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Offensive Online Comments - New ECtHR Judgment

Earlier this month, the European Court delivered what can be seen as its first post-*Delfi* judgment on offensive online user-generated content. It is my pleasure to present a guest blog with critical comments on this case by Dirk Voorhoof and Eva Lievens of Ghent University:

ECtHR confirms and tempers *Delfi* judgment: operators of Internet portals not liable for dissemination of offending - but not “clearly unlawful” - user comments

Dirk Voorhoof and Eva Lievens

On 2 February 2016, the European Court of Human Rights decided that a self-regulatory body (Magyar Tartalomszolgáltatók Egyesülete, MTE) and an Internet news portal (Index.hu Zrt) were not liable for the offensive comments posted by their readers on their respective websites. Anonymous users of MTE and Index.hu Zrt had posted vulgar and offensive online comments on a real estate website, following the publication of an opinion on MTE and Index.hu Zrt criticising the misleading business practices of two real estate websites. The European Court found that by holding MTE and Index.hu Zrt liable for the comments, the Hungarian courts had violated the right to freedom of expression as guaranteed by Article 10 ECHR. The [present judgment](#) is the first in which the principles set forth in the [controversial](#) Grand Chamber’s judgment in [Delfi AS v. Estonia](#) are tested.

The perspective of *Delfi*

The *Delfi AS* judgment of 16 June 2015 considered the monitoring and removal of user comments taken on initiative of the providers of an online platform with user-generated content (UGC) as the necessary way to protect the rights of others, at least in cases where it concerned hate speech and incitement to violence. The Grand Chamber emphasised the professional running and commercial character of the news platform at issue, together with the clearly unlawful content of the readers’ comments as decisive arguments in order to justify the finding of the liability of the internet news portal for their readers’ offending comments. The Grand Chamber at the same time tried to limit the impact of its judgment by clarifying that the case did not concern “other fora on the Internet” where third-party comments can be disseminated, for example an internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum’s manager. Consequently, the Grand Chamber’s judgment was neither applicable on a social media platform where the platform provider does not offer any content, nor in cases where the content provider is a private person running the website or a blog “as a hobby”. By restricting the impact of its judgment both to hate speech and “clearly unlawful content” with a direct threat to the physical integrity of individuals and to professional, commercially run online news platforms with UGC, the question remained how the Court would decide on the liability in other circumstances than those of the *Delfi* case.

In *MTE and Index.hu Zrt v. Hungary*, the Court had the occasion to answer this question and eventually to clarify the impact or consequences of the Grand Chamber judgment in a case which allegedly did not concern hate speech nor direct threats against the physical integrity of individuals, but 'only' wanton insults and vulgar opinions, criticising the business policy and commercial practices of a corporate company. Another difference with *Delfi AS v. Estonia* is that the injured company never requested the applicants to remove the comments, but opted to seek justice directly in court. And while Index.hu Zrt is run by a commercial company and is one of the major Internet news portals in Hungary, MTE is a non-commercial website.

MTE and Index.hu Zrt

The case started in Hungary in 2010, when a real estate company brought a civil action claiming an infringement of its personality rights, on the basis that its right to a good reputation had been violated by readers' comments posted on MTE and Index.hu Zrt. Anonymous users of MTE and Index.hu Zrt had posted comments claiming that the company at issue was "sly" and "rubbish". One comment uttered that "people like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead". The operators of the websites immediately removed the allegedly offending comments once they were notified of the civil proceedings. Subsequently, the domestic courts found that the comments at issue were insulting and went beyond the acceptable limits of freedom of expression. They rejected the applicants' argument that they were only intermediaries and that their sole obligation was to remove certain content, in case of a complaint. As the comments attracted the applicability of the Hungarian Civil Code rules on personality rights and since the comments were injurious for the plaintiff, the operators of the websites bore objective liability for their publication. As the applicants were not considered intermediaries, they could not invoke the limited liability of hosting service providers, as provided in the Directive 2000/31/EC on Electronic Commerce. Therefore the applicants were held liable for the offensive comments on their websites and they were ordered to pay the court fees, including the costs of the plaintiff's legal representation. No award for non-pecuniary damages was imposed.

