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» Samenvatting

MTE is een samenwerkingsverband tussen internetproviders dat ook een eigen internetportal heeft waarop nieuwsberichten verschijnen. Index is de eigenaar van een van de grootste nieuwssites in Hongarije. Beiden beschikken voor hun portals over een notice-and-take-down-procedure; Index kan bovendien commentaren modereren en eventueel verwijderen. Op enig moment is op de portals een nieuwsbericht geplaatst met commentaar op onoirbare advertentiepraktijken door een vastgoedbedrijf, waarop enkele voor dat bedrijf beledigende commentaren zijn geplaatst. Daarop is het vastgoedbedrijf een smaadprocedure gestart, in het kader waarvan de klagers beide volledig verantwoordelijk zijn gehouden voor de commentaren die op de portals zijn verschenen. Volgens klagers levert dat een schending van de vrijheid van meningsuiting op. Er is enig debat tussen de partijen over de voorzienbaarheid van de regelgeving, nu de EU-richtlijn 2000/31 eigenlijk niet lijkt toe te staan dat internetproviders volledig verantwoordelijk worden gehouden voor bepaalde uitingen, maar het EHRM gaat daarop niet echt in en geeft vooral aan dat de wettelijke bepalingen voldoende voorzienbaar maakten dat deze aansprakelijkheid kon bestaan. Vervolgens roept het Hof de uitgangspunten in zijn rechtspraak over de rechten en verantwoordelijkheden van journalisten in herinnering, nu het in dit geval gaat om exploitatie van nieuwssites, net als de rechtspraak over smaad en in het bijzonder de eerdere uitspraak in Delfi, waarin het criteria heeft vastgesteld over verantwoordelijkheid van exploitanten van internetportals. Ook al gaat het in dit geval niet, zoals in Delfi, over hate speech en evenmin over commercieel geëxploiteerde sites, de daar geformuleerde criteria zijn ook hier relevant. Het Hof constateert vervolgens dat de opmerkingen betrekking hadden op een onderwerp van algemeen belang; dat het ging om waardeoordelen; dat weliswaar sprake was van vulgair taalgebruik maar dat dat niet relevant mag zijn voor de beoordeling; dat de nationale autoriteiten ten onrechte niet hebben nagegaan of de klagers voldoende mogelijkheden hadden om onwelgevallige opmerkingen te (laten) verwijderen; dat die mogelijkheden er in dit geval wel degelijk waren

en dat ze effectief konden zijn; dat de beoordeling van volledige verantwoordelijkheid voor de exploitanten neer kan komen op een voortdurende, onuitvoerbare en excessieve hoeveelheid controle op de commentaren die de vrijheid van meningsuiting op het internet kan ondermijnen; dat de reputatie die hier op het spel staat uitsluitend commercieel van aard is en dat het bedrijf toch al aan kritiek onderhevig was vanwege zijn praktijken; en dat de aansprakelijkheidsstelling als zodanig – nog los van de precieze financiële consequenties – een chilling effect kan hebben. Schending art. 10 EVRM.

beslissing/besluit

» Uitspraak

I. Alleged violation of Article 10 of the Convention

29. The applicants complained that the rulings of the Hungarian courts establishing objective liability on the side of Internet websites for the contents of users' comments amounts to an infringement of freedom of expression as provided in Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

30. The Government contested that argument.

A. Admissibility

31. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

32. At the outset, the applicants drew attention to the EU framework governing intermediary liability and the relevant international standards developed by the United Nations Special Rapporteur on Freedom of Expression as well as the Council of Europe expressed notably by the Committee of Ministers.

33. Moreover, in their view, it was immaterial which precise domestic legal provisions had served as the basis of the restriction complained of. The State interference resulted in the applicants' objective liability for the comments made on their websites.

34. They disputed the rulings of the Hungarian courts according to which the comments had violated others' right to good reputation. Those comments had appeared in a public debate on a matter of common interest. The debate concerned the unethical conduct of a service-provider, where there should be little restriction on expressions, even disturbing ones, especially when it comes to value judgments as in the present case. In any case, the comments could not be equated with edited readers' letters.

35. The applicants also contended that the lawfulness of the interference leaves a lot to be desired because the domestic legal practice was divergent in such cases.

36. As to the Government's suggestion that liability for comments could be avoided either by pre-moderation or by disabling commenting altogether, the applicants argued that both solutions would work against the very essence of free expression on the Internet by having an undue chilling effect.

37. The applicants furthermore contended that imposing strict liability on online publications for all third-party contents would amount to a duty imposed on websites to prevent the posting, for any period of time, of any user-generated content that might be defamatory. Such a duty would place an undue burden on many protagonists of the Internet scene and produce significant censoring, or even complete elimination, of user comments to steer clear of legal trouble – whereas those comments tend to enrich and democratise online debates.

38. It was noteworthy that the law of the European Union and some national jurisdictions contained less restrictive rules for the protection of rights of others and to manage liability of hosting service providers. Indeed, the application of the "notice and take down" rule was the adequate way of enforcing the protection of reputation of others.

