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The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

Third-Party Intervention by
European Information Society Insitute (EISi)

In re *Sanchez v. France*
App. No. 455581/15

I. Introduction

(1) *Sanchez v France* raises an opportunity for the Court to rule on the outer limits of intermediary liability laws imposed by Article 10 of the European Convention on Human Rights ('Art 10 ECHR'). It is a unique opportunity to consider the interplay between a range of different actors that defines the digital ecosystem.

(2) This submission will argue that holding somebody criminally liable as a publisher for failing to take prompt, pre-notification action against unlawful comments by identifiable authors on a Facebook wall is a disproportionate measure that violates the right to freedom of expression under Art 10 ECHR.

(3) Social media platforms permit users to be not only speakers, but also *speech facilitators* through the creation of their own fora (e.g. a Facebook wall). As such, these platforms constitute complex, multi-layered spaces which are shaped by both their user base and the platform's design and internal governance mechanisms. Unlike in the previous cases that have come before the Court, this case is more representative of the digital ecosystem. It involves two distinguishable types of speech facilitators: the platform as a *general facilitator* and active users of platforms, such as the applicant, as *proximate facilitators*, who both create the ecosystem and invite third parties to contribute with their comments.

(4) In *Delfi AS v Estonia*[1] and *MTE v Hungary*,[2] the Court ruled on situations where there was only *one* speech facilitator with *full* control over the online speech environment it created.[3] This effectively reduced the range of interventions to a triangle made up by: (i) the platform as a facilitator, (ii) the authors of the unlawful comments, and (iii) the victims of the comments. The Court formulated its *Delfi*-test for the lawfulness of intermediary liability laws assuming this type of digital ecosystem. It then ruled that hate speech or incitement to hatred or violence distributed in such a digital ecosystem might be exceptionally subject to liability before acquiring actual knowledge through notification (see Section II).

(5) However, in the present case and like in many others, the speech facilitator corner of this triangle is not a singular entity but rather two separate actors with different capabilities. Therefore, simply applying the *Delfi*-test to the applicant as the *proximate facilitator* fails to distinguish it from the scenario with a single *general facilitator* (platform). There is a need to 'translate' the criteria and considerations the Court set out in *Delfi* into a test that acknowledges the *shared responsibility* of two or more speech facilitators who determine the digital ecosystem. This brings *Delfi* in line with the 'graduated and differentiated' approach to new media recommended by the Committee of Ministers.[4]

(6) The notion of a 'shared responsibility' has not only been prominent in general EU intermediary law, but was also supported by the Court's reasoning in *Delfi*. First, the Court emphasised the importance of the commercial nature of the facilitator and its economic incentive to allow third-party comments (*Delfi*, para 144). In the present case, it is not the proximate facilitator, but rather the general facilitator, the platform, who has an economic incentive to promote user engagement. Second, the Court considered measures taken by the platform such as a liability disclaimer, a notice-and-take down system, and automated filtering algorithms (*Delfi*, para 155). Where there are several facilitators, only some of them can take such measures. Not only do social media platforms have greater *technological capabilities and economic resources*, they also set general community guidelines specifying what content is permissible on the platform. Lastly, while the proximate facilitator, the active user, might be naturally more closely connected to his/her user page, it is again the general facilitator, the platform, that enables the dissemination of content throughout the entire platform. In cases where content is amplified by the platform, the harm to society arises from the action of the authors combined with the inaction of the proximate facilitator *and* the active involvement of the general facilitator.

(7) If the Court fails to make provision for this dynamic in its judgement, it risks having a strong *chilling effect* on freedom of expression (see Section III.D) and would create unintended consequences in the political realm (see Section III.C). Given their limited technological capabilities and economic resources, many proximate facilitators will be overburdened by a requirement to monitor their online spaces for hate speech and other unlawful comments. While the harmful effect of such comments must not be ignored, the responsibility for mitigating such an effect should be shared by all speech facilitators and authors that are involved, and distributed in accordance with their respective actions, capabilities, and incentives. The possibility to hold the authors of the comments accountable in the present case constitutes a further

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[1] *Delfi v Estonia*, Application Number 64569/09 (ECtHR, 16 June 2015).