MTE and Index.hu Zrt complained that the rulings of the Hungarian courts establishing objective liability on Internet websites for the contents of users' comments amounts to a violation of freedom of expression as provided in Article 10 ECHR. As a consequence, liability for comments could only be avoided either by pre-moderation or by disabling commenting altogether: both solutions would work against the very essence of free expression on the Internet by having an undue chilling effect. They argued that the application of the "notice-and-take-down" rule, as a characteristic of the limited liability for internet hosting providers, was the adequate way of enforcing the protection of reputation of others.

The Judgment of the Fourth Section of the ECtHR

Referring to *Delfi AS v. Estonia*, the European Court took as its starting point that the provisions of the Hungarian Civil Code made it foreseeable for a media publisher running a large Internet news portal for an economic purpose (Index.hu Zrt) and for a self-regulatory body of Internet content providers (MTE), that they could, in principle, be held liable under domestic law for unlawful comments of third parties. Thus, the Court considered that the applicants were able to assess the risks related to their activities and that they must have been able to foresee, to a reasonable degree,

the consequences which these could entail. The Court therefore concluded that the interference in issue was “prescribed by law” within the meaning of the second paragraph of Article 10.

The decisive question remained whether there was a need for an interference with freedom of expression in the interests of the “protection of the reputation or rights of others”. By referring to its Grand Chamber’s judgment in *Delfi AS v. Estonia* again, the Court confirms that Internet news portals, in principle, must assume duties and responsibilities. However, because of the particular nature of the Internet, these duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party content. The Court is of the opinion that the present case was different from *Delfi AS*: though offensive and vulgar, the incriminated comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence, as they did in *Delfi AS*. Next, the Court applied the relevant criteria developed in its established case-law for the assessment of the proportionality of the interference in situations not involving hate speech or calls to violence. These criteria are: (1) the context and content of the impugned comments, (2) the liability of the authors of the comments, (3) the measures taken by the website operators and the conduct of the injured party, (4) the consequences of the comments for the injured party and (5) the consequences for the applicants.

The Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants’ case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants’ right to freedom of expression and the real estate website’s right to respect for its commercial reputation. Notably, the Hungarian authorities accepted at face value that the comments had been unlawful as being injurious to the reputation of the real estate websites. The European Court, however, held that the comments were related to a matter of public interest, being posted in the context of a dispute over the business policy of the real estate company perceived as being harmful to a number of clients. It also observed that the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – a consideration that reduces the impact that can be attributed to those expressions.

For the Court, the conduct of the applicants providing a platform for third parties to exercise their freedom of expression by posting comments is a journalistic activity of a particular nature. The Court, referring to some of its earlier case-law states:

“Even accepting the domestic courts’ qualification of the applicants’ conduct as “disseminating” defamatory statements, the applicant’s liability is difficult to reconcile with the existing case-law according to which “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 discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so”” (§ 79).

The Court continued by observing that the applicants took certain measures to prevent defamatory comments on their portals or to remove them. Both applicants had a disclaimer in their general terms and conditions and had a notice-and-take-down system in place, whereby anybody could indicate unlawful comments to the service provider so that they be removed. Holding the applicants

liable would undermine the right to express and impart information on the Internet. The Court considered that

“domestic courts held that, by allowing unfiltered comments, the applicants should have expected that some of those might be in breach of the law. For the Court, this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet” (§ 82).

The Court also observed that the injured company

“never requested the applicants to remove the comments but opted to seek justice directly in court – an element that did not attract any attention in the domestic evaluation of the circumstances. Indeed, the domestic courts imposed objective liability on the applicants for “having provided space for injurious and degrading comments” and did not perform any examination of the conduct of either the applicants or the plaintiff” (§ 83).

The Court next emphasised that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status:

“Whereas the latter might have repercussions on one’s dignity, for the Court interests of commercial reputation are primarily of business nature and devoid of the same moral dimension which the reputation of individuals encompasses” (§ 83).

