Pihl v. Sweden, *supra* note 132, para.32
[150] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 160.
[151] ECtHR MTE v. Hungary, *supra* note 24, para. 87-88.

that imposition of liability should be refrained, by emphasizing the importance of intermediaries as the places for freedom of expression and thus considered that requiring the platforms to be aware of impugned comments, which may appear would be unreasonable and harmful for such spaces. Some arguments, such as discussed portal's assumption of emergence of unlawful comments were rejected in the cases, which came afterwards.

Seemingly, the Court provided the substantial legal interpretation that when there is a commercially run leading website with an interest that many comments would be posted, and where comments after the lack of safeguard measures taken by portal, pass the threshold of causing sufficient harm and threat to individuals, imposition of liability would be within the standards of Article 10. In other cases, when online platforms are governed by non-commercial bodies, not widely known amongst the bigger part of the society and comments are not widely reachable, decision to hold websites liable would be outside the scope of Article 10.

However, the ECtHR's approach towards imposition of liability upon websites has received a tremendous critical attention. Eileen Weinert considered the Courts' conclusions as putting freedom of expression in danger[152] and called the initial judgment as an extraordinary and shocking judgment in terms of ECHR.[153] Caddel admitted that current legislative background for online intermediary liability is probably limited, and the Court so far is showing the restrictive interpretation of it.[154] That is to say, when the ECtHR decided to hold the portal liable, a very restrictive interpretation of the E-Commerce Directive was made. It was also recognized that imposition of liability on *Delfi* news portal could be considered as prescribed by law only in the case if it was a traditional media publisher.[155] Lisl Brunner agreed with such consideration, acknowledging that in *Delfi* the online portal was basically treated as traditional media, which is "responsible when providing a platform to other speakers as part of its task of imparting information and ideas of public interest"[156]. In other words, it means that scholars recognized the Court as completely disregarding the nature of Internet and equating website to offline media forms.

Nonetheless, it could be agreed to the logic that in such case it was unreasonable to expect that Delfi would be aware of all the comments.[157] It was also not understandable by some scholars

[152] Eileen Weiner, *supra* note 131, 139.
[153] Eileen Weinert, "Delfi AS v Estonia: Grand Chamber of the European Court of Human Rights Hands Down its Judgment: Website Liable for User-Generated Comments," *Entertainment Law Review* 26, 7 (2015): 250.
[154] Richard Caddel , *supra* note 130, 91.
[155] Eileen Weinert,*supra* note 153, 250.
[156] Lisl Brunner, "The Liability of an Online Intermediary for Third Party Content: The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia," *Human Rights Law Review* 16, 1 (2016): 171.
[157] Eileen Weinert, *supra* note 153, 249.

why encouraging to upload comments made such a different outcome.[158] Indeed, given the nature of most of online sites, comments most likely to be welcome everywhere. Thus, the appearance of them should be attributed to the peculiarities of the Internet, rather than specific features of only commercial sites. Additionally, according to dissenting judges in *Delfi* case, requiring to remove comments, which are likely to be injurious would be a sort of pre-censorship.[159] As if summing up the aspects touched by other scholars, Robert Spano reasoned out that *Delfi* case is relatively unique and not appropriate to be a "basis for broad interpretive conclusions"[160]. The outcome in the *MTE* case and, correspondingly, in subsequent judgments, was considered by scholars as more reflecting the long-established ECtHR's jurisprudence related to freedom of expression.[161] The discussed considerations reveal that legal experts firmly recognized the Court's primary arguments regarding imposition of liability as not very well reasoned and capable of confining freedom of expression in online platforms.

To evaluate, whether the stricter Court's approach of treating the news website as a publisher of comments is firmly in line with its previous assessments, it is relevant to have a glance at its jurisprudence related to freedom of expression in traditional journalism and potential threats to freedom of expression.

In *Cumpănă and Mazăre v. Romania,* proceedings against publishers of articles for insult and defamation were brought. While evaluating sentencing of journalists and prohibiting them on the exercise of their profession, the Court held that "the chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident"[162]. Even given that the publishers practically did not undergo the intended effects of conviction, the Court still considered that an inevitable contravention with freedom of expression comes when there is no clear justification for the sanction.[163] Following that, the outcome of the case was that the restriction on publishers' freedom of expression was found unnecessary, leading to a violation of Article 10.

In *Altuğ Taner Akçam v. Turkey*, where the impugned editorial opinion was published in the newspaper, the ECtHR considered that even given the fact, that sanctions in reality have not yet been applied to the publisher, the situation when investigation in the future could be possibly exercised against him and the fear of sanctions would have a chilling effect on individual's freedom

[158] Eileen Weinert, *supra* note 153, 249.
[159] ECtHR Delfi AS v. Estonia, *supra* note 1, Joint dissenting opinion of judges Sajó and Tsotsoria, para. 1-3.
[160] Robert Spano. *supra* note 95, 679.
[161] Richard Caddell, *supra* note 130.
[162] ECtHR, Cumpănă and Mazăre v. Romania, *supra* note 85, para.114.
[163] *Ibid*., para. 166.

of expression.[164] Thus, the Court related imposition of legal sanctions on the publisher with the risk for the right enshrined in Article 10.

In *Morice v. France* there has been also pointed out by the Court that "the relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression"[165]. Similarly, in one of the recent cases, *Dmitriyevskiy v. Russia,* which concerned the sentence of the journalist due to his publication, the Court held that imposition of such sanctions could possibly cause a chilling effect on the exercise of free expression in whole country.[166] Having analyzed this, it can be seen that many times the Court has protected freedom of expression of journalists and publishers, even when they were not acting absolutely in line with freedom of expression or that they practically have not been affected by sanctions. It appears that the ECtHR considered even a mere possibility that sanction can be applied may already be diminishing the enjoyment of freedom of expression. It is also apparent that the Court has consistently put freedom of expression in a very important place in terms of media.

In *Delfi* case, the portal, as discussed above, was also perceived as traditional media publisher, however, the Court did not recognize any chilling effects on the exercise of freedom of expression with regard to imposition of liability on website. It also skipped the considerations whether such situation when website would be aware of possible sanctions, would lead to excessive removal of comments, negative affecting the free speech environment in the website. Having in regard such considerations of the ECtHR, it could be said that the latter *MTE, Pihl* and *Tamiz* cases, where it was avoided to impose sanctions on the online platforms and the chilling effect was recognized, were more consistent with ECtHR longstanding jurisprudence than the initial *Delfi* case.

Further it will be discussed how the problematic aspects of online comments and the ECtHR's findings are interpreted by domestic courts in the Republic of Lithuania.

2.3 The approach of the Lithuanian courts

Article 2.24 of the Civil Code of the Republic of Lithuania protects person's honour and dignity by allowing the ones who believe this right was infringed, to access the justice.[167] Article 154 of the Criminal Code of the Republic of Lithuania forbids libel by spreading false information, which can possibly contemn or humiliate the other person, as well as accusing person of committing

[164] ECtHR, Altuğ Taner Akçam v. Turkey, no. 27520/07, 25 October 2011, para 68.
[165] ECtHR, Morice v. France, no. 29369/10, 23 April 2015, para. 127
[166] ECtHR, Dmitriyevskiy v. Russia, no. 42168/06, 29 January 2018.
[167] "Lietuvos Respublikos Civilinis kodeksas," *Valstybės žinios*, 74, 2262 (2002).

a crime in the media.[168] Subsequently, Article 170 of this Code forbids incitement to hatred on one of the mentioned grounds. The scope of application of these provisions extends to the Internet. Thus, in Lithuania, the judicial practice related to unlawful comments is formed by the judgments in civil and criminal cases. Also, the starting point for any case related to online website liability issues in Lithuanian courts are provisions laid down in Articles 12, 13, 14 of Law on Information Society Services, which implements the norms of the E-Commerce Directive.[169] Therefore, imposition of liability on online intermediaries in Lithuania, consistently with the EU law, is not allowed on circumstances discussed in previous subchapter.

After having analyzed the case law of Lithuanian domestic courts, it becomes evident that the courts explicitly referred to *Delfi* judgment only several times. Besides, the other in previous chapter discussed cases, namely *MTE, Pihl* and *Tamiz,* have never been cited by Lithuanian courts until the moment. As both *Pihl* and *Tamiz* decisions appeared in 2017, such situation may be partly justified by a relatively short period of time passed. However, while it have already been two years since the *MTE* judgment and three years since the *Delfi* judgment, probably it would be reasonable to expect more Lithuanian courts' attempts to explicitly rely on the ECtHR jurisprudence.

Moreover, it should be noted that until the moment, no case in Lithuanian courts provided an explicit analysis of the case through all the four criteria established by the ECtHR. However, examination of the separate elements, which belonged to these criteria in the ECtHR case law, took place in a number of judgments. Thus, it is relevant to analyze the approaches of Lithuanian courts by putting emphasis on these established principles.

As for the context of the comments, a significant amount of cases in Lithuanian courts focused on specific online platforms designed to post complaints about employers or services. The courts recognized such platforms as based on user-generated content completely.[170] Thus, that apparently fell within what the ECtHR considered as being other types of websites, for which motives of imposition of liability set out in *Delfi* judgment were not relevant. Already before the presence of the discussed ECtHR judgments, in the case law of domestic courts the attention was brought towards the situation that when in online complaints platform the comment is being checked by the website prior its publication whether it is not libelous, that is considered to be an active role

[168] "Lietuvos Respublikos Baudžiamasis kodeksas," *Valstybės žinios*, 89-2741(2000).
[169] "Lietuvos Respublikos Visuomenės informavimo įstatymas," *Valstybės žinios*, 71-1706 (1996).
[170] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2014 m. vasario 19 d. nutartis civilinėje byloje Nr. 3K-3-30/2014," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/803432

of the portal.[171] Thus, the liability, in accordance with coming-after ECtHR evaluation in related case law, is more likely to be imposed then. Analogous approach was embedded in other cases. It means that the role of website in the context of the comments is important to consider in Lithuanian case law.

In one of the civil judgments of the Supreme Court of Lithuania, which came almost simultaneously with initial judgment of the ECtHR in *Delfi* case, factual circumstances involved the applicants request to remove the allegedly harmful for reputation comments about him as an employer in one of the platforms for individual anonymous complaints about various entities.[172] In this case, the Supreme Court relied on the ECtHR's findings that discussion, which takes place in online spheres, has specific aspects with regard to freedom of expression, such as wide accessibility of injurious comments and thus, imposition of liability can sometimes be compatible with the framework of freedom of expression.[173] That is to say, the Supreme Court recognized that holding a website liable can be a measure to prevent the situation when impugned comment stays available for wide audience and keep causing a harm for an individual or entity.

In the same judgment, the Supreme Court held that the character of the site, which was the online platform for complaints, as well as the possibility that due to the comments a highly possible risk for business reputation may arise, emphasized the commercial aspect and bigger duty of care for online intermediary.[174] Thus, by such deliberationn the court attributed the nature of the website to one of the factors to consider when determining the application of liability. However, in other cases regarding online news platforms, the courts did not heavily concentrate on these considerations and relation between the commercial nature and increased possibility of liability on website. The author of this thesis did not find any recent case where Lithuanian courts would explicitly discuss the commercial or non-commercial nature of websites as determining points of the case. Therefore, it can be noted that Lithuanian courts did not put a strong and consistent emphasis on the nature of the online site, where the injurious comments took place.

