19 Liability for Third-Party Comments before the European Court of Human Rights

Comparing the Estonian Delfi and the Hungarian Index-MTE Decisions

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19.1 Introduction

Nowadays it may seem unnecessary to emphasize the relevance of freedom of expression. But these days technical and social developments raise new questions regarding the scope of this right, and how the law can keep up with these rapid changes. As print media, radio, and later television had forced lawmakers to introduce new legal solutions to problems which didn't exist earlier, the internet also provides numerous new challenges for the courts. One of these challenges is the website-owner's liability for third-party comments placed on its website. The main question here is whether Internet news sites may face civil actions for comments which violating someone else's personality rights or not. The European Court of Human Rights (ECtHR) recently published two decisions on this matter. At first glance it may seem that the verdicts contradict each other, but more extensive investigation reveals that they are very similar indeed.

19.2 The Delfi Decision

Delfi is one of the most popular news portals in Estonia. Delfipages will appear automatically with the comments without prior moderation, but the paper filters posts in three ways. The first one is the so-called 'notice-and-take-down' system, according to which anyone can report an offensive comment to the editors following which they will investigate. The second means is a direct report from the person whose rights have been violated, and the third method is an automatic filter, which deletes comments containing certain offensive words. The news portal stipulated on its website that it is not responsible for third party comments and that is reserves the right to delete offensive comments.

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On 24 January 2006 Delfi published an article on its website under the heading "SLK destroyed planned ice road". The article attracted 185 comments, about 20 of which contained personal threats and offensive language directed against L., the ferry company's owner and operator. On 9 March 2006 L's lawyers requested Delfi to remove the offensive comments and demanded approximately EUR 32,000 in compensation. The offensive comments were removed on the same day by Delfi at which time they responded to L's lawyers confirming that the comments had been removed, but nevertheless refused the claim for damages. L. subsequently brought a civil claim against Delfi.[1]

The Estonian civil procedure started on 13 April. The Harju County Court dismissed L's claim on the basis of the domestic law that implemented the EU hosting exemption in Article 14 of the E-Commerce Directive.[2] The Court found that the site could not be considered the publisher of the comments, therefore, it did not incur any obligation to moderate. However, following an appeal from L. the Court ultimately determined that the company itself was to be considered the publisher of the comments and it could not avoid responsibility by publishing a disclaimer that it was not liable for the content of its comments. It was found that the news article itself was balanced, but that a number of the comments made were vulgar in form and that they were defamatory of L. The Court concluded that freedom of expression did not extend to the protection of the comments concerned and L was awarded EUR 320 in damages.[3] On 16 December 2008 the Tallinn Court of Appeal upheld the County Court's judgment. It emphasized that the applicant company was not required to exercise preliminary control over comments posted on its news portal. However, having chosen not to do so, it should have created some other effective system which would have ensured the rapid removal of unlawful comments from the portal. The Court of Appeal considered that the measures taken by the applicant company were insufficient and that it was contrary to the principle of good faith to place the burden of monitoring the comments on the potential victims. The Court of Appeal rejected the applicant company's argument that its responsibility was excluded on the basis of the Information Society Services Act. It noted that the applicant company was not a technical intermediary in respect of the comments, and that its activity was not of a merely technical, automatic and passive nature; instead, it invited users to add comments. Thus, the applicant company was a provider of content services rather than of technical services. On 10 June 2009 the Supreme Court dismissed the applicant company's appeal. It upheld the Court of Appeal's judgment in substance but partly modified its reasoning. The number of comments had an effect on the number of visits to the portal and on the applicant com-

1 McKinty and Wright: Delfi AS v Estonia, Art. 10 & Online Comments, Who's Responsible? www.mckinty-wright.co.uk/delfi-v-estonia-implications-online-comments/.

2 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.

3 McKinty and Wright.

pany's revenue from advertisements published on the portal. Thus, the applicant company had an economic interest in publishing comments. The fact that the applicant company did not write the comments itself did not imply that it had no control over the comment environment. It adopted the rules for commenting and removed comments in case these were breached. The users, on the contrary, could not change or delete the comments they had posted; they could merely report indecent comments. Thus, the applicant company had control over which comments were published and which weren't. The fact that it made no use of this possibility did not mean that it had no control over the publishing of the comments.

