Liability of Hosting ISPs: the Czech Perspective

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Abstract
This paper deals with the issues of liability of the hosting ISPs under Czech law with focus on copyright infringement. It introduces the Czech transposition of the E-commerce Directive (EU Directive No. 2000/31) and discusses the theoretical questions of establishing and limiting the civil non-contractual liability of the hosting ISPs. Furthermore, the rather scarce case law dealing with these issues is presented and analysed. Finally, the paper offers a glimpse into the possible changes vis-à-vis the transposition of the Copyright on the Single Digital Market Directive (EU Directive No. 2019/790).

Keywords:
copyright infringement; information society service provider; liability; case law

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Introduction

In copyright infringement cases on the Internet consisting of unauthorized communication of the protected content to the public via various services allowing users to do so, rightsholders often find it challenging to

pursue their claims against the actual infringers – the uploading users – successfully. For this reason, attempts are made to take action against third parties, namely intermediaries offering these services, who, although not being direct infringers, have nevertheless contributed to the infringement, i.e., have indirectly caused it by providing the needed infrastructure and service. However, the liability of these intermediaries is limited by the so-called safe harbour regulated in the article 14 E-commerce Directive.[1] As noted by *Husovec*, the regulation thereof *"is akin to conditional liability-free zone, in which you can move freely as long as you respect its predefined boundaries"*.[2] The establishing of the liability, i.e., what happens outside "the zone" is a matter national law of the Member State.[3]

This paper aims to present the situation "outside the European law zone" in Czech civil law. It introduces the transposition of the E-commerce Directive and discusses the theoretical questions of establishing and limiting the civil liability of hosting intermediaries. Furthermore, the relatively scarce case law dealing with these issues is presented and analysed. Finally, the paper offers a glimpse into the possible changes vis-à-vis the transposition of the Copyright on the Single Digital Market Directive (hereinafter as "Digital Single Market Directive")[4] into the Czech law.

1. Transposition of the E-commerce Directive and the System of Safe Harbours

The article 14 E-commerce Directive has been transposed to the Czech law into the Section 5 of the Act No. 480/2004 Sb., on Certain Information Society Services and on Amendments to Certain Acts (Act on Certain Information Society Services; hereinafter as "ISSPA"), in a peculiar way.[5]

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1 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 [2002] OJ L178/1.

2 Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017) 50.

3 Husovec (n 2) 50. Also see Matthias Leistner, 'Structural Aspects of Secondary (Provider) Liability in Europe' (2014) 9 Journal of Intellectual Property Law & Practice 75, 76.

4 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

5 It must be noted that this is not the only peculiarity since the prohibition of the monitoring set in Section 6 ISSPA is as such also rather peculiar. As *Polčák*

Whereas the E-Commerce Directive sets out conditions under which hosting ISPs cannot be held liable due to the applicable safe harbour protection, the Czech transpositions may be interpreted as "*providing specific grounds for the liability of service providers for user conduct*".[6] Namely, the Section 5 ISSPA is formulated in such a way that the ISP *is liable* only if certain conditions are fulfilled, i.e. in the case of the hosting ISP that it either could have known (constructive knowledge) about the illegal nature of the information or actually knew about the illegal nature of the information and did not act upon it (actual knowledge). The provision of Section 5 ISSPA must be, however, interpreted in conformity with the E-commerce Directive correctly as actual "safe harbour", i.e. setting limits on the liability of the ISPs.[7] This means that Section 5 ISSPA, does not impose any separate liability on hosting ISPs, but represents a waiver of liability arising under civil, administrative or criminal law.[8]

Unfortunately, even the courts seem to be confused by this wording.[9] In the *Prolux* case,[10] the website operator (qualified as hosting ISP) as defendant has been sued by reality estate company (*Prolux*) for comments under one of its posts where many involved individuals commented on

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notes, the fact that ISPs do not have such a duty can be deduced merely from the absence of the explicit regulation of the duty [Radim Polčák, 'Information Society Between Orwell and Zapata: A Czech Perspective on Safe Harbours' in Graeme B Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer International Publishing 2017), 263].