The availability and reachability of comments were other factors the domestic courts attributed to the context criteria. In the case, which concerned one of the major online news portals in Lithuania, the court made a general statement that when comments are spread via Internet, they

[171] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2012 m. lapkričio 13 d. nutartis civilinėje byloje Nr. 3K-3-479/2012," *Teismų praktika.* 2012, 38, p. 19-37
[172] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2014 m. vasario 19 d. nutartis civilinėje byloje Nr. 3K-3-30/2014," *supra* note 170.
[173] *Ibid*.
[174] *Ibid*.

are freely available to unlimited number of people.[175] However, the domestic courts revealed diverse considerations towards comments' availability to wide public in different types of website. In the criminal case related to a comment posted under individual's post in Facebook social networking site, the court recognized it as the fact, that information online was disseminated to the public.[176] Nevertheless, despite establishing the mere fact, it is seen that the court did not scrutinize whether comment was publicly available, or reachable only by the connections of that particular Facebook account. In one of the cases related to online complaints platform, it was recognized that in the website of such category the comments are available to everyone.[177] On the other hand, the Court did not consider the section of anonymous comments in online news portal as the one which is being *de facto* reached by many people. Alternatively, in the situation when the applicant claimed that critical comments about him as a doctor, which appeared under the article in one regional news online portal, were infringing his honour and dignity, the court emphasized that anonymous sections of comments are often not read by people who are interested in an article, and there are no proves that many patients and hospital staff members, as the applicant claimed, read it.[178] Similarly, once, the claimant, representative of human rights organization, raised an argument the injurious comment was available to huge audience while it was below one article in a very popular online news platform. The court disagreed evaluating the comment as unethical, but not amounting to hatred and did not consider the claimant's argument related to reachability of that particular comment.[179] Thus, even though these considerations in the latter cases concerned commercial news online sites, almost as analogous nature as in the one in *Delfi* case, the court demonstrated a distinct approach from the ECtHR, when assessing the availability of comments sections there and thus the actual harm such comments may have.

Furthermore, the content of online comments was analyzed virtually in every case. It was generally recognized that everyone is allowed to freely impart the ideas and opinions in all the means of public information, including such online platforms as Facebook, however, no right to spread defamatory statements is provided and thus the information, opinion or comments spread

[175] "Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus 2017 m. kovo 7 d. nutartis baudžiamojoje byloje Nr. 2K-56-697/2017," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/803432
[176] "Kauno apygardos teismo Baudžiamųjų bylų skyriaus 2017 m. spalio 25 d. nutartis baudžiamojoje byloje Nr. 1A-600-498/2017," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1534670
[177] "Kauno apygardos teismo Baudžiamųjų bylų skyriaus 2015 m. vasario 27 d. nutartis baudžiamojoje byloje Nr. 1A-52-317/2015," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1007421
[178] "Vilniaus apygardos teismo Civilinių bylų skyriaus 2015 m. liepos 9 d. nutartis civilinėje byloje Nr. e2A-2230-392/2015," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1086208
[179] "Vilniaus apygardos teismo Baudžiamųjų bylų skyriaus 2017 m. kovo 15 d. nutartis baudžiamojoje byloje Nr. 1S-94-1020/2017," http://www.infolex.lt.skaitykla.mruni.eu/tp/1442466

there have to the highest possible level correct and reflecting reality.[180] The importance of content analysis was also related to the situations, when the request to make inaccessible the comments which are stored by online intermediary is brought before the courts, provided that the basis for this request is the evaluation of the content of the comment, rather than the legitimacy of acts of a service provider.[181] Thus, the content of the comment is one of the primary things when there is a need to determine liability question for it.

Additionally, there was a case, which concerned the request for removal of comment with misleading information in the review column on the company's page on Facebook. The court evaluated the nature of the particular locality where the comment appeared, namely the review column, and declared that "it was reasonable to expect that negative comments may appear there"[182]. That is to say, the court made a connection between a concrete place and the influence it may have over the content of the comment.

In another case, the applicants claimed that comments under investigative journalistic research about secret group ruling the law enforcement, published in one of the major online news websites, was making them easily identifiable as the targets of that research. In one comment, the CV of the applicant was uploaded, while in the other comment his name and surname were indicated, thus the applicant claimed that his honour and dignity were negatively affected. However, the court held that, in total, there were 201 comments, therefore 2 comments composed only a very small part of a whole commenting area and accordingly were likely to be accidental, particularly when in many other comments there were more attempts to guess who were the targets of that investigative research too.[183] This recognition demonstrates the approach of the court that generally in the context, when article attracts a sufficiently big amount of various comments, one or two comments there possibly may not be of big significance.

Thus, it can be noticed that when evaluating the context of the comments written, Lithuanian domestic courts more rely on the type and purpose of website and whether appearance of injurious comments there is widely approached by the audience, rather to referring to intention of websites to attract many comments and generate profit.

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[180] "Kauno apygardos teismo Baudžiamųjų bylų skyriaus 2017 m. spalio 25 d. nutartis baudžiamojoje byloje Nr. 1A-600-498/2017," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1534670

[181] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus teisėjų kolegija 2012 m. lapkričio 13 d. K-3-479/2012," *supra* note 171.

[182] "Šiaulių apygardos teismo Civilinių bylų skyriaus 2017 m. balandžio 24 d. nutartis civilinėje byloje Nr. 2A-329-357/2017," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1463568

[183] "Vilniaus apygardos teismo Civilinių bylų skyriaus 2015 m. gegužės 11 d. nutartis civilinėje byloje Nr. 2A-439-567/2015," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1047778

When deciding illegitimacy of the comments, like in *Delfi* or *Pihl* cases, the Lithuanian courts had never explicitly referred to the typical Internet style or low online communication. Many times the courts did analysis whether comments were expressing facts[184] or opinions[185], thus for these considerations, the situation whether such statements were posted under Internet articles or Facebook posts, was apparently considered irrelevant. The same was regarding the comments, which amounted to hate speech. In principle, the courts put much emphasis on deciding the boundary between lawful and unlawful comments without regarding the nature of Internet, which may affect the style in expressions used.

In addition, the Supreme court has explicitly ruled that the mere fact that comments were posted on Internet do not give a different, less significant legal meaning to them.[186] However, the Court paid attention to short and laconic style of the comments. For instance, there was stated in several cases that the comment was too short to claim that it was really injurious.[187] One negative, contemptuous comment under the article in one of the biggest news websites was also considered as too laconic comment and nonconcrete.[188] However, the courts had never attributed laconism as the feature of online communication.

As for the amount of comments and possible consequences, in the context when insulting and defamatory comments appeared in one regional news online portal, the court paid attention to the fact that similar statements about the same aspects were already arising in the past other websites, thus the applicant could have expected such comments to appear.[189] That is to say, if critical comments about particular person or entity have been circulating before in other platforms, the court put less significance to a new allegedly unlawful comment in particular website. In the latter case, the court did not include the news portal in proceedings upon the plaintiff request.

Courts also considered the amount of comments written as the confirmation of the infringement of freedom of expression. For example, when person posted 15 injurious comments under various articles in online news portals, as well as the comments under posts in social

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[184] "Vilniaus apygardos teismo Baudžiamųjų bylų skyriaus 2016 m. spalio 13 d. nutartis baudžiamojoje byloje Nr. 1A-337-166/2016," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1352233

[185] "Vilniaus apygardos teismo Baudžiamųjų bylų skyriaus 2016 m. lapkričio 7 d. nutartis baudžiamojoje byloje Nr. 1A-437-195/2016," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1366816

[186] "Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus 2018 m. kovo 13 d. nutartis baudžiamojoje byloje Nr. 2K-91-976/2018," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1574122

[187] "Vilniaus apygardos teismo Baudžiamųjų bylų skyriaus 2018 m. kovo 1 d. nuosprendis baudžiamojoje byloje Nr. 1A-80-211/2018," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1574025

[188] "Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus 2016 m. kovo 1 d. nutartis baudžiamojoje byloje Nr. 2K-86-648/2016," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1220871.

[189] "Vilniaus apygardos teismo Civilinių bylų skyriaus 2015 m. liepos 9 d. nutartis civilinėje byloje Nr. e2A-2230-392/2015," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1086208

networking sites, that was considered as expediency and purposefulness.[190] Thus, for evaluating the context, the number of comments written is a matter to consider. However, it was explicitly mentioned that if there is a dozen of comments, the court should analyze not a whole of them, but each comment individually.[191] Hence, even though the courts related more significant consequences with a higher number of comments written, that did not preclude from stating that lawfulness of each comment should be scrutinized individually.

Concerning the direct liability of authors of comments, probably the most significant differences from the circumstances in the ECtHR's case law can be observed. Before the landmark ECtHR judgments, it was considered that due to the new technologies, it is not always possible to identify who are the real authors of the comments, however, it should not automatically mean that the damage caused by such comments ought to be compensated by the media subjects.[192] Thus, some reluctance towards imposition of liability on online intermediaries was shown. In numerous judgments local courts applied direct liability to the authors of the comments. For example, in the case, where 15 comments were written under the nicknames, the author who was found after the identification of IP address, did not deny that he wrote the comments, leading to holding him criminally liable.[193] In addition, when concerning the comment, allegedly inciting to hatred in one of major news sites, the applicant interestingly did not raise the question that comment should be removed by the news portal, he sought to find the person who actually wrote it. That shows that applicants themselves in Lithuania are more willing to find real perpetrators instead of holding liable online portals for having stored such comments.

On the other hand, there were cases, when authors of comments denied their alleged misbehavior. Namely, in one case where defamatory comment took place in online news portal and one of online complaints platforms. Notwithstanding the IP address was established and the victim believed that the comment was written by that person, the suspected perpetrator strongly denied his fault. Thus, the court found that there was no way to prove that comment was posted by him.[194]

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[190] "Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus 2017 m. spalio 3 d. nutartis baudžiamojoje byloje Nr. 2K-206-693/2017," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1527888

[191] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2014 m. vasario 19 d. nutartis civilinėje byloje Nr. 3K-3-30/2014," *supra* note 170.

[192] "Kauno apygardos teismo Civilinių bylų skyriaus 2012 m. gegužės 24 d. nutartis civilinėje byloje Nr. 2A-852-324/2012," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/379258

[193] "Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus 2017 m. spalio 3 d. nutartis baudžiamojoje byloje Nr. 2K-206-693/2017", *supra* note 190.

[194] "Kauno apygardos teismo Baudžiamųjų bylų skyriaus 2015 m. vasario 27 d. nutartis baudžiamojoje byloje Nr. 1A-52-317/2015," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1007421

Similar outcome was in the case where under article in one of online news portal, the very negative comment, justifying the occupation of Lithuania and aggression against the state in a threatening tone was written. The person, who was found after checking IP address, denied about having written the comment. The appellate court dismissed the initial opposite finding of the first instance court, claiming that having factual evidences of IP address does not immediately bring to a clear conclusion that the injurious comment was written by that particular individual and accordingly, emphasized the need for additional evidences.[195] Thus, the alleged author was not hold liable due to the lack of such evidences.

In contrast, in one case where unlawful comments took place under articles in analogous "Delfi" news website, the alleged author denied her fault after IP identification. However, the whole circumstances of the case allowed courts to conclude that comments were written by that person.[196] Alternatively, there has been a case where it was found that the IP address, from which the impugned comment in the online complaints platform was posted, belonged to the legal entity. Despite the fact, that the court did not found who exactly posted that comment, it held liable the whole legal entity.[197]

Thus, it can be seen that application of direct liability is exclusively common in Lithuanian legal practice. In most of the cases, no question was raised whether online intermediaries shall be involved in the court proceedings. The claimants and victims did not always consider to contact the online intermediaries to remove their rights allegedly infringing comments, instead there is a tendency to seek to find the real author of the comments. Even more, in one case, the court dismissed the claim to involve the online news website in the judicial proceedings as unfounded.[198] The outcome of the case depends on the fact whether the assumed author of the comments admits or denies the alleged act. In the case of denial, it is possible to hold person liable only if the other circumstances in the case support the founding that person really wrote those injurious comments. Therefore, it proves that application of direct liability is a complicated matter in practice.

