

CIVIL LIABILITY OF COMPANIES FOR ANONYMOUS COMMENTS POSTED ON THEIR SITES: A CRITERION OF POTENTIAL CONSEQUENCES OF LIABILITY

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Abstract. *Purpose* – The purpose of this study is to investigate a criterion of potential consequences of liability of an Internet portal for unlawful comments of its visitors and set certain general way-marks, which would apply to cases of this kind.

Research methodology – The European Court of Human Rights has ruled in four cases (*Delfi AS v. Estonia*, *MTE & Index v. Hungary*, *Pihl v. Sweden* and *Tamiz v. the United Kingdom*) on whether civil liability can be justified to the website operators for anonymous comments made on their portals that violate the right to privacy. One of the criteria of such evaluation was the possible negative consequences of the civil liability of these entities, but its content and meaning have not been thoroughly studied in the doctrine. Therefore the authors analyse the content of this criterion on the basis of a *comparative method*. Taking into account the legal context of this study, specific methods of legal interpretation are used in this article (such as, systemic, teleologic, historical).

Findings – Authors conclude that addressing the civil liability of website operators for damages caused by anonymous comments violating the right to privacy must consider not only the financial, and not only *ad hoc*, short- and long-term adverse effects of the website operators in general, but the impact of the ruling on the concept of free media and other property and non-material consequences for a democratic society as a whole.

Research limitations – This article deals with one criteria for the application of civil liability of website operators for the infringement of an individual's right to privacy by anonymous comments, that is – the possible negative consequences of the civil liability of these entities. That is the continuation of the authors' research on the topic of website operator's liability for unlawful anonymous comments.

Practical implications – The research reveals that the consequences of applying the civil liability to the website operator are conditions for assessment of extent of the already existing civil liability; therefore, the criteria of the consequences that arose and / or could arise to website operator are not to be considered as factors justifying the application of civil liability, but rather as factors determining, i.e. extending or limiting, the extent of civil liability.

Originality/Value – The vacuum of a consistent concept of assessing the behavior of website operators in response to unlawful comments poses a threat not only to the sustainability of website operators as business or public interest entities, but also to the stability of the legal system as a whole. It is therefore important to disclose the content of elements of assessment of the necessity of restricting the freedom of expression of website operators in a democratic society, which are unregulated and formulated only

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in the case law of the ECtHR, and which have been applied in national courts for horizontal civil liability claims for anonymous comments. There are no previous research that would focus on these issues.

Keywords: *Delfi AS v. Estonia*, *MTE & Index v. Hungary*, *Pihl v. Sweden*, *Tamiz v. the United Kingdom*, website operator' liability, liability for anonymous comments, unlawful comments, potential consequences of the civil liability.

JEL Classification: K12, K20.

Introduction

Freedom of expression in various international and national legislation – Article 10 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 11 (1) of the Charter of Fundamental Rights (2016), Article 19 of the Universal Declaration of Human Rights (2006), Article 4 (1) of the Republic of Lithuania Law on Public Information (1996) – generally defined as the right to freely express one's opinion, thoughts and beliefs and to freely gather, receive and impart information and ideas. In the modern information society, it is often implemented by publishing anonymous comments publicly and completely freely on various websites. On the other hand, website operators who make them available for publication are simultaneously recognized as exercising their freedom of expression (Geiger & Izyumenko, 2016). The limits of freedom of expression in private law for both actual commentators and website operators are determined by (in addition to the categories of state security, constitutional order or public protection, territorial integrity, public order, human health and morality which are provided by law and indispensable in a democratic society) the dynamic and multifaceted nature of the right to privacy (Oster, 2015), the breach of which may result in civil liability (Norkūnas, 2013).

