

CHAPTER III

THE REGULATION OF SOCIAL MEDIA PLATFORMS IN HUNGARY



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1. Introduction

This overview will examine various issues related to the operation of social media platforms that have a significant impact on the public, along with their legal regulation and jurisprudence in the Hungarian legal system. The overview comprises two main parts. The first part will examine the general issues related to the definition of censorship and its application, as well as the various issues regarding the interpretation of censorship as it relates to social media and its various manifestations. The second part focuses on the legal means available to combat fake news and disinformation. The stakes are high for the public: According to the most recent data published by the Hungarian Advertising Association in 2020, the Internet had the largest share of the advertising market, with 41.45 per cent of the total advertising expenditure devoted to digital media, most of which was spent on various social media platforms.¹ According to research published by the Information Society Research Institute of the University of Public Service (Budapest), usage data show that Facebook—by far the biggest social media platform worldwide—also has an extremely strong market position in Hungary. While Facebook is used by 79 per cent of Internet users at least once a month (59 per cent use it daily and 16.5 per cent at least

1 MRSZ Barométer—A válság hatásai a reklámparban, 2020.

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once a week), all the other social media platforms combined (Twitter, Instagram, LinkedIn, etc.) are used only by 27 per cent of users at least once a month (12 per cent daily, 11 per cent at least once a week).² Legal regulation is key to guaranteeing the proper functioning of the public sphere while enhancing democracy. However, this overview is intended only to present existing legal approaches in regulation and practice and not to propose future regulatory directions.

2. Content regulation on social media platforms

Social media platforms are subject, like other media, to general legislation that restricts freedom of speech and the public expression of opinions. In addition to these laws, other special rules affecting the content of opinions may also apply, which are adjusted to the unique characteristics of the medium concerned. Legal regimes are forced to apply unique solutions to the problems raised by social media platforms that are not applied in the regulation of legacy media.

2.1. *Prohibition of censorship*

The principle that censorship of specific content is not permissible constitutes a cornerstone of freedom of the press. Obviously, it is not entirely clear what exactly is meant by censorship. A narrow interpretation of the term ‘censorship’ might be construed to mean restrictions that are arbitrary without legal or judicial safeguards (which can be anticipated), hence making publication impossible. In addition to this, in public discourse, the term ‘censorship’ is also used to refer to post-publication restrictions applied after disclosure or publication. Originally the word ‘censorship’ referred to state interference with the content published by the media. As the notion of freedom of the press has developed over time, it has become a generally accepted view that ‘censorship,’ as arbitrary intervention in content, is impermissible, whereas *a posteriori* accountability or prosecution for the publication of unlawful content may be acceptable.

According to Frederick Schauer, the meaning of the term ‘censorship’ has become somewhat hazy.³ On the one hand, censorship can be carried out not only by the state, but also as a result of various processes in society. While censorship can obviously still come from the state, it can also come from private companies. Censorship can be either direct or indirect in nature. Another type of censorship occurs when one person or more chooses to stay out of the public eye in response to an opinion against them published by others, for example, as a result of hate speech; this is called the silencing effect.

² Bizalom, tudatosság, veszélyérzet az interneten, 2020.

³ Schauer, 1998.

Following Schauer, we can conclude that an overly broad application of the concept of censorship can render its scope vague, thereby devaluing it; in this way, censorship will no longer necessarily be as serious a threat as it was for the Hungarian revolutionaries of the mid-nineteenth century (contesting the Habsburg reign), for example. As a result, certain content subject to censorship may be left without proper protection, even when the highest level of protection would be justified. Similarly, the term must be used carefully when discussing censorship by or with the participation of social media platforms.

2.1.1. Censorship in Hungarian history

In Hungary, the abolition of censorship was among the first of the twelve demands of the youth of Pest at the beginning of the revolution against Austrian imperial power in March 1848. More than half a century prior to the revolution, at the end of the eighteenth century, after Francis I, Emperor of Austria and King of Hungary ascended to the throne, the rules of press censorship had become significantly harsher. The development of newspapers and periodicals as a result of the Hungarian Enlightenment abruptly slowed down with the gradually increasing rigor of the censors from 1793 onward and was later paralyzed by the suppression of the Jacobin movement. The emperor's decree of 25 June 1793 made inspecting books and licensing the operation of printing presses a royal right, and by 1795, all periodicals had closed, the number of newspapers had fallen sharply, and their content had become anodyne. A royal charter of 1806 further required a royal patent to open a bookshop. The turnover of booksellers and lending libraries was also monitored separately on the basis of a chancellery order issued on 5 June 1818. Two types of censorship were developed: revision and actual censorship.⁴ Revision—regulated by a court decree of 18 April 1793—entailed the oversight of books and press products imported from abroad. Only books, periodicals, and newspapers approved by the central book inspection agency were allowed to be imported across the border. Censorship—as regulated by the decree of 25 February 1795—involved prior licensing by an appointed official censor, whereas its counterpart was the post-publication inspection of the publications submitted as legal deposit copies. Pursuant to the decree of 18 April 1793, each and every printing press was obliged to hand over three copies of each of their publications to the revisor. The publications were read through and, if any objections were raised, the censor in charge was held accountable, and this made them exercise the utmost caution in their work.

