

# Platforms, Delivery Men of “Fake Advertisement”:

## *The paradox of regulation regarding platforms' liability for hosting "fake news" that amounts to be unfair commercial practice*

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DOI: 10.29322/IJSRP.11.06.2021.p114104

<http://dx.doi.org/10.29322/IJSRP.11.06.2021.p114104>

**Abstract-** "Fake news" has undoubtedly become one of the main buzzwords of the 21<sup>st</sup> century. However, since "fake news" is not a legal term, it can take different forms of unlawful content such as unfair competition practice. Unfair competition practice generally refers to "a specific constellation of facts which involves commercial or business conduct that does not satisfy the generally accepted requirements of fairness"<sup>1</sup> and therefore it includes any content that discredits the commercial reputation of a competitor by disseminating false allegations (unfair competition content).

In the EU, platforms' liability for participating in the dissemination of unfair competition content is regulated by: (i) 2000/31 EC Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "**E-commerce directive**"); and (ii) Member States' national legislation on unfair competition practice.

Under the E-commerce directive, a platform, as a hosting service provider, can be exempted from the liability for disseminating unlawful content only if the platform's activity is limited to a mere technical, automatic and passive nature and therefore it has neither knowledge of nor control over the stored information. In practice, however, the platforms' activity is rarely limited to a passive technical role as they (i) provide the visitors access to the content; (ii) ensure search functions; (iii) enable the users to share, embed, review or to curate content on their profiles; and (iv) provide personalized services by identifying and recommending related and relevant content to the visitors. Platforms, therefore, could be held liable under the E-commerce directive for the dissemination of unlawful competition content.

On the other hand, Member States' regulations on unfair competition tend to put the liability for the damages on the primary wrongdoers, therefore, in the case of online advertising on the content providers (advertisers). Therefore, platforms could not be held liable under the Member States' regulations on unfair competition practice since they do not act as primary wrongdoers.

The discrepancy between Member States' regulations on liability for unfair competition practice and the liability regime established by the E-commerce directive, in reality, is an unsolvable paradox. On one hand, if the intermediaries' liability is governed by the E-commerce directive, as *lex specialis*, then it entails that different rules of liability apply to online and offline intermediaries. On the other hand, if the intermediaries' liability is governed by the national unfair competition law, then a coherence is guaranteed but at the same time it also requires to ignore the E-commerce directive's *lex specialis* nature.

**Index Terms-** fake news, unfair commercial practice, platform's liability

### I. INTRODUCTION

On 23 December 2010, a middle-aged man, who was later identified as the franchise owner of Firm T (the second largest company in the Korean bakery industry), posted a picture of a loaf of bread with a rotten rat in it on a famous Korean blog site. In his blog, the franchise owner claimed that he bought the bread from a franchise store of Firm P (the largest franchise-chain in the Korean bakery industry) near his home. On 31 December 2010, however, the news media revealed that the rat was placed in the bread by the franchise owner of Firm T in order to ruin the sales of the competing store. As a result of the fake allegations, the sale of Firm P dropped significantly by an estimated 17%–18% compared with the previous year.<sup>2</sup>

<sup>1</sup> Frauke Henning-Bodewig: Unfair Competition Law: European Union and Member States (2006) at 1.

<sup>2</sup> Reo Song, Ho Kim, Gene Moo Lee & Sungha Jang: Does Deceptive Marketing Pay? The Evolution of Consumer Sentiment Surrounding a Pseudo-Product-Harm Crisis, Journal of Business Ethics volume 158 (2019), available at: <https://doi.org/10.1007/s10551-017-3720-2>  
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The story above is a perfect example of "fake news" used by competing firms as a deceptive marketing tool. Companies' deceptive marketing strategies are built on a simple idea: "when a company suffers a scandalous crisis, the outcomes might benefit competing brands because consumers might seek to switch to other brands."<sup>3</sup>

Social media sites have undoubtedly become one of the most important platforms for firms' marketing, including their deceptive "fake advertisements" as well. Since deceptive marketing is not only unethical but under most jurisdictions unlawful as well, the main question that the present article aims to answer arises: can social media platforms (e.g. Facebook, Twitter) be held liable for the distribution of "fake news" that amounts to be a part of a company's deceptive marketing strategy in the EU?