39. The stance of the Hungarian authorities had resulted in disproportionate restriction on the applicants' freedom of expression in that they had had to face a successful civil action against them, even though they had removed the disputed contents at once after they had learnt, from the court action, that the company concerned had perceived them as injurious. The legal procedure, along with the fees payable, must be seen as having a chilling effect.

40. To conclude, the applicants maintained that the simple application of the traditional rules of editorial responsibility, namely strict liability, was not the answer to the new challenges of the digital era. Imposing strict liability on online publications for all third-party content would have serious adverse repercussions for the freedom of expression and the democratic openness in the age of Internet.

(b) The Government

41. The Government conceded that there had been an interference with the applicants' right to freedom of expression, albeit one prescribed by law and pursuing the legitimate aim of the protection of the rights of others. In their view, the authorities had acted within their margin of appreciation essentially because by displaying the comments the applicants had exceeded the limits of freedom of expression as guaranteed under the Convention.

42. The Government noted that the courts had not availed themselves of the notion of objective liability to be borne by Internet service providers for users' comments. Pursuant to its Section 1(4), Act no. CVIII of 2001 on Electronic Commercial Services (see paragraph 22 above) had not been applicable in the case, since its scope did not extend to communications made by persons acting outside the sphere of economic or professional activities or public duties by making use of an information society-related service. The applicants' objective liability had occurred since they had disseminated opinions privately expressed by

other persons in a manner violating the law. Consequently, the general provisions of the Civil Code governing the protection of personality rights had been relied on by the courts. As they stated, an expression damaging reputation might also be committed by imparting and disseminating information obtained from other persons. The expressions published had contained unduly injurious, insulting and humiliating statements of facts which were contrary to the rules governing the expression of opinions. The publication of a fact might also amount to an opinion since the circumstances of the publication might reflect an opinion. Honour and reputation, however, did constitute an outer limit even to opinions or value judgments. Under Articles 75(1) and 78(1)-(2) of the Civil Code, the statement or dissemination of an injurious and untrue fact concerning another person, or the presentation with untrue implications of a true fact relating to another person constituted defamation.

43. The applicants' own right to impart and disseminate information and ideas was in no way violated. Indeed, they had not disputed that the comments had infringed the plaintiff's personality rights. As regards the publication of the ideas of others, to avoid the legal consequences of allowing the comments the applicants could have pre-moderated them or not disallowed them altogether. Those who enabled the display of unmoderated comments on their websites should foresee that unlawful expressions might also be displayed – and sanctioned under the rules of civil law.

44. In assessing the necessity of the interference, the Government argued that the case involved a conflict between the right to freedom of expression and the protection of the honour and rights of others. The national courts had solved the conflict by weighing the relevant considerations in a manner complying with the principles laid down in Article 10 of the Convention. The comments were undoubtedly unlawful; and the sanctions applied were not disproportionate in that the courts limited themselves to establishing the breach of the law and obliging the applicants to pay only the court fees.

2. The Court's assessment

45. The Court notes that it was not in dispute between the parties that the applicants' freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts' decisions. The Court sees no reason to hold otherwise.

46. Such an interference with the applicant company's right to freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

47. In the present case the parties' opinion differed as to whether the interference with the applicants' freedom of expression was "prescribed by law". The applicants argued that under the European legislation hosting service providers had restricted liability for third-party comments. The Government referred to section 1(4) of Act no. CVIII of 2001 to the effect that private expressions, such as the impugned comments, fell outside the scope of that Act. They relied on section 75(1) and 78(1)-(2) of the Civil Code and argued that the applicants were liable for imparting and disseminating private opinions expressed by third-parties.

48. The Court observes that the Court of Appeal concluded that the applicants' case did not concern electronic commercial activities, and, in any case, pursuant to its section 1(4), Act no. CVIII of 2001 was not applicable to the impugned comments (see paragraph 20 above). The *Kúria*, while upholding the second-instance judgment found, without further explanation, that the applicants were not intermediaries in terms of section 2(lc) of that Act (see paragraph 22 above).

The domestic courts, thus, chose to apply Article 78 of the Civil Code, although, apparently, for different reasons.

49. The Court reiterates in this context that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among others, *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999 III). The Court also reiterates that it is not for it to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004 I). Thus, the Court confines itself to examining whether the *Kúria*'s application of the relevant provisions of the Civil Code to the applicants' situation was foreseeable for the purposes of Article 10 § 2 of the Convention. As the Court has previously held, the level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 142, ECHR 2012). The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see*Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007 IV).

50. The Court notes that the *Kúria* did not embark on an explanation whether and how Directive 2000/31/EC was taken into account when interpreting section 2(lc) of Act no. CVIII of 2001 and arriving to the conclusion that the applicants were not intermediaries in terms of that provision, despite the applicants' suggestion that the correct application of the EU law should have exculpated them in the circumstances.

