WERONIKA WĄTOR

EXCLUSION OF LIABILITY OF SERVICE PROVIDERS FOR OFFENSIVE CONTENT IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

INTRODUCTION

In the internet age, offensive content is becoming more and more common online. Entries containing phrases that violate the good name of third parties appear both in Internet forums and in comment sections of websites or blogs. This phenomenon is difficult to combat, as these contents are most often published by anonymous users. Accordingly, a person who believes that his or her good name has been damaged is faced with the problem of establishing the identity of a person whom they could hold accountable. It is therefore often the case that responsibility is placed on the Internet intermediary, the entity that has allowed the use of the medium in question.

The issue of providing for the liability of Internet intermediaries for offensive content published by third parties is aggravated by the cross-border nature of the Internet. In the absence of national borders in terms of use, no universal legislation may be drafted to address those developments across the board. Given the insufficiently detailed provisions concerning the Internet in the national and European law alike, it is the case-law of the courts that play an important role in determining the question of liability for offensive content published on the Internet. In recent years, the European Court of Human Rights ("ECHR", "the Court") has issued several judgments, the analysis of which leads to the creation of a set of rules concerning the exclusion of liability of internet intermediaries for offensive content published on their websites by anonymous internet users.

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The paper is to present measures to be pursued by Internet intermediaries in order for their liability for offensive content to be excluded. The content of this article derives from the review of the binding legislation and judicial decisions of the ECHR.

1. DEFINITIONS

Those consideration should commence from sorting out the terminology defining the entities that publish content online. Given the above problem of the cross-border nature of the Internet, this argument will be anchored on the EU rules stipulated in the Directive on electronic commerce (hereinafter: the Directive)[2], as many States Parties to the European Convention on Human Rights (ECHR) are also members of the European Union. In the EU legal order, this Directive is the basic act governing the operation of internet intermediaries and the possible exclusion of their liability for offensive content published on their websites by service recipients. This directive has been implemented in all EU Member State[3]. Importantly, in the judgments of the ECHR discussed in the article, the Strasbourg Court also refers to the provisions of the Directive stipulating the exclusion of liability of Internet intermediaries.

Articles 12 to 14 of the Directive detail out the conditions for excluding the liability of intermediary service providers. As mentioned in the report on the application of the E-Commerce Directive[4], the exemptions envisaged in the Directive refer to specific activities enumerated in the provisions and not to the categories of intermediaries or the information they provide. Moreover, the provisions of the Directive do not affect the liability of the author of the content. Under Article 14 of the Directive, hosting is the provision of an information society service consisting in the storage of information provided by a recipient of a service. The Directive defines a *recipient of the service* as any natural or legal person who, for professional

[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 ('Directive on electronic commerce'), OJ L 178, 17.7.2000.

[3] Pursuant to Article 22(1) of the E-Commerce Directive, the deadline for its implementation was 17 January 2002. Most countries implemented the document on time, only France, the Netherlands and Portugal implemented it late, see Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of 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 (Directive on electronic commerce), COM(2003) 702 final, p. 6.

[4] See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of 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 (Directive on electronic commerce), COM(2003) 702 final, p. 12

ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible (Article 2(d)). A *service provider* is any natural or legal person providing an information society service[5] (Article 2(b)). The glossary of the Directive fails to define the concept of intermediary.

Instead, it appears in the heading of Section 4 of the Directive *Liability of intermediary service providers*. This suggests that intermediaries are providers of "Mere conduit" (Article 12 of the Directive), *caching* (Article 13) and *hosting* (Article 14). In a number of publications, the internet intermediary is construed as the provision of platforms for interaction between internet users. This understanding of the concept of internet intermediary is confirmed by EU legislation[6].

2. ROLE OF INTERNET INTERMEDIARIES IN THE CONTENT PUBLISHING PROCESS

In order to analyse the acceptability of the exclusion of liability of Internet intermediaries, their role in the process of exchange of information between recipients of services must be clarified. No doubt, the activity of Internet intermediaries is limited to so-called intermediary services, that is the storage and transmission of information from third parties. In other words, they provide a platform that provides a forum for the exchange of ideas and opinions between service users. Internet intermediaries have no influence over the content of the information they make available. Their activities are therefore passive, automatic and technical[7]. This is the condition for the exclusion of liability provided for in recital 42 of the preamble to the Directive[8]. This means that in the case of the provision of services such as

[5] According to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC, an information society service is any service normally provided for remuneration, at a distance (without simultaneous presence of the parties), by electronic means (transmitted initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and which is entirely transmitted, conveyed

[6] For example, in Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013. on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), an *online marketplace* means a service provider as defined in Article 2(b) of 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 ('Directive on electronic commerce') (11), which enables consumers and traders to conclude sales contracts and service contracts online, via the website of the Internet marketplace.