A provision of the Press Act (Act II of 1986)—repealed in 2011—allowing prior restraint was effective until 1997 in Hungary. Pursuant to Article 15(3) of the Act, exercising freedom of the press would have constituted a criminal offense or an incitement to commit such an offense, in the event it would have caused a breach of public morality or of someone's moral rights. Moreover, if the newspaper had been

4 Bényei, 1994, pp. 15–17.

distributed before registration under the requirement of notification, the court could prohibit the ‘public communication’ of the press product concerned on the motion of the prosecutor. The prosecutor had the right to suspend publication temporarily until the court reached a decision.

According to a motion submitted to the Hungarian Constitutional Court (CC) in 1997, this rule was unconstitutional in restricting the freedom of the press. The CC found the provision partly unconstitutional. However, since the constitutional and unconstitutional content were included in the very same sentence—and the CC ‘has no right to rewrite the law’—the CC decided to annul the entire contested provision (20/1997. (III. 19.) AB). The decision did not examine the provision primarily from the point of view of the freedom of the press, thereby implicitly acknowledging that prior restraint is not incompatible with the fundamental right. Most members of the CC were of the opinion that the provision of the law, according to which the prosecutor had the right to request the prohibition of publication in the case of a violation of the moral rights of others or in private prosecutions of crimes—regardless of the will of the victims—violated the right to self-determination. By contrast, the prior restraint on the grounds of public morals was not found to be unconstitutional with regard to criminal offenses, subject to public prosecution or in the event of failure to meet the requirement of notification.

Clearly, the concept of censorship is historically linked to the state, a potentially oppressive mechanism capable of acting against the freedom of speech. However, in the modern media world, since the second half of the twentieth century, the scope of the concept has grown considerably, and censorship as a legal concept is used much more widely than before. On the one hand, censorship is no longer used only in relation to state restrictions, as various private interests (such as advertisers) are also able to restrict media content; on the other hand, censorship is not necessarily applied as a result of external pressure, which recognizes the possibility of internal so-called self-censorship. It is conceivable that the publication of certain specific content may also be required by law, such as communications published as a result of the exercise of the right of reply or public service media providers’ obligation to publish political advertisements during election periods.

2.1.2. Censorship and social media

With the rise of social media, platform operators have emerged as players capable of imposing restrictions on the content made available to the general public. These service providers have a number of means of restricting freedom of speech, either through service settings (algorithms or moderators) and instructions or through case-by-case decisions about specific content. Service providers may interfere with others’ rights to free speech to further their own business or political interests, or in cooperation with some oppressive state regimes.

However, it is important to underline that, in a strict legal sense, intervention by social networking website operators in the communication process (compiling a search engine results list or the social media platform feed, which will necessarily

suppress some opinions by deleting some links or content from the service or moderating comments) cannot be considered censorship, even within the broader interpretation of the term referred to above. Instead, it can be seen as the exercise of rights derived from private property and other subjective rights, which—in the absence of statutory requirements—are free and not prohibited if they use legal means, even if they may be morally objectionable, for instance.

Censorship is traditionally understood as public authorities' arbitrary interference with the exercise of freedom of the press. In such cases, platforms can become the facilitators of public authorities. It follows from the European Union (EU) Regulations, among others, that platforms are required to decide whether specific user content is infringing or not. In certain situations they are obliged to do so by law.⁵ In democratic states, and hence in the EU member states, this state interference cannot be regarded as censorship, but it is clear that platforms' content decisions are completely lacking in safeguards for the protection of the fundamental right.

2.2. Regulation of social media

Social media platforms in Europe are primarily regulated by common EU rules. Member states have room to maneuver on regulation, but it is narrower. When reviewing regulatory issues regarding platforms, one should not forget the regulation created and overseen by the platforms themselves, which is known as private regulation, as distinguished from legal regulation.

2.2.1. Regulation imposed by the European Union

If the gatekeepers merely provide a technical service by making available, storing, or transmitting others' content (similarly to printing houses or news agents), then as long as they are not aware of any infringements, they should not be held liable for infringements committed by others. According to the European approach, after they have become aware of an infringement, they can be held liable for their own failure (that is, for the failure to take down the infringing content). The EU Directive on Electronic Commerce, which aims to regulate this issue, imposes the obligation of takedown after becoming aware of an infringement on certain intermediary service providers.⁶

The activities of gatekeepers covered by the Directive—simple transmission, caching, and hosting—play an important role in online communications, but since the legislation was adopted in 2000, legal liability has arisen for a number of gatekeepers that either did not exist at the time or which were not covered for other reasons, such as search engines or social media. In the absence of a better solution, the courts apply various analogies to these gatekeepers, such as by classifying some of them as hosting providers.

