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WEBSITE OPERATORS' LIABILITY FOR OFFENSIVE COMMENTS: A COMPARATIVE ANALYSIS OF *DELFI AS v. ESTONIA* AND *MTE & INDEX v. HUNGARY*

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ABSTRACT

In 2013 and 2015, the ECtHR in the famous case of *Delfi AS v. Estonia* recognised the possibility for a website operator to be liable for the delayed removal of illegal comments of internet users. In this case the ECtHR formulated criteria for a website operator's liability for damage caused to a third party by its visitor comments. The judgment of 2016 in the case of *MTE & Index v. Hungary* the ECtHR modified the criteria for a website operator's liability,

interpreting it to the benefit of web managers. This article seeks to reveal the criteria for the liability of a website operator and to draw some general guidance that can be applied in similar cases.

KEYWORDS

Delfi AS v. Estonia, MTE & Index v. Hungary, website operators' liability, internet commentators' liability, liability for offensive comments

INTRODUCTION

Freedom of expression is a cornerstone component of the political and social life of modern societies; in a modern virtual space this freedom is usually implemented by consumers themselves developing public and usually completely freely-accessible internet content. Due to the fact that in this case the content of the statements available over the internet is chosen by the users themselves, it would be normal and correct to believe that it is the comment author who should experience any negative effect of inappropriate implementation of the freedom of expression.

However, on October 10 2013, Section I of the European Court of Human Rights (hereafter the ECtHR), unilaterally¹ – and on June 16 2015, the Grand Chamber Panel of the ECHR,² by the majority of voices (15 to 2) – recognised by their decisions in the case of *Delfi AS v. Estonia* the possibility for an internet news portal manager to be liable for the delayed removal of illegal comments of internet users. This decision has been called unexpected;³ controversial; bearing direct signs of restriction of the freedom of expression;⁴ constraining the rights of internet users;⁵ capable of a radical change in the legal environment of information service providers;⁶ and even having social consequences.⁷ Moreover, the rules of news website managers' liability formulated therein are subject to criticism by the doctrine for a lack of legal certainty.⁸

However, by its judgment of February 2, 2016, in the case of *Magyar Tartalomszolgáltatók Egyesülete & Index v. Hungary*⁹ (hereinafter *MTE & Index v. Hungary*) the ECtHR modified the criteria for internet news portal managers' liability which had been set by the *Delfi AS v. Estonia* case judgment, interpreting this to the benefit of web managers. The fact that in the case of *MTE & Index v. Hungary* the opposite decision was taken on the grounds of the rules formulated in the case

¹ *Delfi AS v. Estonia*, European Court of Human Rights (2013, appeal no 64569/09).

² *Delfi AS v. Estonia* [GC], European Court of Human Rights (2015, appeal no 64569/09).

³ Tatiani E. Synodinou, "Intermediaries' liability for online copyright infringement in the EU: Evolutions and confusions," *Computer Law & Security Review* 31 (1) (2015): 63.

⁴ Hugh J. McCarthy, "Is the Writing on the Wall for Online Service Providers? Liability for Hosting Defamatory User-Generated Content Under European and Irish Law," *Hibernian Law Journal* 14 (2015): 39.

⁵ European Digital Rights (EDRI), "Human Rights Violations Online" (December 2014) // https://edri.org/files/EDRI_CoE.pdf

⁶ Neville Cox, "Delfi AS v. Estonia: The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights," *Modern Law Review* 77 (4) (2014).

⁷ Hugh J. McCarthy, *supra* note 4.

⁸ Bart van der Sloot, "The Practical and Theoretical Problems with 'Balancing'. Delfi, Coty and the Redundancy of the Human Rights Framework." *Maastricht Journal of European and Comparative Law* 23 (3) (2016): 448.

⁹ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (MTE & Index v. Hungary)*, European Court of Human Rights (2016, appeal no 22947/13).

of *Delfi AS v. Estonia*, clearly invites analysis of whether today's ECtHR case law formulates the universal criteria for internet news portal managers' liability, or whether they are relative and should rather be applied *ad hoc* in each case. Taking into account the fact that, overall, the situation with different regimes for determining online intermediaries' liability is considered not fully clear and defined,¹⁰ and sometimes even fragmented and scattered,¹¹ this matter is important to discuss not only in order to develop coherent case law that would ensure the balance of rights and obligations of internet space members,¹² but also to form a national and international human rights policy in general.

It is the aim of this article, using a comparative approach, to examine the criteria formulated in the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary* for the liability of an internet news portal operator for unlawful failure to remove third-party comments and to draw some general guidance that could be applied in the hearing of such cases.

1. THE FACTUAL BACKGROUND OF THE CASES *DELFI AS V. ESTONIA* AND *MTE & INDEX V. HUNGARY*

Before analysing the criteria applied in the cases *Delfi AS v. Estonia* and *MTE & Index v. Hungary* for the liability of the internet news portal operator, it is essential to assess the specifics of the particular cases, especially in the light of differences in the factual backgrounds. Therefore, the following paragraphs present the factual background of these two cases as well as the concise outcome of national courts' decisions (*ratio decidendi*), providing a framework for the national legal systems to apply the principle of *stare decisis*.¹³

¹⁰ Urs Gasser and Wolfgang Schulz, "Governance of Online Intermediaries Observations from a Series of National Case Studies": 1–2, 16; in: Urs Gasser and Wolfgang Schulz, eds., *Governance of Online Intermediaries Observations from a Series of National Case Studies* 2015 (5) (Harvard and Hamburg: The Berkman Center for Internet & Society, 2015).

¹¹ Bart van der Sloot, "Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe," *Journal of Intellectual Property, Information Technology, and Electronic Commerce Law* 6 (2015): 212–213, 224.

¹² Eileen Weinert, "MET v Hungary: the first European Court of Human Rights ruling on liability for user comments after *Delfi AS v Estonia*," *Entertainment Law Review* 27(4) (2016).

¹³ Although the ECtHR cases are heard with regard to each of the ECHR Parties social, legal and technological development (Liudvika Meškauskaitė, *Teisė į privatų gyvenimą (The Right to Private Life)* (Vilnius: VĮ Registrų centras, 2015), 25) and the ECHR States undertake to abide by the final judgment of the Court in any case to which they are parties, they must also take into account the ECtHR practice in other cases.

1.1. DELFI AS V. ESTONIA

On January 24, 2006, one of the largest Estonian news portals – www.delfi.ee – published an article¹⁴ reporting that when the shipping company SLK providing public ferry services had changed ferry routes, the ferries damaged ice, thus postponing the opening of cheaper and faster ice roads over the frozen sea between the Estonian mainland and some islands in winter. The article allowed anonymous comment by unregistered users. About 20 of the 185 article comments (10.81%) contained personal threats and offensive language directed against a member of the supervisory board of SLK and the company's majority shareholder, L.¹⁵

On 9 March 2006, L. requested Delfi AS to remove the offensive comments and claimed EUR 32,000 in compensation for non-pecuniary damage. On the same day Delfi AS removed the offensive comments but later refused the claim for damages.

On 27 June 2008, Harju County Court ordered Delfi AS to pay non-pecuniary damages of EUR 320. On 10 June 2009, the Supreme Court upheld the Court of Appeal's judgment in substance, but partly modified its reasoning.

On 4 December 2009, Delfi AS applied to the ECtHR complaining that national courts holding it liable for the comments posted by the readers of its internet news portal infringed its freedom of expression as provided in Article 10 of the Convention.