## II. "FAKE NEWS" AS UNFAIR COMMERCIAL PRACTICE

"Fake news" has undoubtedly become one of the main buzzwords of the 21<sup>st</sup> century. But what exactly is "fake news"? Currently, there is no universally accepted definition for it. According to Donald Trump CNN is "fake news."<sup>4</sup> Hunt Allcott and Matthew Gentzkow defined "fake news" as "news articles that are intentionally and verifiably false, and could mislead readers."<sup>5</sup> For the purpose of this article, "fake news" refers to "online publications of intentionally or knowingly false statements of facts."<sup>6</sup>

As our definition also implies, "fake news" is not a legal term. On the one hand, this means that not every "fake news" is unlawful, and therefore unprotected by freedom of expression. On the other hand, it also means that "fake news" can take different forms of unlawful content. "Fake news", for instance, can constitute defamation, trademark infringement, misleading advertisement or, what is also in the focal point of the present article, unfair competition practice. Unfair competition practice generally refers to "a specific constellation of facts which involves commercial or business conduct that does not satisfy the generally accepted requirements of fairness."<sup>7</sup>

Although unfair competition law is not completely harmonized in the EU, and therefore national approaches to certain aspect of this field may differ, the core regulation of unfair competition practices is the same in every Member State.<sup>8</sup> For instance all Member States' regulations reflect the definition of unfair competition established in the Paris Union Convention according to which unfair competition is any act of competition which is contrary to the honest practices in industrial or commercial matters. In Article 10<sup>BIS</sup> (3) the Paris Union Convention identifies three typical unfair competition practices one of which is discrediting the competitors through false allegations.<sup>9</sup>

The prohibition on discrediting competitors could be found in all Member States' legal system. For instance, in Germany disparaging allegation of facts outside the scope of comparative advertising and trademark law which cannot be proven true constitute unfair competition practice; in France any statement irrespective of its truthfulness is prohibited if it harms the commercial reputation of a competitor, its company or its product;<sup>10</sup> and in Hungary it is prohibited to denigrate or to risk to denigrate the commercial reputation of the competitor by stating or disseminating false statements.<sup>11</sup>

Consequently, "fake news" irrespective of its form (posts, comments, articles, advertisements or user reviews) that discredits the commercial reputation of a businesses by disseminating false allegations could be considered as unfair competition practice provided that such user-generated content was originated from the discredited company's competitor or the person acting on behalf of such competitor. ("Fake news" that constitute unfair competition practice is hereinafter is referred to as "**unfair competition content**".)

## III. PLATFORM'S LIABILITY FOR HOSTING UNFAIR COMPETITION CONTENT

In the EU, platforms' liability for participating in the dissemination of unfair competition content is regulated by: (i) 2000/31 EC Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "**E-commerce directive**"); and (ii) Member States' national legislation on unfair competition practice.

### 3.1 Platforms' liability for hosting unfair competition content under the E-commerce directive

The E-commerce directive aims to regulate the conducts of information society service providers (the '**ISSPs**'). ISSP refers to any natural or legal person that provides any service normally for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service. Service providers that are not directly paid by the users, but indirectly compensated through the income

<sup>3</sup> Reo Song, Ho Kim, Gene Moo Lee & Sungha Jang: Does Deceptive Marketing Pay? The Evolution of Consumer Sentiment Surrounding a Pseudo-Product-Harm Crisis, *Journal of Business Ethics* volume 158 (2019), available at: <https://doi.org/10.1007/s10551-017-3720-2>

<sup>4</sup> David Sumpter: Outnumbered: From Facebook and Google to Fake News and Filter-Bubbles – The Algorithms that Control Our Lives (2018) at 165.

<sup>5</sup> Hunt Allcott and Matthew Gentzkow: Social Media and Fake News in the 2016 Election, *Journal of Economic Perspective* Volume 31 Issue 2 (2017), available at <https://web.stanford.edu/~gentzkow/research/fakenews.pdf> at 214.

<sup>6</sup> David O. Klein, Joshua R. Wuller: Fake News: A Legal Perspective, 1 May 2017, available at: <http://www.kleinmoynihan.com/fake-news-a-legal-perspective/>

<sup>7</sup> Frauke Henning-Bodewig: Unfair Competition Law: European Union and Member States (2006) at 1.