[2] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Application Number 22947/13 (ECtHR, 2 February 2016).

[3] For instance, in *Delfi*, even the authors were not capable of editing or deleting the comments. Only Delfi AS was in a position to do so; (n 1) [81].

[4] Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (21 September 2011), 7.

significant distinction between past cases brought to the Court and the current case which should be considered when assigning liability (see Section III.B).

II. Speech Facilitators and the Convention

(8) The Court tends to review cases involving speech facilitators in the digital space, including platforms and access providers, under Art 10 ECHR. This is because the imposition of liability on facilitators engages the chilling effect principle, therefore raising issues for freedom of expression under Art 10 ECHR.

(9) The chilling effect principle was laid down in *Jersild v. Denmark*,[5] where the Court stated that the 'punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would *seriously hamper the contribution of the press* to the discussion of matters of public interest [emphasis added]' (*Jersild*, para 35). In light of this, the Court went on to reject the argument that 'the limited nature of the fine is relevant', instead stating 'what matters is that the journalist was convicted' (*Jersild*, para 35) and thus is likely to change his/her future behaviour.

(10) While the role of a journalist is analogous to that of digital speech facilitators with respect to facilitation itself, there is an important difference in cases of platforms, and users acting as facilitators for *non-editorial speech*, owing to their lack of content control. Indeed, the Committee of Ministers has called for a 'graduated and differentiated' response to the proliferation of actors with different roles within the platform ecosystem.[6] This has significant implications for the area of media involving non-editorial content. Still, it is relevant that in *Jersild*, even where the applicant did exercise editorial control, the imposition of liability for the dissemination of racist remarks was held to be in violation of their Art 10 ECHR rights due to chilling effects it might have on future behaviour.

(11) The test established in *Delfi* for determining the lawfulness of facilitator liability under Art 10 ECHR was subsequently reformulated in *MTE* to a different context. Based on both cases, the Court examines (i) the context of the comments, (ii) the measures applied by the applicant to prevent or remove the comments, (iii) liability of the actual authors of the comments as an alternative to the facilitator's liability, (iv) the consequences of the domestic proceedings for the applicant, and (v) the consequences of the comments for the injured party.[7] This test has since been applied in *Pihl v Sweden*[8] and *Tamiz v United Kingdom*.[9]

(12) Rather than emphasising the commercial character of the platform in *Delfi*, these later cases have focused on Delfi's role in the context of its professional editorial activities. Accordingly, in *Tamiz*, the Court stated: '[i]n *Delfi*, the Grand Chamber was concerned with a *large, professionally managed* Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them; it *expressly* stated that it did *not concern* other Internet fora, such as a social media platform where the platform provider does not offer any content and where the content provider may be a private person running a website or blog as a hobby [emphasis added]'.[10] In this way, the Court has made clear that the finding in *Delfi* was *not* a general endorsement of facilitator liability prior to notification as consistent with Art 10 ECHR, but instead flowed from the particular circumstances surrounding Delfi's

[5] *Jersild v. Denmark*, Application Number 15890/89 (ECtHR, 23 September 1994).
[6] Committee of Ministers (n 4).
[7] *MTE* (n 2) [69], [84].
[8] Application Number. 74742/14 (ECtHR, 9 March 2017).
[9] Application Number 3877/14 (ECtHR, 19 September 2017).
[10] *Delfi* (n 1) [85].

technological capabilities and economic resources. In *Delfi* itself, reference to the platform's 'commercial character' should therefore be read as a *proxy* for these two considerations.

(13) The *exceptional nature* of *Delfi* is also helpfully explained by reference to the application of the chilling effect principle. The Court in *MTE* and *Pihl* more explicitly relied upon the chilling effect argument. In *MTE*, it was held that expecting some of the unfiltered comments 'might be in breach of the law' amounted to 'requiring *excessive and impracticable forethought* capable of undermining freedom of the right to impart information on the Internet [emphasis our own]' (*MTE*, para 82). This principle was then similarly applied in *Pihl* (*Pihl*, para 31).