6 Polčák (n 5) 263.

7 Martin Maisner, *Zákon o Některých Službách Informační Společnosti: Komentář* (C H Beck 2016) 69–70; František Korbel, Roman Cholasta and Alexandra Molitorisová, 'Safe Harbour: Vyloučení Odpovědnosti Poskytovatelů Hostingových Služeb Za Obsah Vložený Uživateli Internetu' [2016] Soudce 9, 15.

8 Martin Husovec, 'Zodpovednosť na Internete: podľa českého a slovenského práva' (CZ.NIC 2014) 114; Korbel, Cholasta and Molitorisová (n 7) 9, 16.

9 As noted by Husovec (translated by the authors): "*Many courts have interpreted this concept to mean that, in the event of a loss of safe harbours, liability for third party content is presumed. But the exclusion of liability institute is not intended to establish liability. Its purpose is merely to determine, across–the–board, the point at which liability for damages and other property claims does not or cannot arise. If the exclusion of liability is not applied, it only means that the liability of the provider is to be assessed on the basis of the principles mentioned above (under domestic law)*." [Husovec (n 8) 93]. Similar conclusions are also expressed by Polčák [Radim Polčák, 'Odpovědnost ISP' in Radim Polčák and others, *Právo Informačních Technologií* (Wolters Kluwer ČR 2018) 74].

10 Municipal Court in Prague, 17 March 2010, file no. 10 Cm 47/2009; High Court in Prague, 2 March 2011, file no. 3 Cmo 197/2010–82, and Supreme Court of the Czech Republic, 31 July 2013, file no. 23 Cdo 2623/2011.

their experience with *Prolux*. *Prolux* has requested take-down of comments and compensation. The Municipal Court in Prague, however, ordered only the take-down of the whole post and refused to grant the compensation due to *Prolux's* controversial business activities. However, the High Court in Prague limited this injunction only to obviously unlawful (indecent) words. Interestingly, both the trial court[11] as well the appeal court[12] mentioned the section 5 ISSPA as the *"sole reason for the liability of a discussion board service provider who, despite receiving a notice from a defamed corporation, refused to remove the defamatory statement"*.[13]

Apart from the discrepancy in the wording, however, Section 5 ISSPA follows the wording of the E-commerce Directive in the conditions of safe harbours rather closely.

The first safe harbour (Section 5 para. 1 let. a) ISSPA) shields the hosting ISP in cases where it could have not, with regard to the subject of its activity and the circumstances and nature of the case, known that the contents of the information stored is illegal. This provision thus aims at manifestly illegal content such as child pornography or terrorist content[14]. In the already mentioned *Prolux* case,[15] the courts dealt not only with the question of knowledge of the ISP that the information exists but rather with the knowledge of illegal nature of this information.[16] As aforementioned, the courts incorrectly based the liability of the provider on the Section 5 ISSPA. However, they stated that the provider has to remove information that is evidently illegal automatically, i.e., when there is no doubt about its illegal nature [i.e., where the constructive knowledge might be established pursuant to Section 5(1)(a) ISSPA]. If the illegal nature is not evident, the actual knowledge of a provider is established by informing the provider about the unlawful information pursuant Section

11 Martin Husovec, 'Zodpovednosť poskytovateľa za obsah diskusných príspevkov' (2011) 2 Revue pro právo a technologie 40, 41 <https://journals.muni.cz/revue/article/view/4015> accessed 10 June 2021.

12 Confirmed by the Supreme Court of the Czech Republic, 31 July 2013, file no. 23 Cdo 2623/2011.

13 Polčák (n 5) 264. Confirming this view Ján Matejka and Alžběta Krausová, 'Odpovědnost poskytovatelů hostingových služeb se zřetelem k povaze a druhu přenášeného obsahu' (2017) 156 Právník 751, 754.