51. Nonetheless, the Court is satisfied on the facts of this case that the provisions of the Civil Code made it foreseeable for a media publisher running a large Internet news portal for an economic purpose and for a self-regulatory body of Internet content providers, that they could, in principle, be held liable under domestic law for unlawful comments of third-parties. Thus, the Court considers that the applicants was in a position to assess the risks related to their activities and that they must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention (see mutatis mutandis,*Delfi AS*, cited above, §§ 125 to 129).

52. The Government submitted that the interference pursued the legitimate aim of protecting the rights of others. The Court accepts this.

53. It thus remains to be ascertained whether it was "necessary in a democratic society" in order to achieve the aim pursued.

(a) General principles

54. The fundamental principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have been summarised as follows (see, among other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports of Judgments and Decisions* 1998 [illegible]*Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005 [illegible]*Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013; and most recently in *Delfi AS*, cited above, § 131):

“(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

55. Furthermore, the Court has emphasised the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see Bladet Troms⌀ *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999 III; *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; and *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997 I). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Couderc and Hachette Filipacchi Associés v. France* [GC] (no. 40454/07, § 89, 10 November 2015; Bladet Troms⌀ *and Stensaas*, cited above, § 59; and *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313). The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or governments (see, for example, *Delfi AS*, cited above, § 132; *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998 IV; and *Tammer v. Estonia*, no. 41205/98, § 62, ECHR 2001 I).

56. Moreover, the Court has previously held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general (see *Ahmet Yildirim v. Turkey*, no. 3111/10, § 48, ECHR 2012; *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 27, ECHR 2009; and *Delfi*, cited above, § 133). At the same time, in considering the “duties and responsibilities” of a journalist, the potential impact of the medium concerned is an important factor (see *Delfi*, cited above, § 134; see also *Jersild v. Denmark*, cited above, § 31).

57. The Court further reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others v. France*,

no. 64915/01, § 70, ECHR 2004 VI; and *Polanco Torres and Movilla Polanco* v. Spain, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Delfi AS*, cited above, § 137; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; and *A. v. Norway*, no. 28070/06, § 64, 9 April 2009).

58. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *Delfi AS*, cited above, § 138; *Axel Springer AG*, cited above, § 84; *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

59. The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who has been the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see *Axel Springer AG*, cited above, § 87, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, with further references to the cases of *Hachette Filipacchi Associés*, cited above, § 41; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, cited above, § 88, and *Von Hannover (no. 2)*, cited above, § 107, with further references to *MGN Limited*, cited above, §§ 150 and 155; and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Delfi AS*, cited above, § 139; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007 I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999 III; and *Ashby Donald and Others v. France*, no. 36769/08, § 40, 10 January 2013).

(b) Application of those principles to the present case

(i) Preliminary remarks and applicable criteria

60. In order to determine the standards applicable in the instant case, the Court will consider the nature of the applicants' rights of expression in view of their role in the process of communication and the specific interest protected by the interference, namely – as was implied by the domestic courts – the rights of others.

61. The Court notes that both the first applicant, as a self-regulatory body of internet service providers, and the second applicant, as a large news portal, provided forum for the exercise of expression rights, enabling the public to impart information and ideas. Thus, the Court shares the Constitutional Court's view according to which the applicants' conduct must be assessed in the light of the principles applicable to the press (see paragraph 25 above).

62. The Court reiterates in this regard that although not publishers of the comments in the traditional sense, Internet news portals must, in principle, assume duties and responsibilities. Because of the particular nature of the Internet, those duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party contents (see *Delfi AS*, cited above, § 113).

63. In particular, the Court has examined in the case of *Delfi AS* the duties and responsibilities under Article 10 § 2 of large Internet news portals where they provide, for economic purposes, a platform for user-generated comments and where the users of such platforms engage in clearly unlawful expressions, amounting to hate speech and incitement to violence.

64. However, the present case is different. Although offensive and vulgar (see paragraphs 12 and 14 above), the incriminated comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence. Furthermore, while the second applicant is the owner of a large media outlet which must be regarded as having economic interests, the first applicant is a non-profit self-regulatory association of Internet service providers, with no known such interests.

65. The domestic courts found that the impugned statements violated the personality rights and reputation of the plaintiff company, a moral person. At this juncture the Court notes that the domestic authorities accepted without any further analysis or justification that the impugned statements were unlawful as being injurious to the reputation of the plaintiff company.

66. As the Court has previously held, legal persons could not claim to be a victim of a violation of personality rights, whose holders could only be natural persons (see *Sdruzení Jihoceské Matky v. Czech Republic* (dec.), no. 19101/03, 10 July 2006). There is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court, interests of commercial reputation are devoid of that moral dimension (see *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011). Moreover, the Court reiterates that there is an interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II; *Kuliś and Rózycki v. Poland*, no. 27209/03, § 35, ECHR 2009).

67. However, in the present case it is not necessary to decide whether the plaintiff company could justifiably rely on its right to reputation, seen from the perspective of Article 8 of the Convention. It suffices to observe that the domestic courts found that the comments in question constituted an infringement of its personality rights. Indeed, it cannot be excluded that the impugned comments were injurious towards the natural person behind the company and that, in this sense, the decisions of the domestic courts intended to protect, in an indirect manner, that person from defamatory statements. The Court will therefore proceed under the assumption that – giving the benefit of the doubt to the domestic courts' stance identifying a valid reputational interest – there was to be a balancing between the applicants' Article 10 rights and the plaintiff's Article 8 rights.