Furthermore, the Supreme Court considered that in the present case both the applicant company and the authors of the comments were to be considered publishers of the comments. In this context, it also referred to the economic interest of an internet portal's administrator which made it a publisher as entrepreneur, similarly to a publisher of printed media. The Supreme Court found that the plaintiff was free to choose against whom he brought the suit, and L. had chosen to bring the suit against the applicant company. Delfi appealed to the ECtHR, arguing that the decision holding it liable for the six-week period before taken down the comments violated its Article 10 right to freedom of expression. Delfi also argued that it should have been exempt from liability under the EU hosting exemption.[4] The key issue of the application brought before the ECtHR was whether Delfi's civil liability for the defamatory comments was a disproportionate interference with its right to freedom of expression. The Court concluded that the domestic court's findings were justified in restricting Delfi's right to freedom of expression.[5]

The Court recognized that a notice and take down system had been put in place, as well as an automatic filter for certain words. Delfi took several measures to filter potentially problematic comments. The system automatically deleted comments containing certain obscene words. The site also provided an opportunity for its users to report unlawful comments and those marked as such were immediately taken down. The Court however concluded that the filter in particular was insufficient. The Court considered that the writers of the comments could not modify or delete these once they were posted on the news portal and that therefore Delfi effectively exercised sole control over the publication of the comments, if not their content.[6] The Court noted that it was not in dispute between the parties that the applicant company's freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts' decisions. It added, that such an interference with the applicant company's right to freedom of expression

4 Timothy Pinto: Liability for online comments: chilling decision or storm in a teacup? http://uk.practicallaw.com/4-617-5303?q=&qp=&qo=&qe=.

5 McKinty and Wright.

6 Id.

must be (1) "prescribed by law", (2) have one or more legitimate aims in the light of Paragraph 2 of Article 10, and (3) be "necessary in a democratic society".[7]

The Court noted that the (1) lawfulness of the interference is met if a given entity has the opportunity to foresee the consequences of its actions. The Court found that since Delfi is a professional publisher and it operates one of the largest news portals in the country, it should have been aware of the legal framework and practices regarding offensive comments on its website. The Court was satisfied that Delfi was able to foresee to a reasonable degree that it could be found liable under Estonian law, so the interference was prescribed by law. As regards the (2) aim of the restriction, the Court established that it was legitimate because it served one of the aims allowed by Paragraph 2 of Article 10, namely the protection of others' good reputation. The question of whether Delfi's rights were excessively restricted by holding it liable for comments written by third parties is a question of whether the (3) restriction was "necessary in a democratic society". The Court noted that it is not disputed that the comments posted by readers in reaction to the news article published on the applicant company's Internet news portal were clearly unlawful in nature. To resolve the question with a balancing exercise, the Chamber analyzed four salient factors.[8] Firstly, the Court examined the context of the comments, and stated that the news article published on the Delfi news portal addressed a topic of a certain degree of public interest. The portal should have been aware that the article might provoke negative reactions, and "there was a higher-than-average risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech."[9] Secondly, the Court examined the measures applied by the applicant company in order to prevent or remove defamatory comments. It concluded that Delfi could not be said to have wholly neglected its duty to avoid causing harm to third parties' reputations, but while there was no reason to doubt its usefulness, the automatic filter was insufficient.[10] Then the Court dealt in greater detail with the notice-and-take-down system as used by the applicant company, mainly because the main point of disagreement between the parties in the present case was whether by applying this system the applicant company had fulfilled its duty of diligence.[11]

The Chamber previously stated that

> The Court notes that in the interested person's opinion, shared by the domestic courts, the prior automatic filtering and notice-and-take-down system used

7 *Delfi As v. Estonia*. Appl. No. 64569/09. 16 June 2015, paras. 118-119.
8 Péter Nádori, 'Anonymous mass speech on the Internet', in: András Koltay (Ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Wolters Kluwer, Budapest, 2015, p. 227.
9 *Delfi As v. Estonia*, para. 156.
10 Nádori, 2015, p. 230.
11 *Delfi As v. Estonia*, para. 157.

