Elena LAZĂR

The responsibility of website administrators for online posts in the light of ECHR case law

I. Introduction

The freedom of expression, as protected by Article 10 § 1 of the European Convention of Human Rights, constitutes an essential basis of a democratic society[1] and the limitations on this freedom foreseen in Article 10 § 2 should be interpreted strictly. Thus, the interference of States in the exercise of this right is possible, provided it is "necessary in a democratic society", according to the Court's case-law, it corresponds to a "pressing social need", it is proportionate to the legitimate aim pursued within the meaning of the second paragraph of Article 10, and is justified by judicial decisions that give relevant and sufficient reasoning.

The amplifying effect of the Internet and the fact that it is easily accessible to everyone[2] has led the Court to establish a specific balance between the protection of freedom of expression and respect for other rights or requirements. Internet publications fall within the scope of Article 10 and its general principles, but the particular form of this environment has led the European Court to rule on certain particular restrictions that have been imposed on freedom of expression on the Internet[3], whatever the type of message and even when used for commercial purposes[4] .

The freedom of expression in the online environment also includes possible recourse to a certain degree of exaggeration or even provocation. With regard to internet discussion sites, the Court recently stated that the limit of admissible criticism is broad where the comments are those of professional journalists well-known to the public who are commenting on matters of general interest[5].

On the other hand, offensive and injurious speech on the Internet that goes beyond the satirical and defamatory leads the Court to reject an application[6]. The issue of vulgar and insulting comments posted on an Internet discussion site arose in the case of *Buda v. Poland*[7], which was communicated to the Polish Government under Article 8 of the Convention on 19 January 2015. Thus, we may notice that Article 10 does not guarantee unlimited freedom of expression, especially when information published on websites is likely to have serious repercussions on the reputation and rights of individuals and is defamatory. In these conditions, the European Court appreciated that "(…) the Internet plays an important role in

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[1] ECHR, *Handyside v. the United Kingdom*, Series A no. 24, 7 December 1976.

[2] *D.N. Costescu*, Regimul juridic european al prelucrării datelor cu caracter personal, PhD thesis, University of Bucharest, September 2015, p. 36.

[3] ECHR, *Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015.

[4] ECHR, *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013.

[5] ECHR, *Niskasaari and Otavamedia Oy v. Finland*, no. 32297/10, 23 June 2015.

[6] ECHR, *Bartnik v. Poland* , no. 53628/10, 11 March 2014.

[7] ECHR, *Buda v. Poland,* no. 38940/13, lodged on 16 May 2013.

enhancing the public's access to news and facilitating the dissemination of information in general and on the other hand, the risk of harm posed by content and communications on the Internet[8] "to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press[9].

It seems thus that the European Court has drawn the line when it comes to the reputation and rights of individuals that can be affected by injurious posts that can lead even to defamation[10]. In these circumstances, bearing in mind that freedom of expression in the online environment is subjected to certain limitations, we ask ourselves if the person managing/administrating an online website/blog can be held liable for its posts and content.

II. The ECHR jurisprudence regarding the liability of website administrators for online posts

Bartnik case[11]

This case concerned the defamation conviction of a man who had published several articles on a website in which he accused the managers of a housing cooperative of having mismanaged the cooperative and diverted funds. He was sentenced to a fine of EUR125. The applicant was Mr Stanisław Bartnik, a Polish national, born in 1970, residing in Białystok.

The applicant, author of the articles on a cooperative called « Słoneczny Stok », published on its website a series of texts wherein it denounced the management methods of the cooperative by its administrators S.P. and W.A. At the time of the facts, S.P. was also a senator in the national Parliament. In an article entitled « Dzin Slonecznego Stoku » the applicant qualified S.P. as "Aladin that with the support of his genius, terrorized 34 thousand people"; the applicant imputed to S.P., inter alia, the financing of his election campaign with money from rents collected from tenants, abuse of the property of the cooperative and extortion of rents from retired tenants. The applicant also qualified W.A. as the "shadow of the great leader". These texts were followed by other series of texts regarding S.P. and W.A. In these circumstances S. P and W.A filed against him a criminal complaint for defamation.