Increasingly, the right to privacy is violated by the anonymous comments of Internet visitors (Meškauskaitė, 2015), whose authors cannot be identified (for example, as in the cases of *Delfi AS v. Estonia*, *MTE & Hungary*, *Tamiz v. the United Kingdom*) or the cost of finding them is prohibitive (as in the case of *Pihl v. Sweden*). Thus, victims have started to claim redress for the damage they cause as a result from the generally more easily identifiable and accessible managers of the websites where these anonymous comments are published (even in the United States: Sartor, 2017; Martin & Fargo, 2015; Sang & Anderson, 2012). However, the managers are not the authors of unauthorized comments (Stalla-Bourdillon, 2017), and the legislation does not oblige them to monitor all comments posted, which raises the question of when civil liability for anonymous comments infringing the privacy rights of third parties applies specifically may be legally justified for website operators (van der Sloot, 2016). Neither international or European Union law nor the law of individual countries contain any criteria for the application of civil liability of website operators for the infringement of an individual's right to privacy by anonymous comments. Therefore, irrespective of the choice of tort law model, the issue of their civil liability for anonymous comments violating the right to privacy is generally resolving in case-law *ad hoc*. Paradoxically, it is for national courts to balance the rights and obligations of webmasters, Internet users and addressees (third

parties) in a generally acceptable manner under national tort law, otherwise risking breach of international obligations, including the ECHR.

The ECtHR, examining in specific cases whether national civil liability claims for anonymous comments made by third parties for breach of the right to privacy of third parties, has struck the right balance between the right to respect for private life and freedom of expression in Articles 8 and 10 of the ECHR evaluates whether the restriction on the freedom of expression of website operators is compatible with the criteria for restricting that freedom set out in Article 10 (2) of the ECHR, that is: (a) does the restriction pursue a legitimate aim; (b) such a restriction is provided for by law; or (c) it is necessary and proportionate in a democratic society. In essence, this means analyzing, in a vertical relationship, whether the state has exercised its discretion in a fair, reasonable and prudent manner in the application of standards consistent with the principles enshrined in Article 10 of the ECHR and in assessing relevant facts. In this category of cases, the ECtHR has formulated elements for assessing the necessity of restricting the freedom of expression of webmasters in a democratic society, which have not been directly regulated by law and now are applied in national courts to resolve horizontal civil liability claims against anonymous comments by third parties.

In this way, the aspects of proportionality of the restriction of the freedom of expression of website operators in civil law highlighted by the ECtHR have become a set of criteria justifying the application of their civil liability for damages caused by anonymous visitors' comments to third persons. However, civil liability is applied between equal persons and only when all the necessary conditions for its application (unlawfulness, fault, damage and causal relationship between the person's conduct and the resulting consequences) are established (Koziol, 2015; Principles, Definitions and Model Rules of European Private Law, 2009; Principles of European Tort Law, 2005; Unification of Tort Law: Wrongfulness, 1998). This raises the question of how the elements of proportionality in restricting the freedom of expression of webmasters as formulated by the ECtHR in vertical disputes are to be understood in the context of the civil liability of webmasters for damages caused by anonymous visitors' comments violating the right to privacy of third persons. The question also arises as to their content from the point of view of civil liability, where the ECtHR case-law itself rules for assessing the necessity of restricting the freedom of expression of website operators in a democratic society, if the rules of the ECtHR case-law to assess the necessity of restricting the freedom of expression of website operators in a democratic society are too abstract and doctrinally criticized for their lack of legal certainty (van der Sloot, 2015; Gasser & Schulz, 2015; van der Sloot, 2016; Lavi, 2018). This vacuum of a consistent concept of assessing the behavior of website operators in response to unlawful comments poses a threat not only to the sustainability of website operators as business or public interest entities, but also to the stability of the legal system as a whole. There is still a significant risk that the limits on the civil liability of website operators for the third parties' privacy violations by anonymous comments on webpages may be set too wide or too narrow each time, thereby violating the balance between the rights to privacy and freedom of expression enshrined in Articles 8 and 10 of the ECHR and the private interests of civil law subjects. It is therefore important to disclose the content of elements of assessment of the necessity of restricting the freedom of expression of website operators in a democratic society, which are unregulated and formulated only in the case law of the ECtHR, and which have been applied in national courts for horizontal civil liability claims for anonymous comments.