As for the measures taken, firstly it should be noted that comment can be legitimately requested to remove if the factors of its unlawfulness and comment being stored by online

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[195] "Vilniaus apygardos teismo Baudžiamųjų bylų skyriaus 2018 m. kovo 1 d. nuosprendis baudžiamojoje byloje Nr. 1A-80-211/2018," *supra* note 187.
[196] "Vilniaus apygardos teismo Baudžiamųjų bylų skyriaus 2016 m. spalio 13 d. nutartis baudžiamojoje byloje Nr. 1A-337-166/2016," *supra* note 184.
[197] „Klaipėdos apygardos teismo Civilinių bylų skyriaus 2014 m. vasario 27 d. nutartis civilinėje byloje Nr. 2A-142-538/2014," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/804343
[198] "Vilniaus apygardos teismo Civilinių bylų skyriaus 2015 m. liepos 9 d. nutartis civilinėje byloje Nr. e2A-2230-392/2015," *supra* note 189.

intermediary are proven.[199] However, it was further interpreted that obligation to remove stored unlawful information comments cannot be synonymous with imposition of liability for storing or disseminating such information.[200] In the judgment concerning the complaints platform, it was held that if there is a request to remove comment, and the online intermediary has some doubts, it has to consult the competent authority, while not doing so can lead to liability.[201] Thus, the court equated consultation with the competent authority to a reasonable step in order to ensure that the statement infringing freedom of expression would not be circulating in the website's comments section and prove the efforts of the website made in order to avoid the harm such circulation may cause. Accordingly, in the other judgment it was held that refusal to delete impugned comments should be well-founded, because like the ECtHR did in *Delfi* case, the Supreme Court related it with the duty of care of the portal.[202] It follows that otherwise, if such duty is not duly exercised, possibilities for website's liability increase. Even though the courts did not explicitly discuss the length of injurious comment stay in the platforms, it could be envisaged that longer stay of comment would be related with portal's not well-exercised duty of care. At this point it also relevant to mention that in Lithuania, analogous news portal like in *Delfi* case, has a policy, based on which all the comments are being removed 30 days after their publication. The courts have never discussed the effectiveness of such type of measure, thus it can be only presumed whether it could be appropriate for evaluation of imposition of liability, when the injurious comment had stayed in the platform for this period.

Having considered what is discussed above, it can be summed up that Lithuanian courts discuss certain criteria established by the ECtHR in the cases of online intermediary liability. However, the gradual analysis, like it was established in the ECtHR judgments, has not been applied in the Lithuanian courts jurisprudence so far. Holding online intermediaries liable for the comments circulating in their platforms is not very common legal practice in Lithuania so far. Applicants instead of intending to involve websites in the judicial proceedings for keeping the injurious comment, seek to find the real authors. Thus, direct liability is mostly applied. However, as the examples demonstrated, application of such form of liability is challenging if person who allegedly wrote the comment is denying the fact and there are no additional evidences. Lithuanian courts have

[199] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2012 m. gruodžio 21 d. nutartis civilinėje byloje Nr. 3K-3-586/2012," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/499997.
[200] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2012 m. gruodžio 21 d. nutartis civilinėje byloje Nr. 3K-3-586/2012," *supra* note 199.
[201] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus teisėjų kolegija 2012 m. lapkričio 13 d. K-3-479/2012," *supra* note 171.
[202] "Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2014 m. vasario 19 d. nutartis civilinėje byloje Nr. 3K-3-30/2014," *supra* note 170.

also demonstrated a partly diverse approach on the context of the comments, putting less emphasis on the nature of website. It rather focused on the purpose and aim of website, the exact locality within that website where comments appeared and the factual reachability of the comments. Nevertheless, if websites tend to refuse to delete comments without any proper reasoning, or hesitate to consult the competent authority regarding legitimacy of impugned comments, it could possibly lead to imposition on liability on them in Lithuania.

3. LEGAL PROBLEMATICS OF FAKE NEWS ONLINE

An important task of the press to impart news and the public's right to receive news in the light of freedom of expression was already reflected in the first chapter. It could be added that social and political news in general is one of the most important things when it comes to enjoying the right to freedom of expression.[203] Accordingly, "news is a key source of accurate information about political and societal affairs".[204] At the same time, the ECtHR has explicitly recognized that the Internet plays an important role "in enhancing the public's access to news and facilitating the dissemination of information in general"[205]. Having considered the already discussed everyone's possibility to become a sort of journalist online, we arrive to the situation where publishers on social media or various websites currently are not under the requirements professional journalists have, neither editorial control which are applicable to latter. While journalists have internal standards, many online news sources may not have such.[206] Accordingly, that leads to increased occurrence and spread of fake news in online platforms and social media. Due to an unprecedented rise of false publications online, this phenomenon recently started to attract more and more attention among legal scholars specializing in human rights and media law. Therefore, it requires consideration whether fake news is a legitimate matter, completely falling within allowed boundaries of freedom of expression, or it is rather a violation of this right, which needs to be a subject to interferences.

3.1 General considerations regarding fake news online

All the authors who have been analyzing the issue unanimously agree that the phenomenon of fake news is not a complete novelty, but the growth of social media accelerated and facilitated it to previously unimagined margins. Accordingly, efficiency and affordability of online networks made such platforms "the lifeblood of fake news"[207]. Increasing amount of population chooses social media as their main service to read the news online[208], which means that spread in social

[203] ECtHR, Khurshid Mustafa and Tarzibachi v. Sweden, no. 23883/06, 16/12/2008, para. 44.
[204] Tarlach McGonagle, ""Fake news" False fears or real concerns?" *Netherlands Quarterly of Human Rights* 35, 4 (2017): 204.
[205] ECtHR Delfi AS v. Estonia, *supra* note 1, para. 157.
[206] Lee K. Royster, "Fake News: Political Solutions to the Online Epidemic," *North Carolina Law Review* 96, 1 (2017): 276.
[207] David Klein and Joshua Wueller, "Fake News: A Legal Perspective," *Journal of Internet Law* (2017), available at SSRN: https://ssrn.com/abstract=3059977
[208] "New Eurobarometer shows how 15 to 45 year olds use the internet to access music, films, TV series, images and news," EC Digital Single Market, accessed 2018 March 16, https://ec.europa.eu/digital-single-market/en/news/new-eurobarometer-shows-how-15-45-year-olds-use-internet-access-music-films-tv-series-images

media fake news can reach and influence even wider audience than before. Indeed, knowing the popularity of social networking sites, it is obvious that fake news spread there, can reach wider audiences faster than through other channels. Thus, while issue of fake news in broadcast media, radio or traditional newspapers would be already giving rise to a sufficient level of concern, circulation of fake news online raises the bar even more. The question of the effect towards freedom to spread and receive information arises, which supports the attempts to analyze the issue of fake news from the new perspective, paying a particular attention to its peculiarities online.

The issue of fake news online starts from its definitional question. Until the moment, there is no official and globally recognized legal definition, which would clearly state what fake news is and what components constitute it. In legal researches targeting fake news, a variety of attempts to define such false publications can be found.

Some researchers characterize fake news as "online publication of intentionally or knowingly false statements of fact" about public persons or occurring events, which is spread via social media and sometimes may be used to generate profit.[209] Thus, fake news are linked to publication online, contribution to public debate and knowledge that information which is being disseminated as truthful.

Others explicitly follow the guidelines provided in the Council of Europe policy report DGI (2017)09[210] and relate fake news to "information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts"[211] and likely to be "perceived as news"[212]. Again, it can be seen that the purposefulness of spreading false information is emphasized.

Several more observers present a similar definition, referring fake news to knowingly false or intentionally misleading information, which is presented as a verified truth.[213] "Expression that describes statements and reports falsely presented as truthful to public"[214] is another definition that can be found in the literature related to fake news online.

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[209] David Klein and Joshua Wueller, *supra* note 207.

[210] Claire Wardle and Hossein Derakhshan, "Information disorder: Toward an interdisciplinary framework for research and policy making," (Council of Europe, 2017). In this report, the term "fake news" is avoided and such publications are referred to "information disorder". Elements, which help to recognize fabricated news are represented and analyzed there.

[211] Tarlach McGonagle, ""Fake news" False fears or real concerns?" *Netherlands Quarterly of Human Rights* 35,4 (2017): 203.

[212] *Ibid*.

[213] Anna Gonzalez; David Schulz, "Helping Truth with Its Boots: Accreditation as an Antidote to Fake News," *Yale Law Journal Forum* 127 (2017-2018): 317.

[214] Lucas de Lima Carvalho, "The Case Against Fake News Gatekeeping by Social Networks (October 27, 2017), available at SSRN: : https://ssrn.com/abstract=3060686

Joint declaration on freedom of expression and "fake news", disinformation and propaganda, which was issued in 2017 by the UN, OSCE, OAS and African Commission on Human and Peoples' Rights representatives, did not propose an exact definition. Nevertheless, it follows from there that fake news is disinformation, implemented to mislead a population and sometimes to interfere with the public's right to know.[215] That is to say, fake news is recognized again as a publication which is spread with an aim to mislead people.

Thus, from the attempts to define fake news mentioned above, it can be concluded that even though there is no single and official definition of fake news yet, it follows from discussed considerations that most of the legal scholars agree about distinguishing three main components that constitute fake news. It is, namely, information taking the form of news, falsity of disseminated content, and the intention to deceive the public for particular purposes.

In accordance with these attributed features, the definition of fake news apparently excludes the cases of honest mistake or traditional news publications, where is the lack of intentional falsity. Correspondingly, fake news could not be compared to an individual opinion either. As Lee K. Royster accurately indicates, "the key distinction between personal opinion or editorial pages on websites and fake news is that in context, the former is generally not perceived as genuine news story"[216]. Scholars generally suggest that where the opinion is clearly established, it is not fake news.[217] It could be completely agreed to these considerations, as the ones who are reading the news article, tend to regard information as being factual, rather than consider it to be an expression of someone's viewpoint.

Having observed various ongoing discussions, it is apparent that some may confuse the term "fake news" with propaganda. It is challenging to find one uniform definition of propaganda, however, it could be held that referring to "information, especially of a biased or misleading nature, used to promote a political cause or point of view"[218] or "dissemination of information—facts, arguments, rumours, half-truths, or lies—to influence public opinion"[219] presents adequately the main features on which the phenomenon of propaganda is based. Following that, it could be stated that fake news, if it is of political nature and seeks to affect the attitude of public, it would be not a mistake to equate such disinformation to propaganda. Therefore, it could be agreed with the view

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[215] "Joint declaration on freedom of expression and "fake news", disinformation and propaganda of 3 March 2017," https://www.osce.org/fom/302796?download=true

[216] Lee K. Royster, "Fake News: Political Solutions to the Online Epidemic," *North Carolina Law Review* 96, 1 (2017): 278- 279.

[217] *Ibid*., 279

[218] "Oxford Dictionary", accessed 6 April 2018, https://en.oxforddictionaries.com/definition/propaganda

[219] "Encyclopedia Britannica", accessed 6 April 2018, https://www.britannica.com/topic/propaganda

that propaganda is one type of false news.[220] Thus, apparently, the concepts of fake news and propaganda are interrelated. Certainly, most likely not all fake news would amount to different types of propaganda, such as war propaganda or others. However, if fake news is of political nature and by deceiving the audience seeks to form its opinions and attitudes, then the boundary separating fake news and propaganda clearly disappears. While propaganda intentionally seeks to form opinions and some fake news can be also created with a clear intention to affect the viewpoints and knowledge of population or certain members of it. Joint declaration, which was mentioned before, puts fake news in the place next to propaganda, thus, that affirms that both these issues are not only connected, but also bring similar risks. Both propaganda and fake news are capable of causing confusion in people's minds, and which, if spread widely, might have negative consequences in the society.

One more related concept is disinformation, which refers to "false information which is intended to mislead"[221]. Although the same Joint declaration identified fake news and disinformation as two independent aspects, however, it is true that sometimes the terms can be used interchangeably. It follows from the definitions provided above, that all the fake news contains disinformation. While the concept of disinformation is broader and may take many forms, it could probably be agreed that disinformation which takes the form of news publication, is fake news.

Indeed, the aspects of falsity and intention to deceive are the ones, which primarily raised the most questions about fake news legitimacy. In social media, particularly Facebook, it is difficult from the first sight to distinguish whether the posted content comes from real of fabricated news website, as the appearance of the post is always identical.[222] In connection with this, it is acknowledged that fake news poses a certain danger to recipients of information, who might be no longer able to distinguish between truthful and false information, when a huge amount of fake news in social media platforms is easily spread, that leading to indirect infringement of their right to receive information.[223] It could be argued whether right to receive information would be for real violated or not, however, the reflected concerns are justified at the point that the public might need additional efforts and knowledge to sort out which news is not true when receiving information.