In a judgment from 19 January 2010, based on Article 212 § 2 of the Penal Code (section 14 forth below), the district Court Białystok found the applicant guilty for the offense of defamation against the complainants, the applicant being obliged to pay a fine of 800 PLN and to reimburse each of the complainants the costs of the procedure of 3 172 PLN. The Court appreciated that due to his remarks in his texts the applicant had exposed the complainants to public contempt, prejudicial to their functions and had thus infringed on their reputation.

The court also found that the applicant had failed to demonstrate that his assertions regarding the alleged use of cooperative funds in the election campaign of S.P. and the offences committed at the expense of the tenants had any factual basis. The court noticed that a criminal investigation conducted in the past related to these criminal offences had been closed by a decision noting the non-existence of the offense. In addition, none of the

[8] ECHR, *Delfi AS v. Estonia* [GC], § 133.

[9] ECHR *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, 5 May 2011.

[10] *C.G. Achimescu*, La notion de juridiction au sens de l'article 1er de la Convention europeenne des droits de l'homme, PhD thesis, University of Montpellier, January 11, 2013, p. 130 et ss.

[11] ECHR, *Bartnik vs. Poland*, no. 53628/10, 11 March 2014.

witnesses were credible, as the authors were involved personally in the litigation with the cooperative.

The Court held that, by calling the complainants robbers and other offensive appellatives, the applicant used an offensive language which was not adequate to the circumstances of the case or themes addressed in his texts and thus rejected the argument of the applicant that he wanted to express – in a satirical language – his critical opinion about the situation at the cooperative.

The applicant claimed that statements about public figures, like the directors of the cooperative, are protected by the European Convention on Human Rights, but the Court stressed that these kind of statements on public figures are protected by the Convention only if they were carried out in the general interest, found righteous, and proportionate in relation with the interest covered by texts, and these conditions had not been met in this case, the applicant exceeding the limits of free speech.

In an appeal against the judgment from 19 January 2010, the applicant held that the District Court had not considered the satirical character of his texts and that some of the statements from the article entitled "the devil of the cooperative" were only meant to shed some light on the wrongs which can occur in every community.

In a judgment from 20 May 2010, the Regional Court upheld the judgment of 19 January 2010, but only on the applicant's conviction for the statements on wages paid to employees of the cooperative. The court fined him 500 PLN (about 125 Euro) and found that the applicant had exceeded the limits of freedom of expression.

According to article 212 § 1 of the Criminal Code "whosoever blames others (...) of acts or behavior that may belittle that person in the eyes of the public opinion or jeopardize the confidence necessary for the exercise of its function or profession is punishable with a fine sentence or with a freedom restrictive measure[12]".

In these circumstances, relying on Article 10 of the Convention, the applicant complained to the European Court of Human Rights for his conviction for defamation arguing that his articles had been of satirical *in nature*, and that as a journalist he had commented on an issue of public interest.

The Court observed that the applicant's conviction represented an "interference" in the exercise of his right to freedom of expression, within the meaning of the first paragraph of Article 10 of the Convention, but the interference was in accordance with the internal law (article 212 of the Criminal Code) and pursued a legitimate aim, "the protection of the reputation of others". Thus the only concern here is whether the interference was "necessary in a democratic society".

The Court noticed that the applicant's allegations were value judgements[13], but he had failed to show their veracity or bring any evidence to support them, particularly in regards to the diversion of funds from the cooperative, and recalls that even value judgements can prove to be excessive when devoid of any factual basis. It thus considered that the applicant *has exceeded* the limits of free speech taking into consideration the terms used in his texts –

[12] Ibidem, §16.

[13] *C. Bîrsan*, Convenția europeană a drepturilor omului, Comentariu pe articole, ed. 2, C.H. Beck, 2010, p. 787.

bandits, thieves, and racketeers – to describe the managers, and appreciated that these acts could not be justified even if the articles were intended to be satirical[14].

The European Court dismissed the complaint as "manifestly ill-founded". While the Court accepted that the topic of criticism was indeed an issue of public interest, and it acknowledged the importance of "satirical journalism" such as the web articles in question, *it also noted that the Internet is different from the written pres*s and that it posed a greater risk to privacy and reputational interests. Bearing in mind the low amount of the fine imposed, the Court therefore found that the defamation conviction did not violate the right to freedom of expression.