(14) This method of applying the chilling effect principle, as seen in both *MTE* and *Pihl*, is more clearly oriented towards considering the *future risk* of a chilling effect. The concern with future risk is *better suited* in the context of *digital* content disputes, given the different kinds of actors involved and the potentially unforeseeable number of users, all with the right to receive and impart information. When balancing rights in these cases, the Court must be careful to conduct a *holistic examination* of the relevant situations, bearing in mind that the rights at stake extend beyond just those of the immediate parties to the proceedings.

(15) It is also important to note that any standard of liability accepted by the Court will have an impact on both unlawful and lawful speech (a *spill-over effect*). This has been acknowledged by the U.S. Supreme Court, in the case of *Smith v California*.[11] The Supreme Court concluded that 'the free publication and dissemination of books obviously are within the constitutionally protected freedom of the press' (*Smith*, para 150). Therefore, they held the imposition of strict liability on the appellant bookstore proprietor to be unlawful, as it would 'tend to restrict the books he sells to those he has inspected; and thus, the State will have imposed a restriction upon the distribution of constitutionally protected, *as well as obscene literature* [emphasis our own]' (*Smith*, para 153). Furthermore, they stated that this form of 'self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered' (*Smith*, para 154).

(16) The conclusions of the U.S. Supreme Court in *Smith* illuminate how the standard of liability for facilitators endorsed by the Chamber in *Sanchez* would have a spill-over effect on *lawful speech* in a way that Art 10 ECHR actually seeks to prevent. Similar to the bookseller example in *Smith*, if liability for a speech facilitator arose lawfully prior to notification, they would restrict the content visible on their platforms (or sub-page, in the case of a user as a proximate facilitator) to that which they can be assured will not result in liability. In practice, given the lack of ability to undertake monitoring for a large section of speech facilitators in the digital space, especially proximate facilitators, such liability would result in either closing down a page or *over-blocking content* of individual comments. Accordingly, the chilling effect that flows from facilitator liability operates not only in relation to unlawful speech, but lawful speech as well. In light of this, the rights of facilitators must be given the *same* level of rigorous protection regardless of the nature of the speech that actually gives rise to legal proceedings.

(17) Therefore, when applying *Delfi*, the Court must bear in mind the following *three* considerations. Firstly, users of online platforms also act as proximate facilitators that facilitate *non-editorial speech* of others. Secondly, the lack of editorial control needs to be considered when analysing technological capabilities and economic resources. Thirdly, when considering the chilling effect of facilitator liability in digital content

[11] 361 U.S. 147 (1959). For further discussion on this, see Daphne Keller, 'Amplification and Its Discontents: Why Regulating the Reach of Online Content is Hard' [2021] 1 Journal of Free Speech Law 46.

disputes, the Court must consider the *future risk of chilling effect*, including the *spill-over effects on lawful speech* in the same digital ecosystem.

III. Applying *Delfi*

A. Content and context of the comments

(18) The Internet is one of the principal means by which individuals exercise their right to freedom of expression and information and it provides essential tools for participation in activities and discussions concerning political issues and issues of general interest'.[12] The services of social media platforms, which include the capturing and spreading of immediate reactions of people to the world, have inherent characteristics that are incompatible with editorial control and the conversation on such platforms could be equated to everyday offline conversations. Applying strict liability to such speech leads to the sacrifice of instant decentralised speech. This *fertile environment* for public discussion outside of centralised media should be preserved.

(19) It is pertinent to note the context in which the speech on social media is often made. The comments on pages of politicians are not commercial, but of a political nature. The 'public account' of politicians can be open in their capacity as state actors. Political speech is given the highest value and importance by the Court. On the other hand, the protection afforded to expression through pornography, gratuitous personal attacks and hate speech is minimal.[13] In *Delfi,* the Court, while considering the context of the comments, paid attention to the economic benefits of the comments made on the Delfi platform (*Delfi*, para 145). Based on this, the comments in question were considered to be commercial speech. However, in the context of political speech, the exchanges are crucial to gain more supporters, and on a more fundamental level, are an extension of an essential democratic function of the political debate.

(20) It is always important to take into account the kind of comment and the level of seriousness that is to be afforded to any comments on social media platforms. At this juncture, there is a need to distinguish between high level and low level speech. High level speech is professionally produced, aimed at a wider audience, and well-researched. Low level speech on the other hand would refer to amateur content that is spontaneous, inexpensive to produce, and akin to everyday conversation which carries with it a lower standard for responsibility (see Rowbottom (2012)).

