European Court of Human Rights: Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary

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On 2 February 2016 the European Court of Human Rights (ECtHR) held 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 had posted vulgar and offensive online comments criticising the misleading business practices of a real estate website. The European Court found that by holding MTE and Index.hu liable for the comments, the Hungarian courts have violated the right to freedom of expression. The present judgment is the first in which the principles set forth in the Grand Chamber's judgment in Delfi AS v. Estonia were tested (see IRIS 2015-7/1).

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. The operators of the websites immediately removed the allegedly offending comments from their websites. In the subsequent proceedings 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 the event 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 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 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 of the European Convention on Human Rights (ECHR). As a consequence,

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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.

Referring to Delfi AS v. Estonia, the European Court takes 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 economic purposes (Index.hu) 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 considers 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. It therefore concludes 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 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 whether the interference in situations not involving hate speech or calls to violence is proportionate. 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 considers 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 is of the opinion 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

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being harmful to a number of clients. It also observes 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.

Apart from that, the conduct of the applicants in providing a platform for third-parties to exercise their freedom of expression by posting comments is to be considered as a journalistic activity of a particular nature. Interferences with such activities, including the dissemination of statements made by other persons, may 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. The Court continues to state 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 could be removed. Holding the applicants liable merely for allowing unfiltered comments breaching the law would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.

The Court also emphasises 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. 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 damages payable, but the manner in which Internet portals can be held liable for third-party comments. Such liability may have foreseeable negative consequences for 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 being particularly detrimental for a non-commercial website such as MTE. 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 would affect freedom of expression on the Internet. Indeed, when allocating liability in the case, those courts did not perform any balancing analysis between this interest and that of the plaintiff at all.

Finally, the Court refers once more to Delfi AS, 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

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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 are sufficient for the Court to conclude that there has been a violation of Article 10 of the Convention.

Judgment of the European Court of Human Rights, case of Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, Application no. 22947/13 of 2 February 2016

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