1.2. MTE & INDEX V. HUNGARY

On 5 February 2010, MTE, which is an association of Hungarian internet content providers, published an opinion about the deceptive practices of two real estate management websites, owned by the same company, that provided a thirty-day advertising service for their users free of charge; following the expiry of the free period, the service became subject to a fee without prior notification to the users. Furthermore, the service provider removed any obsolete advertisements and personal data from the websites only if any overdue charges were paid. This opinion published on MTE attracted a number of negative comments from users

¹⁴ "SLK Destroyed Planned Ice Road." "SLK" means AS Saaremaa Laevakompanii, a public limited liability company. Ice roads are public roads over the frozen sea which are open between the Estonian mainland and some islands in winter.

¹⁵ For example: "bloody shitheads... they bathe in money anyway thanks to that monopoly and State subsidies and have now started to fear that cars may drive to the islands for a couple of days without anything filling their purses. burn in your own ship, sick Jew!"; "aha... [I] hardly believe that that happened by accident... assholes fck"; "What are you whining for, knock this bastard down once and for all [...] In future the other ones ... will know what they risk, even they will only have one little life."

under pseudonyms.¹⁶ On 8 February 2010, the internet portal *www.vg.hu*, operated by Zöld Újság Zrt, reproduced the opinion word for word under the title “Another mug scandal” (there were no comments on this article). At the same time the company Index, which owns one of the major internet news portals in Hungary, wrote an article about the MTE opinion and published the full text of the opinion. One Index user, acting under a pseudonym, posted an unethical comment under the publication.¹⁷ The company operating the websites criticised on the mentioned websites brought a civil action against MTE, Index and Zöld Újság Zrt, claiming that the subsequent comments had infringed its right to good reputation. On learning of the impending court action, the applicants removed the impugned comments at once.

On 31 March 2011, the Regional Court partially sustained the claim, the Budapest Court of Appeal upheld in essence the first-instance decision, and on 13 June 2012 the Supreme Court of Hungary imposed HUF 75,000 (about EUR 243) on each applicant as review costs. On 27 May 2014, the Constitutional Court stated that if the identity of an offensive comment author is unknown, the liability of the operator of the webpage is constitutionally justified.

On 28 March 2013, MTE and Index appealed to the ECtHR, complaining that the domestic courts applying liability for the third-party actions violated Article 10 of the Convention.

1.3. THE SIMILARITIES AND DIFFERENCES OF THE CASES *MTE & INDEX V. HUNGARY AND DELFI AS V. ESTONIA*

The similarities in the factual backgrounds of the cases *MTE & Index v. Hungary* and *Delfi AS v. Estonia* can be clearly detailed as follows: 1) websites *www.delfi.ee*¹⁸ and *www.index.hu* are both among the main news portals in their countries; 2) in both cases, the websites published articles on sensitive social topics; 3) the commented articles were completed in good style; 4) readers of *www.delfi.ee*, *www.index.hu* and *www.mte.hu* websites had the opportunity to comment on articles published therein; 5) all the websites indicated that authors are responsible for the content of their comments; 6) the comments area was not moderated (i.e. the content of the comments depended on their authors solely), and a comment was removed only following the *notice-and-take-down* principle; 7)

¹⁶ For example: “They have talked about these two rubbish real estate websites a thousand times already”; “Is this not that Benkő-Sándor-sort-of sly, rubbish, mug company again? I ran into it two years ago, since then they have kept sending me emails about my overdue debts and this and that. I am above 100,000 [Hungarian forints] now. I have not paid and I am not going to. That’s it.”

¹⁷ “People like this should go and shit a hedgehog and spend all their money on their mothers’ tombs until they drop dead.”

¹⁸ At the time of the lodging of the application Delfi AS published up to 330 news articles a day on an internet news portal in the Estonian and Russian languages.

all comments of the dispute were abusive in style; 8) at the time of the proceedings, the comments had been already removed.

The essential differences in factual background of the aforementioned cases are as follows: 1) site operator's legal status and associated economic interest. The website www.mte.hu acts on a non-commercial basis while www.delfi.ee and www.index.hu were commercial internet portals; 2) non-identity of the entities. The website www.delfi.ee hosted publication was associated with the commercial activities of the company (SLK), and offensive comments concerned its main shareholder and member of the supervisory board, i.e. a natural person, who was later defending his own (not the company's) personal non-property rights. In the meantime, in the Hungarian portals both article and the comments concerned the same legal entity; 3) the different nature of the damaged interest arises from the above-mentioned aspect: the SLK shareholder defended his own reputation as that of a physical person – moral rights to honour and dignity – while in the MTE and Index cases a legal person defended its commercial (business) reputation which is non-identical to the first one from a moral and values point of view;¹⁹ 4) opportunity for commenting. The website www.delfi.ee allowed authors to comment anonymously without registration, while in Hungarian portals only registered users could post a comment (however, use of pseudonyms was allowed); 5) partially different system of illegal comments removal. Comments on all three websites were removed upon the request of any reader, however, only on the www.index.hu website the comments were partially moderated and could have been removed on the website operator's initiative. Moreover, www.delfi.ee had a word selection system automatically blocking comments with obscene word roots; 6) the use of pre-trial dispute settlement procedure. In the case of *Delfi AS v. Estonia* the injured person, asking to remove the offensive comments, appealed to Delfi AS (although 6 weeks after the appearance of comments), which removed the comments on the day of referral. In the case of *MTE & Index v. Hungary* the injured company appealed directly to the court (MTE and Index removed the comments just after they had become aware of the upcoming trial).

The circumstances revealed by the national courts are not radically different; however, the results of *Index MTE & V. Hungary* and *Delfi AS v. Estonia* cases heard before the ECtHR are essentially different.

¹⁹ *MTE & Index v. Hungary*, *supra* note 9, § 84; *Uj v. Hungary*, European Court of Human Rights (2011, appeal no 23954/10), § 22.

2. CRITERIA OF WEBSITE OPERATOR LIABILITY FOR OFFENSIVE COMMENTS

As an integral and accessible-from-everywhere virtual environment, internet space is generally opposed to a certain national jurisdiction distinguished by exceptional regulatory features. Paradoxically, while recognising that applying different standards of liability should not be justified for the participants of the same virtual environment, it was the national courts that for the first time dealt with the disputes of such nature, and had a very difficult task in balancing in a democratic society the rights and duties of such important website operators, as new (internet) generation of media, internet users (commentators), and addressees of their comments (third parties) at a generally acceptable level. This caused not only a real challenge, but also the specific issues that the two analysed cases reached and were examined in the ECtHR.

On 10 October 2013, in the case of *Delfi AS v. Estonia* the ECtHR somewhat modified the criteria that had been set in cases of *Axel Springer AG v. Germany*²⁰ and *Von Hannover v. Germany (No. 2)*²¹ for the assessment of the media liability for press releases. Based on the factual background of the case of *Delfi AS v. Estonia*, the ECtHR formulated criteria for internet news portal operator liability for damage caused by third-party comments published in it: (i) the context of the comments; (ii) the measures applied by the website operator in order to prevent or remove defamatory comments; (iii) the liability of the actual authors of the comments as opposed to the applicant company's liability; and (iv) the consequences of the domestic proceedings for *Delfi AS*. On 16 June 2015, the ECtHR Grand Chamber upheld the decision.

Thus, *Delfi v. Estonia* has become the first case which indirectly replaced the practice previously applied in many countries, according to which the liability of the news portals for visitors' comments was not applicable, and where the criteria for internet news portal operator liability for failure to immediately remove the comments potentially causing damage to the third party were formulated.