<sup>8</sup> Frauke Henning-Bodewig: Unfair Competition Law: European Union and Member States (2006) at 25.

<sup>9</sup> Frauke Henning-Bodewig: Unfair Competition Law: European Union and Member States (2006) at 18-19.

<sup>10</sup> Frauke Henning-Bodewig: Unfair Competition Law: European Union and Member States (2006) at 122. and 135.

<sup>11</sup> Section 3 of the Act LVII of 1996

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<http://dx.doi.org/10.29322/IJSRP.11.06.2021.p114104>

generated by the advertisements posted on the service provider's website also fall under the scope of ISSPs.<sup>12</sup> Consequently, even though platforms provide their services for free, they still must be regarded as ISSPs since their services are compensated by the income originated from advertisement.

Section 4 of the E-commerce directive explicitly addresses the liability of only technical service providers and intermediaries of the e-commerce sector (the '**internet intermediary**').<sup>13</sup> Based on the structure and the wording of the E-commerce directive and on the CJEU's jurisprudence,<sup>14</sup> internet intermediaries form a subcategory of ISSPs and include three types of service providers:

- i. mere conduits that provides the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
- i. providers of catching services that ensure the transmission in a communication network of information provided by a recipient of the service; and
- ii. hosting service providers the services of which consists of the storage of information provided by a recipient level, by trade, professional and consumer associations.

Recital (42) of the E-commerce directive refers to the provisions of Section 4 of the E-commerce directive as "exemptions from liability established in the directive". This allows us to conclude that the E-commerce directive establishes a binary liability regime that distinguishes between internet intermediaries that benefit from the exemption of liability with regard to the content transmitted, temporary stored or hosted and ISSPs that as a rule can be held liable for illegal content.<sup>15</sup> This interpretation was also confirmed by the CJEU, for instance, in *Google France and Google* when the court held that "in order to establish whether the liability of a referencing service provider may be limited..., it is necessary to examine whether"<sup>16</sup> they acted as internet intermediaries.<sup>17</sup>

With respect to platforms, however, the practical application of such binary system proves to be difficult as the directive is silent about their classification.<sup>18</sup> Moreover, platforms are hybrid ISSPs that provide multiple services (e.g. delivering messages, hosting contents, providing platforms for advertisements). The present article, however, only aims to focus on platforms' main activities: (i) enabling the users to create content; and (ii) store such user-generated content. Consequently, in order to assess platforms' liability under the E-commerce directive for hosting unfair competition content, the question that needs to be answered is whether platforms can be considered as hosting service providers.

According to Recital (42) of the E-commerce directive, an ISSP could be considered as a hosting service provider only if its activity is of a mere technical, automatic and passive nature and therefore the ISSP has neither knowledge of nor control over the stored information. Two main factors should be considered in order to distinguish hosting service providers and other ISSPs: (i) the characteristics of the service provider's services;<sup>19</sup> and (ii) service provider's mental statement.<sup>20</sup>

An ISSP can only fall under the scope of Article 14 of the E-commerce directive if its activity does not go beyond storage. In practice, however, the intermediaries' activity is rarely limited to record third parties' material in a computer storage medium as they generally provide the visitors access to the content as well as search functions. Furthermore, intermediaries usually enable the users to share, embed, review or to curate content on their profiles, as well as they provide personalized services by identifying and recommending related and relevant content to the visitors.<sup>21</sup> Since the E-commerce directive was drafted with a technology-neutral mind-set the CJEU has interpreted the term 'storage' broadly and therefore immunised certain forms of network-layer assistance as well.<sup>22</sup> The line between protected acts of storage and unprotected act of intervening in content could be identified by judging whether the ISSP took an active or a passive role in the dissemination of information.

In *Google France and Google*, CJEU found that Google cannot be deprived from being classified as a hosting service provider solely on the basis that (i) the referencing service was subject to payment; (ii) Google set the payment terms; and that (iii) Google provided general

<sup>12</sup> Sotiris Papisavvas v O Fileleftheros Dimosia Etairia Ltd, Takis Kounnafi and Giorgos Sertis at 30., C-352/85 - Bond van Adverteerders and Others, EU:C:1988:196 at 16; C-51/96 and C-191/97, Deliège, EU:C:2000:199 at 56; and C-484/14, Tobias Mc Fadden v Sony Music Entertainment Germany GmbH, EU:C:2016:689 at 41-42.