14 Polčák (n 9) 86.

15 Municipal Court in Prague, 17 March 2010, file no. 10 Cm 47/2009; High Court in Prague, 2 March 2011, file no. 3 Cmo 197/2010–82, and Supreme Court of the Czech Republic, 31 July 2013, file no. 23 Cdo 2623/2011.

16 Similar conclusions were expressed in the Google France case, see: Joined Cases C-236 to 238/08 *Google France and Google* [2010] ECR I–2417, para 109.

5(1)(b) ISSPA. As the High Court in Prague noted, this criterion covers a broader spectrum of situations – the unlawful nature of the information could be decided upon by a court in a decision or proven by other means to the ISP.[17] *Parlamentní listy* case[18] concerned infringement of personality rights by racist and xenophobic comments posted by the readers in the discussion forum under an article on a webpage operated by the defendant. The defendant, qualified as hosting ISP, did not remove the respective comments for a substantive amount of time (years). The liability was based on the constructive knowledge due to the highly controversial topic; thus, the ISP should act proactively and have either be more active regarding the content[19] or simply not allow the discussion.

The second safe harbour is thus lost as soon as the ISP knows about the illegal nature of the content and does not act upon it [Section 5(1)(a) ISSPA]. There is no general regulation of notice and take-down (or stay-down for that matter) procedure under the Czech law vis-à-vis hosting ISPs, e.g., legal requirements as to who, how and in what form this notice shall be executed.[20] To establish the (actual) knowledge of the ISP, the notification shall identify accurately the content that is, according to the notifier, of unlawful nature, indicate precisely in what consists the unlawfulness of the content.[21] If the notification does not identify sufficiently on what grounds the unlawfulness of the content rests, it shall not be qualified as precise enough.[22] As to the person entitled to submit such a notice, the doctrine opines that it could be anyone.[23] However, usually the notice will be sent by the rightsholder or representative thereof. The ISP must examine the notification and respond to it in order not to be held liable.[24] In reaction to the notification, the provider can remove the content or deny access to it.[25] If not, the liability of the ISP could be established.

17 High Court in Prague, 2 March 2011, file no. 3 Cmo 197/2010–82.
18 Municipal Court in Prague, 12. 1. 2015, file no. 66 C 143/2013.
19 The defendant operating the website failed to respond to notice and, as noted, did not remove the respective comments for a substantive amount of time (years).
20 Polčák (n 9) 86.
21 It must be sufficiently precise or adequately substantiated as the CJEU ruled in C-324/09, *L'Oréal v eBay*, ECR [2011] I-06011, para 122.
22 Matejka and Krausová (n 13) 751, 762.
23 Polčák (n 9) 86.
24 It seems impossible to establish a uniform reaction time of the ISP. It is necessary to assess its proportionality according to the circumstances of individual cases, depending on the type of a service, the nature of unlawfulness or on the person/type/nature of a provider [Polčák (n 9) 87–88].
25 Husovec (n 8) 115–119.

However, ISP liability would be based on different provisions (as will be discussed below) than the ISSPA provisions.

As regards to civil liability, the safe harbours cover the issues of liability for third-party content/conduct. As *Husovec* generally notes,[26] as soon as the ISP accepts the third-party content as its own, the safe harbours do not apply since the ISP is to be treated as a direct infringer (section 2910 of the Act no. 89/2012 Sb., Civil Code, as amended, further referred as "CC")[27] and all the sanctions, remedies, and injunctions available to the rightsholder do apply.[28] However, the concept of safe harbour and its effect is still unclear in terms of Czech tort law. It is not sufficiently clear whether it is a defence precluding illegality ("grounds for justification"; "Rechtfertigungsgründe"; see article 7:101 PETL) or whether the requirements of article 14(1) E-commerce Directive are directed at the subjective aspect of the tort and define the requirements of responsible care.[29]

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26 Ibid (n 8) 44.

27 English translation of the CC available from <https://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf> accessed 10 June 2021. Quotations of the English translation of the CC stem from this source.