We may notice that in this case the European Court offered a preview of its position in the *Delfi* case, according more importance to reputational interests than to freedom of expression. What seems surprising though is the fact that in this case we were not in the presence of hate speech, if we were to apply the criteria from the subsequent decision in *Delfi*, which shows the extensive protection conferred by the Court to the rights protected by article 8 of the European Convention on Human Rights.

Delfi case[15]

Delfi was the first case in which the Court was called upon to examine a complaint concerning the liability of a company running an Internet news blog with regard to the comments posted on the portal by its users. The portal provided a platform, ran on commercial lines, and allowed user-generated comments on previously published content. In such cases some users – whether identified or anonymous – may post clearly unlawful comments which may in certain situations infringe the rights of others.

The applicant company, Delfi AS, complained that the domestic courts had found it liable for the offensive comments left by its users under one of its online news articles, about a ferry company The article caused lots of comments (180), 20 of which included insults and threats against L. Through his lawyers, L. required Delfi to delete all the comments and demanded moral damages of approximately EUR 32,000. Delfi AS removed the offending comments but only six weeks after they were published, at the request of the lawyers that were claiming that the unlawful comments infringed the personality rights of the owner of the ferry company; the company refused to pay moral damages maintaining that it is only an intermediary - an information services provider, and that, as a result, its activity is governed by the law transposing in the national legislation Directive 2000/31/CE on certain legal aspects of information society services, in particular electronic commerce. Pursuant to the transposition law, an information service provider that stores information provided by the users of its services is not responsible for the content of such information if, on the one hand, it is not aware of the respective content and of circumstances indicating any illegal activity, and, on the other hand, if immediately after it learns of such circumstances, removes the information or bars the access to it.

In these circumstances, L. sued Delfi demanding moral damages and, after losing in the court of first instance, both the Court of Appeals and the Supreme Court found in his favor, deeming that the news portal's editor is responsible for the content of the insulting comments

[14] ECHR, *Bartnik vs. Poland*, §34.
[15] ECHR, *Delfi AS v. Estonia* [GC].

and thus applied the general regime on tort liability stipulated by the Law on liabilities, and not the special regime, which is governed by the law transposing Directive 2000/31/CE. However, the compensation for the prejudice incurred by L. was significantly lower than what was demanded, i.e. EUR 320.

Then Delfi filed a complaint with the ECHR considering that the decision had been a violation of its right of expression provided for by Article 10 of the European Convention on Human Rights. The Court found that Delfi is responsible for the comments anonymously posted by the readers of its news portal. The editor filed an appeal, but the Great Chamber decided on June 16, 2015 to uphold the original decision and backed its ruling with arguments drawn up on less than 86 pages.

To begin with, in regard to this case, we must stress that the portal concerned was a major professionally and commercially operated Internet news portal publishing news articles written by its own staff on which users were invited to comment. The comments of the third parties invited to comment were apparently advocating acts of violence against others and constituted hate speech[16]. In these circumstances the question that must be posed was whether Delfi AS could be held liable for these third-party comments or this would infringe its right to impart information.

On this new question the Grand Chamber held (§ 113): "(…) the Court considers that because of the particular nature of the Internet, the "duties and responsibilities" that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content".

Furthermore, the Court appreciated that a professional Internet publisher should be familiar with the legislation and case-law, as it can easily seek legal advice on these matters. The Court considered that the publisher was in a position to assess the risks related to its activities and to foresee, to a reasonable degree, the consequences which these could entail in terms of its "liability and duties". The Grand Chamber then laid down the criteria for determining whether or not Delfi AS could be held liable for comments posted by third parties: the extreme nature of the comments in question, the fact that the comments were posted in reaction to an article published by the applicant's company on its professionally managed news portal run on a commercial basis, readers being invited to post their comments without registering their names, the insufficiency of the measures taken by the applicant company to remove the offending comments without delay after publication and last but not least, the moderate sanction imposed on the applicant company (320 Euros).