However, on 2 February 2016, when applying for the first time the criteria for liability derived in the case of *Delfi AS v. Estonia*, in the apparently similar case of *MTE & Index v. Hungary*, the ECtHR took the opposite decision, and found a violation of Article 10 of the ECHR by the domestic courts. Furthermore, in this

²⁰ *Axel Springer AG v. Germany* [GC], European Court of Human Rights (2012, appeal no 39954/08), § 89-95.

²¹ *Von Hannover v. Germany* [GC], European Court of Human Rights (2012, appeal no 40660/08 and 60641/08), § 108-113. In both cases the information (articles, photos) was published by the media itself by the means of traditional publications (newspapers, magazines). The criteria: 1) contribution to a debate of general interest; 2) a public awareness of the person in question; 3) a prior conduct of the person concerned; 4) a method of obtaining the information and its veracity; 5) content, form and consequences of the publication and 6) a severity of the sanction imposed.

judgment the ECtHR also added two new criteria: the injured party behaviour, and the consequences of the comments for the injured person.

The fact that within six months the ECtHR adopted two different decisions on a related subject certainly encourages analysis of how and to what extent an operator of an internet news portal having a comments section can (and must) ensure that the comment content does not infringe rights of third parties.

2.1. CONTEXT OF THE COMMENTS AND THE CONTENT OF THE DISPUTED COMMENTS

In the case of *Delfi AS vs. Estonia* it was indisputably established that the commented article about the breaking of ice roads important to a significant part of society was legitimate, and had not violated the rights of third parties. However, the ECtHR is aware that even a neutral topic may provoke fierce discussions on the internet. Therefore, Delfi AS had to predict that the publication of a topic sensitive to the public could get different responses. Furthermore, the ECtHR had paid special attention to the fact that Delfi AS was a professionally-managed internet news portal, run on a commercial basis, which sought to attract a large number of comments on news articles published by it, as the number of visits to the applicant company's portal depended on the number of comments, thus determining the revenue earned from advertisements (i.e. the volume of advertisements depended on the number of visits). Moreover, the ECtHR noted the fact that Delfi AS had integrated the comment environment into its news portal, inviting visitors to express their own opinions as comments, and Delfi AS itself actively called for them. Furthermore, according to the rules of commenting published on www.delfi.ee, readers were prohibited from posting comments that were without substance and/or off-topic, were contrary to good practice, contained threats, insults, obscene expressions or vulgarities, or incited hostility, violence or illegal activities – but only Delfi AS had the technical means to modify or delete comments.

The ECtHR interpretations caused the most debate about the compatibility of ECtHR jurisprudence with the Court of Justice of the European Union (hereinafter CJEU) case law applying the directive on electronic commerce (E-Commerce Directive)²² issue,²³ according to which the mere fact that the internet service

²² *Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (no 2000/31)*, Official Journal of the European Union, L 178, 17/07/2000, p. 0001 – 0016).

²³ For example, the Court of Justice of the European Union by its judgment of *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA, Google France SARL v. Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, 2010, joined cases no. C-236/08, C-237/08 C-238/08 (hereinafter the case *Google France*) and by

provider receives payment for certain online content or placement of links, does not preclude reliance on the remedies enshrined in the E-Commerce Directive.²⁴ Meanwhile, the case of *Delfi AS v. Estonia* stated that the liability of an internet news site operator stems from the fact that it did not, on its own initiative, monitor and remove third-party comments, in the supply of which it had an economic interest. For example, L. Brunner criticises the recognition by the ECtHR that permission for internet users to provide comments, the content of which is controlled by the same news portal, is attributable to the sphere of activities of the media, to which the E-Commerce Directive does not apply.²⁵ According to L. Brunner, the *www.delfi.ee* website is one of hybrid internet service providers for whom, due to their disparate role in some cases, different legal status can be recognised: *Delfi AS* is both a provider of its own created, published and edited web content, and should be seen as a mass medium to which the E-Commerce Directive does not apply,²⁶ and a host to user-created web content (intermediary) in terms of user-created content in the spirit of the rules formulated in the E-Commerce Directive and in the case of *Google France and L'Oréal SA v eBay*.²⁷

In the case of *MTE & Index v. Hungary* the ECtHR first paid attention to the fact that although offensive and vulgar, the incriminated comments, as opposed to those in the case of *Delfi AS v. Estonia*, did not amount to hate speech or incitement to violence, so they did not constitute clearly unlawful speech. Second, the MTE is a non-profit internet content provider's self-association, economically disinterested in the number of the comments. However, the ECtHR noted that in this case it should also be guided by the criteria for the internet news portal operator liability formulated in the case of *Delfi AS v. Estonia*, that Hungarian courts have not followed.²⁸ Therefore, the ECtHR decided to carry out the

judgment of *L'Oréal SA and Others v eBay International AG and Others [GC]*, 2011, case no. C-324/09 (hereinafter the case *L'Oréal SA v eBay*) stated that according to article 14 of the E-Commerce Directive Internet service provider cannot be held liable for the information stored at the request of the advertiser, if he did not play an active role, which allowed him to have knowledge about the stored data or control it unless it knew that the information or the advertiser's actions were illegal, and did not take immediate measures to eliminate the information or to disable access to it.

²⁴ E-Commerce Directive article 15 p. 1 does not impose on providers neither general obligation, when providing the services covered by articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity (see *Google France* § 116, *L'Oréal SA v eBay* § 115, *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd, Takis Kounnafi, Giorgos Sertis*, Court of Justice of the European Union, 2014, case no. C-291/13 (hereinafter – *Papasavvas v O Fileleftheros Dimosia Etaireia*), § 42-44.

²⁵ Lisl Brunner, "The Liability of an Online Intermediary for Third Party Content. The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*," *Human Rights Law Review* 16 (2016): 168–172.

²⁶ Which is consistent with the CJEU's case law in *Papasavvas v O Fileleftheros Dimosia Etaireia*, *supra* note 24.

²⁷ Lisl Brunner, *supra* note 25: 168-169.

²⁸ Technical way of disseminating information (e.g., through television, radio, the Internet, etc.) does not determine any other person's rights protection. Therefore, although the Hungarian courts dealt with the case before the decision in the case *Delfi AS v. Estonia*, they could and should have referred to the criteria applicable to media operators determined in 2008 in the cases *Axel Springer AG v. Germany* (*supra* note 20) and *Von Hannover v. Germany* (*supra* note 21).

evaluation of the circumstances of the case for itself, following the criteria formulated in the case of *Delfi AS v. Estonia*.

ECtHR assessed that in the case of *MTE & Index v. Hungary* the underlying article concerned the business practice of two large real estate websites, which generated numerous complaints and prompted various procedures against the company concerned. Therefore, the article cannot be considered devoid of factual basis or provoking gratuitously offensive comments. The public interest required ensuring reasonable public debate on issues essential for many consumers and internet users, so the comments triggered by the article can be regarded as amounting to a matter of public interest.

The ECtHR highlighted that *Index* was the owner of a large news portal, run on a commercial basis and obviously attracting a large number of comments (same as *Delfi AS*). However, *MTE* on the contrary was a self-regulatory association of internet content providers, whose website mostly published contents of a predominantly professional nature and was unlikely to provoke heated discussions on the internet. Yet the domestic courts appear to have paid no attention to the role, if any, which *Index* and *MTE* respectively played in generating the comments.