[7] See M. Z. Zieliński, *Odpowiedzialność deliktowa pośredniczących dostawców usług internetowych*, Warsaw 2013, p. 53 *et seq*.

[8] Recital 42 states that 'the exemptions from liability established in this Directive cover only cases where the activity of the Information Society service provider is limited to the technical process of operating and giving

"Mere conduit" or *caching*, the service provider has no influence on the content posted by recipients of the service. On the other hand, Article 14 on hosting services provides for a broader exclusion of intermediary liability. In pursuance with Article 14(1) of the Directive, the liability of the host provider is excluded if it does have actual knowledge of illegal activity or information'. In the event that the host provider receives such messages or is notified of them, its liability will be excluded if it "acts expeditiously to remove or to disable access to the information"[9]. At the same time, Article 15 of the Directive provides that Internet intermediaries are not required to 'monitor the information which they transmit or store, nor *[under]* a general obligation actively to seek facts or circumstances indicating illegal activity'.

Obligation to block access to illegal content imposed on the host provider Article 14 of the Directive may be referred to as the *notice and takedown*[10] procedure. Regretfully, the directive does not explicate the manner in which an internet intermediary is advised of an infringement. In effect, individual EU Member States adopted different rules governing the notification of an online intermediary of an infringement[11], which raises a number of problems in view of the cross-border nature of the Internet. Further, the situation of internet intermediaries is adversely affected by the uniform rules not being in place, which would provide guidance on what they should do to benefit from the exclusion of liability. The directive does not lay down a time-limit for the blocking of access to the allegedly unlawful content.

All of the above factors contributed to uncertainty of the owners of Internet portals. The lack of guidance on how to act is undesirable both for Internet intermediaries providing platforms for the exchange of views and for network users. The inaccuracies concerning certain

access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the Information Society service provider has neither knowledge of nor control over the information which is transmitted or stored'.

[9] More broadly: *Hosting danych osobowych. Zagadnienia podstawowe*, Monitor Prawniczy 23/2008, p. 1257, M. Jackowski, *Hosting - operacje na danych objęte wyłączeniem odpowiedzialności - polemika*, Monitor Prawniczy 24/2009, p. 1334.

[10] This procedure has been first introduced in the US legal system by the Digital Millennium Copyright Act of 28 October 1998. This mechanism, often referred to as *DMCA 512* or *Safe Harbor*, has first introduced provisions conditionally excluding the liability of Internet intermediaries for published, illegal content. Though this provision applies only to copyright infringements, it contains a precisely regulated *notice and takedown* procedure. Whereunder, notification should, first of all, be submitted in writing, specify illegal contents and contain the signature and contact details of the notifying party.

[11] *The notice and takedown* procedure is regulated in detail in Finland and Hungary, see L. Edwards (ed.), *The New Legal Framework for E-Commerce in Europe*, Oxford - Portland, 2005, p. 123.

aspects of the exclusion of liability of internet intermediaries for offensive content published by third parties are partly ordered by the case law of the Strasbourg Court.

3. DELFI V. ESTONIA[12]

The first time that the ECHR has considered the exclusion of liability of internet intermediaries for content published by service users was the Delfi v. Estonia judgment. This judgment has been widely criticised in the literature because of a number of inconsistencies in the arguments of the ECHR.

A largest Estonian web portal, Delfi, publishes numerous articles of informative character. At the material time, at the end of the body of the news articles there were fields for comments. The comments were uploaded automatically and were, as such, not edited or moderated by the portal. Service users could published them anonymously. Nevertheless, there was a system of notice-and-take-down in place. Any comment marked by an internet user as offensive or containing hate speech was removed. Furthermore, comments that included certain stems of obscene words were automatically deleted. In addition, a victim of a defamatory comment could directly notify the applicant company, in which case the comment was removed immediately[13].