Thereupon, it would be reasonable to presume that if the number of fake news circulating online keeps growing, previously discussed role of the press as a "public watchdog" might lose its

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[220] Genevieve Zook, "Spotting Fake News: Best Practices for Authenticating Trustworthy Sources," *AALL Spectrum* 21, 6 (2017): 24.
[221] "Oxford Dictionary", accessed April 6 2018, https://en.oxforddictionaries.com/definition/disinformation
[222] Emma M. Savino, "Fake News: No One Is Liable, and That Is a Problem, " *Buffalo Law Review* 65, 5 (2017): 1116.
[223] Suzanne Nossel, "The Pro-Free Speech Way to Fight Fake News," *Foreign Policy*, October 12, 2017, http://foreignpolicy.com/2017/10/12/the-pro-free-speech-way-to-fight-fake-news/

potential. It is natural that with big amounts of fake news the public receives, the trust in media, which has duties in informing society and imparting ideas, would decrease, possibly leading to diminished place of press in the light of freedom of expression. Many scholars have also expressed concern that such news, which intends to deceive the population, can have significant consequences, such as impinging the results of elections and referendums, as it was widely discussed about the cases of US presidential election and UK referendum for Brexit.[224] Without any doubts, these are the primary basic observations, which raises questions regarding the legitimacy of fake news as such when individuals, who are using their freedom to impart ideas for the purpose of deceiving large public groups, in such cases are putting other individuals' right to receive in weaker position. Thus, further considerations are necessary in order to determine what place fake news in general take in the light of freedom of expression.

It can be noted that most of legal scholars do not see fake news illegal *per se*. The expert of freedom of expression, Suzanne Nossel, agrees that fake news is generally not illegal and falls under international human rights standards.[225] Tarlach McGonagle, human rights researcher from University of Amsterdam, presents a view that as freedom of expression under Article 10 is not limited to truthful and factual information, it leads to protection of fake news with regard to this article too, bearing in mind that requirements to prove truth in some cases would infringe freedom to hold opinions.[226] There is a complementary opinion of legal scholar Lucas de Lima Carvalho that fake news could be equated to "untrue statements of public interest"[227], which fall under the same article too. Indeed, as already mentioned in the first chapter, the freedom to impart ideas can sometimes comprise ideas, which might be disturbing the population. Thus, the mere fact that disseminated information is fake, would not be sufficient to hold fake news automatically illegitimate.

Alternative approach belongs to Italian legal scholar Oreste Pollicino, specializing in the field of freedom of expression in online platforms. Taking into account the limited nature of freedom of expression under Article 10 and the existing "passive dimension to the right to be pluralistically informed"[228] he supposes that fake news possibly may not be covered by the

[224] See, for example, Damian Tambini, "Fake News: Public Policy Responses. Media Policy Brief 20", London: Media Policy Project, London School of Economics and Political Science (2017).
[225] Suzanne Nossel, *supra* note 223.
[226] Tarlach McGonagle, *supra* note 211, 208-209.
[227] Lucas de Lima Carvalho, *supra* note 214.
[228] Oreste Pollicino, *supra* note 49, 25.

"European vision of free speech".[229] Therefore, it is apparent that the latter approach gives a larger significance to public's right to receive over the right to spread untruthful information.

However, it is noteworthy that the authors, who analyzed the issue, were relying on general concept of fake new as simply untruthful information and questioned what it would mean for receivers if they are deceived by such news. In other words, they provided a basis for a basic understanding of fake news online instead of putting emphasis on specific types of fake news, which are likely to constitute a more significant harm than a simple confusion in people's minds. Thus, they did not go into a deeper analysis of fake news, which is covering propaganda, ideas threatening national security, state order, territorial integrity or other more dangerous forms of the concept and accordingly, to what extent such forms of expression shall be regulated.

To sum up shortly, it can be said that fake news, a knowingly false publication in the form of news that is spread widely online and seeks deceive the ones who are receiving information, raised some concerns about its place within Article 10 of ECHR and other international provisions entailing freedom of expression. Yet, as discussion above shows, if such news does not constitute a hate speech or does not seriously hinder other human rights, most of legal scholars are careful about declaring fake news as violation of freedom of expression. As presented considerations were of general nature, the next subchapter will provide a deeper analysis of the matter, focusing on the most prominent recent legal attempts to clarify and target the issue fake news online in the European legal framework and the following reaction of legal society to them.

3.2 Regulatory issues related to fake news in the European context

Analysis, which was exercised above, demonstrates that fake news, even though bringing specific risks, generally is not considered as an explicitly illegal concept. However, that does not preclude certain forms of fake news from turning into legally unprotected speeches. At this point, it is relevant to inspect recently emerged regulatory approaches relevant to the European context, to see what is suggested there.

It is important to mention again the Joint declaration on freedom of expression and "fake news", disinformation and propaganda, in which preparation OSCE was involved and which set the guidelines which all the subsequent regulations on fake news shall follow. This instrument attempted to make the issue of fake news more clear and provided some directions, which states should follow when intending to deal with the problem of fake news in their jurisdictions.

[229] Oreste Pollicino, *supra* note 49, 25.

According to the Joint declaration, states are allowed to impose restrictions on fake news following the same test as for any other case, when there is a need to interfere with right to freedom of expression.[230] Thus, the ECtHR's provided assessment of restrictions as being legitimate, necessary and proportionate was recognized as a relevant tool to determine whether subject's freedom to spread news could be interfered and not constituting a violation of Article 10. Also, it followed the ECtHR's approach, explicitly referring to positive obligation of States with regards to environment of freedom of expression.[231] Further, Article 2 (a) of Declaration establishes that when it comes to fake news, "general prohibitions […] are incompatible with international standards for restrictions on freedom of expression". Thus, it can be interpreted that this instrument recognized that fake news as such shall not be held illegal.

Amongst legal scholars, this Joint Declaration was described as "an appropriate rejoinder to those who would address these aforementioned challenges by censorship, algorithmic suppression, outsourcing of fact checkers, or state legislation"[232]. That is to say, the position suggested by the declaration was seen as relevant in order to control excessive restrictions on fake news, which could lead to grave infringements of freedom of expression. In addition, others saw it as an inducement "for ''fake news'' to be dealt with in the context of an enabling environment for free expression"[233]. In the opinion of the author of this Master thesis, Joint declaration, as a non-legally binding document set the guidelines, which could be positively evaluated as a step towards further considerations and binding regulations related to fake news. However, by being of relatively abstract nature it avoided to go into the issue deeper, as well as trying to define the clear boundaries of fake news falling inside and outside the scope of freedom of expression.

In the European Union level, the High Level Expert Group on Fake News and Online Disinformation established by the European Commission intended to provide the guidelines for practices with relation to the matter by preparing the report. This document, even though it does not represent the whole attitude of the EU and could be considered to be as more of political nature, still provided some good insights how the issues of fake news and disinformation are seen from the EU perspective. By the report, it was emphasized that most of the measures within the EU framework should be non-regulatory nature, "as government or EU regulation of disinformation can be a blunt

[230] "Joint declaration on freedom of expression and "fake news", disinformation and propaganda", *supra* note 215.
[231] *Ibid*.
[232] Mickey Huff, "Joint Declaration on Freedom of Expression and "Fake News," Disinformation, and Propaganda," *Secrecy and Society* 1, 2 (2018): 4.
[233] Tarlach McGonagle, *supra* note 211, 207.

and risky instrument"[234]. Such approach was motivated by the risk of censorship, which may eventually emerge and the recognition that it is not always possible to easily classify information as accurate or fake.[235] It could be interpreted that, the document provided by the High Level Expert Group, like previously discussed Joint Declaration, intended to make the states restrain from broad restrictions and generalized measures against fake news in order to give the priority to freedom of expression.

Besides, it explicitly pointed out that "press freedom could become an issue if black lists of media were to be established"[236]. Seemingly, it meant that if some news websites or other online platforms due to several impugned publications gain the reputation of "fake news sources", it could lead to excessive blocking of such sources just because they are commonly held as unreliable. Indeed, that would constitute a threat to the recognized principle of media pluralism and diversity of news that society is entitled to receive. To illustrate such approach with a concrete example, it was investigated that Russia, when it comes to fake news, primarily uses traditional news media and then spreads the content published there via social networking sites, blogs and specific websites.[237] However, it leaves not much doubt that in accordance with principles related to freedom of expression, general inclusion of traditional news site into black list of media which contains not only the impugned news, would constitute a violation of right to impart information.

Nevertheless, after analyzing the report, no hints could have been found about fake news as unlawful content, causing threat to rights of others, national security or territorial integrity. The question was raised about the risk for integrity of elections, however, only broadly defined policy measures, not related to legal field were proposed. Thus, the report presumably left more harmful types of fake news subject to regulation on case-by-case basis, which is applied when alleged violation of freedom expression takes place.

In line with approaches provided in the report High Level Expert Group and Joint Declaration, many scholars agree about not imposing generalized restrictions on fake news. For instance, there is an indirect suggestion that only the most harmful cases of fake news should be regulated.[238] Contributing to such opinion, it is pointed out by some other scholars that freedom to receive information under European legal framework is more like a liberty "which creates positive

[234] "A multi-dimensional approach to disinformation. Report of the independent High level Group on fake news and online disinformation," (Directorate-General for Communication Networks, Content and Technology, 2018), 19.
[235] *Ibid*., 20
[236] *Ibid*., 29
[237] Jessikka Aro, "The cyberspace war: propaganda and trolling as warfare tools," *European View* 15, 1 (2016): 124.
[238] Tarlach McGonagle, *supra* note 211, 209.

obligations for the state only in limited circumstances"[239]. With accordance to this, fake news, which may simply confuse the recipients and challenge their selection between true and false information, should not be prohibited. However, if false publications contain elements of manifestly unlawful speech or constitute exceptional threat to the rights of state or other persons, necessity to suppress the spread of this news is more evident and theoretically conformable with approaches set forth by these scholars.

At national law level in the European framework, the most prominent example in regulation of such fake news is the Act to Improve Enforcement of the Law in Social Networks (NetzDG)[240] which came into force on January 1, 2018 in the Federal Republic of Germany. The law was accepted really controversially amongst European legal society, thus, it deserves some attention. In short, this law equates fake news to hate speech and intends to hold social media companies, such as Facebook or Twitter, liable for not removing the unlawful content, which is considered to be fake news, within 24 hours.[241] Resistance to remove the fake publications, which qualifies as unlawful with reference to this law, may lead to imposition of up to 50 million euro sanctions on online platforms, which contain such impugned material. Article 1 of NetzDG defines what unlawful content in the sense of the NetzDG is and in the paragraph 3 cites a number of different criminal offences of the German criminal code (StGB). It follows from this provision, that fake news, which is combined with a criminal offence(s), such as war propaganda, incitement to hatred, violating someone's privacy, breach of the public order, spreading treacherous information, libel and defamation, is considered as violation of freedom of expression and thus is required to be targeted by social networking sites. Such legal approach was motivated by relating fake news to criminal act and stating that many criminal acts like that are not being removed, even though "lies should have as little place in social media as in every other area of society".[242] Thus, the legal framework invoked by German authorities is apparently more stringent interpretation of what was provided in the guidelines of Joint Declaration or the EU experts group, which intended that states would bypass the generalized strict restrictions of the matter.

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[239] Sarah Eskens, Natali Helberger, and Judith Moeller, "Challenged by news personalisation: five perspectives on the right to receive information," *Journal of Media Law* 9, 2 (2017): 263.

[240] "Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG)", accessed at http://www.gesetze-im-internet.de/netzdg/BJNR335210017.html

[241] *Ibid*. See Section 3 (2) 2.

[242] "Answers to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in regard to the Act to Improve En-forcement of the Law in Social Networks (Network Enforcement Act), provided by the Federal Government of Germany," 9 August 2017, accessed at http://www.ohchr.org/Documents/Issues/Opinion/Legislation/GermanyReply9Aug2017.pdf

Correspondingly, already in the drafting process, the concerns were raised that such approach was non-consistent not only with guidance of Joint Declaration. In short, some scholars argued that this German legislation is not in line with international human rights law[243], while others claimed that this law is promoting censorship[244]. In other words, the debates focused on the risk to freedom of expression in social media, which may arise after social media sites start actively implement the requirements set by this law. Currently, discussions regarding possible amendments to NetzDG are taking place. Thus, it is too early to make conclusions on the actual effect, which enforcing such law may have with regard to freedom of expression in online platforms. However, if the law stays in force as it is right now, the concern may be well founded in the sense that such legal act would set the example for other states to follow.