Taking all these factors into consideration, the European Court found that there was no violation of Article 10. Thus, the decision of the Estonian courts to hold Delfi AS accountable was justified and did not constitute a disproportionate restriction on the company's right to freedom of expression, taking into account the *offensive comments posted by its users*.

The decision was accompanied by two concurring opinions and a dissenting opinion issued by justices Sajo and Tsotsoria, respectively. These two justices warned that "active intermediaries and blog operators will have a considerable stimulus not to provide the users with the possibility to comment online, and the apprehension of liability may lead to additional self-censorship from the part of the operators." On the other hand, we must take into account two important aspects. Firstly, in principle, an individual whose personality

[16] Press release on issued by the Registrar of the Court, ECHR 205 (2015), 16.06.2015.

rights were violated is entitled to be compensated for the prejudice thus caused. The fact that it would be impossible to identify the legally liable party hinders the realization of this right. However, an obligation imposed on all internet users to identify themselves before publishing comments would affect on a large scale the freedom of expression on internet. A proportionate measure would be for the information intermediaries to adopt minimum measures intended to eliminate comments calling for hatred and violence. Such measures would have less devastating effects on the freedom of expression than banning anonymity on the internet, and, at the same time, this goal would be achieved without refusing the right of affected individuals to compensation.

We may notice that in this case the European Court used similar arguments to those in the *Bartnik* case, putting in balance the freedom of speech and the reputation of others, but based its judgement on the fact that in this case we are facing not only offensive comments, but hate speech. In these circumstances we have to ask the following question: what if the comments were only offensive and perhaps vulgar, but not amounting to hate speech? What would have been the decision of the Court? Would it have been similar to the decision in the *Bartnik* case? The *Magyar Tartalomszolgáltatók Egyesülete and Index hu zrt v. Hungary* case answers these questions.

Magyar Tartalomszolgáltatók Egyesülete and Index hu zrt v. Hungary case[17]

In this case, the applicants, a self-regulatory body (Magyar Tartalomszolgáltatók Egyesülete) and a news portal (Index.hu Zrt) complained that they had been held liable by the national courts for online comments posted by their readers following the publication of an opinion criticizing the misleading business practices of two real estate websites.

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. In addition, in the case of Index, comments were partially moderated, and removed, if necessary, and furthermore, the applicants advised their readers, in the form of disclaimers, that the comments did not reflect the portals' own opinion and that the authors of comments were responsible for their contents.

On 5 February 2010, MTE published an opinion concerning two real estate management websites according to which MTE had found the websites to have acted unethically when automatically charging users for its services following thirty days of free service. Index.hu subsequently published an opinion on the MTE's story. Anonymous users of both websites posted comments claiming that the company operating the real estate management websites was "sly", "rubbish"[18].

In these circumstances, on 17 February 2010, the real estate company brought a civil action complaining of an infringement of its personality rights on the basis that its right to a good reputation had been violated. As a consequence, the applicants immediately removed the allegedly offending comments from their respective websites.

The Hungarian domestic courts found that the comments went beyond the acceptable limits of freedom of expression and appreciated that the applicants could not rely on the protections available to intermediaries under the Hungarian law transposing EU Directive 2000/31/EC because this law only applied to information society-related services. The

[17] ECHR, *Magyar Tartalomszolgáltatók Egyesülete and index hu zrt v. Hungary*, no. 22947/13, 2 February 2016.

[18] Idem, § 12.

Hungarian Supreme Court found that the applicants were not "intermediaries" under that law and stated that, by allowing user comments on their website domains, the two applicants had assumed strict liability for any unlawful comments made by those users. Thus, following domestic proceedings, the applicants were each ordered to pay a total of 116,000 HUF in court costs.

Considering that the judgment was contrary to the essence of the freedom of expression on the internet, the portals' administrators filed a request with the European Courts of Human Rights requiring the cancellation of the judgment, complaining under Article 10 of the Convention that, by effectively requiring them to moderate the contents of comments made by readers on their websites, the domestic courts restricted the liberty of internet commenting

The Court found that the interference was "prescribed by law". The Court also accepted that the law pursued the legitimate aim of "protecting the rights of others". Thus the only question remains whether the interference was "necessary in a democratic society".