68. The Court has already had occasion to lay down the relevant principles which must guide its assessment in the area of balancing the protection of freedom of expression as enshrined in Article 10 and the protection of the reputation of those against whom allegations were made, a right which, as an aspect of private life, is protected by Article 8 of the Convention. It identified a number of relevant criteria, out of which the particularly pertinent in the present case, to which the Court will revert below, are: contribution to

a debate of public interest, the subject of the report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the gravity of the penalty imposed on the journalists or publishers (see *Couderc and Hachette Filipacchi Associés v. France* [GC], cited above, § 93; *Von Hannover v. (no. 2)*, cited above, §§ 108 to 113, ECHR 2012; and *Axel Springer AG*, cited above, §§ 90-95, 7 February 2012). At this juncture the Court would add that the outcome of such a balancing performed by the domestic courts will be acceptable in so far as those courts applied the appropriate criteria and, moreover, weighed the relative importance of each criterion with due respect paid to the particular circumstances of the case.

69. In the case of *Delfi AS*, the Grand Chamber identified the following specific aspects of freedom of expression in terms of protagonists playing an intermediary role on the Internet, as being relevant for the concrete assessment of the interference in question: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the applicant company (see*Delfi AS,* cited above, §§ 142-43).

70. These latter criteria were established so as to assess the liability of large Internet news portals for not having removed from their websites, without delay after publication, comments that amounted to hate speech and incitement to violence. However, for the Court, they are also relevant for the assessment of the proportionality of the interference in the present case, free of the pivotal element of hate speech. It is therefore convenient to examine the balancing, if any, performed by the domestic courts and the extent to which the relevant criteria (see *Von Hannover (no. 2)*, cited above, §§ 108 to 113) were applied in that process, with regard to the specific aspects dictated by the applicants' respective positions (see *Delfi AS*, cited above, §§ 142-43).

71. Consequently, it has to be ascertained if the domestic authorities struck an appropriate balance between the applicants' right under Article 10, as protagonists in providing Internet platform for, or inviting expressions from, third-parties on the one hand, and the rights of the plaintiff company not to sustain allegations infringing its rights under Article 8, on the other. In particular, in the light of the *Kúria*'s reasoning, the Court must examine whether the domestic courts' imposition of liability on the applicants for third-party comments was based on relevant and sufficient reasons in the particular circumstances of the case.

The Court itself will proceed to assess the relevant criteria as laid down in its case-law to the extent that the domestic authorities failed to do so.

(ii) Context and content of the impugned comments

72. As regards the context of the comments, the Court notes that the underlying article concerned the business practice of two large real estate websites, which was deemed misleading and injurious to their clients, thus there was a public interest in ensuring an informed public debate over a matter concerning many consumers and Internet users. The conduct in question had already generated numerous complaints to the consumer protection organs and prompted various procedures against the company concerned (see paragraph 16 above). The Court is therefore satisfied that the comments triggered by the article can be regarded as going to a matter of public interest.

Moreover, against this background, the article cannot be considered to be devoid of a factual basis or provoking gratuitously offensive comments.

73. The Court attaches importance to the fact that the second applicant is the owner of a large news portal, run on a commercial basis and obviously attracting a large number of comments. On the contrary, there is no appearance that the situation of the first applicant, the self-regulatory association of Internet content providers, was in any manner similar; indeed, the latter's publication of contents of predominantly professional nature was unlikely to provoke heated discussions on the Internet. At any rate, the domestic courts appear to have paid no attention to the role, if any, which the applicants respectively played in generating the comments.

74. As regards the contents of the comments, the domestic courts found that they had overstepped the acceptable limits of freedom of opinion and infringed the right to reputation of the plaintiff company, in that they were unreasonably offensive, injurious and degrading.

75. For the Court, the issue in the instant case is not defamatory statements of fact but value judgments or opinions, as was admitted by the domestic courts. They were denouncements of a commercial conduct and were partly influenced by the commentators' personal frustration of having been tricked by the company. Indeed, the remarks can be considered as an ill-considered reaction (compare and contrast *Palomo Sánchez and Others* cited above, § 73). They were posted in the context of a dispute over the business policy of the plaintiff company perceived as being harmful to a number of clients.

76. Furthermore, the expressions used in the comments were offensive, one of them being outright vulgar. As the Court has previously held, offence may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult (see *Skalka v. Poland*, no. 43425/98, § 34, 27 May 2003); but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression (see *Uj*, cited above, § 23).

77. Without losing sight of the effects of defamation on the Internet, especially given the ease, scope and speed of the dissemination of information (see *Delfi AS*, cited above,§ 147), the Court also considers that regard must be had to the specificities of the style of communication on certain Internet portals. For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – a consideration that reduces the impact that can be attributed to those expressions.