This article is the continuation of the authors' research on the topic of website operator's liability for unlawful anonymous comments (Šidlauskienė & Jurkevičius, 2017; Šidlauskienė, 2017; Jurkevičius & Šidlauskienė, 2018). The object of the article – the judgements of the ECHR in the cases *Delfi AS v. Estonia*, *MTE & Index v. Hungary*, *Pihl v. Sweden* and *Tamiz v. the United Kingdom*. The aim of this article is to investigate a criterion of potential consequences of liability of an Internet portal for unlawful comments of its visitors and set certain general waymarks, which would apply to cases of this kind.

1. Criteria formulated in ECtHR case law for the liability of website operators for anonymous comments in breach of the right to privacy

Criteria for assessing the limits of the freedom of expression of website operators for the first time and, at the same time, civil liability for unauthorized comments (or even failure to take preventive measures) by third parties (Internet users), have been internationally recognized in the highly-publicized ECtHR case *Delfi AS v. Estonia* in 2013 and 2015. In the present case, the ECtHR, relying on *Delfi AS v. Estonia* slightly modified and adapted the rules on the assessment of restrictions on media freedom in other cases (*Axel Springer AG v. Germany* (2012) and *Von Hannover v. Germany* (2012) (No. 2) to the Internet space, and for the first time distinguished such an assessment of the proportionality (ie necessity in a democratic society) of the civil liability of a website operator: (a) Context of comments, (b) Preventive or expeditious removal of comments by the website operator, (c) Possibility of genuine commentary liability as an alternative to website operator's liability, and (d) Consequences applicable to website operator in national law.

Although the ECtHR did not justify the choice of these criteria, on June 16, 2013, the ECtHR Grand Chamber by majority (15: 2) upheld the ECtHR ruling of October 10, 2013, thereby definitively recognizing that the Estonian courts had rightly classified as a journalist the activity of *Delfi AS*, and *Delfi AS* itself, as publishing comments, and has been subject to proper civil liability for the consequences of a third party's non-immediate removal of comments of its own initiative. Thus, in *Delfi v. Estonia* has become the first international case to formulate criteria for limiting the freedom of the website operators of all ECHR members. At the same time, the criteria for civil liability for the immediate non-removal of anonymous comments that could harm third parties have been developed; this case also became the first legal basis to distinguish such criteria in general.

However, just after six months – this is February 2, 2016 – the ECtHR for the first time applying the criteria for assessing the civil liability of website operator in *Delfi AS v. Estonia* (Weinert, 2016), in their circumstances in a similar case *MTE & Index v. Hungary* (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (2016)), slightly modified and supplemented them. The judgment itself, in addition to the context of the comments, assessed the content of the comments themselves and also distinguished two new criteria for non-comment liability on website operators, namely (a) the behavior of the victim and (b) the consequences of the comment to the victim. In doing so, the ECtHR recognized the Hungarian courts by failing to strike a balance between the right to freedom of expression enshrined in Article 10 of the ECHR and the right to respect for

private life enshrined in Article 8 of the ECHR and held that under Hungarian tort law, the website operator was unreasonably subject to strict liability. In addition, although the reasoning behind the *Delfi AS v. Estonia* case was expressis verbis decoupled from websites of a different nature (such as online discussion forums, bulletin boards and others where users can freely post their ideas on any subject without the input of a forum moderator, or social media platforms whose moderator does not provide any content and where the content provider may be an individual who owns a website or blog as a hobby), in *MTE & Index v. Hungary* the ECtHR also assessed the civil liability of MTE under public law in accordance with the same criteria.