In this case, the Court found there was a public interest context to the comments in question, namely a debate involving consumer protection, related to the frustration users felt after having been tricked by the real estate company. The Court also reasoned that, although the comments were on "a low register of style"[19], they represented a common form of communication in the comments sections of Internet portals. In addition, the Court was critical of the domestic courts for failing to consider the feasibility of identifying the users of the comments and for not investigating the system of registration that the applicants had in place for their users. Thus, the Hungarian courts, when deciding on the notion of liability, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for their commercial reputation and a proper evaluation on whether the comments reached a sufficient level of seriousness and whether they were made in a manner actually causing prejudice to a legal person or not.

The European judges further emphasized the measures that had been adopted by the applicants to prevent defamatory comments being made by third-parties like the disclaimer and the "notice-and-take-down" procedure and found that the domestic courts failed to perform any examination of the conduct of either parties.

Furthermore, the Court noted that, although offensive and vulgar, the comments in the present case had not constituted clearly unlawful speech. In light of the above, the Court found that there was a violation of the Applicants' rights to freedom of expression under Article 10 ECHR. In reaching this conclusion, the Court opined that "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[20]" and thus found that the Hungarian courts should have not held the portals accountable for the posts published on real estate advertisement websites, since although " insulting and sometimes vulgar", those comments "were not defamatory statements, but the expression of value judgments or opinions[21]", according to the ECHR.

The Court's decision found in favor of the two portals, pointing out that they had already put in place a procedure permitting the users to red flag inappropriate content, thus making it

[19] Idem, § 77.

[20] *P. Lambert*, Liberté et responsabilité du journaliste dans l'ordre juridique européen et international, ed. Bruylant, 2003, p. 97.

[21] ECHR, *Magyar Tartalomszolgáltatók Egyesülete and index hu zrt v. Hungary*, §64.

possible for such content to be removed. Furthermore, the European justices noted that, in this case, the sentences ruled by the Hungarian courts risked allowing the applicants to entirely suppress the possibility of internet users to post comments, which would obviously constitute a violation of the freedom of expression principle provided for by Article 10 of the Convention.

It must be emphasized that the applicants' case was different in some aspects from the Delfi AS case previously analyzed, in which it has been held that a commercially-run Internet news portal had been liable for the offensive online comments of its readers. Why this sudden change of heart of the European justices in this case? The Court then goes to make a clear distinction between the types of comments involved in both cases. While the user comments in Delfi were excessive, as they took the form of hate speech and direct threats to the physical integrity of individuals, the comments in Magyar T.E. were not excessive, they were at most "*vulgar and offensive*"[22], as Judge Kūris puts it in his concurring opinion. Basically what the Court wanted to say was that removing vulgar and offensive comments violates freedom of speech, but removing hateful speech does not. Although this appears a rational line, we do not totally agree with the Court's position.

In the present case, it looks like the Court was keener on attaching weight to the sensible measures already adopted by the Applicants to prevent the publication of defamatory speech on its website domains, than on the right to reputation, implementing a notice-and-take down mechanism being in this case considered sufficient to balance the rights and interests of the parties involved. The Court did not see why such a system could not have provided a viable means to protect the commercial reputation of the plaintiff. Interpreted in combination with the *Delfi AS* ruling, it seems that higher standards of care need to be applied only when we are facing hate speech, which requires portals to remove material on their own initiative.

Although we very much agree with the Court's decision in the *MTE* and *Index.hu* case that hate speech is indeed more serious than vulgar offenses, the present case effectively should still lead to general monitoring bearing in mind that reputation of others is also extremely important.

Buda case[23]

In the *Buda vs. Poland* case, the applicant was a PhD student at the Institute of Theoretical Physics of the University of Wroclaw that had participated in the forum of the University of Wrocław since 2008. The portal that hosted the forum was owned and administered by Nasza Klasa, a limited liability company with its seat in Wrocław. The users of the portal could store their data in it. Discussions taking place on a forum were supervised by a moderator. The moderator was responsible for removing irrelevant or offensive content and for moderating a discussion. The moderators were not employees of the portal and their position was not regulated in the terms of service but they were appointed by the administrator of the portal. Moderators could remove unlawful posts by other users.