Furthermore, there were already ongoing inquiries into the plaintiff company’s business conduct. Consequently, the Court is not convinced that the comments in question were capable of making any additional and significant impact on the attitude of the consumers concerned.

The Court is of the view that the decisive question when assessing the consequence for the applicants is not the absence of an award of non-pecuniary damage, but the manner in which Internet portals can be held liable for third-party comments. According to the Court, *“such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet. This effect could be particularly detrimental for a non-commercial website such as the first applicant” (§ 86).*

The Court is of the opinion that the Hungarian courts paid no heed to what was at stake for the applicants as protagonists of the free electronic media, as they did not embark on any assessment of how the application of civil-law liability to a news portal operator will affect freedom of expression on the Internet. Indeed, argued the Court, *“when allocating liability in the case, those courts did not perform any balancing at all between this interest and that of the plaintiff” (§ 88).*

Finally, the Court referred once more to *Delfi AS v. Estonia*, in which it found that if accompanied by effective procedures allowing for rapid response, the notice-and-take-down system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved. The Court sees no reason to hold that such a system could not have provided a viable avenue to protect the commercial reputation of the plaintiff. It is true that, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. As the present case did not involve such utterances, the European Court comes to the conclusion that the rigid stance of the Hungarian courts reflects a notion of liability which effectively precludes the balancing between the competing rights according to the criteria laid down in the Court's case-law. All these considerations were sufficient for the Court to unanimously conclude that there had been a violation of Article 10.

Comment

In *Delfi AS*, at the national level, the comments at issue were considered humiliating and defamatory, impairing the honour, dignity and reputation of an individual, amounting to simple insults. The European Court however re-qualified the defamatory and insulting statements as hate speech, directly inciting to violence against a person. The question remains why the Grand Chamber itself re-qualified the comments as such, and why the Grand Chamber, like in *MTE and Index.hu Zrt v Hungary*, did not consider that "*regard must be had to the specificities of the style of communication on certain Internet portals*" and that the comments on the Delfi-platform, although belonging to "*a low register of style*", were "*common in communication on many Internet portals*" (§ 77).

While in *Delfi AS*, the Grand Chamber emphasised the commercial and professionally managed character of the Estonian online news portal (§§ 115, 144, 158 and 162) as a justification for its accountability and hence its liability, the Fourth Section in *MTE and Index.hu Zrt v. Hungary* pays much less weight to the commercial and professional character in order to determine the websites' liability for UGC. The judgment of 2 February 2016 indeed does not connect decisive consequences to the different characteristics of the online platforms at issue, Index.hu Zrt being run by a commercial company and being one of the major Internet news portals in Hungary, while MTE is a non-commercial website of a self-regulatory body of Internet content providers. What seemed to be a crucial element in *Delfi AS*, is not considered relevant in *MTE and Index.hu Zrt v. Hungary*.

In *Delfi AS* the Grand Chamber also emphasised the news portal's failure to take measures to remove "clearly unlawful comments" without delay following publication. In the present case, the Court recognised that measures had been adopted by the applicants to prevent the publication of defamatory speech on its website domains or to remove such comments (§ 81). Furthermore, the Court highlighted that, in many cases, a "notice-and-take-down-system" could function as an appropriate way of determining intermediary liability. The latter finding echoes a consideration of the Grand Chamber in *Delfi AS v. Estonia* which stated that:

"If accompanied by effective procedures allowing for rapid response, this system (of notice-and-take-down) can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved" (§ 159).

And it continued:

"However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law (..), the Court considers, as stated above (..), that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties".

Hence the Fourth Section of the court, in *MTE and Index.hu Zrt v. Hungary*, simply reiterates and literally confirms one of the most crucial considerations of the Grand Chamber judgment in *Delfi AS v Estonia*. In case of hate speech and direct incitement to violence against individual persons, news portals can be held liable if they fail to remove such clearly unlawful comments without delay, even without notice. As in *MTE and Index.hu Zrt v. Hungary* the insulting and vulgar statements were not of such a kind, there is indeed no reason to impose liability on the portals' operators. In such cases it is to be accepted that the operators took sufficient precautions and acted as responsible and diligent intermediaries by installing an effective notice-and-take-down system (§ 81): in such circumstances there is no need in a democracy to hold the operators of the website liable for the offending - but "not clearly unlawful"- content posted on its platform by its readers.