28 The situation is obfuscated by the fact that the respective articles of the E-commerce Directive stipulating the possibility of the Member States to set up a system of injunctions to terminate or prevent an infringement or remove or disable access to the unlawful information were not implemented generally into the Czech Law. In cases of copyright infringement, the Czech Copyright Act [Act no. 121/2000 Sb., on Copyright and Related Rights and on Amendment of Certain Other Acts, as amended (zákon o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů)] in section 40(1)(f) stipulates that the rightsholder whose rights were *"unlawfully infringed or are in danger of unlawful infringement may demand (…) prohibition of providing the service that is used by third parties for breaching or endangering the rights."* (English translation of CA quoted and if needed adapted stems from the Legal Information System ASPI, Wolters Kluwer ČR, 2021).
Similarly, following the argumentum *a maiore ad minus* rightsholders may demand prohibition of providing segments/parts of the respective service. [Husovec (n 8) 168]. In civil law proceedings, this injunction is a measure resulting from a decision on the merits of the case. Therefore, it is to be accomplished in formal civil proceedings where the rightsholder must also claim and prove the infringement or exposure of infringement via the service provided (Ivo Telec and Pavel Tůma, *Autorský Zákon: Komentář* (2nd edition, C H Beck 2019) 503).

29 On applying different standards of care in safe harbour limitation of tort liability, see Husovec (n 8) 89 ff.

2. Establishing the Liability of ISPs

As mentioned above, if the safe harbour is lost for the ISP, its liability for third-party content and conduct must be established based on general tort law liability as stipulated by the CC, not on specific liability which the ISSPA provisions would have prescribed.

The primary liability for copyright infringement rests with the user, i.e., the person who unlawfully uploads the copyrighted work or other protected subject matter to the relevant platform. This liability is based on interference with the absolute right of the injured party, as follows from section 2910 CC.[30] As was noted, the exact primary liability also applies to the intermediary if it takes over someone else's content as its own.[31]

A question that has not yet been uniformly resolved in Czech doctrine is whether Czech law establishes secondary liability for intermediaries, i.e., whether it is possible to consider their position as "several concurrent tortfeasors" similar to German law.

Unlike German law, where the liability of intermediaries for infringement of intellectual property rights is based on the concept of *Störerhaftung* (Breach of Duty of Care),[32] the establishing of intermediaries' liability in

30 Husovec (n 8) 53; Roman Cholasta and others, 'Safe Harbour: Režim Vyloučení Odpovědnosti Poskytovatelů Služeb Informační Společnosti v Kontextu Pasivní Role Poskytovatele' (2017) Právní rozhledy 399 <www.beck-online.cz> accessed 10 June 2021.

31 Husovec (n 8) 41 ff.

32 Breach of duty (*Störerhaftung*) is a unique form of third-party liability for indirect infringements outside the categories of direct infringement and participation (cooperation). Breach of Duty of Care involves a party's own responsibility for contributing to another party's infringement of the law. Initially, the prerequisite for liability as a "Störer" (secondary infringer) is an infringement of the law. Claims can only be asserted against the secondary infringer if it is established that an infringement has occurred at all. Accordingly, a person is liable as a secondary infringer if he or she has in some way intentionally and adequately causally contributed to the creation or maintenance of an unlawful infringement, it is legally and factually possible and reasonable for him or her to prevent the direct infringement and has breached reasonable inquiry obligations. The concept of *Störerhaftung* is well developed in German tort law (see e.g. BGH, 26 September 1985, I ZR 86/83; BGH, 22 April 2009, I ZR 216/06; BGH, 12 July 2012, I ZR 18/11; Thomas Hoeren and Silviya Yankova, 'The Liability of Internet Intermediaries – The German Perspective' (2012) International Review of Intellectual Property and Competition Law, 501; Jan Bernd Nordemann, 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) - The Geman Approach', 2 JIPITEC 37 <https://nbn-resolving.org/urn:nbn:de:0009-29-29629> accessed 10 June 2021; Christina Angelopoulos, 'European Intermediary Liability

the Czech law is still subject to doctrinal disputes. Generally, two doctrinal streams of thoughts discussed later in detail might be identified. The ISP might be liable as an indirect (secondary) infringer [Section 2915 (1) and (2) CC] or addressee of the prevention duty and duty to act to avoid (Section 2900 and 2901 CC).