> by the applicant company did not ensure sufficient protection for the rights of third persons. The domestic courts attached importance in this context to the fact that the publication of the news articles and making public the readers' comments on these articles was part of the applicant company's professional activity. It was interested in the number of readers as well as comments, on which its advertising revenue depended. The Court considers this argument pertinent in determining the proportionality of the interference with the applicant company's freedom of expression. It also finds that publishing defamatory comments on a large Internet news portal, as in the present case, implies a wide audience for the comments. The Court further notes that the applicant company – and not a person whose reputation could be at stake – was in a position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public.[12]

Thirdly, regarding the (3) liability of the actual authors of the comments as an alternative to the applicant company's liability, the Court found that it was very difficult for an individual to establish the identity of the persons to be sued, and it would appear disproportionate to put the onus of identifying the authors of the defamatory comments on the injured person in a case like the present one.[13] Lastly, (4) on the consequences of the domestic proceedings for the applicant company the Court stated that the EUR 320 fine paid for non-pecuniary damages was not disproportionate, considering that Delfi was the professional operator of one of the largest Internet news portals in Estonia.[14]

The judgement goes some way to clarify what is expected of a large, commercial online news portal in terms of combating hate speech:

> If accompanied by effective procedures allowing for rapid response, the (notice and take down) system can function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases … where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, … 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.[15]

12 *Delfi As v. Estonia*, Appl. No. 64569/09, Judgment of First Section Chamber, 10 October 2013, para. 89.
13 *Delfi As v. Estonia*, para. 159.
14 *Delfi As v. Estonia*, para. 160.
15 *Delfi As v. Estonia*, para. 159.

It was also emphasized

> that because of the particular nature of the Internet, the 'duties and responsibilities' that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content.[16]

The Grand Chamber emphasized 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 to justify the finding of the liability of the internet news portal for its readers' offending comments. The Grand Chamber at the same time sought 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 channeled through any input on the side of the forum's manager. The judgement specifically distinguished an internet news portal from an Internet discussion forum or a bulletin board or a social media platform where the provider does not offer any content and where the content provider may be a private person running the website, or a blog as a hobby.[17] The Court restricted the impact of its judgment 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.[18]

19.3 The Index-MTE Decision

The antecedents of the decision date back to 2010, when the Hungarian Association of Content Providers (Magyar Tartalomszolgáltatók Egyesülete – MTE) issued an opinion on its website about the advertising practices of a real estate company. In the resolution, the MTE condemned the company because of its unethical and deceptive practices, namely because the originally free advertising service turned into an obligation to pay after 30 days, yet users were not given clear and sufficient information in this respect.

The resolution was republished on a consumer protection blog site, called "Tékozló Homár" ("Prodigal Lobster") which is run by Hungary's most popular major online news portal, Index.hu. The publications generated comments that criticized the real-estate

16 *Delfi As v. Estonia*, para. 113.

17 Internet news portals – freedom of expression in moderation? https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/scottish-legal-articles/internet-news-portals-freedom.

18 Dirk Voorhoof and Eva Lievens, 'Offensive Online Comments – New ECtHR Judgment', http://echrblog.blogspot.hu/2016/02/offensive-online-comments-new-ecthr.html.

website and some comments used vulgar phrases. For example, one comment read: "People like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead.", or "They have talked about these two rubbish real estate websites a thousand times already". The applicants share and sometimes create content and allow users to comment on it. The websites contained disclaimers stating that the comments did not reflect the views of the websites' operators. The websites also had a 'notice and take down' system, allowing users to flag comments for deletion. Furthermore, Index.hu partially moderated and sometimes deleted comments. Additionally, the websites had a publicly accessible code of ethics that explicitly forbade comments violating the rights of others.[19]

On 17 February 2010 the company operating the websites concerned brought a civil action before the Budapest Regional Court against the publishers, claiming that the comments had infringed its right to good reputation. Once they learned of the impending court action, the websites removed the impugned comments at once. The court of first instance ruled that the comments violated the realtor websites' right to good reputation because they were offensive, insulting and humiliating, and went beyond the scope of the freedom of expression. The court also held that the comments constituted edited content and equated them with readers' letters.

The appellate court upheld in essence the first-instance decision but amended its reasoning. It disagreed with the finding that the comments were edited content, and held that the comments, unedited, reflected solely the opinions of the individual commenters. This notwithstanding, the owner of the website concerned was liable for the comments.