The case at issue in the Strasbourg case concerned an article relating to the activities of an Estonian company (SLK) published by Delfi in January 2006. Over two days the article attracted 185 comments. About twenty of them contained personal threats and offensive language directed at President of the SLK (Mr. L.). The lawyers requested that the abusive comments be removed and that compensation be paid. Delfi, on the date of notification of Mr L.'s claims, removed all the comments made but declined to pay compensation. The case was then brought before the national courts. As a result of civil proceedings, the District Court, amending its original ruling in accordance with the instructions of the District Court, ruled that the measures taken by the portal to protect the rights of third parties (information on the ban on publishing offensive comments, notification system of abusive content) were insufficient. In

[12] Delfi AS v. Estonia, 64569/09 Chamber judgment of 10 October 2013.
[13] See *ibid*, §11-43.

the court's view, Delfi should have been regarded as an entity publishing comments. The Court of Appeal upheld this stance, emphasizing that the portal had not been required to exercise prior control over comments. However, having chosen not to do so, it should have created some other effective system which would have ensured rapid removal of unlawful comments.

Delfi lodged a complaint with the ECHR alleging that the national authorities had infringed Article 10 of the Convention (freedom of expression). The company raised that the judgments of the national courts groundlessly required it to monitor every comment published on the portal (up to 10,000 comments daily). No provision required prior monitoring of third party content. According to Delfi, its liability (as an internet intermediary) was excluded by the provisions of the E-Commerce Directive, as implemented in Estonian law as the *Information Society Services Act*. According to the applicant, the only persons liable for offensive comments were the authors of those comments, and the imputation of liability to Delfi was pointless.

In addition, Delfi did not play an "active role" in the process of publishing comments, but only stored them on its server[14].

On 10 October 2013 the ECHR Chamber passed a judgment which did not state that the Estonian authorities had violated the ECHR. The Court ruled that in the said case there was interference with the right guaranteed by Article 10 ECHR, but that interference was provided for by national legislation. The ECHR agreed with the interpretation of the national courts, which derived Delfi's liability from the provisions of the Obligations Act. In support of its stance, the Court noted that the role of national courts is to resolve problems of interpretation of national law and that the ECHR can only rule on whether that interpretation is compatible with the provisions of the ECHR[15]. However, it is difficult to agree with this argument of the Court. Disregarding the fundamental conflict-of-law rules for the application of the law (*lex specialis derogat legi generali, lex posteriori derogat legi priori*), national courts have waived the application of the special rule contained in the Act on Electronic Services[16]. They considered that Delfi's business was not subject to the exemptions provided for in the Act. Instead, they applied a general provision introduced two years prior. The ECHR itself acknowledged that the

[14] *Ibid*, § 52-58.
[15] *ibid*, § 74.
[16] According to the opinion of a friend of the court filed in Delfi by the Helsinki Foundation for Human Rights, the problem of courts omitting the provisions of the E-Commerce Directive and using the provisions of the press law instead is also common in Poland, see *Delfi v. Estonia*, 64569/09, *Written comments by Helsinki Foundation for Human Rights*, 29 April 2011, p. 3.

civil law provisions on which the national judgments were based were much less detailed than the Act implementing the E-Commerce Directive, nonetheless, in view of national case-law, determined that the *media publisher* is liable for all content published on its website.

The Court also pointed out that the article (albeit balanced and not vilifying) concerned a matter of a significant public interest. For this reason, Delfi should have expected considerable interest from internet users and could have anticipated the article to provoke a discussion with comments possibly going beyond the permitted criticism. The Court fail to support this reasoning with any legal acts. No legislation requires intermediaries to moderate users' comments.

On Delfi's application, the case was referred to the jurisdiction of the Grand Chamber, which passed its judgment on 16 June 2015. The Grand Chamber did not hold that Article 10 ECHR had been infringed and upheld the judgment of the Chamber. Although the Grand Chamber deemed it necessary to distinguish between obligations relating to the making available of third party content by traditional press publishers and internet intermediaries, it did not specify what those differences should be. The ECHR acknowledged that national courts have misapplied the law on obligations instead of the Information Society Act, but on considering that the national courts were responsible for interpreting and applying the law, it confined itself to examining whether the application of the general rules was in conformity with Article 10(2) ECHR.

In its judgment, the Grand Chamber pointed out that the additional circumstances to be taken into account while considering the proportionality of the interference with the right guaranteed by Article 10 of the Convention in the three-step test, such as the context of the comments, measures pursued by the portal with a view to removing offensive content, holding commentators liable as an alternative to the liability of the internet intermediary and the consequences of national proceedings for the portal. The Court noted that a largest Internet portals in Estonia, Delfi, benefited financially from the users' comments. From a technical perspective, the person whose personal rights have been infringed could not claim their rights directly from the author of the comment. Moreover, the Chamber highlighted the low amount of compensation awarded to Delfi (EUR 320). According to the ECHR, a penalty of little seriousness ensured that the judgment would not have a freezing effect.