One year later, that is, on 7 February 2017, the rules formulated in the judgments in above mentioned cases (i.e. *Delfi AS v. Estonia* and *MTE & Index v. Hungary*) were also used in *Pihl v. Sweden* case (*Rolf Anders Daniel Pihl v. Sweden. (2017)*), assessing the possibility of a non-commercial website manager being held liable for comments posted after a blog is biased and biased. On September 19, 2017, the criteria justifying the need to restrict the freedom of expression of website operators in a democratic society and, at the same time, the civil liability for the consequences of anonymous comments violating the right to privacy were applied by analogy to *Tamiz v. the United Kingdom* case (*Payam Tamiz v. the United Kingdom (2017)*), which in general analyzed the liability of a potential information society intermediary.

Thus, while the ECtHR supports the interpretation of the criteria for limiting the freedom of expression of the context-sensitive webmaster to make civil liability for anonymous comments, the reasoning behind the *Delfi v. AS Estonia* case was expressis verbis decoupled from the other nature of webmaster liability, the foregoing, and the fact that the technical means of disseminating information (for example, by television, radio, internet, etc.) does not lead to other forms of protection of individual rights, implies that all of the above criteria apply mutatis mutandis to the liability of various types of webmasters and, by analogy, of intermediary information society service providers or even, as in the Lithuanian courts, of factual commentators (*Judgment of Klaipėda Regional Court of 27 February, 2014, civil case no. 2A-142-538 / 2014*).

In the light of the continuity of their research, the authors in the following paragraph disclose one of the elements of proportionality in the application of the civil liability of a website operator to the damage caused to a third party by its visitors through unlawful comments: this is the criterion for the consequences of the liability imposed on the website operator by national law which is assessed by the institution of civil liability.

2. A criterion of potential consequences of liability of an Internet portal for unlawful comments of its visitors

While the doctrine rightly states that changing the behavior of online marketers requires clear standards of good conduct and not responsibility for the actions of visitors to their uncontrolled sites (Pappalardo, 2014), even in deontological literature, the behavior of website operators is usually measured from the perspective of consequences rather than from the means through which they are achieved (Thompson, 2016). There are two

reasons for this: first, website operators are best placed to prevent online malpractice because of their capabilities, and secondly, applying liability to them would help solve the problem of redress (Rustad & Koenig, 2005a, 2005b). This trend is also reflected in the ECtHR case-law that justifies the civil liability of webmasters for the damage caused by anonymous comments – namely, the consequences of civil liability for anonymous comments posted on its web site that infringe the privacy of third parties.

From the point of view of civil law, the content of this criterion is examined in individual ECtHR cases. In the *Delfi AS v. Estonia* case, the following property and non-property aspects of the consequences were analyzed in order to assess the possible adverse consequences of the application of civil liability for anonymous comments violating the privacy of third parties to Delfi AS.

The property aspects of determining consequences are:

- a) Absolute amount of compensation for non-pecuniary damage suffered by the victim: EUR 320;
- b) Relative amount of compensation applied as a proportion of the sanction to the website manager's position. Delfi AS is a professional manager of one of the largest news portals in Estonia and therefore such a minor sanction can in no way be regarded as inappropriate for the infringement committed by the ECtHR;
- c) Additional operating costs as a result of court decisions. Following the ruling of the ECtHR, Delfi AS has set up a special team of moderators to monitor and delete all comments appearing on www.delfi.ee, the cost of which was undoubtedly high (ie additional funds).

The property aspects of determining consequences are:

- d) Impact of national court decisions on the business model chosen by the website operator. As a result, Delfi AS did not change its business model, and during the *Delfi AS v. Estonia* case before the ECtHR, anonymous comments continued to dominate, in the first place, comments from registered users, primarily to readers;
- e) Change in readership (popularity): www.delfi.ee continues to be one of the largest Estonian news websites in Estonia and so far the most popular with the ever-growing number of comments;
- f) Following *Delfi AS v. Estonia* case, the subsequent case law of Estonia on the liability of other website operators. Later, in Estonia, there were other cases that recognized the possibility of civil liability of the website operator for unlawful comments by visitors (Judgment of the Tallinn Court of Appeal of 21 February 2012, civil case no. 2-08-76058; Judgment of the Tallinn Court of Appeal of 27 June 2013, civil case no. 2-10-46710). Thus, the decisions of other Estonian Internet portal managers in the Delfi AS case of national courts and the ECtHR did not have any negative consequences.