For the Court, the issue in the instant case is not defamatory statements of fact but value judgments or opinions – they were denunciations of commercial conduct and were partly influenced by the commentators' personal frustration of having been tricked by the company. ECtHR also recognised that the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression. For the Court, regard must be attached to the specificities of the style of communication on certain internet portals: if the expressions used in the comments are common in communication on many internet portals, that reduces the impact that can be attributed to those expressions.

A closer analysis of the content of the decisions shows that the ECtHR focused not on the similarities, but essentially on the two differences in circumstances in both cases: the legal status of *MTE*, and the nature of the comments. This position is open to criticism on several grounds.

First, although www.index.hu and www.delfi.ee are almost identical online news portals that are professionally managed, commercial, economically interested in content and number of comments and having a control over their content, the ECtHR essentially emphasised the non-commercial status of *MTE* as a non-profit organisation. Its purpose is to promote public debate on issues relevant to a number of internet users, as well as economic gratuitousness in encouraging users to write a negative comment, and mostly spoke jointly on the liability of both applicants. Thus, although the *Index* website is essentially identical to

www.delfi.ee, the same protection was automatically applied to it as it was to MTE, completely ignoring the status, goal and activity of Index.

Second, in these cases, the value of the criterion formulated in the case of *Delfi AS v. Estonia* is obviously different – “a professionally-managed website run on a commercial basis which sought to attract a large number of comments on news articles published by it, and having exclusive control over the comments”. While in the case of *Delfi AS v. Estonia* this criterion was of essential value when recognising *Delfi AS* liable, in the case of *MTE & Index v. Hungary* it was almost not mentioned, however another, the opposite – non-commercial – legal status of MTE was considered. So, although Hungarian courts did not assess difference in companies’ interest in the number and content of the comments at all, and the ECtHR, on the contrary, focused on the difference in legal status between *Index* and *Delfi AS*, and MTE, in both cases the result was determined by the identical arguments, which is mistaken. However, there is reasonable doubt whether in the event *Index* had published the initial text by itself, and not copied it from MTE, the decision of the ECtHR in this case would have been the same.

Third, assuming that for the liability of the commercially-based online news portal to appear (at least to some extent) the ECtHR evaluated as important the legal status of the primary source of publications, in this case a non-commercial website operator, it is legitimate to question whether the legal form of the website operator in general can be a relevant criterion in deciding on the website operator liability. This is so because the injured person suffered damages due to the comment statements, independent of whether the internet news site operator seeks and/or receives economic benefit from the comments.²⁹ In addition, in cases where the website operator works with both commercial and non-commercial purposes,³⁰ the criterion of determining the liability justified by this circumstance in general is difficult to apply. As it becomes clear that the public legal person is less likely to carry the liability for the failure to remove the unlawful third-party comments (at least as it seems now), while maintaining the possibility of making a profit, the decision in *MTE & Index v. Hungary* case could lead to choosing a business model through a public legal person and/or profit-making legal person to deny its liability because the commented article is copied from another public legal entity. Finally, the consequences of illegal comments do not directly depend on the nature of the

²⁹ The ECtHR emphasised that those cases are not associated with the Internet portals of other nature where exclusively opinions of other persons are published (for example, internet discussion forums or classified advertising), as well as social networks, operators of which offer no content, and websites operated by private persons or *blogs*). However, the ECtHR itself would hardly justify comments mentioned in the case of *Delfi AS v. Estonia* if they are given while commenting the publication on a website of a legal entity economically disinterested in the number of comments and the content thereof.

³⁰ Richard Caddell, “Third party internet liability and the European Court of Human Rights,” *Communications Law* 21 (3) (2016).

website itself (and in many cases illegal comments are specific to social media and dilettante sites involving a smaller number of members)³¹ – so the SLK shareholder’s rights would hardly be violated less if statements against him turned out not to be not on www.delfi.ee, but on the other large, professional, commercially-run, content-free website³² or, perhaps, in L.’s profile on Facebook or Twitter.³³ So consent should be given to the authors who claim that the general principles of liability and non-discrimination require taking into account not the formal website nature, but the operator role (active/passive) in the process of publishing and removing offensive comments.³⁴

Fourth, the analysed ECHR decisions do not provide a clear standard for the control over comments to be applied to the website operator, which can lead to liability for the consequences caused by the unlawful statements to the injured persons. Considering the fact that the modern online news websites usually have accounts in social networks as well, the question remains who should control the comments on news/articles published and/or shared; and whether decisions taken in the *Delfi AS v. Estonia* and *MTE & Index v. Hungary* cases should also be applied when internet news site operators fail to remove immediately illegal user-created instances in their social network profiles, or take no measures to remove them from other publicly-accessible internet user accounts. The authors point out that, according to the criteria formed in the ECtHR case law in the assessment of a liability of website operators of different natures (other than set in the decisions under question, such as Yahoo!, Facebook, Twitter and so on), the issue of compatibility of ECtHR and CJEU case law in the field of the application of the E-Commerce Directive may arise; but this would be a subject for a new study beyond the scope of this article.

Fifth, although the nature of the comments has been recognised an essential difference in the cases, decisions did not address separately the wording of comments that had been declared unlawful in the national courts, and comments in each case are rather seen as a complex of speeches. Therefore it is difficult to understand from the ECtHR decisions whether the unlawfulness of each comment has to be determined in a case, or the entire set of comments to be investigated, whether the subsequent decisions of the ECtHR should be followed as a global comments evaluation standard, meaning that separate comments mentioned in the

³¹ Richard Caddell, "The last post? Third party Internet liability and the Grand Chamber of the European Court of Human Rights: *Delphi AS v Estonia* revisited," *Communications Law* 21 (2) (2016): 51.

³² Lisl Brunner, *supra* note 25: 172.

³³ Richard Caddell, *supra* note 31.

³⁴ Almost all modern sites, users can publish their own content, and a website is usually difficult to assign to a particular category (especially when mentioned web users actively encourage third parties to post comments) (Megan E. Griffith, "Downgraded to "Netflix And Chill": Freedom of Expression and the Chilling Effect on User-Generated Content in Europe," *The Columbia Journal of European Law* 22 (2016): 370, 377; Lisl Brunner, *supra* note 25).

cases *Delfi AS v. Estonia* and *MTE & Index v. Hungary* in every event should be considered lawful or unlawful,³⁵ or only upon the establishment of identical actual circumstances. It remains unclear whether a decision on the legality of the comments, however, is to be adopted *ad hoc*. In addition, although the ECtHR analysed the cases already examined by national tort law, the decisions under investigation had not taken into account the fact that simply because of the diversity of regional tort law systems, the illegality of the same comment in individual countries can reasonably be assessed according to different criteria,³⁶ which can lead to different assessments of similar comments. Also, there is little research on whether internet news site liability under national tort law is strict or fault-based,³⁷ and so on. ECtHR jurisprudence also does not compare comments in both cases,³⁸ although an appropriate determination of comments' illegality, as a central element of liability, is of fundamental importance in assessing both individual and joint liability of commentators, which, as an alternative, is the internet news portal liability fact and dimension detection criterion. Finally, there should be the possibility to clearly establish the illegality of the comments and the link with the originating consequences – if comments are assessed as a whole, this may be especially difficult. Thus, the position of the ECtHR maintaining the nature of comments as a fundamental difference, while not speaking more on the comments themselves, is hardly appropriate.