As it can be seen, not the mere criminalization of fake news, which is threatening certain aspects, such as national security, territorial integrity or rights of others raised the biggest doubts. Since this element was barely raised and discussed by scholars and legal experts, it could be presumed that holding fake news, which contains features of other clearly unlawful acts or amount to manifestly illegal exercise of freedom of expression, was not held as entirely improper action done by German authorities. Instead, the attention was focused on the ways, how this complicated matter shall be regulated. That is to say, German legal measure to deal with the problem, by putting a big pressure on platforms, which contain the biggest number of fake news online, was recognized as constituting danger to freedom of expression in the spheres where such news is spread, while considering introduced sanctions to be too grave and not proportionate.

It can be noted that legal scholars also tended to refrain from strict regulation of fake news online, especially when this task is attributed to platforms where such news are spread. For instance, Carvalho rebuts arguments on posing the pressure on social networks to filter the content, as then they may be likely to limit users' freedom of expression.[245] The scholar criticizes such gatekeeping concept, as he thinks it may eventually lead social networking sites to censoring the sources, solely because they have a reputation of spreading fake news.[246] It can be understood that the author considers not fake news itself as a threat to free expression, but the reaction to them leading to

[243] "Germany: The Act to Improve Enforcement of the Law in Social Networks. Legal analysis," Article 19, accessed 2 March 2018, at https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf

[244] See, for example, "Is a new German law encouraging social media giants to censor opinions?", *The Local Germany* , 5 January 2018, https://www.thelocal.de/20180105/is-a-new-german-law-encouraging-social-media-giants-to-censor-opinions

[245] Lucas de Lima Carvalho, *supra* note 214.

[246] *Ibid*.

filtering and gatekeeping the content posing the bigger threat. It can be also agreed to the assumption that there is a risk that being afraid of punishments social media sites start to block the content solely because it was published just because of publisher's bad reputation, that leading to violations of the ECHR.[247] It leaves no doubts that if there is too big amount of deleted posts, freedom of expression in the online environment is put at stake. By relating to the ECtHR's reiteration regarding requirement not to engage in an activity that would hinder freedoms granted by the ECHR, Carvalho concludes that too big involvement of social networks in creating labels or using algorithms to lessen the exposure of particular posts, would constitute such hindering.[248]

Thus, it is evident that similar concerns related to regulation of fake news emerged, as it did with liability issues for unlawful virtual comments. In other words, the more possibilities to be held liable or become subject to sanctions the online platforms would face, more likely they would be willing to delete bigger amount of content, posts with impugned untruthful news in this case, just to be sure that the authorities will not impose penalties on these platforms. As a consequence, such excessive reaction would lead to deteriorated environment for enjoyment of freedom of expression in these websites.

That by no means significates that fake news shall not be subject to sanctions at all. Nonetheless, agreeing to considerations proposed by scholars and recognizing the concerns raised, choice and imposition of sanctions should be exercised in a very careful manner. Having said this, it is relevant to look further at the long standing jurisprudence of the ECtHR and examine how the Court evaluates the issue of fake news as such and how does it interpret the sanctioning imposed on such news.

3.3 Fake news in the case law of the ECtHR

Having in mind the conditional novelty of the subject, there is no formal approach directed to fake news online done by the ECtHR yet. Therefore, it is worth to analyze the Court' considerations in other judgments, which were related to spread of false news in general and particular cases when the spread of misleading information is likely to affect some other rights.

To start the analysis, it is firstly necessary to distinguish what is the ECtHR's approach regarding presented untruthful information. There have been several relevant to mention judgments, which questioned whether the disseminated false information could amount to the breach of freedom of expression.

[247] Lucas de Lima Carvalho, *supra* note 214.
[248] *Ibid*.

In *Nurminen and Others* v. *Finland* the Court found no violation of Article 10 regarding misleading leaflets disseminated before the referendum, basing such decision on the fact that the applicants were not prevented from obtaining the other information, which would have been relevant for them.[249] In other words, the Court recognized that person who receives information, which is not true, can still possibly seek and receive information from other trustworthy sources. To draw an analogy, the fact of mere reception of fake news would leave the possibilities to obtain the real news and, in such a way, most likely would not constitute a violation. Therefore, the presentation of fake news alone could be considered as enjoyment of right to disseminate information and ideas.

In *Salov v. Ukraine* case, the issue concerned disseminated false information about the alleged death of a presidential candidate, and the court did not see in necessary in a democratic society to convict a person who spread it. It was stated by the ECtHR there that "Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression"[250]. Hence, the Court proved again that freedom of expression under the ECHR includes the freedom to disseminate possibly false ideas. Hence, cases of interference should be well-grounded.

In another case, *Monnat v. Switzerland*, the ECtHR dealt with the broadcast of documentary, which contained a sharp criticism of Switzerland's and its leaders' position during the Second World War and consequently provoked a huge amount of complaints amongst viewers, leading to the domestic court's decision that personal opinion was unduly presented as factual information, disrespecting the pluralism requirements.[251] However, the ECtHR reminded about the search for historical truth as the recognized element of freedom of expression, and, taking into account that the speech was a matter of public interest, as well as the factor that the programme dealt with old events, held that sanction (suspension of the sale of videotapes of that programme) was a violation of Article 10.[252] Thus, the information which may be widely regarded as untruthful, but is presented as facts to the public, is not considered by the Court to be a subject to relatively strict sanctions, as long as it does not bring any visible harm.

[249] ECtHR, Nurminen and Others v. Finland, no. 27881/95, 26 February 1997.
[250] ECtHR, Salov v. Ukraine, no. 65518/01, 06 September 2005, para. 113.
[251] ECtHR, Monnat v. Switzerland, no. 73604/01, 21 September 2006.
[252] *Ibid*., paras. 56, 71.

Meanwhile, in *Perincek v. Switzerland* the ECtHR found the controversial speech, containing factually false ideas on historical issues the person spread denying the obvious facts during the press conferences to be protected under Article 10 because it fell within the matter of public interest and did not amount to a call for hatred or intolerance.[253] Subsequently, the Court considered the statements as partly exaggerated in order to attract attention should not be regarded as overstepping of boundaries of allowed freedom of expression.[254] Thus, by this judgment the ECtHR proved the fact that information is false and of exaggerating nature does not automatically preclude the protection awarded by Article 10 either.

Similarly, it should also be reminded that in many cases, for instance, *Bedat v. Switzerland*, the Court has persistently reiterated that freedom of expression of journalists allows them to involve elements of exaggeration or some provocation in their publications.[255] Therefore, it means that information which contains certain overstatement of facts or embellishments of situations, consequently misleading some members of the society, could be regarded as staying in the scope of freedom of expression.

These examples demonstrate that the court is apt to award protection not only for statements, which are absolutely truthful. Following that, the threshold regarding which the situations of deception would amount to the violation of freedom of expression at least in cases of offline fake news should be relatively high. Certainly, the fact that in the above-mentioned cases the ideas were spread by individuals not through the means of social media or other online tools, means that they were reaching arguably smaller audience. Nevertheless, it would be still reasonable to believe that fake news, as simply untruthful information, which does not cause a sufficient threat to other rights embedded in the ECHR, possibly could be regarded as a non-violation.

However, the situation becomes more challenging when the issue of false news appears to be inherently related with the matters of state security, public order or territorial integrity. If fake news takes form of a dangerous propaganda or causes other possible treats for important state's matters, then, indeed, the balance question between freedom of expression and elements, which can at times constitute legitimate limits to this right appears. In journalism, the ECtHR recognized the situations of conflicts and tensions should deserve particularly discreet exercising of journalists' freedom of expression.[256] It suggests that the spread of fake news in such circumstances should also

[253] ECtHR, Perincek v. Switzerland, *supra* note 61, paras. 231, 233-234.
[254] *Ibid.*, para. 239.
[255] ECtHR, Bedat. V. Switzerland, no. 56925/08, 29 March 2016, para 58. See also ECtHR De Haes and Gijsels v. Belgium, no. 19983/92, 24 February 1997, para. 46.
[256] ECtHR, Dmitriyevskiy v. Russia, *supra* note 166, para.117

receive a more strict legal approach. The ECtHR case law has a sufficient number of examples, where the balancing questions regarding right to disseminate information and the other rights, such as territorial integrity, public safety were raised.

For instance, in *Sürek and Özdemir v. Turkey* the ECtHR found the conviction of weekly news owner and editor in chief, publishing declarations and propaganda of terrorist organizations, disproportionate. As there were no incitements to violence or hatred in the published texts, the Court, even though expressing the understanding about the government's concerns regarding possible dangers for the tense situation in the territory, which ideas in such texts can intensify, found it not adequate for justifying the restrictions applied right to freedom of expression.[257] "Public's right to be informed of a different perspective on the situation"[258] was one of the main arguments for holding such decision. Thus, the Court took approach to protect primarily freedom of expression over the principles of territorial integrity.

Additionally, in *Kommersant Moldovy v. Moldova*, there was a case concerning the number of articles, published in the newspaper, where actions of the Moldovian authorities in the break-away region of the country were harshly criticized by Russian leaders. The Court considered that duties and responsibilities journalists are subject to, gain special significance when "there is a question of endangering the national security and the territorial integrity of a State"[259]. The Court further reaffirmed that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism"[260]. Thus, the duty of journalists to behave in a way that they would not deceive the ones, who are reading their publications, was emphasized in this context. Accordingly, regarding the closure of the newspaper by domestic courts, which was based on consideration that articles were endangering territorial integrity and national security in Moldova, as well as creating the potential for disorder or crime, the Court considered to be prescribed by law and seeking a legitimate aim.[261] Nevertheless, it held that "domestic courts did not give relevant and sufficient reasons to justify the interference, […] did not specify which elements of the applicant's articles were problematic and in what way they endangered the national security and the territorial integrity of the country or defamed the President

[257] ECtHR, Sürek and Özdemir, nos. 23927/94 and 24277/94, 08 July 1999, para. 61-64.
[258] *Ibid*., para. 61.
[259] ECtHR, Kommersant Moldovy v. Moldova, no. 41827/02, 9 January 2007, para 32.
[260] *Ibid*.
[261] *Ibid*., para. 35.

and the country"[262]. Finally, the ECtHR found a violation of Article 10, as that newspaper was forced to close without a detailed reason why phrases threatened national security and territorial integrity. In other words, the sanction, which was imposed on the newspaper due to the content appeared there, was regarded as barely adequate or proportional.

Two important aspects follow from this judgment. First, it can be seen that the Court recognized that publications, which are threatening such important State's matters as national security and territorial integrity can possibly be outside the scope of freedom of expression. However, such finding was not sufficient to justify the closure of the entity, which was spreading such equivocal information. Respectively, the Court's position was not affected by the situation that matters related to Transnistrian region of Moldova, strictly speaking, a puppet state, were of high level of sensitivity in the area. It could be argued, that the Court set relatively high standards for possibilities to interfere with freedom of expression, even given the circumstances which might sometimes significantly threaten national security and territorial integrity

Alternatively, in *Erdoğdu and İnce v. Turkey*, where domestic courts considered that the content amounted to propaganda targeted against the integrity of the State, which was spread in the monthly magazines by the editor and journalists, the Court took similar approach. It was noted that despite "the press must not overstep the bounds set, inter alia, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime"[263], press is still entitled to impart divisive ideas.[264] Therefore, the right of press to spread information, which can negatively affect the state's indivisibility, was still recognized. Despite that, "it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks"[265]. That is to say, the Court recognized the possibility of legitimate interference by state authorities targeted at the divisive expressions in the media. However, the ECtHR finally considered that the Turkish courts by intending to promote the state's order and integrity, disregarded the public's right to be informed of a different perspective on the situation in South-East Turkey, provided that publication at question did not amount to incitement to violence.[266] To strengthen such arguments, in concurring opinion of judge Bonello and Joint concurring opinion of judges Palm, Tulkens, Fischbach, Casadevall and Greve it was strongly

[262] ECtHR, Kommersant Moldovy v. Moldova, *supra* note 259, para. 36.
[263] ECtHR, Erdoğdu and İnce v. Turkey, nos. 25067/94 and 25068/94, para. 48.
[264] *Ibid*.
[265] *Ibid*., para. 50.
[266] *Ibid*., para. 52.

emphasized that the danger has to be imminent and assessment whether there was a real risk, should be very careful.[267] Hence, the Court again required very clear justification on restrictions imposed on freedom of expression, mere fact of propaganda and possible threat not being sufficient for interference.