<sup>13</sup> Emmanuel Sordet and Anne Cousin Denton Wilde Sape: The Liability of E-commerce Platforms: The Case of eBay, *Nusiness Law Review*, October 2009 at 217.

<sup>14</sup> Sotiris Papisavvas v O Fileleftheros Dimosia Etairia Ltd, Takis Kounnafi and Giorgos Sertis at 45.

<sup>15</sup> Emmanuel Sordet and Anne Cousin Denton Wilde Sape: The Liability of E-commerce Platforms: The Case of eBay, *Nusiness Law Review*, October 2009 at 217.

<sup>16</sup> C-236/08, *Google France and Google*, ECLI:EU:C:2010:159 at 114.

<sup>17</sup> C-236/08, *Google France and Google*, ECLI:EU:C:2010:159 at 113-114.

<sup>18</sup> Peggy Valcke and Marieke Lenaerts: Who's Author, Editor and Publisher in User-Generated Content?: Applying Traditional Media Concepts to UGC Providers, *International Review of Law, Computer and Technology* Colume 24 Issue 1 at 125.

<sup>19</sup> C-521/17, *Coöperatieve Vereniging SNB-REACT U.A. v Deepak Mehta*, ECLI:EU:C:2018:639 at 44.

<sup>20</sup> Janni Riordan: *The Liability of Internet Intermediaries* (2016) at 403.

<sup>21</sup> Janni Riordan: *The Liability of Internet Intermediaries* (2016) at 401.

<sup>22</sup> Janni Riordan: *The Liability of Internet Intermediaries* (2016) at 401.

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information to its clients. Moreover, concordance between the keyword selected and the search term entered by an internet user was not sufficient either to justify the view that Google had knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server.<sup>23</sup> The second finding of the CJEU, therefore, could imply that the technical and automatic processes neutrally applied to the hosted information should be considered as ‘storage’ activity.<sup>24</sup>

On the other hand, CJEU went further in *L’Oréal and Others* by implying that since eBay provided assistance to optimise or promote certain offers for sale (including advertising some of the products sold on its marketplace by using search engine operators)<sup>25</sup>, eBay could not be regarded as an intermediary that took a neutral position between the customer-seller concerned and potential buyers. eBay, therefore, played an active role and had knowledge of as well as control over the data relating to the offers for sale.<sup>26</sup> CJEU’s decision, therefore, allows us to conclude that a technical and automatic process which aims to promote or optimise certain content cannot be regarded as ‘storage’ activity, irrespective of the fact that such process is applied neutrally to the hosted information.

Platforms usually use some kind of artificial intelligence or algorithm to “show people the stories that are most relevant to them.”<sup>27</sup> These algorithms select and recommend content that fits with user interests, that is popular among other users and/or that generates more interactions between users in order to increase the traffic, the user attention and consequently the advertising revenue for the social media networks.<sup>28</sup>

Facebook,<sup>29</sup> for instance, uses a so called ranking process<sup>29</sup> in order to ensure a “personalized and diverse stream of posts from the people, news sources, businesses and communities”<sup>30</sup> a user have connected with on Facebook. The order of the posts a user can see on his news feed is determined by several circumstances which might have different weighting factors. During the ranking process Facebook algorithm considers the followings:

- (i) the frequency of your interactions with the author (friends, groups or Pages) of the post (e.g. “You’ve liked (...)’s posts more than posts from others”);
- (ii) whether the post is a content a user often interacts with (e.g. “You’ve opened posts with links when they’ve been in your News Feed”);
- (iii) number of comments, likes, reactions and shares a post receives from other users (e.g “This post from (...) is popular compared to other posts you’ve seen”);
- (iv) the accuracy, relevancy of the content.<sup>31</sup>

On one hand, the content distribution mechanism relies solely on algorithms, technical and automatic processes which are neutrally applied to the information shared on social media websites. Consequently – based on the logic applied in *Google France and Google* – such data processing should not prevent the social media websites to be considered as passive hosting service providers. On the other hand, such algorithmic curation promotes and optimizes content in a sense as it was applied in *L’Oréal and Others*. Intermediaries’ algorithms favors content that generates more interaction between users, for instance because of its popularity, and pushes such content on top of the user’s news feed. Social media websites’ content distribution mechanisms, therefore, constitute content optimization and promote contents that are likely to attract users’ attention, and consequently increase traffic and at the end the advertising revenue.