⁵ Directive 2000/31/EC, art. 14.

⁶ Directive 2000/31/EC, arts. 12–14.

The material scope of the legislation is important: the EU Directive grants gatekeepers an exemption from liability, even if they transmit infringing content, provided certain conditions are met. This system of exemptions itself has not necessarily become obsolete, but one thing has certainly changed since 2000: Today's gatekeepers are increasingly less likely to be considered actors that merely store or transmit data and are passive with regard to its content; although the content is still produced by their users or by other actors independent of them, the services themselves select, arrange, prioritize, de-prioritize, delete, or make inaccessible the content in their systems. An equitable rule in the Directive exempts the passive actor until it becomes involved (i.e., until it becomes aware of the infringement), but it seems that this is not the only conceivable approach in this respect for the new types of gatekeepers. Although it is still true that the volume of content these new gatekeepers manage makes the pre-publication monitoring obligation both impossible and unreasonable, the same is true of comprehensive post-publication checking without an external call for attention.

Articles 12 to 14 of the Directive grant broad exemption to intermediary service providers. For hosting service providers, this means that if the content they transmitted or stored was not their own, and if they were not aware of the infringing nature of such content, they are not held liable, provided that they take immediate action to take down the content or terminate access to it (Article 14). However, failure to do this could result in the service provider being held liable for this as if it were its own infringement. In addition, the Directive also stipulates that no general infringement monitoring obligation can be imposed on intermediaries (Article 15). This general prohibition appears to have been undermined by the judgment of the Court of Justice of the European Union (CEJA) in *Glawischnig-Piesczek v. Facebook*,⁷ in which the CJEU ruled that it was not contrary to EU law to oblige a platform provider to delete posts with similar or the same content as a defamatory post that has previously been declared unlawful.

The Commission's subsequent Recommendation reinforces this approach, including the exceptions to liability (notice-and-takedown system) set out in the E-Commerce Directive as a solid basis for dealing with illegal online content.⁸ Although the document applies to states, it aims to broaden gatekeeper obligations and responsibilities through state legislation relating to notification and proper processing of user requests, the possibility of counter-notification by hosting providers, transparency (which seems to be the magic word in these disputes), and procedural safeguards. More importantly, however, "hosting service providers should be encouraged to take, where appropriate, proportionate and specific proactive measures in respect of illegal content,"⁹ but "there should be effective and appropriate safeguards to ensure that hosting service providers act in a diligent and proportionate manner in

⁷ *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd.*

⁸ Commission Recommendation (EU) 2018/334.

⁹ Commission Recommendation (EU) 2018/334, s. 18.

respect of content that they store.”¹⁰ The Recommendation clearly demonstrates the Commission’s approach of strengthening the regulatory mechanisms already in place by formalizing gatekeepers’ (hosting service providers’) existing non-legal procedures and policies.

In addition to the E-Commerce Directive, several more general pieces of legislation also apply to communications via social media platforms, including laws on data protection, copyright, protection of personality rights, public order, and criminal law. Such legal provisions may also introduce special obligations for hosting service providers in the context of taking down violating content.

Offline restrictions on speech are also applicable to communications through social media platforms.¹¹ Common violating behaviors on social media can be fitted into a more traditional criminal category (that is, one that was adopted in the context of the offline world) almost without exception, making the introduction of new prohibitions unnecessary.¹² However, this duality gives rise to numerous difficulties, as, on the one hand, such limitations are defined as part of the national legislation of each and every country (and the law of free speech is also far from being fully harmonized among EU member states), and, on the other hand, social media constitute a global phenomenon by nature, meaning that it transcends national borders. For instance, an opinion that is protected by the freedom of speech in Europe might constitute punishable blasphemy in an Islamic country. Since harmful content can be made available worldwide and shared on a social media platform quickly, the absence of a uniform standard can lead to tensions and even violence.¹³

On-demand media services that can also be accessed through the Internet have been subject to the scope of the Audiovisual Media Services (AVMS) Directive since 2007,¹⁴ but social media are not counted among such services. The main reason for this is that providers of on-demand media services bear editorial responsibility for the content they publish; they order and purchase such content, and they have a final say in publishing a piece of content.¹⁵ In contrast, social media operators only provide a communication platform, but may not make any decision regarding a piece of content before it is published (the situation is different if some kind of preliminary filtering is used, but such filtering only relates to specific categories of content). As social media platforms spread, it became clear, about a decade after the previous amendment of the Directive, that media regulation cannot be interpreted in such a restrictive manner any longer. To address this, the AVMS Directive introduced the terms ‘video-sharing platform service’ and ‘video-sharing platform provider.’¹⁶ Even though the original proposal would not have extended the Directive’s scope to social