4. MTE V HUNGARY[17]

Although the Delfi judgment articulated some concerns about the exclusion of liability of internet intermediaries for offensive content, the Strasbourg Court continued to be addressed with complaints pertaining to violation of a good name on internet portals. Less than a year after the Grand Chamber's judgment in the Delfi case, the ECHR ruled in a case with similar facts - MTE v. Hungary. The applicant companies (MTE and Index) are web portals that have enabled recipients of services to comment on articles published on their websites, following prior registration. None of the portals has edited or moderated comments. Both applicants put in place a system of notice-and-take-down, namely, any reader could notify the service provider of any comment of concern and request its deletion Moreover, the applicants' terms of use forbade to publish comments violating the personal rights of others. In February 2010 the MTE portal published an article on two real estate websites owned by one company. The two websites provided thirty-day long advertising service for their users free of charge. Following the expiry of the thirty-day free period, the service became subject to a fee; and this without prior notification of the users. The article were followed by numerous comments, some of which contained offensive statements against MTE. Three days after MTE publication, the Index portal posted the same article on its website, which also gave rise to offensive comments. The company subject to defamatory comments sued both portals, claiming that the content of the articles was untrue and offensive, and that the comments published under the text damaged its reputation. Once learning of the impending court action, MTE and Index removed the impugned comments at once. Over the national proceedings, the applicants argued that they, as intermediary publishers were not liable for the user comments. Additionally, they noted that their business practice attracted numerous complaints to the consumer protection organs. Their judgment derived from civil law rules, the national courts found that the comments went beyond the acceptable limits of freedom of expression. Furthermore, they were a form of "readers' letters", and MTE and Index were responsible for their publication.

In their application to the ECHR, the portals argued that the rulings of the national courts amounted to an infringement of freedom of expression as provided in Article 10 of the Convention. They argued that applying the rules on the liability of traditional media to *online* publication was not the right solution in the age of Internet. In the course of the Strasbourg

[17] ECHR judgment in *Magyar Tartalomszolgáltatók Egyesülete* and *Index.hu Zrt* ("MTE") v Hungary of 2 February 2016. (Application No 22947/13).

proceedings, the Hungarian Government argued that the E-Commerce Directive should not apply in the present case. That view was supported by the statement that the scope of the Directive did not cover activities outside the scope of economic or professional activities or the fulfilment of public obligations relating to the provision of information society services. In its judgment, the ECHR noted that the national court had not clarified whether the interpretation of the civil law applied was based on the E-Commerce Directive. However, it could be inferred from civil law that the *media publisher*, owner of a business website, is liable for third party comments.

The said judgment distinguishes from Delfi by the difference found by the Court in the three-stage test of admissibility of interference. The ECHR has concluded that MTE and Index provided a forum for third parties to exchange views and remarks. For this reason, the activities of the applicants should be assessed in terms of press-related legislation. Because of the particular nature of the Internet, those duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party contents. When examining whether there is a need for an interference with the rights guaranteed by Article 10 of the Convention, the Court focused on identifying the differences between Delfi and the MTE and Index case. Unlike Delfi, the comments published on the MTE and Index portals, though offensive and vulgar, did not amount to hate speech or incitement to violence. Furthermore, while the Index is a large media outlet, the MTE is an NGO non-profit platform[18] for Internet intermediaries. The national courts did not take into account the differences in the activities of the applicants, which translated into their role in the possible provocation of discussions. The ECHR also pointed out that as a legal person, the victim of offensive comments was not entitled to respect for private life. However, the Court found that the national courts had resolved the conflict between the applicants' freedom of expression and the privacy rights of the owner of the company. In the verification whether the right guaranteed under Article 10 of the Convention can be interfered with, the Court referred to additional circumstances developed in the Delfi judgment. When examining the context of the ECHR's comments, it noted that the article under which they were published concerned the business of real estate websites whose practices affected consumers' interests. The comments initiated by the article were therefore dictated by the public interest. When considering holding commentators (instead of applicants) liable, the ECHR noted that national courts were satisfied that it was the portals that bore