(iii) Liability of the authors of the comments

78. As regards the establishment, in the civil proceedings, of the commentators' identities, the Court notes that the domestic authorities did not at all address its feasibility or the lack of it. The Constitutional Court restricted its analysis to stating that the injured party was unlikely to receive any compensation without the liability of the operator of the Internet portal.

At this juncture, the Court notes that there is no appearance that the domestic courts enquired into the conditions of commenting as such or into the system of registration enabling readers to make comments on the applicants' websites.

79. The national courts were satisfied that it was the applicants that bore a certain level of liability for the comments, since they had "disseminated" defamatory statements (see paragraph 42 above), however without embarking on a proportionality analysis of the liability of the actual authors of the comments and that of the applicants. For the Court, the conduct of the applicants providing platform for third-parties to exercise their freedom of expression by posting comments is a journalistic activity of a particular nature

(see *Delfi AS*, cited above, §§ 112-13). Even accepting the domestic courts' qualification of the applicants' conduct as "disseminating" defamatory statements, the applicant's liability is difficult to reconcile with the existing case-law according to which "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild*, cited above, § 35; *Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001 III; and, mutatis mutandis, *Verlagsgruppe News GmbH v. Austria*, no. 76918/01, § 31, 14 December 2006, *Print Zeitungsverlag GmbH v. Austria*, no. 26547/07, § 39, 10 October 2013; and *Delfi AS*, cited above, § 135).

(iv) Measures taken by the applicants and the conduct of the injured party

80. The Court observes that although the applicants immediately removed the comments in question from their websites upon notification of the initiation of civil proceedings (see paragraphs 15 above), the *Kúria* found them liable on the basis of the Civil Code, since by enabling readers to make comments on those websites and in connection to the impugned article, they had assumed objective liability for any injurious or unlawful comments made by those readers. As the Budapest Court of Appeal held, the circumstances of removing the comments were not a matter relevant for the assessment of objective liability but one for the assessment of any compensation (see paragraph 20 above).

81. The Court observes that the applicants took certain general measures to prevent defamatory comments on their portals or to remove them. Both applicants had a disclaimer in their General terms and conditions stipulating that the writers of comments – rather than the applicants – were accountable for the comments. The posting of comments injurious to the rights of third parties were prohibited. Furthermore, according to the Rules of moderation of the second applicant, "unlawful comments" were also prohibited. The second applicant set up a team of moderators performing partial follow-up moderation of comments posted on its portal. In addition, 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. The moderators and the service providers could remove comments deemed unlawful at their discretion (see paragraphs 7-10 above).

82. The domestic courts held that, by allowing unfiltered comments, the applicants should have expected that some of those might be in breach of the law. For the Court, this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.

83. The Court also observes that the injured company never requested the applicants to remove the comments but opted to seek justice directly in court – an element that did not attract any attention in the domestic evaluation of the circumstances.

Indeed, the domestic courts imposed objective liability on the applicants for "having provided space for injurious and degrading comments" and did not perform any examination of the conduct of either the applicants or the plaintiff.

(v) Consequences of the comments for the injured party

84. As the Court has previously held in the context of compensation for the protraction of civil proceedings, juristic persons may be awarded compensation for non-pecuniary damage, where consideration should be given to the company's reputation (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000 IV). However, the Court reiterates that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are

primarily of business nature and devoid of the same moral dimension which the reputation of individuals encompasses. In the instant application, the reputational interest at stake is that of a private company; it is thus a commercial one without relevance to moral character (see, mutatis mutandis, *Uj*, cited above, § 22).

85. The consequences of the comments must nevertheless be put into perspective. At the time of the publication of the article and the impugned comments, there were already ongoing inquiries into the plaintiff company's business conduct (see paragraph 17 above). Against this background, the Court is not convinced that the comments in question were capable of making any additional and significant impact on the attitude of the consumers concerned. However, the domestic courts do not appear to have evaluated whether the comments reached the requisite level of seriousness and whether they were made in a manner actually causing prejudice to a legal person's right to professional reputation (see paragraph 57 above).

(vi) Consequences for the applicants

86. The applicants were obliged to pay the court fees, including the fee paid by the injured party for its legal representation (see paragraph 22 above), but no awards were made for non-pecuniary damage. However, it cannot be excluded that the court decision finding against the applicants in the present case might produce legal basis for a further legal action resulting a damage award. In any event, the Court is of the view that the decisive question when assessing the consequence for the applicants is not the absence of damages payable, but the manner in which Internet portals such as theirs can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet. This effect could be particularly detrimental for a non-commercial website such as the first applicant (compare and contrast *Delfi AS*, cited above, § 161).

87. The Constitutional Court held that the operation of Internet portals allowing comments without prior moderation was a forum of the exercise of freedom of expression (see paragraph 25 above). Indeed, the Court stressed on many occasions the essential role which the press plays in a democratic society (see *De Haes and Gijsels v. Belgium*, cited above, § 37) – a concept which in modern society undoubtedly encompasses the electronic media including the Internet.