10 Commission Recommendation (EU) 2018/334, s. 19.

11 Rowbottom, 2012, pp. 357–366.

12 House of Lords, 2014.

13 Kohl, 2018.

14 Directive 2010/13/EU.

15 Directive 2010/13/EU, art. 1.

16 Directive 2010/13/EU, art. 1(1)aa.

media platforms in general (as it applied to the audiovisual content uploaded to such sites), it became clear during the legislative process that they could not be exempted from the Directive by focusing on portals used primarily and actually to share videos (such as YouTube).¹⁷ This means that despite its somewhat misleading name, a video-sharing platform also includes social media where audiovisual content is published. An important aspect of the newly defined term is that service providers do not bear any editorial responsibility for such content; while service providers do sort, display, label, and organize such content as part of their activities, they do not become media service providers.

Article 28b of the amended Directive provides that Articles 12 to 15 of the E-Commerce Directive (in particular the provisions on hosting service providers and the prohibition of introducing a general monitoring obligation) remain applicable. In addition to this, member states must ensure that video-sharing platform providers operating within their respective jurisdiction take appropriate measures to protect children, combat hate speech and content in support of terrorism, and comply with the rules relating to commercial communications.¹⁸

2.2.2. Provisions of the Hungarian legal system

At the outset, it is worth noting that in the Hungarian legal system, while the activities of social media platforms are regulated by law, judicial practice is very fragmented, which may be due to the difficulties of enforcement against the largest service providers. The Hungarian regulation on electronic commerce services¹⁹ was developed by implementing the E-Commerce Directive in 2001. Based on the ‘country of origin’ principle, the scope of the E-Commerce Act covers information society-related services provided to and from Hungary, the providers of such services, and the recipients of such services.

The Hungarian legislation—in line with the E-Commerce Directive—lays down, as a general rule, the liability of intermediary service providers for the information they make available to the public, while also specifying the cases in which their exemption from this liability is guaranteed. It should be highlighted that this regulation covers liability under civil law, criminal law, and public administration law alike (and also the possibility of exemption). Assuming that intermediary service providers’ activities only include information storage, transmission, and making it available, they hence cannot be obliged to monitor information or to identify circumstances that indicate unlawful activities. As a consequence, the liability for the information produced and published by a content provider on the Internet is direct,

¹⁷ Robinson, 2017.

¹⁸ Directive 2010/13/EU, art. 28b(3).

¹⁹ Act CVIII of 2001(hereinafter ‘E-Commerce Act’).

while the liability of the intermediary service provider, which is only a passive actor in the content production process, is limited.²⁰

The thinking behind the provisions of the E-Commerce Act governing the scope of exemptions from liability for intermediary service providers regarding the information they store, transmit, or make available is based on the fact that, on the one hand, service providers are not liable if their activity is purely technical, automatic, and passive, involving the transmission of information to the public (or to the recipient), while on the other hand, once they become aware of the unlawful nature of the content, they must take immediate action to take it down (Articles 8 to 11).

The purpose of the notice-and-takedown procedure under the E-Commerce Act is to offer the affected parties an alternative to lengthy and cumbersome court proceedings to establish the infringement and remedy the infringing situation by giving right-holders the possibility to restrict access to the infringing information and remove the infringing content. The legislation also regulates in detail the process and conditions of the notice-and-takedown procedures as they relate to copyright infringements and the takedown of content infringing the personality rights of minors. It should be noted that this form of procedure merely prevents, but does not exclude, the possibility of bringing a claim before the courts, and that the relevant rules only apply in the relationship between the service provider and the injured party, not in any court proceedings (Article 13).

In Hungary, the implementation of the provisions of the AVMS Directive on video-sharing platforms was achieved through the amendment of the E-Commerce Act—in the course of which the legislator mainly adopted the Directive's rules, but also imposed additional obligations on video-sharing platforms through certain detailed rules. The amendment obliges video-sharing platform providers to take appropriate measures and apply suitable technical solutions if the content of their service endangers the physical, mental, spiritual, or moral development of minors; offends human dignity or constitutes hate speech, a criminal offense, or an incitement to commit such an offense; or violates the rules on commercial communications (Article 15/D(1)). Similarly to the AVMS Directive, the Hungarian legislation does not specify such appropriate measures, but lets the service providers determine these for themselves. In order to protect minors, the law provides for the use of age verification and parental control systems (Articles 15/F-H).

In addition to this, with regard to commercial communications, the E-Commerce Act stipulates the application of the rules specified in the media regulations—Article 20(1)-(7) of the Act on the Freedom of the Press and the Fundamental Rules of Media Content (Press Freedom Act)²¹ and Article 24 of the Act on Media Services and Mass Media (Media Act)²² which means that video-sharing platform providers in Hungary must comply with the same obligations as media service providers with regard to the

²⁰ See: court decision BDT2008.1777.

²¹ Act CIV of 2010 (hereinafter, 'Press Freedom Act').