The ECtHR, after considering that Delfi AS had sufficient control over the comments posted on its portal and finding, in accordance with the above criteria, that Delfi AS was not adversely affected by the Estonian courts, found that Delfi AS recognized an obligation to remove unlawful, hateful, and violent comments are not a disproportionate restriction on freedom of expression. On the other hand, following the ruling on the *Delfi AS v. Estonia* case, there was

a debate among scientists about the unjustified imposition of an absolute obligation to monitor all comments that appear (Caddell, 2016a, 2016b), for which Delfi AS was forced to set up a dedicated team of moderators on www.delfi.ee. It has also been feared that this proactive imposition of comment obligations threatens to strike a fair balance between the rights and legitimate interests of online market participants and inevitably leads to private censorship (Brunner, 2016; Frosio, 2017).

Paradoxically, a similar obligation imposed on webmasters of the Hungarian courts by the judgment in the *MTE & Index v. Hungary* case was seen as an exaggeration and an infringement of the right to free information sharing on the Internet. Although in the present case *MTE and Index*, which manage the websites, were not ordered to pay non-pecuniary damage, they were ordered to pay the costs, including the costs of the applicant's representation in court. In the latter case, in assessing the consequences of civil liability for webmasters, the ECtHR considered the substantive, negative and decisive effect of the decisions of Hungarian courts to be not so much the award of specific redress as the way in which web portals are held liable for the further legal disputes in which damages will already be awarded.

The ECtHR emphasized in particular the crucial role of the media in a democratic society (as it did in the *De Haes and Gijssels v. Belgium* case) and noted that the Hungarian Constitutional Court also ruled that the management of Internet portals allowing comment without prior editing was a medium for the exercise of freedom of expression. The ECtHR noted that the Hungarian courts did not assess that the applicants were part of free electronic media and did not analyze how the application of liability to the managers of these two different websites would affect freedom of expression on the Internet. Thus, according to the ECtHR, the imposition of such objective liability on the website operator for the comments of visitors, even without seeking a balance between the rights and obligations of the applicant and the defendants, may have a foreseeable negative impact on the web commenting environment. For example, encouraging the general withdrawal of comments and restricting the exercise of freedom of expression on the Internet, which, in the ECtHR's view, could have a direct or indirect negative impact on freedom of expression on the Internet, would be extremely damaging to non-commercial websites such as *MTE*. According to the ECtHR, the mere fact that, in apportioning the burden of liability, the courts did not even seek a balance of rights and obligations between the plaintiff and the defendants casts doubt on the adequacy of the protection of applicants' freedom of expression under national law.

In *Pihl v. Sweden* case, the non-civil liability of the blogging association did not have any negative consequences to it, but the ECtHR reiterated its earlier position in the *MTE & Index v. Hungary* case that liability for third party comments could have adverse consequences for the commenting in internet and thereby reduce enforcement of online freedom. Such effects can be particularly damaging to a non-commercial website. In the *Tamiz v. United Kingdom* case, *Google Inc.* nor did it have any negative consequences, but it is also noted in this case that the crucial role of internet service providers such as *Google Inc.* must be taken into account when deciding on civil liability for website operators in order to take into consideration the role of facilitating access to information and debate on a variety of political, social and cultural topics. Member States have a wide margin of discretion in this regard in order to achieve a fair treatment of the applicant's right to privacy under Article 8 of the ECHR and the balance between

the right to freedom of expression guaranteed to Google Inc. and end-users of the Internet (this reasoning should be seen as a continuation of the ECtHR's *Max Rufus Mosley v. the United Kingdom* (2011). ECtHR in the *Tamiz v. the United Kingdom* case, also identified two factors to be taken into account in defining the limits of the State's discretion in such cases: the nature of the action, including the seriousness of the interference with the right to private life; the existence or absence of safeguards.