As “fake news” are one of the most popular content shared on social media, it probably appears on the top of the users’ news feed. If the user interacts with such content, for example by clicking on the link in the post, the algorithm will – regardless of the user’s real interest or initial intention – most likely select similar “fake news” for the user in the future as well since, according to the rules of the website’s ranking mechanism, such content is not only popular but it is also content with which the user often interacts. Consequently, a vicious circle begins which will eventually force the user into an information bubble right before the user could even realize it.

Furthermore, social media websites optimize and promote content not (or at least not only) because they wish to provide a better service for their users but because a higher traffic achieved by the content optimization causes higher advertising revenue. However, according to the advocate general’s opinion delivered in *Google France and Google*, an intermediary, such as Google, should be considered neutral

<sup>23</sup> C-236/08, *Google France and Google*, ECLI:EU:C:2010:159 at 116-117

<sup>24</sup> Janni Riordan: *The Liability of Internet Intermediaries* (2016) at 401-402.

<sup>25</sup> C-324/09, *L’Oréal and Others*, ECLI:EU:C:2011:474 at 31.

<sup>26</sup> C-324/09, *L’Oréal and Others*, ECLI:EU:C:2011:474 at 116.

<sup>27</sup> <https://www.cpcstrategy.com/blog/2019/05/facebook-algorithm/>

<sup>28</sup> Bertin Martens, Luis Aguiar, Estrella Gomez-Herrera and Frank Mueller-Langer: *JRC Technical Report: JRC Digital Economy Working Paper 2018-02: The Digital Transformation of News Media and the Rise of Disinformation and Fake News* (2018), available at:

[https://ec.europa.eu/jrc/communities/sites/jrccties/files/dewp\\_201802\\_digital\\_transformation\\_of\\_news\\_media\\_and\\_the\\_rise\\_of\\_fake\\_news\\_final\\_180418.pdf](https://ec.europa.eu/jrc/communities/sites/jrccties/files/dewp_201802_digital_transformation_of_news_media_and_the_rise_of_fake_news_final_180418.pdf) at 22.

<sup>29</sup> As the essence of the algorithm is same in the case of all social media websites, the thesis will only assess the content distribution mechanism through one example (Facebook).

<sup>30</sup> [https://www.facebook.com/help/1155510281178725/?helpref=hc\\_fnav](https://www.facebook.com/help/1155510281178725/?helpref=hc_fnav)

<sup>31</sup> [https://www.facebook.com/help/1155510281178725/?helpref=hc\\_fnav](https://www.facebook.com/help/1155510281178725/?helpref=hc_fnav)

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because although it undeniably has an interest – even a pecuniary interest – in displaying the more relevant sites and information to the internet, but it does not have an interest in promoting any specific content to the internet user’s attention.<sup>32</sup>

According to the jurisprudence of the CJEU, an ISSP must take a neutral role in order to benefit from the limited liability of Section 4 of the E-commerce directive. The concept of neutral platforms, however, is just a myth. Platforms act as “patrons” of collective creativity. They invite, even nudge, their users to participate in content creation and in doing so they determine the conditions under which creative content is produced.<sup>33</sup> “These conditions are practical, technical, economic and legal, and they stray far from the hands-off neutrality suggested by the ‘platform’ rhetoric.”<sup>34</sup>

In *Google France and Google* the CJEU falsely assumed that neutrally applying an automatic processes means that the ISSP fulfils only a neutral role. In reality, an algorithm which is neutrally applied to all user-generated content will not necessarily have neutral effects. Algorithms used for content moderation represent the platforms’ values coded into them. Therefore, every post tested by such algorithms reflects the approval or disapproval of the platforms.<sup>35</sup> But if platforms filter pornography not because they are illegal but because they are not in accordance with their policies, then how can we say that platforms take a neutral role in the dissemination of information?