(21) The content on pages of politicians often constitutes low level speech. The social media as general facilitators are built on the premise of replicating an environment for 'real life conversation' in an online space. Comments thus tend to be spontaneous, ill-researched, and generally made in an informal context. Consequently, these online comments are analogous to mere comments made by the voters during campaigns, which would carry little consequences had they not been disseminated and made permanent by the general facilitator. It is not argued that such expressions should have no constraints. Rather, it is suggested that the Court should focus on the possibility of regulating aspects which make low level speech more harmful online than it would be offline.

(22) States could regulate the *amplification* of content by the general facilitator or the permanency of online low level speech. For instance, they could consider lower liability for comments subject to auto-deletion.

[12] *Cengiz & Others v. Turkey,* Applications nos. 48226/10 and 14027/11(ECtHR, 29 March 2016) [49]

[13] Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) Cambridge Law Journal 355.

Such a focus might be more helpful to find a balance between protecting the freedom to converse online and the legitimate goal of mitigating the negative effects of low level speech.

(23) The comments on the applicant's post were *manifestly unlawful* and warranted imposition of liability on their *authors*. However, the Court should resist a temptation to create one uniform model of platform regulation. It should rather outlaw the extremes of such models, within which the States can experiment. The French court considers that *ever*y post by a *political leader* (proximate facilitator) with a *public* account attracts very wide liability. This is clearly going too far. The level of knowledge attributed to the proximate facilitator should be limited to *only* such comments which flow directly as a result of the post and not every low level comment made which often has no relation to the primary post. The drawing of a limit on the knowledge attributed to the proximate facilitator becomes even more important in lieu of the context it is made in and the kind of comments the context attracts. This foreseeability limit would also help the proximate facilitator to anticipate the level of liability that might be imposed on them. Therefore, if the comments are made, although *manifestly unlawful*, even if provoked by someone else, the liability imposed on such proximate facilitators should consider how much they could have foreseen given the intent and context of their own speech that provoked those comments. If the comments are unrelated to the original speech, there is little justification to hold the facilitator liable before they are requested to act.

B. Liability of the authors

(24) If authors of comments are easily identifiable, as in *Sanchez v France*, this should have implications for the balancing exercise. This applies even more when they can be confronted personally. Both aspects are implicit in the *Delfi* ruling, where the Court considered the context of anonymous authors who could not delete their own comments after posting them (even the authors of comments had to ask the platform to intervene if they change their mind).

(25) When the proximate facilitator of comments neither incited them, nor tried to amplify their distribution, it would be disproportionate to expect him/her to monitor all the comments that are posted by unrelated third parties (even if on one's own profile). To require the proximate facilitator to monitor the comments in the first 24 hours of their publication could doubtlessly become an onerous personal burden. Moreover, such intervention seems unnecessary when the platform adopts a real name policy. In such a case, it is always possible to first bring a case against the actual authors of the hateful comments.

(26) The Court should thus consider whether: i) the authors could have been clearly identified by the victims; ii) it was possible to bring a case against them; and iii) they had the ability to delete their own comments.

C. Measures taken by the applicant

(27) In the present case, the French court effectively imposed on the proximate facilitator a duty to monitor the comments on the basis of them being a political leader with a public account. This duty, according to the French courts, was linked to the lack of vigilance and responsiveness.

(28) In assessing the applicant's liability, the Firth Chamber of the Court relied on the *Delfi* formulation. However, by simply transposing the test to the present case, the Court failed to account for the two different digital landscapes in which the manifestly unlawful comments were made. In *Delfi* (as well as *MTE*), the Court was encountering an online speech environment in which only one speech facilitator had full control: only Delfi AS had the ability to delete the content as authors were unable to modify any comments once they were submitted. Where users can delete their unlawful comments, they should be

expected to act. By imposing liability on proximate facilitators without accounting for author's ability to remove content, and the platform's role as a speech facilitator, the Court would fail to recognise the limited capabilities and resources of two facilitators, and their differing roles in facilitating unlawful comments.