In summary, in assessing the civil liability of website operators for their comments on third parties' privacy violations, the ECtHR in *Delfi AS* assessed the amount of damages awarded to *Delfi AS* (EUR 320) for non-pecuniary damage. At the time, in the *MTE & Index v. Hungary* case, while *Index's* legal status in the latter case was analogous to that of *Delfi AS*, the very fact of applying liability was recognized as legally unacceptable and dangerous to freedom of expression. As the fact of applying liability and the extent of liability already applied are not the same, this position of the ECtHR does not appear to be consistent and does not explicitly answer the question of whether national courts, when assessing the effects of a decision on the exercise of freedom of expression, should consider the legal consequences of the imposition of liability or its magnitude.

However, from the ECtHR's reasoning in subsequent *Pihl v. Sweden* and *Tamiz v. the United Kingdom* cases, which highlight the potentially negative consequences of third party commentary liability on a non-commercial website and the potential for restricting freedom of expression and reducing the scope for expression, suggest that the ECtHR, by analyzing the consequences of civil liability on website operators, focuses in particular on the fact of civil liability for the effects of anonymous comments as (a) a circumstance that may limit freedom of expression and (b) a precedent for future litigation that will address the specific amount of civil liability rather than justification.

The foregoing implies that the question of justifying the civil liability of a web portal manager must be weighed against (a) not only the financial and (b) the ad hoc short-term and (c) the long-term adverse effects and (d) the possible effects of the judgment on the concept of free media in general, and other (e) property and non-material consequences for the democratic society as a whole, in particular, which could adversely affect freedom of expression. Although this criterion of the ECtHR is broadly formulated in public law in its analysis of the proportionality of the application of civil liability to webmasters, whether or not it has been imposed, civil liability in national courts dealing with the effects of the right to privacy, despite the fact that the criterion of negative consequences for the webmaster neither confirms nor denies his civil liability and is not related to the fact of civil liability in private law.

While making civil liability for website operators responsible for anonymous comments violating the privacy rights of third parties, courts should certainly take into account the potential property and non-property consequences of such civil liability, but because civil matters do not address the question of the expediency and objectivity of statutory regulation, the criterion of the consequences for the website operator of the civil liability for the effects of anonymous comments should be regarded as a condition for assessing the extent of the civil liability that has already arisen and should not be regarded as justifying but extending or limiting its scope. In addition, the principle of disposition, which prevails in civil

proceedings, requires that website operator should submit a request to take into account the extremely negative consequences of the civil liability. To sum up, the consequences criterion must be interpreted in a broad sense and should be related in general to the justification for civil liability on the part of the website operator for the consequences of anonymous comments (ie the possibility of applying it). At the time, in private law, this criterion due to the principles of civil and civil procedural law (disposition, adversarial, equality of parties, binding only on the parties to the case, etc.) must be interpreted more narrowly and qualify as a factor defining the scope of civil liability.

Conclusions

In assessing whether the liability of website operator for anonymous comments on its website for violation of the privacy of third parties can be justified, it is necessary to consider not only the financial, but also the other *ad hoc* short and long term negative effects for the individual website operator, also the consequences of this precedent for analogous entities, and the potential impact of the judgment on the concept of free media in general. The other property and non-property consequences for a democratic society as a whole must also be taken into account, in particular with regard to their impact on freedom of expression.

Public law criteria of the consequences that arise or might arise for website operator civil liability must necessarily be integrated into the civil liability application process. However, it does not deny the existence of civil liability conditions of private law and is not relevant to the fact that a third party is liable to a third party for damages arising from an infringement of their right to privacy by anonymous comments from website visitors.

The criterion of the consequences arising from and / or likely to arise from civil liability is to be classified as a condition for assessing the extent of of already existing civil liability. Therefore, in civil law, it must be regarded not as justifying the application of civil liability, but as determining its scope – i.e. an expanding or restrictive factor, taking into account the specificities of the regulation of tort law in each individual state.

Disclosure statement

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