88. However, the Court cannot but observe that the Hungarian courts paid no heed to what was at stake for the applicants as protagonists of the free electronic media. They did not embark on any assessment of how the application of civil-law liability to a news portal operator will affect freedom of expression on the Internet. Indeed, when allocating liability in the case, those courts did not perform any balancing at all between this interest and that of the plaintiff. This fact alone calls into question the adequacy of the protection of the applicants' freedom-of-expression rights on the domestic level.

(vii) Conclusion

89. The Court considers that the rigid stance of the Hungarian courts reflects a notion of liability which effectively precludes the balancing between the competing rights according to the criteria laid down in the Court's case law (see *Von Hannover (no. 2)*, cited above, § 107).

90. At this juncture, the Court reiterates that it is not for it to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland*, cited above, § 67).

91. However, in the case of *Delfi AS*, the Court found that 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. The Court sees no reason to hold that such a system could not have provided a viable avenue to protect the commercial reputation of the plaintiff. It is true that, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties (see *Delfi AS*, cited above, § 159). However, the present case did not involve such utterances.

The foregoing considerations are sufficient for the Court to conclude that there has been a violation of Article 10 of the Convention.

II. Application of Article 41 of the Convention

92. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

93. The applicants made no damage claim.

B. Costs and expenses

94. The applicants, jointly, claimed 5,100 euros (EUR) for the costs and expenses incurred before the Court. This sum corresponds to 85 hours of legal work billable by their lawyer at an hourly rate of EUR 60.

95. The Government contested this claim.

96. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed.

C. Default interest

97. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court, unanimously,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicants, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,100 (five thousand one hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and

expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Concurring opinion of Judge Kūris

1. Somewhat similarly to *Delfi AS v. Estonia* (GC] (no. 64569/09, ECHR 2015), which was, in the Court's own words, "the first case in which the Court has been called upon to examine a complaint of this type [regarding the liability of Internet providers for the contents of comments]", the present case is the first in which the principles set forth in *Delfi AS*, to the balanced reasoning in which I subscribe, have been called upon to be applied and, at the same time, tested.

2. Together with my colleagues, I voted for the finding of a violation of Article 10 of the Convention. The vulgar and offensive comments dealt with in the present case were value judgments of no value whatsoever; however, they did not incite violence, did not stoop to the level of hate speech and, at least in this most important respect, could not *a priori* be viewed by the applicants as "clearly unlawful". This is essentially what distinguishes these comments from the hate speech dealt with in *Delfi AS*. This decisive difference is rightly noted in, *inter alia*, paragraph 64 of the judgment. Thus, although it results in the opposite conclusion to that found in *Delfi AS*, the present judgment does not, in my opinion, depart from the *Delfi AS* principles.

3. Consequently, this judgment should in no way be employed by Internet providers, in particular those who benefit financially from the dissemination of comments, whatever their contents, to shield themselves from their own liability, alternative or complementary to that of those persons who post degrading comments, for failing to take appropriate measures against these envenoming statements. If it is nevertheless used for that purpose, this judgment could become an instrument for (again!) whitewashing the Internet business model, aimed at profit at *any* cost.

If, alas, such a regrettable turn of events should occur, those in the Internet business would not stand alone in their moral responsibility for further contamination of the public sphere. And we cannot pretend that we do not know *who* – if not personally, still certainly *institutionally* – would have to share that responsibility. If things develop in that direction, then Judge Bostjan Zupancic's pointed remark in his concurring opinion in *Delfi AS* would become even more pertinent (emphasis added):

"I do not know why the national courts hesitate in adjudicating these kinds of cases and affording strict protection of personality rights and decent compensation to those who have been subject to these kinds of abusive verbal injuries, but I suspect that *our own case-law has something to do with it*."

4. This is the first post-*Delfi* judgment, but, of course, it will not be the last. It is confined to the individual circumstances of this particular case. There will inevitably be other cases dealing with liability for the contents of Internet messages and the administration thereof. Today, it is too early to draw generalising conclusions. One should look forward to these future cases, with the hope that the present judgment, although it may now appear to some as a step back from *Delfi AS*, will prove to be merely further evidence that the balance to be achieved in cases of this type is a very subtle one.

» Noot

1. The European Court of Human Rights' judgment in the case of *Magyar Tartalomszolgátatók Egyesülete (MTE) en Index.hu Zrt* had been much anticipated because it presented the Court with its first opportunity to re-engage with issues of Internet intermediary liability since its Grand Chamber judgment in the *Delfi* case (*Delfi AS* v. *Estonia* ECHR 16 June 2015 [GC], no. 64569/09, «EHRC» 2015/172 case comment Van der Sloot). In *Delfi*, the Estonian courts held a large online news portal liable for the unlawful third-party comments posted on its site in response to one of its own articles, despite having an automated filtering system and a notice-and-take-down procedure in place. The Court found that this did not amount to a violation of Article 10 of the European Convention on Human Rights (ECHR). The judgment has proved controversial, particularly among free speech advocates, who fear that such liability would create pro-active monitoring obligations for Internet intermediaries, leading to private censorship and a chilling effect on freedom of expression (for critical analysis, see: D. Voorhoof, 'De aansprakelijkheid van online nieuwsplatforms na Delfi', *Mediaforum* 2015-6, p. 194-204).