Concerning the other judgment, which was related to questions regarding freedom of expression and the territorial integrity, *Zana v. Turkey*, the Court found no violation of Article 10 regarding the punishment, which had been exercised after the statements, supporting local terrorist organization, were expressed by former mayor in the newspaper. Unstable situation in the country was the basis for interference by government, while the ECtHR agreed that wider margin of appreciation belongs to a state when terrorism takes place in the region and poses a threat to state's territorial integrity.[268] Thus, the Court, like in the previously mentioned case, recognized the possibility of interference with freedom of expression in such circumstances. Accordingly, as the remarks said were in the heat of bloody events, the Court found that the reasoning provided by the government regarding imposition of penalty was to fulfill a pressing social need.[269] Thus, the interference was acknowledged as necessary. Correspondingly, the Court recognized that "at a time when serious disturbances were raging in south-east Turkey such a statement – coming from a political figure well known in the region – could have an impact such as to justify the national authorities"[270]. It follows, that the principle of proportionality was satisfied as well. Therefore, by this judgment, differently than in other discussed cases, the ECtHR proved that the content, which is able to jeopardize the matters of national security and territorial integrity can form a sufficient ground to acknowledge that freedom to impart ideas can be legitimately interfered.

Ultimately, the ECtHR tends to be divided when deciding the outcome in cases related to false or war propaganda-type information spread by media, as well as when evaluating aspects such information is threatening. Although all the discussed situations in cases took place in the territories of political sensitivity, the answer of the ECtHR depended on the exact circumstances in each case. It follows from the Court's analysis, that it requires significant proof that the threat caused by such information is real. Another aspect, which becomes evident after the examination, is that the proportionality of the sanction imposed upon impugned news played an important role when determining the interference's consistency with Article 10. In most of the cases, such sanctions as

[267] ECtHR, Erdoğdu and İnce v. Turkey, *supra* note 263. Joint concurring opinion of judges Palm, Tulkens, Fischbach, Casadevall and Greve.
[268] ECtHR, Zana v. Turkey, no. 18954/91, 25 November 1997, para. 53
[269] *Ibid*., para. 56.
[270] *Ibid*., para. 50.

complete closure of the subject, which disseminated harmful information or imprisonment of the publisher of impugned content, were not considered as proportionate.

Having discussed that, it is apparent that the concept of fake news, even if not illegal *per se* in the light of the ECtHR case law, still can become a subject to some restrictions. Then, a particular importance is given to requirements for necessity and, particularly, proportionality of each interference, leaving not so many possibilities to impose grave sanctions on subjects who wrote and disseminated false information. Further, having in regard situations when fake news is of harmful nature and constitute threat to the aspects such as national security and territorial integrity of the state, the problem will be analyzed by invoking exact examples from jurisdiction of Lithuania.

3.4 Fake news in Lithuanian legal practice

Article 25 (4) of the Constitution of the Republic of Lithuania states that "the freedom to express convictions and to impart information shall be incompatible with criminal actions—incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation"[271]. It suggests that individuals who are enjoying their freedom of expression should do that in a way that is not undermining the main values the Constitution is based on. The Constitutional Court of Lithuania has elaborated on this constitutional provision, stating that spreading disinformation in the society or amongst separate members of it is incompatible with constitutional conception of freedom of expression.[272]

This approach is implemented in the Law on the Provision of Information to the Public (hereinafter referred to as LPIP), where Article 19 (6) forbids dissemination of disinformation.[273] In Article 2 (13) of this law, disinformation is defined as intentionally disseminated false information. Thus, it is apparent that in the Lithuanian legal framework disinformation is described more abstractly than it was characterized in definitions of fake news provided in the first part of this chapter. As the definition is not explicitly said to be applying only to news publications, it could be presumed that the scope of disinformation is broader, encompassing the concept of false publications as well, particularly, when it also contains the main elements that constitute fake news – falsity of information and intention to spread such inaccurate content. Thus, while there is no

[271] "Lietuvos Respublikos Konstitucija," *Valstybės Žinios*, 33, 1014, (1992).
[272] Lietuvos Respublikos Konstitucinio Teismo 2005 m. liepos 8d. nutarimas „Dėl Lietuvos Respublikos įstatymo „Dėl kultūros įstaigų reorganizavimo ir likvidavimo tvarkos" (1995 m. birželio 13 d. redakcija) ir Lietuvos Respublikos Vyriausybės 1997 m. lapkričio 28 d. nutarimo nr. 1320 „Dėl Lietuvos nepriklausomybės signatarų namų ir Lietuvos menininkų rūmų" 1, 2.3 ir 2.4 punktų atitikties Lietuvos Respublikos Konstitucijai", *Valstybės Žinios.* 87, 3274 (2005).
[273] "Lietuvos Respublikos Visuomenės informavimo įstatymas," *Valstybės žinios*, 71-1706 (1996).

separate legal definition of fake news in Lithuanian national laws, the phenomenon would probably be considered to form a part of disinformation. Having in regard that freedom of expression in Lithuanian legal framework is incompatible with criminal actions and actions capable of infringing the Constitutional values, it can be understood that false news, which are non-consistent with the values of the Lithuanian Constitution, are considered to fall outside the scope of freedom of expression in the state.

Above mentioned law prohibits spread of knowingly misleading information not only in the traditional forms of media, such as newspapers, magazines, books, cinema, television and radio where information can be publicly spread (Article 2 paragraph 86), but it also extends to online sphere. For example, Internet blogs are officially recognized as the means of public information in Lithuanian framework if they provide information available to everyone.[274] Accounts on social networks, if they are public and managed by providers of public information are treated in the same way.[275] Thus, disinformation is not allowed to spread in all the spheres widely available for public, regardless the fact whether it occurs online or offline.

The most prominent case of fake news in the ordinary courts at national level concerned real-time transmission of radio programme, where the public figure performed a speech with an aim to explicitly derogate the aggression against Lithuania in January Events and denied grave crimes against the state at the same time. The Supreme Court upheld the arguments of the Court of Appeal that such statements were not an expression of opinion, but instead a clear denial of facts, which are recognized by the law.[276] As a result, the person was convicted for the spread of news, which was manifestly false and denying very serious crimes. Such judicial decision demonstrated that false information, which is presented as facts and targeted against the state values, can be regarded as unlawful expression which is in need to be interfered with.

Not only natural persons in Lithuania are bound by requirements not to spread injurious disinformation via public channels. National legal framework leaves some space for restrictions with regard to free expression exercised via means of public information, such as television. Article 34^1, paragraph 11 of the LPIP, by allowing to take proportionate measures to the violations committed, indicates that "free reception in the Republic of Lithuania of television programmes and/or parts of

[274] "Lietuvos vyriausiojo administracinio teismo 2009 m. balandžio 20 d. nutartis administracinėje byloje Nr. A-444-70/2009," http://eteismai.lt/byla/129024264486550/A-444-70-09
[275] "Lietuvos žurnalistų ir leidėjų etikos komisijos 2013-02-18 sprendimas Nr. 4," http://www.etikoskomisija.lt/zurnalistu-ir-leideju-etikos-komisijos-nutarimai/2013
[276] "Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus 2013 m. sausio 22 d. nutartis baudžiamojoje byloje Nr. 2K-7-102/2013," *Teismų praktika*. 2013, 39, p. 475-483.

programmes and/or catalogues from countries other than the EU Member States, states of the European Economic Area and other European states which have ratified the Council of Europe Convention on Transfrontier Television may be suspended upon a decision of the Commission if such television programmes and/or parts of the programmes and/or the catalogues of those countries violate the requirements of Articles 17 or 19 of this Law"[277]. Thus, this provision allows to restrain the reception of foreign broadcasts if the disseminated information threatens the Constitutional order, the state's sovereignty, integrity, spreads war propaganda, incitement to hatred, disinformation and defamation capable of undermining individual's honor and dignity, or provides advertising of addictions and sexual services. As the examples discussed below will demonstrate, the most significant problem with relation to fake news in Lithuania is the misleading information, which is threatening the state's order and territorial integrity in Lithuania, spread via television. In the last few years, Lithuanian legal practice in the field of spreading fake information is full of examples arising from Russian television. Series of sanctioned measures were invoked in order to tackle the completely false pro-Russian information presented as factual to the public.

To begin with, for the first time the broadcast of the TV channel, "PBK Lithuania", was restrained for 3 months among Lithuanian re-broadcasters due to disinformation expressed in one of the programmes about January 13 Events in the territory of Lithuania. Expressions there were considered as deceiving the public and contemning the remembrance of people who had been fighting for independence.[278] The Radio and Television Commission of Lithuania (RTCL), which is an independent authority responsible for supervision of re-broadcasters activities, based this decision on Article 19 (1) paragraph 3 and Article 19 (2) of the LPIP, which correspond to war propaganda and disinformation. Thus, the authority enforced an approach that fake information is incompatible with the elements, which intend to mislead population and at the same time express contempt towards painful topic for the Lithuanian state and nation.

In addition, a year later, the RTCL on the basis of the same legal provision suspended the TV programme "NTV Mir Lithuania" for 3 months, where it again found the intentionally spread disinformation about the January Events and the defiance of aggression and crimes committed

[277] "Lietuvos Respublikos Visuomenės informavimo įstatymas," *supra* note 273.
[278] LRTK 2013 m. spalio 9 d. sprendimas „Dėl programų iš ne Europos Sąjungos valstybių narių, Europos ekonominės erdvės valstybių ir kitų Europos Tarybos konvenciją dėl televizijos be sienų ratifikavusių Europos valstybių, sudarančių televizijos programą „PBK Lithuania", laikino retransliavimo sustabdymo", accessed at https://www.rtk.lt/content/uploads/2015/08/2013-KS-168.pdf

against Lithuania.[279] That is to say, the responsible Lithuanian authorities one more time put the national aspects of serious importance in the first place over freedom of expression of the TV programme.

Further, Vilnius Regional Administrative Court satisfied the request of the RTCL to suspend temporarily for 3 months retransmission of TV channel "Ren TV Baltic", which is comprised of content produced in Russia Federation.[280]. The national regulator based this decision on the fact that TV programme of this TV channel tendentiously and in a partial manner, without providing an alternative opinion, spread the disinformation about Ukrainian history and incitement to hatred towards different nations, including Lithuanian. The programme also contained accusations of fascism in Baltic countries, them being allegedly governed by people with nationalist and fascistic views.[281] Thus, the presentation of false information as verifiable truth was recognized as a major factor leading to suspension of the channel. The TV programme contained many other aspects, which were considered as being inappropriate. Namely, there were allegations, that Baltic countries on purpose cultivated Russophobia in their territories, claims that Western countries are intending to destroy relations between Russia and Ukraine, as well as assertions that Russian speaking minorities in Lithuania had been depicted as enemies and occupants. It was recognized that there was an intention to purposefully form the opinion of the audience.[282] Such decision was based on the fact that the disseminated information was mainly not upheld by evidences, the statements of the announcer were given as indisputable facts, without providing the right to reply nor alternative opinions regarding the events. Thus, suspension for 3 months was accepted as a proportional sanction with regard to the infringement, corresponding to Paragraph 1.3 of Article 19 of the LPIP, by which war propaganda and incitement to hatred are forbidden. This recognition reveals again that statements of false information presented in the form of facts, without providing alternative viewpoints, are incompatible with Lithuanian regulatory framework.