The fourth element which should be considered during the classification of intermediaries is the exercise of editorial control. While this distinguishing factor was established in the common law, it is highly recommended to assess the exercise of editorial control as this component provides insight regarding the intermediaries’ knowledge about the hosted information. Editorial control in the traditional sense describes the creation, selection or redaction of content before its publication.<sup>36</sup> On the other hand, defining editorial control in the context of platforms could be difficult.

The platforms usually apply voluntary content moderation. Facebook, for instance, uses and develops advanced technologies – such as artificial intelligence, machine learning systems, and augmented reality – to *prior monitor*, to detect and remove abusive and dangerous activity, content. Furthermore, Facebook not only defines the limits of permitted content, but it also enforces its rules by taking appropriate actions (such as *removing content*, disabling accounts etc.).<sup>37</sup> Twitter’s policy on service integrity also states that the platform uses *prior monitoring*, *preempting identification* of problematic accounts and behavior even without any notification by developing machine learning tools that identify and take actions automatically.<sup>38</sup>

The question, therefore, arises whether such content moderation voluntary taken by the platforms could be considered as editorial control. On one hand, editorial control implies the knowledge of the edited content.<sup>39</sup> Such mental element, however is clearly missing from platforms’ algorithmic curation. Furthermore, an intermediary cannot be compared to a corporate proprietor of newspaper in which an illegal article was published as there is no relationship of employment or agency between the intermediary and the users posting comments on the website.<sup>40</sup> For instance in the case of Google the British court declared that the existence of contractual term about the content of blogs was not sufficient to give Google effective control over the person who posted the defamatory comments.<sup>41</sup>

On the other hand, Stadlen J found in *Kaschke v Gray Hilton*, that Mr. Hilton, operator and controller of the website Labourhome.org, exercised his editorial control by “rarely altering” members’ posts and articles, by promoting contents on the homepage and by removing articles from the website.<sup>42</sup> Furthermore, editing content is a key element of platforms’ business models. Content moderation is not just a tool to battle against illegal content and therefore to avoid liability, but it is an essential offer intermediaries make to produce and sustain appealing platforms to the users.<sup>43</sup>

Based on the aforementioned it could be concluded that from the perspective of hosting unlawful competition content the platforms take rather an active role in the dissemination. Consequently, as they do not qualify as internet intermediaries they could be held liable under the E-commerce directive.

### 3.2 Platforms' liability for hosting unfair competition content under the national law on unfair competition practice

Member States’ regulations on unfair competition show similarities with regard to the forms of unfair competition practice as well as to the liability for them. For instance, they all tend to put the liability for the damages on the primary wrongdoers, therefore, in the case of online advertising on the content providers (advertisers). Exceptions include for instance Germany’s liability regime according to which

<sup>32</sup> Advocate General’s opinion rendered in *Google France and Google* (ECLI:EU:C:2009:569) at 146.

<sup>33</sup> Tarleton Gillespie: *The Politics of ‘platforms’*, *New Media and Society* Volume 12 Issue 3 at 358.

<sup>34</sup> Tarleton Gillespie: *The Politics of ‘platforms’*, *New Media and Society* Volume 12 Issue 3 at

<sup>35</sup> Tarleton Gillespie: *Custodian of the Internet: Platforms, Content Moderation and the Hidden Decision that Shape Social Media* (2018) at 210-211.

<sup>36</sup> Jan Oster, *Media Freedom as a Fundamental Right* (2015) at 58.

<sup>37</sup> <https://www.facebook.com/legal/terms>

<sup>38</sup> [https://about.twitter.com/en\\_us/values/elections-integrity.html#service-integrity](https://about.twitter.com/en_us/values/elections-integrity.html#service-integrity)

<sup>39</sup> Rebecca Ong: *Liability of Internet Intermediaries for User-generated content: An Examination of Oriental Press Group v Fevaworks Solution Ltd*, *Computer Law and Security Review* Volume 31 Issue 1 (2015) at 135.

<sup>40</sup> *Tamiz v Google Inc*, [2013] EWCA Civ 68 at 25.