As regards the liability as an indirect (secondary) infringer as the person participating in this delict, it must be noted as a general remark that the Czech tort law does not expressly operate with the concept of secondary liability.[33] However, the position of intermediaries acting as secondary infringers in Czech tort law can be derived from Section 2915 (1) CC.[34] This

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in Copyright: A Tort-Based Analysis' <https://dare.uva.nl/search?identifier=a406e67d-b537-49ae-9f46-80e831b988d4> accessed 10 June 2021 148 ff.). *Husovec* suggests that the conclusions of the German doctrine on *Störerhaftung* may also be applicable in Czech law and that Czech courts may be inspired by them [Husovec (n 8) 170]. It should also be highlighted, that according to the Czech tort law, stricter criteria apply to professionals regarding their intentional or negligent conduct than to ordinary users. In its general part, the Czech Civil Code already sets out two basic rational assumptions for acting subjects of private law. The first is the standard of reasonable conduct of an average person (Section 4 CC), the second is the standard of conduct of a professional (Section 5 CC). Both standards are then reflected in tort law by the fact that the CC establishes rebuttable presumptions of negligent conduct. Section 2912(1) CC provides that "*if a tortfeasor does not act as a person of average character might reasonably be expected to act in private, he shall be presumed to have acted negligently*." As to the standard of a professional, the Civil Code in Section 2912 (2) CC regulates that "*if the tortfeasor displays special knowledge, skill, or care, or undertakes an activity for which special knowledge, skill, or care is required, and fails to exercise those special qualities, he shall be deemed to have acted negligently*". If we accept that the concept of *Störerhaftung* is applicable in Czech law and that the liability of intermediaries is based on a failure to comply with the requirements of the duty of care, we would also apply the rebuttable presumption regulated in section 2912 (2) CC.

33 Polčák (n 5) 257; Husovec (n 8) 54.

34 Sec. 2915 reads as follows: "*(1) If several tortfeasors are obliged to provide compensation for damage, they shall do so jointly and severally; if any of the tortfeasors has the duty under another statute to provide compensation only up to a certain limit, he is obliged jointly and severally with the other tortfeasors within that scope. This also applies where several persons have committed separate unlawful acts, each of whom may have caused a harmful consequence with a high degree of certainty, and if the person who caused the damage cannot be ascertained.*

(2) Where there are reasons deserving special consideration, a court may decide that the tortfeasor shall provide compensation for the damage in proportion to his participation in the harmful consequences; if the participation cannot be determined accurately, account is taken of the degree of probability. Such a decision may not be made if a tortfeasor knowingly participated in causing the damage by another tortfeasor, or instigated or supported it, or if the entire damage can be attributed to each tortfeasor,

provision, in accordance with article 9:101 PETL Principles establishes solidary liability for those persons whose joint conduct led to the damage. Nevertheless, this provision affects the relationship of these persons to the injured party. It does not in any way address the nature of the liability of the tortfeasors.[35] Thus, it is possible that a user who uploads a file to a platform provided by the ISP may be liable under different principles than the ISP. If the actions of both have led to the damage, they will be jointly and severally liable for compensation.

Husovec implies that the ISP might also be held liable for the breach of its preventive duty.[36] This concept can be derived from Section 2900 and subsequent provisions CC[37] and aims at active (commission: Section 2900 CC) or passive (ommission: Section 2901 CC)[38] of an obliged person in three specific situations.