The problem remains, however, that in order to detect hate speech or utterances of direct incitement to violence one needs to put a system in place to pre-monitor **all** user generated comments, in order to be able to remove, without delay and without notification by others, this specific kind of hate speech and direct threats to the physical integrity of individuals. Doesn't such an obligation to pre-monitor or 'filter' incoming comments by users precisely amount to a system the European Court considers incompatible with the freedom of expression on the Internet, as this indeed requires "excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet" (§ 82)? Moreover, most platforms will not be able to fulfil such an obligation to pre-monitor **all** comments in order to avoid liability in case of hate speech or "clearly unlawful comments", and, as a result, might decide to disable commenting by third-parties altogether.

Hence, one can agree with the Court's position in *MTE and Index.hu Zrt v. Hungary* that "the decisive question" is "the manner in which Internet portals (...) can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet" (§ 86). However, the Court's judgment in *MTE and Index.hu Zrt v. Hungary* and even its finding of a violation of Article 10 ECHR in this case, does not prevent such a chilling effect on the freedom of expression on the Internet. Keeping the possibility open that operators of online platforms can be held liable for clearly unlawful comments, even after expeditious removal upon obtaining actual knowledge of the illegal content, holds the risk both of overbroad removal of allegedly illegal content as well as the disabling of the facilities for posting comments by third parties.

The open notion of “clearly unlawful comments”, the burden on private actors to pre-monitor all comments and eventually remove some of them, with no clear criteria, no transparency and no procedural guarantees indeed creates a clear and present danger for the right to freedom of expression on the Internet.

Although the Fourth Chamber has maybe tried to reduce, to some extent, the problematic consequences of the approach chosen in *Delfi AS v. Estonia*, the judgment in *MTE and Index.hu Zrt v. Hungary* nevertheless reiterates the endorsement of the system of notice-and-take-down by private online platforms deciding on the lawfulness of content. This approach risks to put the European Court in an isolated position, as in some jurisdictions intermediaries can only be found liable for “unlawful” content when they have failed to take action following notice from a judge, a court or another independent body as to the illegality of the relevant content. Intermediary service providers are less well-placed than courts to consider the lawfulness of comments on their website domains. Especially qualifying speech as hate speech is a very difficult and delicate exercise, not only for domestic courts, but also for the European Court of Human Rights. This is illustrated by case-law of the Strasbourg Court itself, as various cases (e.g. [I.A. v. Turkey](#); [Lindon, Otchakovsky-Laurens and July v. France](#); [Féret v. Belgium](#) and [Perinçek v. Switzerland](#)), concerning the question whether certain speech could or should be qualified as hate speech resulted in divided votes (see also [Vejdeland and others v. Sweden](#), especially the discussion in the concurring opinions). Moreover, decisions by online platforms currently lack transparency and their decision-making contains few or no procedural guarantees (e.g. possibilities for recourse and remedy in case of removal of ‘lawful’ content) for those whose right to freedom of expression is interfered with.

Quoting from the concurring opinion of Judge Kūris, one can conclude that *“there will inevitably be other cases dealing with liability for the contents of Internet messages and the administration thereof. Today, it is too early to draw generalising conclusions. One should look forward to these future cases, with the hope that the present judgment, although it may now appear to some as a step back from Delfi AS, will prove to be merely further evidence that the balance to be achieved in cases of this type is a very subtle one”*. It is to be hoped indeed that the European Court in future cases will succeed to find this subtle balance, taking into consideration that the obligation to (pre-)monitor, filter and remove certain types of comments by users on online platforms puts an *“excessive and impracticable”* burden on the operators and risks to oblige them to install a monitoring system *“capable of undermining freedom of the right to impart information on the Internet”*.

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