(29) The Court in *Delfi* distinguished between commercial and non-commercial actors (paras 115-116). As a matter of principle, 'economic operators exercising free speech should not because of that status, enjoy lower speech protection'.[14] This distinction is best understood as expressing the technological capabilities and economic resources that an intermediary has to monitor the comments on the online platform they provide. This follows from *Delfi* itself (paras 115, 116).

(30) Indeed, while the active user who provokes comments may to some extent monitor the contents of his/her page, the platform is in a better position to do so, as large commercial social media platforms have the economic and operational ability to act against specific items of illegal content. For example, they already have monitoring and filtering algorithms in place. By imposing *a pre-notification liability* on the proximate facilitator, the Court would oblige them to *manually* check their pages constantly or to hire professional moderators in order to discharge their duty. This would be burdensome, particularly in the context of algorithmic amplification and computational propaganda that both define the digital ecosystem of social media.

(31) The platform's ecosystem relies on user engagement and their algorithms are designed to maximise such engagement: they often '[appropriate] speech as mere content to advance their own economic interests'.[15] Because controversial content has been found to be more engaging for users, such content is thereby amplified by algorithms, and helps to drive the platform's profit. As a result, it is crucial for the Court to recognise the role the platform has to play in the amplification of unlawful content and this should be reflected in the shared liability assessment.

(32) Furthermore, if the responsibility places a higher burden on the proximate facilitator, it also creates *unintended consequences* in the political campaigning and communication with voters. Too much responsibility would put political leaders in a position to take decisions on what can or cannot be said in their digital spaces. Given that most political leaders use their social media accounts as a medium for official communications, this would give them, as state actors, a cover to cultivate a favourable impression of the discussions on their *public fora*.[16] Allowing politicians to remove comments from their accounts without justification hinders the ability of their voters to confront them publicly where "it hurts". More importantly, in an electoral context, it deprives voters of content that is necessary for them to make their decisions.

(33) Holding the proximate speech facilitators liable regardless of actual knowledge of the illegality of the comments and placing them under a duty to monitor fails to account for the multiplicity of actors and the shared responsibilities amongst them. In such a setup, in absence of notification about unlawful comments, it would be more appropriate to focus on the role and actions of the general facilitator owing to its greater

[14] Robert Spano, 'Don't Kill the Messenger – Delfi and Its Progeny in the Case-Law of the European Court of Human Rights' (Speech at the University of Tallinn, 8 September 2017) <https://www.ivir.nl/publicaties/download/Speech_Spano.pdf > accessed 20 March 2022, 6.

[15] Kai Riemer and Sandra Peter, 'Algorithmic audiencing: Why we need to rethink free speech on social media', Journal of Information Technology' (2021) 36(4) Journal of Information Technology 409, 409.

[16] Fallow on the judgement in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (S. Ct.): 'The Second Circuit applied the public forum doctrine and said, in essence, just as if a public official like the President were to host a public open meeting, that would be considered a public forum. And you can't exclude people or kick people out of that public meeting based on their viewpoint'.

technological capabilities and economic resources to limit the harm caused by comments and their subsequent amplification.

D. Consequences for the applicant

(34) In assessing the proportionality of the measure, it is important to assess the consequences it has on the class of digital (social) media users in the same position, and not just whoever happens to be the applicant in the proceedings. When assessing the proportionality of criminal liability and of a pre-notification monitoring duty, the Court should bear in mind the following considerations: (i) the chilling effects of overburdening of proximate facilitators causing over-blocking; (ii) the broader impact on hampering of political discussion due to presence of computational propaganda and abusive litigation.

(35) Users of social media may have different roles as actors on the social media platforms. Thus, the starting point should always be the analysis of any resulting consequences *within* the context of the user's technological capabilities and economic resources.

(36) Unlike the platform, its users, whether active or not, do *not* possess the *same level* of technical capabilities and economic resources to protect the interests of speakers, readers, and victims. They cannot constantly monitor their pages for unlawful comments, as that would make the cost of social media prohibitive. It is unreasonable to expect regular users who stir the discussion to be obliged to hire extra help to avoid liability for unlawful speech posted onto their user pages. Prescribing this higher burden onto proximate facilitators to generally monitor their pages on the off chance that the user content is of the worst kind,[17] would *overburden* them and result in a *chilling effect* due to over-blocking of speech.