Passive liability is limited only to the person (i.) who created or controlled dangerous situation, (ii.) with a personal relationship with the perpetrator, or (iii.) for whom the intervention is cheaper in comparison to imminent damage.[39] The subsumption of a specific person under this

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even where they acted independently, or if the tortfeasor is to pay for the damage caused by a helper where the helper also incurred the duty to provide compensation."
As for the conclusion that Czech tort law recognizes secondary participants to a tort, see Husovec (n 8) 86, Filip Melzer In: Filip Melzer and Petr Tégl, Občanský Zákoník: Velký Komentář. Svazek IX: § 2894-3081 (Leges 2018) 384. Concurrently, *Polčák* rejects this conclusion and suggests that section 2915 (1) CC establishes only the liability of joint tortfeasors. Polčák (n 5) 257, 258.

35 Melzer in Melzer and Tégl (n 34) 376, 384.

36 Husovec (n 8) 73 ff.; Husovec (n 2) 51 ff.

37 Section 2900 CC reads as follows: "*If required by the circumstances of the case or the usages of private life, everyone has the duty to act so as to prevent unreasonable harm to freedom, harm to life, bodily harm or harm to the property of another.*"

38 Section 2901 CC reads as follows: "*If required by the circumstances of the case or the usages of private life, the person who produced a dangerous situation or who has control over it, or where it is justified by the nature of the relationship between the persons, has the duty to intervene to protect another. The person who can, according to his potential and skills, easily avert harm of which he knows or must know that its impending gravity clearly exceeds what must be exerted for the intervention has the same duty*". This provision was inspired by article 4:103 of the PETL Principles and applies to so-called non-genuine omissions. It means that a person is liable for damages if the circumstances show that there is a duty to act to avert the impending harm. In these situations, we do not reproach the person for having caused the damage, but we reproach him or her for not having prevented the damage [Melzer in Melzer and Tégl (n 34) 92].

39 Husovec (n 8) 80.

obligation as an indirect (secondary) infringer must be thus decided on a case-by-case basis.

However, the application of the preventive duty as a ground for establishing ISP liability is not uncontroversial. Namely, the doctrine differs whether the safe harbours also cover the prevention duty. On the one hand, *Telec*[40] opines that the ISPs are actually taking advantage of the unlawful situation that they have created and under which they have control which directly contravenes the Section 6(2) CC.[41] *Maisner*, on the other hand, concludes that application of such broad prevention duty *ex-ante* would basically annul the safe harbours and the specific liability regime set in ISSPA.[42] *Polčák* concluded in 2017 that it is unclear whether the safe harbours also shield from the liability arising from preventive duty.[43] Nevertheless, it might be claimed that the ISSPA regulation serves as *lex specialis* and, thus, the liability of ISPs for preventive duty is limited.[44]

It can also be argued against *Husovec's* concept of preventive obligations under Section 2901 CC that the general preventive provision cannot be applied where a preventive obligation would result from a specific provision of a statutory norm.[45] As the duty to act is set out in Section 5 (1) ISSPA, it might not be entirely appropriate to consider the Section 2901 CC applicable to the liability of intermediaries.[46]

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40 Ivo Telec, 'Zakázané těžení a nebezpečná situace na elektronických úložištích dat' 1–2 (2015) Bulletin advokacie 19, 20.

41 "*No one may benefit from acting unfairly or unlawfully. Furthermore, no one may benefit from an unlawful situation which the person caused or over which he has control*" [Section 6 (2) CC]. Moreover, *Harašta* claims that the preventive duty may arise as to the specific content that has been already notified to the respective ISP in the extent of keeping it off its service. (Jakub Harašta 'Obecná Prevenční Povinnost Poskytovatele Služeb Informační Společnosti ve Vztahu k Informacím Ukládaným Uživatelem' (2014) Právní rozhledy 590 <www.beck-online.cz> accessed 10 June 2021).