²² Act CLXXXV of 2010 (hereinafter, 'Media Act').

organized commercial communications that they distribute or sell. The Media Act and the Press Freedom Act—in addition to the definition of video-sharing platform services and the clarification of the registration rules—do not contain any material requirements for social media platforms.

2.2.3. Private regulation of social media

‘Private regulation’ refers to a system in which the platforms themselves create rules and oversee them in a process that they also create themselves. These rules do not, of course, oblige the platform itself, but in the first place, its users, although platforms may also be obliged to work within the system (though it cannot be legally enforced against them). Private regulation is thus the additional extralegal regulation of user behavior, which may overlap with codified legal regulation, but which is not a necessary feature of it. Platforms may enforce private regulation on their users through their contract with them, so these rules have legal binding force between the parties. Furthermore, because it primarily concerns content that may be published and shared by users, it directly affects freedom of expression. The Oversight Board²³ established by Facebook can also be considered private regulation, even if the social media platform tries to suggest in its communication that this Board is independent from it. The Board’s rules of operation are established by Facebook; its members are invited by Facebook and its competence extends exclusively to the Facebook platform. The establishment of the Oversight Board is another step toward the construction of a ‘pseudo’ legal system that develops in parallel with the state legal system.

Platforms have the right to create these rules, which stems from their right to property and the right to freedom of enterprise. There are relatively few restrictions on such private regulation, although platforms are required to comply with restrictions on freedom of speech (for instance, with regard to the advertisements they may accept) and with the requirement of equal treatment of their users. As such, in addition to protecting their rights, private regulation may impose other restrictions on the opinions published on the platform. Jack Balkin calls this phenomenon ‘private governance,’²⁴ while others prefer to use the less euphemistic term ‘private censorship.’²⁵ As Balkin warns, it seems unreasonable to attempt to discuss compliance with government regulations separately from private regulation, considering that the threat of government regulation incentivizes platform providers to introduce private regulations because the providers have an interest in avoiding any troublesome government interference.²⁶

23 See the website of the body: <https://oversightboard.com>.

24 Balkin, 2018, pp. 1179 and 1182.

25 Heins, 2014.

26 Balkin, 2018, p. 1193.

The removal of content that is undesirable for the platform concerned is not the only means of implementing private regulation. A far more significant means is the editing and sorting of content presented to individual users, as well as the promotion and suppression of certain pieces of content, the impact of which is not limited to individual pieces of content but to the entire flow of content on the platform. This does not constitute ‘regulation’ because it does not require a normative decision on the ‘suitability’ of the content (examined in the light of the private regulation code), but it fundamentally affects the chances of a piece of content reaching the public, and so it may be regarded as a kind of editing that has more impact on the fate of each piece of content than private regulation.

The enforcement of the freedom of speech on a social media platform is much more dependent on the rules applied and implemented by the various platforms than on the government (legal) regulations relating to freedom of speech as a fundamental right. The standards, policies, and service terms and conditions social media platforms apply result in decisions made in bulk, and they cannot be matched by any lengthy legal proceedings that might be launched in individual cases. In addition to platform ownership, a contract by and between the platform and each of its users serves as the legal basis for the platform’s capacity to interfere with its users’ freedom of speech. The platform determines the provisions of that contract. Users are not in a position to request the amendment of the contract, while it may be amended by the platform unilaterally at any time. It is also important to note that the same contract is concluded with each and every user. Even though the contract and the interference permitted by it affect the exercise of a constitutional right, and countless debates, conversations, and exchanges of information are taking place on the platform at any given time in connection with public affairs, no interference by the platform can be considered state action, and the platform itself is not considered a public forum. An action taken by a platform, even if it restricts its users’ opinions, cannot be attributed to the government, and as such it is not subject to any constitutional safeguard relating to the freedom of speech.²⁷

When there is a conflict of interest or a dispute between the platform provider and the user affecting the exercise of freedom of expression we must hence, in a somewhat sobering way, seek a solution in contract law instead of in constitutional doctrines.²⁸ When a user decides to subscribe to a platform and accepts that platform’s terms and conditions by a simple mouse click, they become subject to ‘private regulation,’ including all content-related provisions, and the safeguards of free speech are no longer applicable to the user’s relationship with the platform.²⁹ It should not be a surprise that the contracts all the major platforms use are carefully considered and precisely drafted documents (or that they knowingly use vague language in order to extend the platform’s discretionary powers).