Sixth, as the liability of a website operator is applied in particular for the consequences determined by the content of the comments, it is clear that in such cases the analysis of the content of the comments should be one of the key aspects of the case study. However, in both the ECHR decisions, the comments themselves are not analysed in detail nor are they compared with each other, and the judgments are based on an abstract evaluation condition – clear illegality of the comments – as an essential difference in the comments recorded in both cases. Moreover, in the case of *MTE & Index v. Hungary* one more criterion is identified which had not existed in the ECtHR case law previously – the criterion of usual style of online communication. Unfortunately, the criteria of clearness (manifestness)

³⁵ For instance, should the comment <...> sly, rubbish, mug company <...>; "People like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead." in all cases be considered lawful and so similar wording could be provided in all cases.

³⁶ For example, in some tort law systems illegality is associated with eligibility of the actions, in other – with the result thereof (Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full Edition, edited by Christian von Bar, Eric Clive, and Hans Schulte-Nölke (Munich: Sellier. European Law Publishers, 2009), 2987-2988; European Group on Tort Law, *Unification of tort law: wrongfulness*, edited by Helmut Koziol (The Hague & Boston: Kluwer Law International, 1998), 129.

³⁷ Mention that an objective liability is actually applied to the applicants (*Delfi AS v. Estonia* [GC], *supra* note 2, § 80, 83) is not itself sufficient.

³⁸ Some comments in *Delfi AS v. Estonia* case are even more ethical than those in *MTE & Index v. Hungary*, *supra* note 9, 16, 17.

and usual style of online communication are highly deterministic categories in terms of value and moral, depending not only on the cultural norms of a certain country, but also on the subjective experiences and views of the judge. Hence, if the ECtHR decisions named no criteria by which certain speech must be regarded as a clearly (obviously) unlawful and/or corresponding to usual communication practice, national courts continue to be at high risk of inadequate qualification of the comments. Finally, in each case where a comment is regarded as illegal a certain justification is required; therefore, the authors believe, the use of benchmark criteria should be associated and measured in analysing the content of the comments.

Seventh, the arguments of both analysed decisions allow discerning a certain progressive graduation of illegality based on benchmark criteria, although the specific components of the scale and their relationship remain unclear. For example, in the case of *Delfi AS v. Estonia* the ECtHR identified as *manifestly* unlawful the comments clearly and openly advocating hate, violence or retribution, yet did not detail the notion of “clear and open” content. The Court neither distinguished other possible cases of obvious illegality, nor did it discuss the criteria for determining the illegality, nor did it disclose other illegality scale levels and the compliance of instances with normal practices of communication on the internet (which is usually more acute, in particular in an anonymous mode) when assessing the degree of legality of the comments. Not only the content of above-mentioned abstract criteria, but also which case law the courts should be guided by, remains unclear, if the level of illegality of the comments is lower than that set in the case of *Delfi AS v. Estonia*, but higher than stated in the case of *MTE & Index v. Hungary*. Finally, the question arises whether the result of the case of *Delfi AS v. Estonia* would be different if the criterion newly determined by the ECtHR is applied in it, and it is disclosed that comments published in www.delfi.ee correspond to the normal practices of communication on the internet. Thus, the legal assessment of other factual background by vague evaluative categories is further left to the discretion of national courts, which does not guarantee an equal assessment of comments at all ECtHR jurisdiction. However, the trend to modify and adjust rules for interpreting and applying law that was formulated in the case of *Delfi AS v. Estonia* is clearly seen to benefit internet news portal operators: recognising the possibility of liability of web operators for the damage caused to third parties by apparently illegal comments by visitors, but not holding such liability to be the general rule for all comments. Such a change in ECtHR case law should be regarded as a positive turn in order to maximise the balance of interests of participants in legal relations characterised by different rights.

Although at the same time the ECtHR points out the need to examine whether the internet portal operators were able to foresee the endpoint of the respective behaviour,³⁹ the results of application of the benchmark criteria can be unpredictable and even contradictory. For instance, the ECtHR in both cases has differently reclassified the comments that had been classified by Estonian and Hungarian courts as defamatory: the comments mentioned in the case of *Delfi AS v. Estonia* have been qualified as incitement to hatred and violence, and in the case *MTE & Index v. Hungary* the comments have been recognised as abusive but routine, characteristic of many internet portals' style (i.e. not clearly unlawful). However, in the case of *MTE & Index v. Hungary* the ECtHR, *de facto* acted as a "fourth" instance of national courts' decisions review, although the legal status of the ECtHR does not empower it to reconsider the law and facts assessment carried out by the national courts,⁴⁰ or even to abolish the decisions of national courts. In *Delfi AS v. Estonia* it adjudged the qualification of their illegality relied on circumstances,⁴¹ but *MTE & Index v. Hungary* on its own initiative newly differently assessed the content of the comments and stated that they did not incite hatred, violence, thus [under national law?] they are not clearly unlawful, but regarded as personal frustration determined by the company's business performance evaluation.

In conclusion, although in both cases the ECtHR analysing the context and content of the comments assessed the circumstances as not quite identical, the relevant evaluation criteria common to both cases for the context of the comments are as follows: (i) the nature of the article and its topic (in both cases – public debate generated thereby as well) and compliance thereof with the public interest; (ii) a website operator's control over the comments section and the right of the commentators to edit their own comments; (iii) the nature of the comments (illegality), which (especially the obvious one) determines the obligation for the website operator to have sufficient control over comments to remove them; (iv) the status of an internet news site operator as well as the purpose and objective of the website closely related thereto: liability is much more justified for a website operator pursuing commercial purposes, especially if it has an economic interest in the number or content of comments.

³⁹ In *Delfi AS v. Estonia* case it has not been adequately studied. Bart van der Sloot, *supra* note 8: 446-447.

⁴⁰ Unless the assessment itself violates the requirements of the Convention (Danutė Jočienė, "Europos Žmogaus Teisių Teismo jurisprudencijos įtaka nacionalinei teisei bei jurisprudencijai, tobulinant žmogaus teisių apsaugą. Konvencijos ir Europos Sąjungos teisės santykis" (The impact of the Jurisprudence of the European Court of Human Rights to the Perfection of the National Law and Jurisprudence in the Context of the Protection of Human Rights. The Relationship of the Convention and the Law of European Union), *Jurisprudencija* 7(97) (2007): 19).

⁴¹ *Delfi AS v. Estonia* [GC], *supra* note 2, § 112-114; § 127-128; § 141-146; § 151, etc.

2.2. POSSIBILITY FOR A COMMENT AUTHOR TO BE SUBJECT TO LIABILITY

The ECtHR in the case of *Delfi AS v. Estonia* noted that anonymity is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the internet a means of avoiding reprisals or unwanted attention. However, different degrees of anonymity are possible: (i) an internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of verification; (ii) an extensive degree of anonymity is also possible, where the users may only be traceable to a limited extent – through the information retained by internet access providers; (iii) in some cases it is impossible to identify the offender at all. The ECtHR has also paid attention to the ease, scope and speed of the dissemination of information on the internet, which may considerably aggravate the effects of unlawful speech compared to traditional media,⁴² and referred to the case *Google v. Spain*,⁴³ where it was found that the individual's fundamental rights, as a rule, overrode the economic interests of the search engine operator and the interests of other internet users.