42 Martin Maisner, 'Snaha o Zakázané Těžení Ze Zdánlivé Absence Výslovné Legislativní Úpravy a Nebezpečná Situace pro Poskytovatele Služeb Informační Společnosti' (Bulletin advokacie, 24 September 2015) <http://www.bulletin-advokacie.cz/snaha-o-zakazane-tezeni-ze-zdanlive-absence-vyslovne-legislativni-upravy> accessed 10 June 2021.

43 Polčák (n 5) 266.

44 Polčák (n 5) 266.

45 This provision is not applicable in cases where the law imposes a specific duty to act for the protection of another. Such an obligation is in the nature of a special protective norm, which has the nature of a special law (*lex specialis*). Section 2901 has a place where the subject has neither a contractual nor a specific legal obligation to act to protect another. Melzer in Melzer and Tégl (n 34) 92.

46 See also Cholasta and others (n 30) 399.

We believe that the new Czech tort law contained in the new Czech Civil Code recognizes, similarly to German law, the tort of "several concurrent tortfeasors" and therefore the joint and several liability of ISP for damages resulting from copyright infringement is based on Section 2915 (1) CC (in connection with 2910 CC). This is a typical example of a tort where two persons, by separate acts, cause damage and are jointly and severally liable for it, although the nature of their liability is different.

On the other hand, we must agree with *Husovec* that even if the ISP is not liable, this does not mean that it cannot be targeted with specific injunctions/remedies as a "non-infringing" ("non-obligated") intermediary.[47] These include interlocutory injunctions (section 74 Act No. 99/1963 on the Civil Procedure Code, as amended), information claim [section 40(1)(c) CA] and prohibition of providing the service that third parties use for breaching or endangering the rights.[48]

3. Conclusion and Outlook

As apparent from this paper, the situation regarding the liability of ISPs for copyright infringement is rather challenging under Czech law.[49] The peculiar "reverse" transposition of the E-commerce Directive and the need to interpret it in conformity with EU law, the doctrinal disharmonization on basic concepts and the relatively scarce case law that is still in the stage of "delimitation" of the playing field do not bring much legal certainty and predictability for the ISPs.[50] Furthermore, no system of best practices as regards the limitations of liability has been established.[51] Unfortunately, the fundamental issues of ISP liability and its limitation have not yet been tested extensively by the national courts and are, as shown above, still debated in the doctrine.

A significant change in this area will be the transposition of the Digital Single Market Directive. The available preparatory legislative documents show that the Czech Republic opted for a rather literal translation of the

47 Husovec uses the term "accountable, not liable". See in general Husovec (n 2) and specifically Husovec (n 8) 163 ff.

48 Husovec (n 8) 168.

49 As already observed generally by Polčák (n 5).

50 Polčák (n 5) 271. *Husovec* notes that the judgment of the Appellate Court in the *Prolux* case was actually one of the first judgments dealing with ISP liability for comments in forum [see also Husovec (n 11) 40]

51 Polčák (n 5) 269.

article 17 Digital Single Market Directive.[52] Consequently, any online content sharing service provider communicating the protected subject-matter uploaded by users of this service will be liable as an indirect (secondary) infringer if the conditions of the special liability exemption regime will not be fulfilled.

Even though that the Commission guidelines explicitly advise the Member States to do so, the proposed Czech transposition does not take specifically into account the recital 62, i.e., that the "*liability exemption mechanism should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy*".[53] Thus, this should be derived from the legislative definition of the online content sharing service provider and by interpreting the regulation in conformity with the EU.

It is obvious that the Czech Republic will not meet the transposition deadline. As of May 2021, the transposition amendment has not started its way through Parliament yet. In October 2021, the general legislative elections to the Chamber of Deputies in the Czech Republic will result in, among other things, constituting new government. As a result, the legislative fate of the transposition is thus yet unknown. The above described and explained mechanism of establishing the liability of hosting ISPs will thus be still relevant for years to come.

52 The documents are available in Czech from <https://apps.odok.cz/veklep-detail?pid=KORNBV4HKCRN> accessed 10 June 2021.

53 Commission (EC) 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market Guidelines' (Communication) COM (2021) 288 final 4.