27 Fradette, 2013–2014, pp. 953–957.

28 Fradette, 2013–2014, p. 971.

29 Fradette, 2013–2014, p. 977.

However, consumer protection does not seem to provide much opportunity to protect users' freedom of speech when a rule set by a platform and its application seem reasonable and justifiable, and not arbitrary. Indeed, they typically are; even though they might be questionable, this is not evidence of any violation of the consumers' rights in and of itself. It also seems difficult to object to the application of such policies on a legal basis, considering that a platform is free to determine its own policies and instruct its moderators without being required to respect the constitutional safeguards and legal limitations of freedom of speech. A user's only option is to show that the platform removed a piece of content it was not authorized to remove,³⁰ something that seems well-nigh impossible to demonstrate due to the widely defined limitations of content and the platform's broad discretionary powers. A user may also try to make use of the existing anti-discrimination rules if their right to equal treatment has been violated, but proving a breach in such a situation (showing that a piece of content was removed which was not removed when published by another user) seems rather difficult, and the enormous volume of content coupled with the absence of a monitoring obligation on the platform's side (which the platform may invoke as a defense) also considerably limit the user's chances.

2.3. Censorship and social media

Social media platforms take part in the supervision of the content published by users through the enforcement of national (or EU) legislation on the one hand and through the means of private regulation created by them on the other hand. An important difference between the two is that while in the first case, the platforms are legally obliged to take down certain content, in the second case, they decide to do so on the basis of a voluntary initiative.

2.3.1. Possibilities for taking down content based on law

While participation in co-regulatory schemes is generally voluntary for service providers, on a single important issue, the law still subjects them to specific co-regulation at the European level. This implementation of co-regulation obliges platforms to participate in monitoring the legality of user behavior. The regulation is binding on the platform, but it aims to take action against infringements committed by users. The platform's liability is not for publishing infringing content, but for failing to take action against it.

Article 14 of the E-Commerce Directive—which is followed by the national legislation—provides for a broad exemption for platforms. Hence, if they did not make their own content available and were not originally aware of the infringing nature of that content, they will not be held liable, as long as upon becoming aware of its infringing nature, they take action to take down or terminate access to the infringing

³⁰ Fradette, 2013–2014, p. 957.

content without delay. In the event of failure to do so, however, they may be held liable for their own omission. In this way, codified legal regulation forces the platforms into a decision-making role with regard to user content, expecting them to make a decision on the illegality of the content, conditional upon them becoming aware of it. The consequence of this procedure may be the takedown (removal) of the content.

The assessment of the ‘infringing’ nature of content raises a very important issue. The takedown obligation is independent of any judicial or other official procedure to establish the infringement, and the hosting provider must act before such a decision is made, if any legal proceedings are instituted at all. It is therefore up to it to decide on the infringement itself, and this decision will be free from the guarantees of the rule of law (while it may also affect the freedom of expression) and will encourage the obligee to decide against the preservation of the content in case of any possible concerns in order to save itself. This co-regulation, enforced by legal regulation, may be seen as a specific form in which the enforcement of codified legal norms (restrictions on freedom of expression) is monitored by a private party (the platform), while at the same time enforcing the sanction (deletion of content).

In the Hungarian case law on social networking websites, users typically do not attempt to enforce the notice-and-takedown procedural obligations of the E-Commerce Act—introduced in the Hungarian legal environment as a result of the E-Commerce Directive—before the Hungarian courts; users of social networking websites instead typically try to settle disputes between themselves through traditional judicial channels.

2.3.2. The application of private regulation and the restriction of debates on public affairs

Another way of taking down user content is through the enforcement of platforms’ private regulation. Unfortunately, content moderation that transgresses the legal boundaries of freedom of speech is a very common and highly criticized means employed by platforms.

Several Hungarian cases have arisen related to the private regulation of social media platforms. A video posted by Minister János Lázár on Facebook in March 2018 during the campaign period for the Hungarian Parliamentary elections made headlines. The footage shot on the streets of Vienna showed the Austrian capital as a dirty, unsafe, and less livable city with the implication that this was due to the large number of immigrants. The platform took down the video on the grounds of violation of the rules of the community standards applicable for the prohibition of hate speech. Following a complaint submitted by Lázár, Facebook ultimately made the video accessible again on the politician’s social media page. The official reasoning behind the decision was that the topic the minister addressed (that is, immigration) had significant news value and public relevance; this circumstance constitutes an

exception for breaches of the rules on hate speech and justifies a reversal of Facebook's previous decision on the breach of community standards.³¹

Even more serious restrictions were imposed on the president of the Mi Hazánk Mozgalom Party, László Toroczkai, and then on the party itself. First, during the final phase of its campaign for the 2019 European Parliament elections, the party leader's profile, with more than 200,000 followers, disappeared without any prior warning or notice.³² The president of the party, on the grounds of what he perceived as politically motivated censorship, eventually filed a personality right lawsuit against the platform, claiming damages for the alleged harm he suffered.³³ A year and a half later, in October 2020, Facebook deleted a page advertising an event the party organized to commemorate the 1956 Revolution, and a few days later, Mi Hazánk's official social media page, also citing a violation of the community standards,³⁴ but the party did not receive a more detailed justification from the platform for the decision.³⁵