> The comments were injurious to the plaintiff [and] the applicants bore objective liability for their publication, irrespectively of the subsequent removal, which was only relevant for the assessment of possible compensation.[20]

Hungary's Supreme Court upheld the judgments of the lower courts.

> It stressed that the applicants, by enabling readers to make comments on their websites, had assumed objective liability for any injurious or unlawful comments made by those readers. It rejected the applicants' argument that they were only intermediary providers which allowed them to escape any liability for the contents of comments, other than removing them if injurious to a third party.[21]

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19 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* https://globalfreedomofexpression.columbia.edu/cases/magyar-tartalomszolgaltatok-egyesulete-index-hu-zrt-v-hungary/.

20 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*. Appl. No. 22947/13, February 2, 2016, para. 20.

21 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para. 22.

The case was then referred to the ECtHR, which found that the freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts' decisions.[22] The remaining question was whether the restriction was prescribed by law, had a legitimate legislative purpose and was necessary in a democratic society.[23] As to the first condition the Court stated that such a large news portal had to know at least in principle, that they could be held liable under domestic law for the unlawful comments of third-parties.

> Thus, the Court considers that the applicants were in a position 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.[24]

The Court accepted the Hungarian Government's reasoning, that the interference pursued the legitimate aim of protecting the rights of others, so the main question remained, whether the sanctions applied were "necessary in a democratic society" in order to achieve the aim pursued.[25]

The Court referred to the Delfi decision, and reaffirmed, that because of the particular nature of the internet itself, major news portals have certain duties and responsibilities regarding third-party contents, especially in connection with hate speech-comments.[26] However, the Court added, that the present case is not entirely comparable to the Delfi judgement, since the comments were not considered "clearly unlawful speech":

> However, the present case is different. Although 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. Furthermore, while the second applicant is the owner of a large media outlet which must be regarded as having economic interests, the first applicant is a non-profit self-regulatory association of Internet service providers, with no such known interests.[27]

According to the Court the criteria set up in the *Delfi* decision should be applied in cases where a news portal does not remove a clearly seriously infringing content immediately. By reference to its earlier case law,[28] the Court identified five factors as relevant for the

22 Id., para. 45.
23 Id., para. 46.
24 Id., para. 51.
25 Id., para. 53.
26 Id., paras. 62-63.
27 Id., para. 64.
28 *Delfi v. Estonia*, *Von Hannover v. Germany* (no. 2), *Axel Springer v. Germany*, *Couderc v. France.*

assessment of whether a fair balance had been struck between the applicants' rights, as protagonists in providing an internet platform for, or inviting expressions from, third-parties on the one hand, and the rights of the plaintiff company not to sustain allegations infringing its rights on the other.[29] These were:

1. The context and content of the impugned comments;
2. The liability of the actual authors of the comments;
3. The measures taken by the applicants and the conduct of the injured party;
4. The consequences of the comments for the injured party;
5. The consequences for the applicants.

Regarding the context of the comments, the Court said that the article concerned a matter of public interest and could not be considered provoking. As regards the content of the comments, the Court refused to qualify them as defamatory, and instead labelled them value judgments and opinions brought on by personal frustration. Although the comments were offensive and one of them was vulgar, the Court noted that the style of comments is also protected.[30]

> 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.[31]

The Court noted that the national courts did not sufficiently consider the liability of the authors of the comments. The national courts were satisfied that it was the applicants that bore a certain level of liability for the comments, since they had "disseminated" defamatory statements, however without embarking upon a proportionality analysis of the liability of the actual authors of the comments.[32]

The Court observes that the applicants took certain general measures to prevent defamatory comments on their portals or to remove them. Both applicants had a disclaimer in their General terms and conditions stipulating that the writers of comments – rather than the applicants – were accountable for the comments. The posting of comments injurious to the rights of third parties were prohibited. Furthermore, according to the Rules of moderation of the second applicant, "unlawful comments" were also prohibited. The

29 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para. 71.
30 Christina Angelopoulos, 'MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression', http://kluwercopyrightblog.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/.
31 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para. 77.
32 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para. 79.