Also, the administrator of the portal did not verify the personal data of the users of internet fora and did not systematically follow discussions taking place on the fora. Thus, there were several thousand internet fora concerning various subjects on the portal of Nasza-klasa,

[22] Concurring opinion of judge Kūris, § 2.
[23] ECHR, *Buda v. Poland*, no. 38940/13, lodged on 16 May 2013.

among them the forum of the University of Wroclaw in which students, graduates, PhD students and teaching staff of that university took part. The forum of the University of Wrocław started in 2008. Between February and March 2009 it was moderated by A.J.

On 3 March 2009 the applicant and another user, T.B., took part in the discussion on the forum concerning abortion. At 11.35 p.m. T.B., commenting on the applicant's post, made the following comments: "Andrzej sucks... We are talking about psychopaths who are cunts". In this situation, the applicant asked T.B. to remove these comments. In response, T.B. posted even a more offensive comment. Another user, T.S., made the following comment: "You are really an exceptional man Andrzej... I feel like killing you like a dog. ... You are an evil man Andrzej". The latter comment was copied on 4 March 2009 by moderator A.J., who also added his comment: "I join in the wishes".

On 1 March 2009 the applicant wrote an email to the administrator of the portal, claiming that he was receiving threats from other users and that A.J. insulted him on the forum of the University of Wroclaw, and requesting that the offensive posts be removed. In his email the applicant indicated the exact http link to the forum where the offensive comments of A.J. had been posted. In his email reply sent on 5 March, the administrator of the service thanked the applicant for his notice and asked him to indicate the content, date and time of the comment.

On the same day the applicant replied enclosing the comment posted by A.J. with information about the time when it had been made. He also attached a screenshot of the post, requesting that A.J. be removed as the moderator of the forum. The following day the administrator asked the applicant to send him a copy of the link to the posted comment. The applicant replied shortly with the link. In an email sent on 9 March 2009 the administrator informed the applicant that the comment he complained about could not be found under the date and time indicated. In an email sent on the same day at 12.10 p.m. the applicant indicated that he had already enclosed a screenshot with the relevant address. He further requested that A.J. be discharged his position as moderator. Otherwise, the applicant would sue the portal for infringement of his rights.

Some time on or before 9 March A.J. had removed his post – "I join in the wishes" – under the comment posted by T.B. However, his and T.B.'s comments were still accessible as they had been copied by others users. This content was removed only in January of 2010 on an order from the Głogów District Prosecutor.

In these circumstances, the applicant filed a complaint with the ECHR considering that it has been a violation of his right to private life provided for by Article 8 of the European Convention on Human Rights.

We have to wonder what will be the decision of the European Court in this case, with the two interests in balance: freedom of expression on the one hand and the right to private life on the other hand. Will the Court consider that the comments in question amount to hate speech or appreciate them as being only offensive and thus maintain its constant line from the *Magyar Tartalomszolgáltatók Egyesülete and index hu zrt v. Hungary* case? When does speech become a threat or, more precisely, when does a communication over the Internet inflict – or threaten to inflict – sufficient damage on its recipient that it ceases to be protected by article 10 of the European Convention on human rights?

III. Conclusions

It seems the Internet offers extraordinary opportunities for ”speakers”, broadly defined to make their thoughts available (on political candidates, cultural critics, corporate governance etc.) to a world-wide audience far more easily than has ever been possible before. This is due to the Internet’s unique characteristics, including its speed, worldwide reach and relative anonymity.

However, it appears that the Internet has stimulated in many cases offensive or even vulgar ideas, hate speech, lurid threats, all these flourish alongside debates in the online environment. In these circumstances, the European judges had the tough task to strike a fair balance between the two rights at stake – freedom of expression on one side and the reputational and private life right on the other side. Did they succeed in accomplishing this? If we were to cast an eye over the case law previously analyzed, the answer would be more or less, bearing in mind the jurisprudential evolution. We do hope that the Buda jurisprudence will shed some light over this issue.