A case that occurred in February 2020, when Google deleted news portal Pesti Srácok's YouTube channel, which had been operating for five years, along with all its content and without any prior warning, is also an example of censorship by social media platforms. The case arose from a video the news portal uploaded to expose an alleged pedophile offense, in which elements of another video—not considered by the journalists to be of concern—were edited in as illustrations, thereby violating the community rule prohibiting the depiction of the sexual abuse of children. In this regard, it should be underlined that, on the one hand, the scenes in the video that could be considered potentially questionable were obscured, and on the other hand, the news portal claimed that the video was not made public; it was only saved as a draft on the editorial interface—despite this, the channel was deleted.³⁶ According to the operator's response, the channel was deleted due to a breach of the rules prohibiting the depiction of the sexual abuse of children.³⁷ As a consequence of the case, two other channels also registered by the same editorial staff suffered the same fate in the days following the incident, but the reasoning was not even attached to the decisions in these cases.³⁸

In addition to removing individual user content or even deleting entire user accounts, a common solution social networking site operators use is the so-called shadow ban—a way of restricting access to individual content and user profiles and reducing their visibility in a less obvious and noticeable way, without the person concerned or their account's friends and followers being aware of it. Platforms rarely mention the use of this tool, yet user experience and reports indicate that the reach of some users' posts to the general public has been significantly reduced. Hungary's

31 Gilbert, 2018.

32 *Toroczkai törlése után megregulázná*, 2019.

33 *Beperli a Facebookot a Mi Hazánk elnöke*, 2020.

34 *Törölte a Mi Hazánk oldalát*, 2020.

35 Pálffy, 2020.

36 *Ez már hajtóvadászat*, 2020.

37 *Gyerekpornós részlet miatt törölték*, 2020b.

38 *Ez már hajtóvadászat*, 2020.

Minister of Justice Judit Varga suspected such interference with her own account in January 2021.³⁹ According to Facebook, this type of restriction applies to content that does not have to be removed based on community standards, but which is still considered problematic.⁴⁰

2.4. Legal disputes between users

Disputes between users, with charges pressed based on claims of defamation, libel, or slander, must be judged according to the provisions of the Hungarian Civil Code or Criminal Code in the same way as if the alleged infringement had been committed in the legacy media.

When civil proceedings are brought to remove infringing content, the court may order the publisher of the infringing content to cease the act, prohibit the publisher from engaging in the activity, or order the publisher to terminate the infringing situation as a sanction for the infringement of the personality right. However, these measures are not imposed on the hosting service provider to take down the content, but instead oblige the person who has actually committed the infringement to perform a certain act. A good example of this is decision no. BDT2019.3987 of the Szeged Regional Court of Appeal, issued regarding a user's blatantly obscene comment about the mayor of a municipality. The plaintiff brought a defamation action directly against the defendant, as a result of which the court, in addition to finding a violation of the right to honor, prohibited the defendant from using any further defamatory language against the plaintiff.

A substantial body of court jurisprudence has grown up in Hungary in relation to comments posted on online content. The main issue in the debate is whether the rules of the E-Commerce Act or those of the Civil Code apply to the liability of platforms that provide the opportunity to comment; in other words, whether, upon learning of an infringing comment (infringing personality rights), prompt removal may lead to an exemption (pursuant to the E-Commerce Act) or the involvement in the publication of the infringing content would automatically lead to the establishment of strict liability (in accordance with the Civil Code). The Pécs Court of Appeal stated in its decision BDT2013.2904 that:

The operator (intermediary service provider) of the website accessible via the Internet is subject to civil law liability for the content of comments that violate reputation, uploaded by others to the website, if it does not initiate the removal (takedown) without delay upon gaining knowledge of it.

³⁹ Varga, 2021.

⁴⁰ *Remove, Reduce, Inform*, 2019.

However, the Hungarian Curia and the CC considered (based on the Civil Code's approach) the provision of an option to comment to be a unique type of dissemination (it is not the platform itself that publishes the infringing post, but it becomes involved in the process as a result of the publication, and therefore courts consider this to be 'dissemination,' which triggers the same civil law liability for defamatory statements as publication itself).

According to the decision of the Constitutional Court of Hungary 19/2014. (V. 30.) AB, a website operator may be held liable for published comments with infringing content even if it does not moderate the remarks because the rights of the person affected by the infringing communication could not be protected if the operator of the Internet site did not have liability for the infringing comments, since liability for the infringing communication is based solely on the fact of infringement.⁴¹ The single decision related to online comments which the CC has taken so far has been subjected to considerable criticism.⁴² In that case, the fact of infringement was not disputed between the parties, nor was it disputed by the website operator (therefore, the CC did not conduct a substantive investigation in this respect), but instead, relying on the E-Commerce Act, it merely objected to the fact that it would be subject to any liability for 'alien' content, regardless of whether the entry had been taken down (removed) without delay upon notification (Paragraph [56]). The CC found that the website operator's liability is based solely on the fact of the infringement; other circumstances cannot be decisive. In the event of an infringement, no distinction can be made between different websites and the operator's legal liability (Paragraph [64]).