In the particular case, *Delfi AS* did not require commentators to reveal their identity, and the Estonian courts managed to identify only some of the computers from which the relevant comments were sent. So, the questionable effectiveness of the means to identify the author of the comments, and the fact that *Delfi AS* had not taken sufficient measures in order to address the claim to the true authors of the comments, were essential criteria supporting the Estonian Supreme Court decision. In addition, the ECtHR noted that the transfer of the risk of the recovery of damages from the injured person to the media company, which usually is in a better financial position, is not a disproportionate restriction of the freedom of expression of the company.⁴⁴ However, the authors note that the mere fact that the website operator is in a better economic situation should not in itself justify its liability, and for the purpose of the protection of an injured person the site operator held jointly or indirectly liable should not be penalised by an unreasonably large financial burden, which may include costs for permanent comment monitoring, later recourse, etc.⁴⁵

⁴² Neville Cox doubts whether the outcome of the case would have been the same if the argument is published in the traditional media (Neville Cox, *supra* note 6: 628).

⁴³ *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Court of Justice of the European Union (2014, no. C-131/12).

⁴⁴ Previous interpretation on this issue in *Krone Verlags GmbH & Co. KG v. Austria (no. 4)*, European Court of Human Rights (2006, appeal no 72331/01), §32.

⁴⁵ Ronen Perry and Tal Z. Zarsky, "Who Should Be Liable for Online Anonymous Defamation?" *The University of Chicago Law Review Dialogue* 82 (2015): 171–172.

In the case of *MTE & Index v. Hungary*, Hungarian courts had not even attempted to identify the authors of the comments; did not consider the option of commentators' liability; failed to analyse terms of commenting; did not investigate the user registration system enabling readers to websites to provide comments; ignored the fact that Index and MTE behaviour, by providing a platform for third parties to exercise their freedom of expression, should be regarded as a certain type of journalism and therefore the liability may significantly restrict the freedom of the media. The courts simply relied on the fact that for Index and MTE certain liability appears solely due to the fact that they "spread" defamatory statements. In this case the ECtHR stated that even assuming that the national courts correctly classified MTE and Index actions as dissemination of defamatory statements, the liability of a website operator would be difficult to reconcile with existing case law, according to which punishment of the journalist who contributed to the distribution of third person statements in the interview would seriously undermine the contribution of the press to the public interest debate, and in the absence of strong reasons to do so should not be applied.

To sum up, in the case of *Delfi AS v. Estonia* some commentators had been impossible to identify, partly due to the lack of measures taken by Delfi AS. With both of these criteria, and the fact that Delfi AS is an economically stronger party with more opportunities to recover damages from violators, the ECtHR confirmed the proportionality of the Estonian court decisions. Meanwhile, in the case of *MTE & Index v. Hungary*, the liability of authors of the offensive comments had not even been considered, so the Hungarian court decisions were stated as non-proportional.

It is acknowledged that an operator of an internet site that has a comments section can be held liable only after identification of its behaviour before and after it became aware of illegal actions, as well as consideration of the chosen business model and the ability to take measures to control the content of the comments.⁴⁶ However, it cannot be denied that in certain cases due to legal identity concealment tools (e.g., *Tor*)⁴⁷ or lack of instruments requiring third parties to protect or disclose certain personal data,⁴⁸ even an entirely appropriately behaved online news site operator may be held liable in a finding that the injured person has no chance to apply to actual commentators (as an alternative), and in the absence of significant adverse consequences for the site operator (i.e. on the grounds of public

⁴⁶ Ronen Perry and Tal Z. Zarsky, "Liability for Online Anonymous Speech: Comparative and Economic Analyses," *Journal of European Tort Law* 5 (2) (2014): 6.

⁴⁷ Tomáš Minárik and Anna-Maria Osula, "Tor does not stink: Use and abuse of the Tor anonymity network from the perspective of law," *Computer Law & Security review* 32 (2016): 111-127.

⁴⁸ For instance, regarding invalidation of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (OL L 105/54) (*Digital Rights Ireland and Seitlinger*, Court of Justice of the European Union (2014, joined cases no. C-293/12 and C-594/12)).

interest). The latter aspect, which raises the issue of the competition of the two constitutional values – privacy, and protection of freedom of expression – is the subject of a separate study. However, the fact that different types of website operators become subject to increasing legal proceedings for the actions of third parties⁴⁹ shows the great importance of the issue and the imminent need for further analysis of the ECtHR judgments studied.

2.3. MEASURES TAKEN BY THE WEBSITE OPERATOR

The ECtHR noted that Delfi AS could not be said to have wholly neglected its duty to avoid causing harm to third parties as, in order to prevent offensive comments, it had taken the following measures: the website announced that the writers of the comments were accountable for them; the posting of comments that were contrary to good practice or contained threats, insults, obscene expressions or vulgarities, or incited hostility, violence or illegal activities, was prohibited. Furthermore, the portal had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose. In some cases, site administrators removed inappropriate comments on their own initiative. Nevertheless, although the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats – on the contrary, they were manifest expressions of hatred and blatant threats to the physical integrity of L., shareholder of SLK – the automatic word-based filter failed to sift out odious hate speech and speech inciting violence posted by readers, and thus limited the ability of Delfi AS to expeditiously remove the offending comments.

In the ECtHR's view, 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. However, in the present case it was insufficient for detecting comments whose content did not constitute protected speech under Article 10 of the Convention and, as a consequence of this failure of the filtering mechanism, such clearly unlawful comments remained online for six weeks. 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, the ECtHR considered that the rights and interests of others and of society as a whole may entitle a state to impose liability on

⁴⁹ Uri Volovelsky and Ray Raynzilber, "The Liability of Website Owners for Defamation in Israel: A Challenge yet to be solved?" *Computer Law and Security Review* 29 (5) (2013): 599; Rebecca Ong, "Liability of Internet intermediaries for user generated content: An examination of Oriental Press Group Ltd v Fevaworks Solutions Ltd," *Computer Law and Security Review* 31 (2015): 131–138.

internet news portals, without contravening Article 10 of the ECHR, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. The ECtHR also noted that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the case under question – could by no means be equated to “private censorship”, in particular taking into account the high risk of harm posed by content on the internet. The ECtHR has also attached weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the internet was more limited than the ability of a large commercial internet news portal to prevent or rapidly remove such comments.⁵⁰

In conclusion, according to the ECtHR reasoning in the case of *Delfi AS v. Estonia*, a notice-and-take-down system ensuring effective and rapid removal of offensive comments immediately after their publication in many cases would be sufficient to escape liability for the third-party damage. However, in this particular case liability was applied to Delfi AS due to the fact that the notice-and-take-down and the automatic word filtering systems used by Delfi AS failed to detect obviously illegal comments encouraging hatred and violence, although the website www.delfi.ee itself announced that it was prohibited to publish such comments, and such comments had to be removed immediately on the website's own initiative. Consequently, in the event where obviously illegal comments encourage hatred and violence, or otherwise violate human rights enshrined in the ECHR, a notice-and-take-down system would be recognised sufficient only if it detects (and removes) such comments. However, in the authors' view, this in general means an absolute obligation to monitor all comments published, and in order to implement this Delfi AS had to introduce a team of dedicated moderators on the www.delfi.ee website.⁵¹

In the case of *MTE & Index v. Hungary* it was found that the Hungarian courts applied to MTE and Index the objective liability for illegal comments, which is virtually impossible to avoid, on the grounds that MTE and Index, by giving readers the opportunity to comment on articles, accepted the liability for any harmful or illegal comment published by a visitor. The ECtHR pointed out that the national courts' position that, by allowing unfiltered comments, the applicants should have expected that some of those might be in breach of the law, basically meant an excessive and impracticable forethought capable of undermining freedom of the

⁵⁰ Doctrine states that the liability for third-party comments cannot be transferred to the website operator, regardless of the measures taken, and the requirement to continuously monitor Internet content does not comply with the E-Commerce Directive (Hugh J. McCarthy, *supra* note 4: 40-46).