Moreover, in 2017, TVCI television channel, managed by Russian company, was suspended by the RTCL for half a year after some previous sanctions in the recent past. This

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[279] LRTK 2014 m. kovo 19 d. sprendimas Nr. KS-46 „Dėl programų iš ne Europos Sąjungos valstybių narių, Europos ekonominės erdvės valstybių ir kitų Europos Tarybos konvenciją dėl televizijos be sienų ratifikavusių Europos valstybių, sudarančių televizijos programą „NTV Mir Lithuania", laikino retransliavimo sustabdymo", accessed at http://www.old.rtk.lt/files/15_1395305523_6431.pdf

[280] "Vilniaus apygardos administracinio teismo 2015 m. sausio 15 d. nutartis administracinėje byloje Nr. I-6300-484/2015 Dėl programų iš ne Europos Sąjungos valstybių narių, Europos ekonominės erdvės valstybių ir kitų Europos Tarybos konvenciją dėl televizijos be sienų ratifikavusių Europos valstybių, sudarančių televizijos programą „Ren TV Baltic", laikino retransliavimo sustabdymo", accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/955750

[281] *Ibid.*

[282] *Ibid.*

decision was adopted, after the statements of the programme participant had been considered as incitement to war and hatred among nations.[283] Also, it follows from the report that the programme contained many false, unfounded statements. For example, there was an assertion that occupation of Eastern Europe after the World War II was legitimate and these countries now have to return their territories to their legitimate owners. The RTCL considered such information as harmful for Russian speaking audience, because it was forming a biased opinion with intention to affect the perception and behavior of the viewers.[284] As most of the times, the RTCL qualified this as propaganda in terms of Paragraph 1.3 of Article 19 of the LPIP. Thus, false information was embedded into the concept of war propaganda and considered as overstepping the allowed boundaries of freedom of expression.

Lastly, on the basis of exactly the same provision, after the series of repetitive infringements made by the TV channel "RTR planeta" and also several suspensions for three months in the recent years[285], the RTCL ordered to suspend the retransmission of this programme and its dissemination online for 12 months upon the decision. The commission motivated this obligation referring to the threatening to attack Baltic countries, which was clearly expressed in particular programmes of "RTR planeta", as well as allegations that Baltic countries are exercising genocide towards Russian citizens in the territories of their countries.[286] There were many statements, which the RTCL considered to amount to war propaganda, and, additionally, disinformation. Most importantly, it was recognized that TV programmes were arranged with an aim to deceive audience and cause them negative feelings, while no acceptance of alternative opinions was present. It can be observed that this decision was the first one where RTCL recognized the impact of the Internet in spreading misleading information in addition to television. Conforming to previously discussed cases, it is apparent that the triggers for suspension were not the mere provision of false information to the society, but its presentation as truthful and authentic facts with an aim to deceive recipients of information and the nature of statements.

Many things can be noted from these discussed examples. First of all, it leaves no doubt that Lithuania so far is following a consistent approach, firmly recognizing that false information

[283] LRTK 2017 m. rugsėjo 20 d. sprendimas Nr. KS-83 S „Dėl televizijos programos „TVCI" laisvo priėmimo laikino sustabdymo", accessed at https://www.rtk.lt/content/uploads/2017/10/ks-83-2017.pdf.
[284] *Ibid*.
[285] See, for example, LRTK 2014 m. balandžio 2 d. sprendimas Nr. KS-59 „Dėl programų iš ne Europos Sąjungos valstybių narių, Europos ekonominės erdvės valstybių ir kitų Europos Tarybos konvenciją dėl televizijos be sienų ratifikavusių Europos valstybių, sudarančių televizijos programą „RTR Planeta", laikino retransliavimo sustabdymo", accessed at http://www.old.rtk.lt/files/15_1396509989_1867.pdf
[286] LRTK 2018 vasario 14 d. sprendimas Nr. TS – 16 „Dėl televizijos programos „RTR Planeta" laisvo priėmimo laikino sustabdymo", accessed at https://www.rtk.lt/content/uploads/2018/02/ks-16-2018.pdf

which is related to sensitive matters, such as national security, territorial integrity, public order denial of painful historical facts goes beyond the acceptable limits of freedom of expression in the Lithuanian legal framework. All of the discussed decisions were based on current national legal norms and were approved by administrative courts. Thus, the sanctions curbing freedom of expression of entities spreading false news were legitimately imposed.

Secondly, the abovementioned Lithuanian regulatory practices with regard to suspension of TV programmes prove that the boundary from what is considered to be propaganda and fake or misleading news, sometimes can easily disappear. That is to say, the false information, that is initially presented in the form of news, can eventually lead to propaganda if it contains particular content. It follows from the discussed RTCL findings that fake news, which contained expressions with unfounded claims of hostile acts, were qualified as not only disinformation, but also war propaganda.

Thirdly, the RTCL in most of the decisions emphasized the established core component of fake news, the intention to deceive the society, as one of the major factor leading to the suspension of the TV programmes. That is to say, if some alternative viewpoints would have been provided in these programmes, or expressions of speakers could have been understood as clearly constituting personal opinions rather than presentation of established facts, the outcome presumably would have been different in these cases. Adding the fact, in the presented cases intention to spread untruthful information was recognized, these aspects clearly contributed to justifying the interference with the programmes' freedom of expression.

Moreover, considering the most recent regulatory attempts, it can be seen that sanctions proposed against the misleading content which is interfering with important aspects of the state, are increasing. Indeed, they are getting stricter because of continuous infringements made by the television programmes while exercising their free expression. Such step forward shows that the previously imposed injunctions apparently were not sufficient to deal with the issue and did not stop the spread of inappropriate content. Indeed, having in mind previously discussed approaches of the ECtHR towards balance between media's freedom of expression and state's rights to territorial integrity or public order, as well as a high threshold for potential threat to justify state's interference, it is not completely evident whether current situation in Lithuania would amount to the one, when restrictions on freedom of expression would be considered by the Court as necessary. However, in the opinion of the author, the initial sanctions of suspension for 3 months, imposed by the Lithuanian regulatory authority, are not disproportionate with regard to the content of the TV

programme, which, by provoking for some actions against Lithuania as an independent state and the EU member and denying historical facts, extremely painful for Lithuania, is threatening the values of the state. Continuous demonstration of such type of false content is likely to affect significantly the opinions of Russian-speaking population living in the country. Besides, it is touching very sensitive points for Lithuania. Thus, it is understandable why the national authorities find it necessary to implement sanctions. As all the initial sanctions were of very temporary nature, such acting most likely shall not be regarded as contradictory to the ECtHR jurisprudence.

Furthermore, the last decision of the RTCL reveals the official acknowledgement that, nowadays, traditional news is spread not only via television anymore, as at the same time the content can be distributed online. Even though so far in Lithuania there were no cases with reference to allegedly harmful fake news online, the latter recognition shows that online sphere is formally considered to be an environment where a harm caused by fake news may extend. However, the sanctions by the RTCL are subject to enforcement only by rebroadcasters. Thus, that does not preclude the same false content, produced or based on the suspended TV programmes, from circulating in other platforms, not managed by retransmittors and available for the Internet users. Thus, currently the adopted measures to handle the issue are not of maximum effect.

However, there is a related issue, that such decisions, aimed to protect territorial integrity and other important statehood aspects by restricting broadcast of the TV programmes, are not always well subordinate to the EU legal framework. For instance, in 2017, the Supreme Administrative Court of Lithuania annulled the decision of the RTCL related to suspension of retransmission of one TV programme. The Court stated that reliance on the above-mentioned Article 34^1 Paragraph 11, which allows the suspension of TV channels coming from not the EU Member States, was incorrect and consequently lead to procedural irregularity, affecting validity of the decision.[287] The RTCL's position relied on the fact that even though the broadcaster was formally licensed in an EU country, however, its programs were produced in the Russian Federation. The enterprise established in the EU Member state had no editorial control or impact over the content, which was generated. Strictly speaking, Lithuanian sanction on false news disseminating entity was held invalid due to the fact, that impugned TV programmes were established in the EU territory, despite that all the control was *de facto* owned by Russian Federation.

[287] "Lietuvos vyriausiojo administracinio teismo 2017 m. spalio 31 d. sprendimas administracinėje byloje Nr. A-638-492/2017," accessed at http://www.infolex.lt.skaitykla.mruni.eu/tp/1535370

Like professor Martišius pointed out, Russia takes advantage of this gap in regulatory framework and thus often establishes TV channels in the EU member states.[288] Such presumably intentional circumvention of rules can also be an additional evidence of the strong willingness of Russian subjects to spread deceiving information in Lithuania with possible purposes to mislead the population and cause some turmoil in the country. As at international level there are not many doubts left about Russia's exercise of information war, and disinformation being one of its tools, it is reasonable for Lithuania to feel the potential threat for national security, territorial integrity and public disorder, and accordingly to take measures which interfere with such TV news disseminators freedom of speech.

Although discussed cases focused mainly on one form of technology, where false news was spread, it is reasonable to believe that with increasing impact of the Internet, more and more fake news, which initially took place in the impugned TV programmes, will circulate via online platforms. Relating that with the discussed risk, it would be acceptable to consider that fake news spreading online and disseminating false which can negatively affect the most important State's security aspects, such fake news should be held as violations of freedom of expression and subject to interferences, which are proportionate.

All things considered, it could be stated that fake news is not illegal *per se*. That is proved by findings of numerous legal researchers and interpretations provided in the ECtHR judgments. Strict measures implemented to explicitly forbid fake news and promptly remove them from online environment, making online platforms subject to huge sanctions is not compatible with current legal framework and instruments which set the guidelines for dealing with fake news. Concerns raised after German regulatory example are justified at the point, that such measures may lead to aggravated environment for enjoying freedom of expression on the Internet. However, there is a number of examples in the ECtHR's jurisprudence and Lithuanian legal practice, which indicate that fake news may constitute threat to the aspects such as national security, territorial integrity and public order in the state. The ECtHR raised relatively high threshold for justifying necessity and proportionality of the interference with news disseminators' freedom of expression in such cases. However, Lithuanian legal practice, after discussion of decisive factors, which lead to imposition of sanctions and not excessive nature of the latter, could be considered as in line with the case law of ECtHR.

[288] Mantas Martišius, "Traits of the Russian information warfare, " *Informacijos mokslai* 69 (2014): 13, 17.

CONCLUSIONS

1. Freedom of expression is an internationally recognized complex human right and the core component of a democratic society. Its complexity appears not only through freedoms to hold opinions, impart and receive information and ideas, but also from other elements it involves, such as freedom of press. However, the concept of duties and responsibilities this right is based on, makes freedom of expression subject to conditions which have to be fulfilled when exercising it. On the other hand, interferences have to be clearly and foreseeably prescribed by law, pressing the social need in the society and proportionate to legitimate aim pursued. Analysis of the term "frontiers" in the UDHR, ICCPR and ECHR provisions related to freedom of expression and interpretation of the ECHR as a living instrument explain that legal protection and restrictions applicable to freedom of expression extend to the online sphere as well. Such approach is explicitly enshrined in the UN HRC resolutions, Joint Declaration on Freedom of Expression and Internet, and findings of the ECtHR.
2. Internet has significantly contributed to the facilitated enjoyment of freedom of expression, abilities of every individual to create and spread content, making them journalists to some extent. Alongside, an ability to generate content without pre-screening or editorial control, possible anonymity of the users, fast pace of dissemination of information creates a favorable environment for violations of freedom of expression to appear online.
3. The approach laid down in the provisions of Declaration on Freedom of Communication on the Internet and the E-Commerce Directive regarding online intermediary liability, such as no general obligation to monitor, is construed in the way that freedom of expression in the online platforms would be ensured.
4. The judgments and decisions of the ECtHR related to impugned comments online provided a strong basis with criteria necessary to determining when online intermediaries shall be held liable for unlawful comments in their platforms. Thorough analysis of the context of the comments, possibilities of direct liability, measures taken by the platform and consequences lead to the conclusion whether imposition of liability on online intermediaries would be in line with Article 10. As *Delfi v. Estonia* case demonstrated, the determining factors for imposition of liability for unlawful comments is commercial nature of online site, its active intention to attract many comments in the platform and not prompt removal of the comment. In contrast, in three other cases (*MTE v. Hungary*, *Pihl v. Sweden* and *Tamiz v. the UK*) the