Court criticized the domestic courts' reasoning, 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. The Court also observes 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.[33]

Regarding the fourth criteria, the ECtHR stated that the domestic courts had also failed to consider whether the comments had reached the requisite level of seriousness and whether they had actually caused real prejudice.[34] According to the Court however, the comments in question were unlikely to have any additional significant impact on the attitude of consumers towards the companies in question.[35] Regarding the final factor, the Court stated, that the Hungarian Courts did not evaluate what was at stake for the applicants as protagonists of the free electronic media. According to the Court, such objective liability may have negative consequences on the comment environment of an internet portal in the future, for example by compelling it to close the commenting space altogether.[36]

According to the Court, in accordance with the *Delfi* case the so-called notice-and-takedown procedure (removing or making the offensive content inaccessible) is an adequate and quick measure to balance the competing rights and interests of the parties concerned. The Court sees no reason why this procedure couldn't provide sufficient protection for the victim's reputation. It is true that in those cases in which the comments of the user

> 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.[37]

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33 Id., para. 82.
34 Angelopoulos.
35 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para. 85.
36 Id., para. 86.
37 Id., para. 91.

19.4 Conclusion

The question is, does this verdict change the status quo regarding the liability for third party-content, or does it merely contribute towards clarifying certain points? The answer is neither.

The essence of the decision is that Internet news sites will have the obligation to immediately remove third party comments from their websites, if these are clearly illegal. If we look at the two decisions we can see that the line of what is 'clearly illegal' and what is not lies somewhere around hate speech and incitement to hatred. In the *Delfi* case, the court ruled that the site must have recognized the clearly illegal nature of the said comments and did nothing to remove them, while in the *Index-MTE* case, the comments in question weren't clearly unlawful, and the applicants didn't used the notice-and-takedown system, therefore in the Court's view it would be disproportionate for the sites to be held liable.

Although it is not possible to draw definitive conclusions from only two decisions, it can be said that according to the ECtHR, right now there are three types of comments. There are those which are clearly lawful, and they are protected by the Article 10's right to freedom of expression. But within the category of unlawful speeches the Court created two separate circles, where one constitutes clearly unlawful expressions (hate speech and incitement to violence) and the other one is difficult to distinguish from 'not clearly unlawful' speech. But what belongs to the latter circle? In many cases it is not so easy to determine whether a comment is clearly unlawful or not.

The Court noted that comments which amounted to hate speech or incitement to violence do not enjoy the protection of Article 10. The issue was therefore limited to whether the domestic courts, in holding the company liable for the comments of third parties, were in breach of its freedom to impart information under Article 10. These decisions clearly say that the internet news portals could be held liable for third party contents, and have to operate some kind of preventive system.

The main problem with the Index-MTE decision is that it does not provide a good explanation for those who operate a website with a commenting platform. The decision puts the main burden on the website operators, because they have to decide if a comment is clearly unlawful or just simply offensive. The term 'clearly unlawful' has a very unique, sarcastic tone, because it's not always so *clear*, if a certain speech must be considered as hate speech or not. There's not always a clear line separating the lawful from the unlawful, even if we consider that there are major differences between the various countries in this respect. The moderator of the website has to act like a preliminary judge, if he or she wants to protect the website from liability-claims. This phenomena raises many concerns, because it is more than likely, that the moderators will root out more comments than they need to, even if these are not all hate speech, just to avoid litigation. This will raise the concern of prior censorship, and will have a chilling effect on democratic debates.

It is further interesting to note that the decisions deal only with anonymous comments. But what is the case with comments where the author is identifiable (for example when the author uses his or her Facebook account to comment)? Does the website operator still have to face charges for the offensive comments if the victim has located the person responsible for the comments? In the *Delfi* case the Court stated that it would be very difficult for an individual to establish the identity of the persons to be sued, and it would appear disproportionate to put the onus of identifying the authors of defamatory comments on the injured person. So this could easily mean, that the person who wrote the offensive comments could escape charges and the portals must assume responsibility, because it is easier to sue the host rather than prove who wrote the comment in question.

These two cases only examined the liability of professional news portals. It is still unclear whether social media sites or blogs or forums have the same levels of liability or the same criteria when deciding whether they must remove certain content or not. Although it is true that every state has its own jurisprudence, it would be useful to have a solid, detailed, unified European standpoint for these cases, but it seems this will take a few more cases before the ECtHR.