2. Essentially, the present case also concerned the responsibility and liability of Internet service providers for comments posted on their sites by users of their services – in the broader context of a robust public debate on matters of societal interest.

3. The facts and issues thus show a strong resemblance to those of the *Delfi* case. Indeed, the present judgment never really manages to fully emerge from the long shadow cast by *Delfi*, even though the Court was at pains to emphasize what it saw as notable differences between the two cases.

4. In its *Delfi* judgment, the Court stressed that the implications of its findings were limited to the particular set of circumstances with which it was presented (*Delfi*, para. 116). It underscored the particularity of the news portal site and its business model, as well as the nature of some of the impugned statements, which it qualified as "hate speech". This was an exercise in "damage control", according to the Joint Dissenting Opinion of Judges Sajó and Tsotsoria (*Delfi*, Joint Dissenting Opinion, para. 9).

5. In the present case, despite distinguishing the *Delfi* case, the Court used a revised version of the *Delfi* criteria for its examination of whether the interference with the applicants' right to freedom of expression was necessary in a democratic society: the context and content of the impugned comments; the liability of the authors of the comments; the measures taken by the applicants and the conduct of the injured party; the consequences of the comments for the injured party, and the consequences for the applicants (paras. 69 *et seq*.). The focus in this case-note is on the content-related and contextual factors and on their relevance for determining the scope and nature of public debate.

6. Concerning the *content*, the Court emphatically distinguished the two cases on the basis of the nature of the comments. Whereas it had deemed that some of the comments in *Delfi* amounted to hate speech, it described the comments at issue in the present case as "offensive and vulgar", but found that they "did not constitute clearly unlawful speech" and "certainly did not amount to hate speech or incitement to violence" (para. 64).

7. This distinction, which positions hate speech and incitement to violence at the far end of the spectrum of dangerous speech, is consistent with the broad lines of the Court's case-law on the right to freedom of expression. The Court has repeatedly held, for instance, that "a prison sentence for a press offence will be compatible with freedom of expression *only in exceptional circumstances*, namely when other human rights have been *seriously impaired*, for instance *in cases of hate speech or incitement to violence*" [emphasis added] (*Cumpana and Mazare* v.*Romania* ECHR 17 December 2004 [GC], no. 33348/96, «EHRC» 2005/16, par 115, ECHR 2004-XI). Nevertheless, in the absence of a legally-binding definition of hate

speech, as well as inconsistencies in the Court's application of the term, the precise scope of the term remains uncertain and problematic from the perspective of legal certainty and foreseeability.

8. Another content-related question concerned whether the comments damaged the reputational interests of the plaintiff companies. The impugned statements were comments posted in response to an article about the business practices of the plaintiffs - two large real estate websites. The Court has long held that business strategies and practices are a matter of public interest (see, for an early authority, *Markt intern Verlag GmbH and Klaus Beermann* v. *Germany*, ECHR 20 November 1989, no. 10572/83, Series A no. 165) and this was also true in the present case insofar as it dealt with a matter concerning consumers and Internet users. Although not specifically referenced in the present judgment, the Court has held in the past that companies, especially "large public" companies, "inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies" (*Steel and Morris* v. *United Kingdom*, ECHR 15 February 2005, no. 68416/01, «EHRC» 2005/37 case comment Gerards, para. 94).

9. Robust public debate therefore contributes to openness in business practices (*Markt intern*, para. 35), but there is also a countervailing "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good" (para. 66). It is against this background that the commercial reputational interests of the plaintiff company had to be assessed. In making that assessment, the Court distinguished between "the commercial reputational interests of a company and the reputation of an individual concerning his or her social status" (para. 66 (and para. 84), following *Uj* v. *Hungary*, ECHR 19 July 2011, no. 23954/10, para. 22). While the latter might have an impact on an individual's dignity, the former lacks "that moral dimension" (*ibid*.).

10. The Court agreed with the domestic courts' finding that the impugned statements were not defamatory statements of fact, but value judgments or opinions. Following its *locus classicus* on such issues, *Lingens* v. *Austria* (8 July 1986, no. 9815/82, Series A no. 103), the Court held that whereas facts are susceptible of proof, value judgments are not (although they are usually expected to have some factual basis) (*MTE & Index*, para. 75). The fact that the statements were offensive or vulgar – without amounting to "wanton denigration" or having the sole intent to insult (*ibid*., para. 76) – was not decisive for the assessment of whether the statements deserved protection. Article 10 of the Convention covers both the substance and the form of expression, including the style in which a statement is made.

11. Concerning the *context*, in *casu*, the two applicant Internet service providers were a self-regulatory body of Internet service providers and a large online news portal. Both applicants' websites allowed users to post comments in response to the articles they published. Thus, as they provided a forum for the exchange of information and ideas – one of the tasks typically fulfilled by the press in democratic societies – the Court agreed with the Hungarian Constitutional Court's view that the applicants' activities should be governed by principles relating to press freedom (para. 61). The Court even described the provision of a platform for comments as "a journalistic activity of a particular nature" (para. 79).