⁵¹ The doctrine expressed the opinion that in such circumstances it would be fairer to use the *standard of actual knowledge* of the illegal comments and the unlawfulness of the website operator's actions must be measured by its behaviour upon the victim's request to remove the comments (Richard Caddell, *supra* note 31).

right to impart information on the internet. The ECtHR has also objected that comment removal and MTE and Index protective measures against offending comments were legally irrelevant considerations, because they took certain general measures to prevent defamatory comments on their portals or to remove them: only registered users could comment, there was a disclaimer in their general terms and conditions stipulating that the writers of comments, rather than the website operator, were accountable for the comments, the posting of comments injurious to the rights of third parties was prohibited, both applicants had a *notice-and-take-down* system in place, whereby anybody could indicate unlawful comments to the service provider so that they be removed. Furthermore, “unlawful comments” prohibited according to the rules of moderation of Index were monitored by a team of moderators who could remove comments deemed unlawful at their discretion. Thus, the ECtHR recognised the protective measures against the illegal comments taken by MTE and Index as sufficient, and stated that their liability is unreasonable.

It follows that the ECtHR in the case of *MTE & Index v. Hungary* looked at the internet news portals operators’ position from the other perspective corresponding to CJEU case law, and detailed the scope of general obligation to monitor all the comments appearing that was formulated in the case of *Delfi AS v. Estonia*, stating in essence that the unconditional obligation to take immediate corrective measures to be applicable only in the event of hate speech and provoking violence. However, such a change in the ECtHR position would hardly dampen the news portals’ burden, as in order to attribute a comment to a certain illegality category, all the comments still need to be read – not to mention the fact that not all site operators generally have sufficient financial and human resources to keep track and immediately remove each risky comment. Furthermore, even the best-qualified lawyers do not always agree on the qualification of comments, so it would be too naive to expect that the comments could be properly selected and deleted by any observer having no legal training. Therefore, even permanent observation of statements would not help to completely avoid the threat of liability; this means that the decision in the case of *MTE & Index v. Hungary* has not eliminated the practical consequences of the rules formulated in the case of *Delfi AS v. Estonia*.

Comprehensively assessing the nature of the unlawfulness of the comments, as well as the adequacy of the measures taken by an internet news portal with regard to illegal comments, it should be stated that the website operator is not to take all possible measures in order for defamatory comments not to appear at all, but has to ensure immediate removal of comments already published in the following order: a) obviously illegal comments need to be addressed, immediately after their appearance, on the site’s own initiative; b) for not obviously unlawful

comments it is sufficient to act only upon receipt of such a request. Although ECtHR case law neither reveals the concept of “immediate” removal of comments nor determines the criteria for such immediate removal, the promptness of the removal can be determined by evaluating the period over which the speech could reach a significant circle of visitors and taking into account the actual legal consequences – the more consequences, the more likely that the removal was not operative. However, although the decision in *MTE & Index v. Hungary* sought to prevent possible elimination of comments columns, fearing the obligation to compensate for losses, the change in position of the ECtHR based on theoretical classification of comments *practically* has not narrowed the requirement set by the judgment in the case of *Delfi AS v. Estonia* to monitor all comments, and has not removed the threat of restricting the possibility to implement the legitimate freedom of expression.

2.4. CONSEQUENCES FOR THE WEBSITE OPERATOR

The ECtHR emphasised that the Estonian courts’ decisions did not result in any negative consequences for Delfi AS: Delfi AS did not need to change its business model; www.delfi.ee remained one of the biggest Estonian news portals where number of visitor comments was steadily growing, is still the most popular according to the number of comments, and the awarded compensation of EUR 320 for such a large news portal was extremely low and could in no way be regarded as disproportionate to the offence. The ECtHR also evaluated the case law established by Estonian courts after the case of *Delfi AS v. Estonia* in dealing with the internet news portal liability issues, which, although based on the ECtHR interpretations, has not awarded non-pecuniary damages to website operators that removed defamatory comments. At the time of *Delfi AS v. Estonia* proceedings before the ECtHR court, anonymous comments still dominated over comments by registered users displayed first to the readers, but they were monitored by the moderation team introduced by Delfi AS. In these circumstances, the ECtHR found that the restriction of freedom of expression of Delfi AS is not disproportionate.

In the case of *MTE & Index v. Hungary*, MTE and Index were obliged to pay the applicant’s costs, and non-pecuniary damages were not awarded. However, the ECtHR noted that the non-awarding of damages was not crucial in assessing the consequences for the applicants, but rather the way in which similar internet portals could be held liable for third-party comments, because such a judgment can lead to further legal disputes in which compensation will be awarded. The ECtHR considered as a negative effect of the Hungarian courts’ decisions not so much the

non-awarding of certain compensation, more the way in which web portals liability for third-party comments was recognised because such application of an objective liability to a website operator, even without trying to search a balance of rights and obligations of the applicant and the defendant, can cause foreseeable negative effects for the environment of internet site commenting. For example, it can lead to abolishing the comments section, which may have a direct or indirect negative impact on freedom of expression on the internet, which would be particularly harmful to non-commercial sites such as MTE. The ECtHR once again pointed out that the Hungarian courts failed to consider that the applicants were part of the free electronic media, had not analysed how the application of liability to news portal operators would have affected the of freedom of expression on the internet, and that mere fact cast doubt on the adequacy of protection of the applicants' freedom of expression in the national legal system

However, in the case of *Delfi AS v. Estonia* the ECtHR evaluated the *amount of compensation* awarded from Delfi AS (EUR 320) for non-pecuniary damages; yet in the case of *MTE & Index v. Hungary* regarded it as legally inadmissible and dangerous for freedom of expression recognising the fact of liability application itself. However, having assessed that the fact of liability application and the amount of already applied liability are not identical things, and the legal status of *Index* in the latter case was analogous to that of Delfi AS, this position does not seem consistent and does not clearly answer the question whether domestic courts, while evaluating the effects of the decision on the implementation of the freedom of expression, should assess the legal consequences of the fact of the liability or those of its size.

In summary, it must be concluded that in resolving the issue of online news portal liability, not only *ad hoc* adverse effects for the certain media must be considered, but in general, the potential effects of the judgment to the concept of a free media. Therefore, in the case of internet news site liability for third parties' defamatory comments, not only the financial consequences for a particular subject, but the non-pecuniary consequences for the entire democratic society – particularly consequences which may have a negative impact on guarantees of freedom of expression – must be considered.

2.5. CONDUCT OF THE INJURED PERSON

In all tort law systems, the victim's behaviour must be regarded as an important factor in assessing the scope of liability, so naturally the ECtHR in the case of *MTE & Index v. Hungary* has also taken to assess this aspect. However, it is

surprising that this criterion is essentially not analysed and not even noted in the case of *Delfi AS v. Estonia*. Nor in the case of *MTE & Index v. Hungary* did the ECtHR assess the nature of the victim's behaviour, which, although noted, was not indicated as a completely separate liability component: the victim's actions were assessed together with the analysis of the website operator's measures in order to prevent a violation of the law. However, the authors believe that the victim's behaviour is an independent criterion, *per se* not resulting from and not directly connected with the internet news websites' measures applied preventively or later on, so it should be analysed separately.