<sup>41</sup> *Tamiz v Google Inc*, [2013] EWCA Civ 68 at 39-40.

<sup>42</sup> *Kaschke v Gray and Hilton* [2010] EWHC 690 (QB) at 77 and 81-82.

<sup>43</sup> Tarleton Gillespie: *Custodian of the Internet: Platforms, Content Moderation and the Hidden Decision that Shape Social Media* (2018) at 207-209.

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an infringing party refers to anyone who for competitive purposes willingly and causally contributed to the unfair competition practice or who supported it although legally he was in the position to prevent it.<sup>44</sup> Or, for example, in Greece a person acting for the account of an advertiser on a contract basis (e.g. advertising agency who contributed to the conceit and the dissemination of the misleading commercial communication) could be held liable if he knew or should have known about the unlawful character of the advertiser's conduct.<sup>45</sup>

The second common feature in these national regulations is that the liability of the press (e.g. publishers) for advertising content that constitute unfair competition practice is significantly limited due to the freedom of expression. Consequently, there is either no duty (e.g. Italy) or only a limited duty (e.g. Germany and England) on the press to monitor the lawfulness of advertising.<sup>46</sup>

Such liability regime is also in line with the jurisprudence of the ECtHR. In *Krone Verlag GmbH & Co. KG v. Austria (no. 3)*, for instance, the ECtHR found that there had been a violation of Article 10 of the ECHR<sup>47</sup> even though in that case only an injunction was issued against a news paper that published a misleading and comparative advertisement despite of being aware of the article's unlawful characters. In this case, the injunction prohibited the applicant company from comparing the sales prices of its newspaper *Neue Kronenzeitung* and the *Salzburger Nachrichten* without indicating the differences in their reporting styles as regards coverage of foreign or domestic politics, economy, culture, science, health, environmental issues and law.<sup>48</sup> According to the explanation of the ECtHR, although there was not any penalty imposed on the news paper, imposing such injunction was still a disproportionate interference with the news paper's freedom of expression as the measure was far too broad, its practical implementation appeared to be highly difficult for the company and it could easily result in the imposition of fines for non-compliance.<sup>49</sup>

In conclusion, platforms cannot be held liable under the Member States' regulations on unfair competition practice since they were not acted as primary wrongdoers. Furthermore, even in countries where secondary wrongdoers' liability is not excluded, platforms, as intermediaries, would still be able to rely on one of the following defences: (i) lack of knowledge of the illegal content; or (ii) freedom of expression.

#### IV. CONCLUSION

As we have seen above, platforms could be found liable under the E-commerce directive for hosting unfair competition content. On the other hand, we have also concluded that platforms should be exempted from such liability under national unfair competition legislations.

Consequently, there is a discrepancy between Member' States regulations on liability for unfair competition practice and the liability regime established by the E-commerce directive. While the former is based on principle of primary liability and therefore exclude the liability of intermediaries, the later only exempt those intermediaries from their liability that have neither knowledge of nor control over the illegal content which is transmitted or stored.

In reality this discrepancy is an insolvable paradox. On one hand, if the intermediaries' liability is governed by the E-commerce directive, as *lex specialis*, then it entails that different rules of liability apply to online and offline intermediaries. On the other hand, if the intermediaries' liability is governed by the national unfair competition law, then a coherence is guaranteed but at the same time it also requires to ignore the E-commerce directive's *lex specialis* nature.

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<sup>44</sup> Thomas M.J. Möllers and Andreas Heinemann: *The Enforcement of Competition Law in Europe* (2007) at 311-312.

<sup>45</sup> Thomas M.J. Möllers and Andreas Heinemann: *The Enforcement of Competition Law in Europe* (2007) at 313.

<sup>46</sup> Thomas M.J. Möllers and Andreas Heinemann: *The Enforcement of Competition Law in Europe* (2007) at 323-324.

<sup>47</sup> *Krone Verlag GmbH & Co. KG v. Austria (no. 3)* at 35

<sup>48</sup> *Krone Verlag GmbH & Co. KG v. Austria (no. 3)* at 3.

<sup>49</sup> *Krone Verlag GmbH & Co. KG v. Austria (no. 3)* at 33-34.

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