12. This represents a logical, contemporary interpretation of press freedom. By providing space to comment on articles, media and news organizations can involve readers in their reporting activities. Such involvement – sometimes referred to as open journalism – facilitates public (including expert) input into news-gathering, thereby making it a more dynamic and diverse exercise. It also facilitates public fact-checking, thereby enhancing the quality of the reporting. Readers and users can in these ways make valuable contributions to public debate (*Steel and Morris* v.*United Kingdom*; *Delfi*, dissenting opinion, para. 39) and to the public watchdog activities of the press (see further: T. McGonagle, 'User-generated Content

and Audiovisual News: The Ups and Downs of an Uncertain Relationship', in S. Nikoltchev (ed.), *Open Journalism, IRIS plus* 2013-2, Strasbourg: European Audiovisual Observatory, p. 7-25).

13. The framing of the applicants' activities as press-like activities has important consequences. It means that the body of principles developed by the Court to guarantee journalists', editors' and publishers' right to freedom of expression is applicable *mutatis mutandis* to Internet service providers. For example, the Court recalls the relevance of one of the key principles established in its *Jersild* judgment, i.e., that journalists should not ordinarily be held liable for comments made by others (e.g. in interviews) as that would "seriously hamper the contribution of the press to discussion of matters of public interest" (*Jersild* v. *Denmark*, ECHR 23 September 1994 [GC], no. 15890/89, para. 35, Series A no. 298).

14. However, the Court knew it would have to tread carefully when going down the press freedom road. It therefore cautioned against equating Internet news portals with "publishers of the comments in the traditional sense" (para. 62). It then limited itself to observing that "because of the particular nature of the Internet", the duties and responsibilities to be assumed by Internet news portals "may differ to some degree from those of a traditional publisher, notably as regards third-party contents" (*ibid*.).

15. These cautionary remarks can be explained in part by the fact that as a rule, publishers are aware of the content they publish before they actually publish it. That is patently not the case for users' comments in response to articles on online fora (unless systematic pre-moderation takes place). The analogy with a traditional publisher is therefore only of limited value. Instead, the suggestion in *Delfi*, following the Council of Europe's Committee of Ministers' CM/Rec(2011)7 Recommendation to member states on a new notion of media (21 September 2011), for a "differentiated and graduated" approach, appears to have informed the present judgment, without it having been specifically referenced. Such an approach focuses on the functions carried out by different types of media or other non-media actors.

16. It is clear that Internet intermediaries are wielding increasing power when it comes to shaping public debate, especially in the online environment (see further: R. Broekstra, 'Private communicatiemachthebbers en onze uitingsvrijheid', *Mediaforum* 2015-1, p. 2-11). This places private companies in positions of influence and/or control of dominant modes of public communication. The public interest in robust freedom of expression and strong data protection does not always coincide with intermediaries' private interests, such as commercial goals and the avoidance of legal liability for users' content (see further: P. Leerssen, 'Cut Out By The Middle Man: The Free Speech Implications Of Social Network Blocking and Banning In The EU', 6 (2015)*JIPITEC* 99).

17. With great power comes great responsibility, as the adage goes. If Internet intermediaries are indeed to be seen as the makers and shakers in online public debate, then it is imperative to examine their role, their impact *and* their duties and responsibilities. In *Delfi*, the Court pointed out that the applicant company had channelled users' comments insofar as it had invited reactions to an article it had posted itself (*Delfi*, para. 116). This was seen as a form of influence or control over the direction and nature of the comments. Nevertheless, the Court did not develop this point in a meaningful way in *Delfi* – much to the dissatisfaction of the dissenting judges (*Delfi*, Joint Dissenting Opinion, paras. 27 and 32). Nor was the point examined in a meaningful way in the present case – the Court limited itself to noting that the Estonian courts did not appear to pay any attention to the question either (para. 73). This issue is, however, sure to return in future case-law: there is a correlation between control/influence over the generation and dissemination of content and liability for the same. The Court will only manage to clarify this very grey area if and when it explores it in a detailed manner.

18. Finally, unlike in *Delfi* and perhaps smarting from the critical fall-out to *Delfi*, the Court seems keen in the present judgment to talk up the importance of Internet intermediaries in fostering public debate online. It refers to them as “protagonists”, i.e., principal actors, “of the free electronic media” (para. 88; see also para. 69). While this realization of the broader implications of intermediary liability for robust public debate may well be a first firm step out of *Delfi*’s shadow, the Court still has a long distance to travel before it can claim to have taken an approach that differentiates between different media and other actors according to their functions, impact, duties and responsibilities and re-purposes its existing case-law on freedom of expression and press freedom for optimal application in the online environment. Analogous reasoning based on understandings of traditional or legacy media need to be rethought in light of insights into the capabilities and use of so-called new media technologies.

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