The decision in the case of *Delfi AS v. Estonia* referred to the victim's behaviour only to the extent that its lawyer made a request to Delfi AS to remove illegal comments. However, the case does not analyse in detail the fact that the victim's request to remove defamatory comments was made as late as six weeks after the appearance of the comments, which certainly could have an impact on the scale of the consequences arising. In this case, it is not clear to what extent this circumstance allowed national courts to reduce the award for non-pecuniary damages,⁵² but it is questionable whether the victim himself, certainly having had the opportunity to see the comment much earlier (it is unlikely that a major shareholder and supervisory board member had read the article in the main national news portal as late as 6 weeks after the publication – and when due to warmer air the relevance of ice roads had already disappeared), by their actions had not contributed to the damage occurring or its increase. So, the question is whether all negative consequences of comments being available publicly for as long as six weeks should be assigned to Delfi AS exclusively, and whether the victim did not contribute to the scope of the consequences by their inaction.

In the meantime, in the case of *MTE & Index v. Hungary* the ECtHR directly recognised the importance of a victim's actions taken both before the appearance of comments and subsequent to it for the fact and scope of liability of the internet news portal. First of all, the ECtHR noted that the aggrieved company never applied to website operators asking to remove the infringing comments, but simply brought the action before the court (if victims appealed to website operators it would probably have helped to avoid additional litigation costs, which in this case were awarded to MTE and Index). In addition, the appearance of the article and the nature of the comments to a large extent resulted from the conduct of the victim – misleading, and having already received customer complaints regarding the business practice of two major real estate websites.

⁵² The claim asked for EUR 32,000 from Delfi AS, EUR 320 was awarded, but the amount of the claim is not clear. However, it might be assumed that the influence of the injured party's actions to the damage was potentially taken into account.

For all the above reasons, the ECtHR ruled that domestic courts unreasonably applied an objective liability to the applicants for the fact that they gave space to harmful and humiliating comments, although their content was determined by the actions of the injured person themselves.

Taking into account that all tort law systems recognise the importance of a victim's contribution to the damage occurring or to the increase thereof in determination of the scope of the defendant's tort liability, the case of *MTE & Index v. Hungary* reasonably took into account not only the contradictory company's business practices and the fact of investigations initiated against thereof, but the personal commentators' experience making the actual basis for the comments was also investigated. The authors believe that personal experience is also one of the most important criteria in determining the victim's contribution to the damage occurring or the fact and extent of its increase. Meanwhile, the judgment in the case of *Delfi AS v. Estonia* lacks an analysis of the injured person's conduct that, based on legal rudiments formulated in the case of *MTE & Index v. Hungary*,⁵³ should be assessed while investigating the conduct of both *the victim* (natural person – shareholder of SLK) and the company managed by him⁵⁴ – and both *before* the comments appeared (i.e. assessing the factual ground for the comments) and after their publication.

Notably, in addition to the victim's behaviour evaluation in the case of *MTE & Index v. Hungary* the ECtHR identified one more additional criterion for liability feasibility – the consequences of the violation to the injured party, which had not been analysed at all in the case of *Delfi AS v. Estonia*.

2.6. THE CONSEQUENCES OF THE COMMENTS FOR THE INJURED PARTY

According to the ECtHR case law, legal persons can be awarded non-pecuniary damages for the violation of the company's reputation, but the reputation of business cannot be equated to a natural person's non-pecuniary interest, i.e. reputation as a concern for their social status. According to the ECtHR, damage to a physical reputation can have negative consequences for one's dignity, while a commercial reputation is primarily of a commercial (business) nature and in terms of value falls into a completely different moral dimension. Thus, even if damage to a reputation the legal person is identified, it does not necessarily mean a personal non-property rights violation, and vice versa.

⁵³ The injured company's contribution is not specified as a separate category in the judgement, but it is identified by the authors on the basis of arguments of it.

⁵⁴ Interestingly, only a major shareholder of the company, but not SLK itself, considered themselves to be the victim.

The objective consequence of comments' publication in each case, and thus in the *Delfi AS v. Estonia* case as well, is their unlimited access by a number of persons (in this particular case those understanding Estonian and/or Russian). However, the mere availability of comments for any potential reader does not mean that a particular entity had suffered adverse effects due to it. The subjective consequences are associated with negative consequences for a particular person. In the case of *Delfi AS v. Estonia* it is a non-pecuniary damage to the shareholder of SLK, which is small (EUR 320).

In the case of *MTE & Index v. Hungary*, the comments' influence upon the commercial reputation of private company was (had to be) assessed. The ECtHR noted that in assessing this criterion it would be in principle sufficient to state that domestic courts evaluated the comments as able to prejudice the applicants' moral rights. However, although at the time of publishing both the article and the comments some research was carried out on the applicant's business practices, Hungarian national courts unjustifiably failed to assess whether the comments actually harmed or could harm the applicant's reputation. The courts did not investigate whether the comments reached a sufficient level of severity, and whether they were made in a way that actually affected the applicant's right to goodwill.

In the ECtHR assessment, it is unlikely that in such a context, where there is more than one investigation initiated against the Company, comments could have a significant impact on consumer attitudes and make any further relevant and significant impact on their attitudes to the injured company. Therefore, the ECtHR found a violation of Article 10 of the ECHR. It should be noted that the actual property or non-pecuniary losses of the injured party is a necessary condition for liability, without which such liability could not arise in general. However, when it is asked to remove a certain comment, or to recognise the fact of violation of law, it is sufficient to establish that the comment goes beyond the limits of freedom of expression and does not fall within the protection sphere of the ECHR Article 10, paragraph 1.

CONCLUSIONS

1. The analysis of ECtHR case law revealed that the guarantee of the balance of rights and obligations of website operators and third parties injured by visitors' comments thereof is a very delicate issue requiring a painstaking study of the specific circumstances of the case. In the case of *Delfi AS v. Estonia*, for the first time the four criteria for website operator liability for the damage caused to

third parties by its visitors' comments were formed, and in the case of *MTE & Index v. Hungary* the ECtHR identified two additional criteria for such liability.

2. Assessing the comments and the context of their content, the focal points are the nature of the comments themselves, a website operator's control over the comments section, and the ability of the authors to edit their comments. At that time, the nature of the commented article and the legal status of the website operator comprise additional criteria for the liability determination.

3. According to ECtHR case law, the assessment of the comments' context criterion implies a certain scale of comments' illegality, the obviously illegal comments being at the top thereof may be subject to the most stringent sanctions. In the meantime, if the illegality of a comment's content needs further study, it is measured according to the normal practices of communication on the internet. It is sufficient for the website operator seeking to avoid liability for damage caused by visitors' comments to implement an effective verification and removal system for comments already published.

4. The possibility of comments authors' liability as an alternative in itself neither confirms nor denies the liability of an online news site. However, the less chance to apply the liability to the authors themselves and the more difficult it is to identify authors due to the technical solutions applied on the website, the more the application of the liability to the website news portal can be justified.

5. The analysis of the potential effects of the application of website operator liability assessed the following: (i) the economic and moral consequences in the short and the long term for a particular site *ad hoc*; (ii) the possible effect of the court decision on a whole democratic society based on freedom of expression and the concept of free mass media. If it is determined that a judgment can lead to a chain of events restricting freedom of expression, the liability of a site operator should be applied only in exceptional cases. In very exceptional cases, the liability could be excluded to fulfil the needs of a democratic society.

6. Assessing the feasibility of the liability of an online news portal, the necessary condition of which is actual property or non-pecuniary losses originating from the website operator actions, in all cases it is necessary to assess the actions of the victim before the appearance of comments and after the publication of the comments.

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