[18] *Non-government organisation*.

liability for the dissemination of offensive content while not embarking on a proportionality analysis of the liability of the actual authors of the comments. When examining the measures taken by the applicants, the Court noted that they immediately removed the comments from their websites upon notification they harmed the third party reputation. In addition, both portals forbade to publish content that violated the rights of third parties, and disclaimed liability for comments. The ECHR disagreed with the stance of national courts that in view of the content of articles, applicants should expect offensive comments. In the Court's view, this would be an excessive requirement restricting freedom of expression on the internet. Moreover, the company, The Court also observes that the injured company never requested the applicants to remove the comments but opted to seek justice directly in court. Based on this argument, the Court found that the national courts failed to adequately examine the actions pursued by the applicants.

Not without significance was also the fact that the "victim" of offensive comments was a legal person. According to previous ECHR case law, a breach of reputational interests produces more far-reaching effects for an individual than for a company. Whereas the former might have repercussions on one's dignity, in the latter, the reputational interest at stake[19].

5. PIHL V SWEDEN[20]

The above cases concern the exclusion of liability of an intermediary who is a commercial and a non-commercial portal. So far, the ECHR has not delivered a judgment in which it would address the issue of the exclusion of the blogger's liability for content published by anonymous users in the comments section. The decision to declare a Pihl complaint inadmissible may provide relevant information on this point. Rolf Pihl was presented in an article published on a blog run by an NGO as a member of the Nazi party. In an anonymous comment posted under the post, the user published insults on the applicant's address. The day after Pihl's intervention, a post was published on the blog, with information that the previous

[19] See *Magyar Tartalomszolgáltatók Egyesülete* and *Index.hu Zrt* ('MTE') v Hungary, Application No 22947/13, §84.
[20] *Pihl v Sweden*, application No 74742/14, decision of 9 March 2017
[20] *Act on Responsibilities for Electronic Bulletin Boards.*

article was based on untrue information. Nevertheless, according to the applicant the previous post could be available via a search engine.

In the national proceedings, the applicant requested that the owners of the blog be held liable not only for the publication of the defamatory post but also for the failure to intervene by immediately removing the comment. The national courts acknowledged that, in terms of content and context, the comment was defamatory. Nevertheless, based on the provisions of the 1998 Act[20], it ruled that a blogger could not be held liable for defamation committed by a commenting user.

In his application to the ECHR, Pihl claimed that Swedish law prevented him from holding the blogger liable for offensive comments, which, in his opinion, constituted a breach of Article 8 of the ECHR (right to respect for your private and family life). The Strasbourg Court declared the action inadmissible on the grounds that the national courts had acknowledged that the comment was in fact defamatory. However, it does not constitute a hate speech or incitement to violence. Furthermore, the ECHR noted that one the applicant's intervened, the offensive post had been deleted. The Court also took account of the fact that the blog was run by a small NGO and was not very popular, which significantly minimised the number of potential readers.

6. SUMMARY

The examples of cases referred to the ECHR in this article show that the provisions on the exclusion of liability of Internet intermediaries are insufficiently precise. The growing number of rulings by the Strasbourg Court is gradually contributing to the creation of rules governing the exclusion of liability of Internet intermediaries. First, it seems reasonable to raise awareness among national judges that cases alleging infringement of freedom of expression on the Internet should be governed by the E-Commerce Directive or the national laws implementing them, rather than by civil law or laws providing for traditional media. It follows from the fundamental differences between traditional media and the Internet.

As argued by the ECHR, when assessing whether an online intermediary is allowed exclusion of liability, the type of intermediary and the nature of its business should be considered. Exclusion of liability for third-party offensive content will prove more difficult for

a large commercial portal than for a non-profit blogger. The content and nature of the published commentary also matter. An entry containing hate speech and incitement to violence will require more intervention from the portal owner than a comment with offensive (but not vulgar) phrases.

The analysis of the Court's judgments in the article also leads to the conclusion that the procedure for notifying the portal of the publication of offensive content by a user, as provided for in the provisions of the Directive on electronic commerce, requires more precise regulation. The introduction of the e-Commerce Directive was an attempt to unify the rules governing the exclusion of liability of internet intermediaries for offensive content published by users at EU level. Regretfully, insufficient definition of the rules for the *notice and takedown* procedure (such as the form of notification or the deadline for the Internet intermediary to take action) results in uncertainty among users and Internet portals. Each country is free to regulate the notification procedure.

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