(37) The Court should be particularly mindful of the *unintended consequences* that arise from such burden in the political realm. In fear of incurring liability, politicians who operate social media pages will err on the side of caution and over-block content.[18] This is particularly troubling when those users are the state actors, such as elected representatives. They can deprive the populace of content that is essential to the electoral process. Politicians who over-block content debilitate voter morale because the removal of voters' comments on their pages excludes voters from the *public forum* run by such state actors. The well-intended attempts to police unlawful material on platforms should not give politicians a pretence to freely pick and choose voters' comments that they allow the public to see, thus manufacturing the false impression of their public approval.

(38) The position as a politician thus does *not* warrant higher responsibility, but rather additional considerations regarding the core democratic principle of fair competition between candidates.

(39) In imposing a pre-notification monitoring duty, the Court would be conferring responsibility to *foresee* potential unlawful activity. The consequence for the proximate facilitator will be either to disable user engagement on their posts or to invest financial resources to ensure prompt action. This will effectively favour incumbent candidates who often can utilise public funds. Moreover, in political competition, the techniques such as trolling or computational propaganda[19] can be used to artificially raise the rival's costs

[17] *Delfi* dissent (n 1) [17].

[18] For empirical evidence showing that the liability imposed on intermediaries has the potential to over-block user content, see Daphne Keller, 'Empirical Evidence of 'Over-removal' by Internet Companies under Intermediary Liability Laws: An Updated List' *(The Centre for Internet and Society Blog*, 8 February 2021) <http://cyberlaw.stanford.edu/blog/2021/02/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws> accessed 19 March 2022.

[19] Samantha Bradshaw and Philip N Howard, 'The Global Disinformation Order 2019 Global Inventory of Organised Social Media Manipulation' (2019) Oxford Internet Institute, 9-11.

of seeking public office. It can also lead to opening of the floodgates of litigation since harmful comments posted on their user page will be generally attributable to them.

(40) Social media is subject to many challenges, such as the excessive use of fake accounts and large-scale dissemination of mis(information), which would be an overwhelming task for an individual account holder to tackle. As was noted earlier, the platforms are much better equipped to counter such challenges.

(41) All these consequences can be easily avoided by endorsing a notice-and-takedown model of enforcement, which this Court already relies on in its case-law (e.g. *MTE* and *Pihl*). Proximate facilitators can be then only expected to act after being notified of unlawful comments. On the other hand, foreseeability and foresight are not an issue where politicians *incite* unlawful comments or actions. In such cases, it is fully justified to impose a higher burden onto those who provoke some reactions as proximate facilitators, especially if they are public figures whose words have broad exposure and carry legitimacy of their office.

E. Consequences for the victims of the comments

(42) As enunciated in *MTE,* the consequences of the comments for the victims must always be put into perspective. This includes the moral dimension which the reputation of the individuals encompasses (*MTE*, paras 84-85). Such consequences can concern individuals or groups. However, digital ecosystem creates two separate types of harms. One results from the publication, and the second from the subsequent exposure of such publication. While the former is at least ex-post in the hands of the proximate facilitators, the latter is only in the hands of general facilitators who run the platform. Distinguishing the two harms is crucial.

(43) The amplification of speech on social media does not solely arise from its dissemination by the proximate facilitators but also through *algorithms* employed by platforms. These algorithms naturally do not distinguish between harmful or legitimate content. Exposure to unlawful content can be gauged using several different methods, such as determining numerical proliferation or ascertaining actual harm to an individual or group of people. Exposure should thus be determined on a case-by-case basis, knowing well that there is no clear threshold.

IV. Proposals

(44) The Court should always consider the digital ecosystem in its entirety. Where more actors create the speech ecosystem, *shared responsibility* of various speech facilitators along with the original authors of the comments should be the guiding principle.

(45) Speech facilitators with limited *technological capabilities and economic resources* should not be expected to do more than is warranted by their position. Overburdening them by monitoring obligations results in the over-removal of legitimate content.

(46) Proximate facilitators on social media shall not be expected to remove someone else's unlawful comments *before they are notified* about such comments, *unless they incited* such comments or actions.