ECtHR took a less strict approach, particularly emphasizing the importance of online intermediaries as providing the platform for freedom of expression. Given the fact, that initial ECtHR's approach on intermediary liability was widely criticized by scholars and the fact that previous cases of the ECtHR regarding sanctions towards media actors firmly recognized a chilling effect they may have on freedom of expression, it leads to the conclusion that avoiding imposition of liability on websites would be more in line with whole Court's jurisprudence under Article 10. Also, the analysis has demonstrated that several related aspects, such as typical Internet style of comments or the actual impact of the nature of the website with regards to harm made for injured party, should be more precisely elaborated in the future ECtHR's judgments

5. There have been only few cases when the domestic courts of Lithuania cited *Delfi* judgment, while no other cases related to intermediary liability for the user-generated content have ever been mentioned. Even though no consistent analysis of the four components established by the ECtHR is invoked by courts, the author found that they tend to focus on similar elements. It follows from the analysis of Lithuanian courts jurisprudence, that contrasting with the ECtHR case law, purpose and aim of the website were considered as more important factors when evaluating the context of the comments rather than commercial or non-profit nature of the online site. Imposition of liability is uncommon practice in Lithuania, as direct liability for authors is usually applied and websites are often not involved in the judicial proceedings. Certain examples of direct liability application, for instance, when person who allegedly wrote the comment is denying the fact and there are no additional evidences, reveal the weak side of such type of liability though. On the other hand, correspondingly to the approach of the ECtHR, the absence of reasonable steps taken by the online platform in order to ensure that injurious comment would not remain there or unfounded refusal to delete comments, could lead to imposition of liability on that website in Lithuania.
6. As regards both regulatory measures regarding impugned comments and fake news online, the imposition of strict obligations to deal with such content for online intermediaries can lead to excessive removal of posts. Analysis of separate measures, such as the EU Code of Conduct on countering illegal hate speech online and the German law NetzDG demonstrated that dealing with unlawful comments and fake news with requirement to promptly remove such expressions as illegal is not in line with freedom of expression framework, if no safeguards are provided. Such situation, even though intended to protect the others from the

harm of unlawful content, can lead to censorship and aggravated environment for enjoyment of freedom of expression in these online platforms, as it was widely recognized by legal scholars specializing in human rights and media law.

7. The analysis revealed that while there is no universal definition of fake news, it is almost uniformly referred to a false publication, spread online with an aim to deceive the public. Fake news form part of disinformation concept and in certain cases, it can constitute propaganda. Despite the risks this concept brings, most of legal scholars tend to refrain from declaring fake news as manifestly unlawful concept. It follows also from the analysis of the ECtHR's case law that the Court tends to protect not only information, which is truthful. Thus, fake news appears not to be illegal *per se*.
8. The analysis of Joint declaration on freedom of expression and "fake news", disinformation and propaganda, EU High Level Expert Group on Fake News and Online Disinformation report and considerations of many legal scholars revealed that strict restrictions of a general nature on fake news shall not be applied by states. If national authorities are intending to restrain published fake news, they shall act in line with the three-part test established to evaluate interference by the ECtHR.
9. In the cases, where fake news amount to war propaganda or constitute threat to national security, territorial integrity or public order, the ECtHR requires well-founded proof that the possible harm is real in order that interferences with freedom of expression could be justified. Even when the Court explicitly recognizes highly possible detrimental effect of fake news on state's matters, the requirements to proportionality of sanction suggest that the latter shall not be as grave as complete closure of the entity or conviction of subject, which disseminated the content**.** The substantial amount of cases in Lithuania demonstrated that fake news can take the form of disinformation aimed to form opinions of the public and war propaganda, and its spread via technologies, having in mind the context of geopolitical situation, is recognized as a threat for state security and territorial integrity. The measures invoked by the Radio and Television Commission of Lithuania, which involve temporary suspension of retransmissions of TV programmes (in the online environment including) and for a limited time interfere with right to impart information of disseminators of fake news, could be considered as not too heavy and proportionate to the aim pursued. Thus, regulatory attempts of Lithuanian authorities should be regarded as not contradictory to the ECtHR related jurisprudence.

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ABSTRACT

Jurgelevičiūtė Indrė. Freedom of Expression Online: Problematic Aspects. Supervisor: Doc.dr. Laurynas Biekša. – Vilnius: Faculty of Law, Institute of International and European Union Law, Mykolas Romeris University, 2018.

This Master thesis deals with issues related to freedom of expression on the Internet: online comments and fake news. The paper starts with analysis of the scope of freedom of expression, including its components and applicable restrictions. The extension of this right to the Internet and positive and negative effects which use of this technology may have over freedom of expression is also discussed.

The special part of the paper is divided into two chapters. In the first one, problematics of online comments and intermediary liability in the sense of freedom of expression is analyzed. The next chapter is devoted to the comprehensive analysis of issue of fake news online, their legitimacy in the light of freedom of expression and possible legal response to the matter. The research is based on the newest findings of media law and human rights scholars, international and European regulatory framework, the ECtHR's jurisprudence and Lithuanian practice. The Master thesis is completed by presenting conclusions.

Keywords: freedom of expression, comments, fake news, intermediary liability, disinformation

ANOTACIJA

Jurgelevičiūtė Indrė. Saviraiškos laisvė internete: probleminiai aspektai. Vadovas: Doc. dr. Laurynas Biekša.– Vilnius: Mykolo Romerio universitetas, Tarptautinės ir Europos Sąjungos teisės institutas, 2018.

Šiame magistro baigiamajame darbe analizuojama saviraiškos laisvės internete problematika skiriant ypatingą dėmesį komentarams, talpinamiems įvairiuose tinklapiuose bei netikroms naujienoms. Mokslinis darbas pradedamas bendra saviraiškos laisvės bei galimų jos apribojimų apžvalga. Taip pat aptariamas šios teisės taikymo internete klausimas bei privalumai ir grėsmės, kuriuos ši moderni technologija sukuria saviraiškos laisvės atžvilgiu.

Specialioji dalis išskiriama į du skyrius. Pirmajame analizuojama internetinių komentarų ir teisinės atsakomybės už juos problematika, o antrajame skiriamas dėmesys netikroms naujienoms, jų vietai saviraiškos laisvės ribose bei galimam teisiniam atsakui į šį reiškinį. Analizėje remiamasi naujausiais teisės mokslininkų darbais, teisinio reguliavimo Europoje pavyzdžiais, EŽTT jurisprudencija ir Lietuvos praktika. Remiantis šia analize, mokslinio darbo pabaigoje pateikiamos išvados.

Raktiniai žodžiai: saviraiškos laisvė, komentarai, netikros naujienos, portalo atsakomybė, dezinformacija

SUMMARY

Freedom of expression is one of the cornerstones in a democratic society. Being enshrined in Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights and other human rights instruments it entitles individuals to hold opinions, spread and receive information and ideas to the extent that it does not become subject to certain established restrictions. The evolution of the Internet unquestionably contributed to facilitated enjoyment of freedom of expression. Easy accessibility, fast speed of dissemination of content, the upgraded role of the press and popularity of sites, which invite to post content are the main factors, letting freedom of expression thrive in the online environment. However, lack of editorial control or pre-screening of posted expressions, possible anonymity of users and extremely easy duplication of content created an environment for violations of freedom of expression to appear and challenged their regulation.

This Master thesis focuses on two issues, which are inherently related to freedom of expression on the Internet: virtual comments and fake news online. As for the first one, the author analyzes current regulatory framework with regard to Internet service providers' liability for the content appearing in their platforms. Guidelines set by E-Commerce Directive and Declaration on Freedom of Communication on the Internet, approaches of legal scholars, case law of the ECtHR and Lithuanian domestic courts are analyzed. As regards fake news, in order to determine the place of this concept within the scope of freedom of expression and find adequate legal answers to deal with an issue, the analysis focuses approaches of legal scholars, highlights of regulatory practice at international and European legal framework, judgments of the ECtHR and legal practice in Lithuania.

The author concludes that the measures taken in order to restrain discussed expressions on the online platforms shall be not applied extensively. Strict sanctions requiring online intermediaries to remove online comments or fake news immediately would have a chilling effect on freedom of expression and could possibly lead to a censorship there. Despite the ECtHR's practice, which is still lacking of consistence and slightly varying Lithuanian approach, it could be concluded that imposition of liability on websites shall be an exception rather than a regular measure. Fake news, as findings of legal scholars and long-standing jurisprudence of the ECtHR demonstrated, is not illegal *per se*. In the cases, where they threaten such elements as national security or territorial integrity of the state, interferences may be necessary, however, special attention shall be given to proportionality of such sanctions.

SANTRAUKA

Saviraiškos laisvė, be abejonės, užima ypatingą vietą demokratinėje visuomenėje. Jos įtvirtinimas Tarptautinėje žmogaus teisių deklaracijoje, Tarptautiniame pilietinių ir politinių teisių pakte, Europos žmogaus teisių konvencijoje ir kituose dokumentuose įgalina individus turėti savo nuomonę, gauti informaciją, reikšti įsitikinimus ir idėjas. Ši teisė, nors apima nemažai saugomų komponentų, gali būti apribota esant nustatytoms aplinkybėms. Internetas teigiamai paveikė saviraiškos laisvės įgyvendinimą, palengvindamas priėjimą prie naujienų, įvairaus turinio publikavimą ir leisdamas kiekvienam naudotojui tapti tarsi žurnalistu kuriant turinį ir skleidžiat idėjas iki šiol dar neregėtu mastu. Tuo pačiu, tokie aspektai kaip galimas anonimiškumas, greita informacijos sklaida per visas platformas, sudarė terpę atsirasti įvairiems šios teisės pažeidimams ir apsunkino jų reguliavimą.

Šis magistro baigiamasis darbas analizuoja dvi su saviraiškos laisve internete neatsiejamai susijusias problemas: internetinius komentarus ir netikras naujienas. ES Elektroninės komercijos direktyva, Deklaracija dėl komunikacijos laisvės internete, tam tikri praktiniai pavyzdžiai ir teisės mokslininkų požiūriai jų atžvilgiu, EŽTT ir Lietuvos nacionalinių teismų jurisprudencija šiame magistro baigiamajame darbe sudaro pagrindą analizei, kada yra galima teisinė atsakomybė ir sankcijų taikymas tarpinių paslaugų teikėjui už komentarus, patalpintus jo internetinėje platformoje taip, kad saviraiškos laisvė toje platformoje nebūtų pažeista. Tuo tarpu, siekiant nustatyti netikrų naujienų vietą saviraiškos laisvės lygmenyje ir rasti teisinius sprendimus, kurie būtų adekvatūs reaguojant į šių naujienų sklidimą internete, autorė analizuoja žmogaus teisių ir žiniasklaidos teisėje besispecializuojančių teisės mokslininkų ir ekspertų darbus, Bendrą deklaraciją dėl saviraiškos laisvės ir netikrų naujienų, dezinformacijos ir propagandos, Europos regioninės praktikos pavyzdžius bei teisinę praktiką, susijusią su netikromis naujienomis Lietuvos jurisdikcijoje.

Autorė baigia šį mokslinį darbą pateikdama išvadas. Vienas kertinių aspektų yra tas, kad teisinės priemonės, kurių imamasi siekiant pažaboti neteisėtą saviraišką internete, neturėtų būti ekstensyvios. Skiriamos griežtos sankcijos internetinėms platformoms ir reikalavimai nedelsiant pašalinti šį turinį gali turėti neigiamą poveikį saviraiškos laisvei šiuose tinklapiuose ir paskatinti cenzūrą juose. Nepaisant kontraversiškos ir kol kas ne visai nuoseklios EŽTT praktikos bei šiek tiek išsiskiriančios Lietuvos teismų jurisprudencijos, galima bendrai teigti, kad teisinė atsakomybė tarpinių paslaugų teikėjams gali būti taikoma labiau išimtiniais atvejais. Netikros naujienos savaime nėra saviraiškos laisvės pažeidimas, tačiau, sutinkamai su EŽTT jurisprudencija ir Lietuvos praktika, tam tikros jų formos, kurios perauga į karo propagandą arba kelia grėsmę nacionaliniam

saugumui bei teritoriniam integralumui, gali būti sankcionuojamos parenkant proporcionalią priemonę.

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