

The European Court of Human Rights rules again on liability for third party comments



In a **recent ruling**, the European Court of Human Rights (ECtHR) ruled that the Hungarian online news portal *Index.hu* cannot be held responsible for offensive or vulgar comments posted by its readers. The Court held that placing strict liability on news portals for such comments is a violation of Article 10 (Freedom of Expression) of the European Convention on Human Rights (ECHR). In this blogpost, Bea Bodrogi, a Hungarian lawyer involved in the case, reflects on the court's decision in light of its previous ruling in the *Delfi v. Estonia* case.

This decision is extremely significant because last summer, in a case with apparently similar facts, the ECtHR held that an Estonian news portal, *Delfi*, should be sanctioned for the content of comments posted by readers in response to one of its articles. After the latter **decision**, many organisations including **Article 19** spoke out about the threat to freedom of expression this ruling posed. What happened in Strasbourg recently, and who, in the end, is liable for third party comments?

Act I – *Delfi v. Estonia*

Delfi is one of Estonia's most popular online news portals. In 2006, it published an article entitled "SLK destroys planned ice road". In winter, the Estonian mainland is connected with various islands in the Baltic sea by way of roads created over the ice. Saaremaa Shipping Company (SLK), a company operating ferry lines in the same area as these ice roads, broke through one of these planned routes. The *Delfi* news portal reported on the event, and a large number of comments by readers in connection with the article were published. Some of these comments included content which incited hatred and violence towards one particular individual, who was the majority shareholder of SLK. Six weeks after the publication of the comments, the individual in question requested that the comments be deleted. The portal, which used a notice-and-take-down approach (whereby content deemed to be illegal is removed by the host following notification), considered the comments to be an unlawful infringement of the personal rights of the subject to whom they were directed, and removed them immediately.

The two Estonian courts (Harju County Court and Tallin Court of Appeal) found that *Delfi* should have prevented what were clearly unlawful comments from being published on its comments section, even though *Delfi* had taken down the offensive comments as soon as it had been notified of them. When *Delfi* lodged a case with the European Court of Human Rights, this Court concluded that the were a justified and proportionate restriction on *Delfi's* right to freedom of expression.

Curtailling online freedom of expression?

Many **defenders of freedom of speech** expressed serious concerns about the ECtHR's ruling and predicted a new dark age for freedom of expression. Even the opinion of the two dissenting judges took a dramatic tone, saying that their colleagues on the bench had treated the internet as a source of danger, adding, "**we trust that this is not the beginning (or the reinforcement and speeding up) of another chapter of silencing and that it will not restrict the democracy-enhancing potential of the new media.**"

The precedent that can be derived from this decision of the ECtHR is that news websites that allow readers to comment are liable for content written by third parties and published online, even

in the event that a) the operator of the website is not aware of these comments; and b) even if the website operator removes the comments after being notified of any injurious content. According to critics, the decision might create a worrying precedent that could force websites to censor content.

Act II: *MTE-Index v. Hungary*

A recent Hungarian case, Magyar Tartalomszolgáltatók Egyesülete (MTE) – *Index v. Hungary*, is similar to the Estonian one, in that the Hungarian courts also found the operators of two websites to be liable for reader comments about published articles. However, a closer examination of the facts of the two cases, the differences between them and the roles of the actors involved (in this case, the content providers and the commenters) reveals a more nuanced view of the recent judgement of the Court and of the reasons why, in the Hungarian case, the ECtHR gave freedom of speech precedence over a right to privacy.

The MTE is a self-regulatory association of content providers. On its website, it published an opinion concerning the contractual practices of a Hungarian online real estate website. MTE stated that it found the real estate company's practice to be unethical, and called upon readers to exercise caution in using these sites. A Hungarian online news portal, *index.hu*, ran MTE's post on its website as well. Among the comments posted by readers in connection with the two articles, some could be deemed to be insulting and vulgar which, without constituting hate speech, were nonetheless value judgements which criticised the real estate company (as opposed to a specific, named individual). The company in question did not notify the operators of the websites where the comments had been posted that it wished to dispute the claims. Instead, it applied directly to the Budapest Regional Court claiming that its reputation had been violated. As soon as the news portals learned of the legal proceedings, they removed the offending comments. Hungary's domestic court found that the two portals were strictly – that is, exclusively – liable for reader comments posted in response to their articles.

According to the ECtHR's case law, when domestic courts are faced with a conflict between two fundamental rights, the right to one's private life and freedom of expression, they should examine the relevant principles set out by the ECHR. Insofar as the domestic court reaches its decision through the application of these criteria, the ECtHR will respect the freedom and jurisdiction of the domestic court. According to this principle however, the Hungarian courts failed to take the following aspects into account.

Criteria to be examined

As set out in *Delfi*, domestic courts must examine how the following criteria apply to the case: the context and content of comments; what measures were taken by the plaintiff to prevent or remove defamatory comments, what responsibility the author of the comments has to ensure comments are accurate (in addition to considering the responsibility of the media provider), and the consequences of domestic proceedings upon the plaintiff).

In both cases, the key issue at hand was the public interest, an issue that was explicitly raised in some of the published comments. While the comments in *Delfi* did include some which could be classed as hate speech and as inciting violence, the impugned comments in *MTE-Index* were not qualified as clearly unlawful speech in the same way, and certainly could not be defined as hate speech. While *Delfi* was a large internet news portal which provided readers with a platform for comments as part of its commercial activities, one of the parties (MTE) in the Hungarian case had no such interests, since its primary purpose is to represent member organisations rather than serve as a publisher itself.

Furthermore, both the identity of the person affected by the comments and his or her reaction of this person is also relevant. In *Delfi*, the plaintiff was a **natural person** who made a direct request to the news portal to remove the offending comments. By contrast, the plaintiff in the Hungarian case was a commercial company operating real estate websites which, without contacting the



internet portals to remove the offensive comments, directly applied to the court for legal redress. These are significant differences.

Therefore, the response to the question as to who is liable for third party comments can be found by applying and balancing the approaches from the two cases. A clearly positive and progressive sign was the ECtHR's statement that where effective editorial procedures make it possible for news portals to respond quickly, the existing notice-and-take-down approach will in many cases work as an appropriate means of balancing the rights and interests of all concerned parties.

This blog gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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