The statement of reasons for the decision is contradictory in many respects and unfortunately fails to provide a general approach applicable to the constitutional characteristics of the online public sphere, which functions according to a different logic from the legacy media and which is increasingly important for the discussion of public affairs.⁴³ Nevertheless, it should be noted that as far as liability for infringing comments is concerned (which was the most crucial issue to be settled by the decision), the approach applied by the CC is not without precedent: It was in harmony with the Hungarian jurisprudence prevailing at that point in time. Furthermore, the European Court of Human Rights (ECtHR) did not subsequently find such application of the general civil law liability rules on the grounds of violation of the personality rights to be incompatible with Article 10 of the European Convention on Human Rights (ECHR) either. This was the way in which the ECtHR had reached decisions prior to the CC decision in *Delfi v. Estonia* and also in another subsequent case that was filed with the ECtHR as a follow-up case based on the case underlying the CC decision.

41 Koltay, 2015.

42 See, for instance: Grad-Gyenge, 2015; Klein, 2016.

43 For a more detailed and informal explanation of the statement of reasons, see the text written by the judge-rapporteur in the case, Bragiyova, 2016.

In 2016, the Fourth Section of the ECtHR awarded in favor of the applicants in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*.⁴⁴ The Strasbourg Court found the decision of the Hungarian courts to be in breach of Article 10 of the ECHR, mainly due to the less offensive nature of the comments compared to the comments in *Delfi*.⁴⁵ The *Magyar Tartalomszolgáltatók Egyesülete* judgment ruled that the subject of the original article (to which comments were posted) concerned a public matter,⁴⁶ and this is of material importance. Increased protection of freedom of expression is essential for the discussion of matters of public interest.⁴⁷ The ECtHR considered not only the articles concerned but also the comments made on them to be defensible due to their participation in a debate on public affairs, thus according them outstanding importance.⁴⁸ In *Delfi* and *Magyar Tartalomszolgáltatók Egyesülete*, the target of the comments was a legal entity, the operation and criticism of which clearly qualified as a public matter. In any case, the protection of a legal entity's rights should be assessed in a different way to that of natural persons; the 'moral' rights of legal entities deserve less strict protection⁴⁹—and the ECtHR considers it necessary to make this distinction.⁵⁰ The ECtHR also considered the consequences for content providers to be serious, even without an obligation to pay compensation. Although the Hungarian courts, in addition to establishing the infringement, also ordered payment of the not excessively high court fees, according to the ECtHR, the wider consequences of the decision must also be taken into account, for example, the incentive for them to close down their interfaces to commenting in the future and to refrain from providing their readers with this option.⁵¹ The reason for Hungary's censure was not the application of civil liability *per se*, but a different assessment of the content of the comments, which—according to the ECtHR—could not have been considered to be infringing. The approach taken by the CC on the main issue was therefore compatible with Strasbourg's practice relating to Article 10 of the ECHR.⁵²

The case law is also developing on non-anonymous comments published on Facebook. In these cases, although the identity of the commenter is known, the plaintiffs sued the users who allowed the comment (under whose post the offensive comments were published). The Curia applied its practice on anonymous commenting in decision BH2016.330: "The holder of a Facebook profile is liable for the communications of unlawful content appearing on his profile page." In contrast, in decision

44 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*.

45 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*, paras. 76 and 91.

46 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*, para. 72.

47 Barendt, 2005, pp. 155–162.

48 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*, para. 72.

49 See also: *Uj v. Hungary*, para. 22.

50 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*, para. 65.

51 *Magyar Tartalomszolgáltatók Egyesülete and Index.hu. Zrt. v. Hungary*, para. 86.

52 With regards to the assessment of the decision of the *Magyar Tartalomszolgáltatók Egyesülete*, see: Sepsi, 2015; Szigeti, Simon, 2016.

BDT2017.3675, the Pécs Court of Appeal applied the requirements of the notice-and-takedown procedure, but apparently by applying the Civil Code:

The content provider fulfils the requirement of conduct that can be expected under the circumstances where, in the event of a complaint against a comment posted to a content published on its Internet portal (Facebook site), it removes that comment without delay.

The decision does not refer to the E-Commerce Act, while the Civil Code does not acknowledge the notice-and-takedown procedure, i.e., gaining knowledge of the infringing nature of a piece of content as a condition for establishing liability or takedown as an option leading to release from liability.

3. The possible regulation of fake news

Ever since the 2016 American presidential election campaign, the term ‘fake news’ has become a popular way to describe a form of propaganda that deliberately spreads false information as widely as possible, mainly through online platforms and social media. Probably the most widely known example of fake news is a scandal commonly called ‘Pizzagate,’ referring to rumors that Democratic candidate Hillary Clinton was operating a child trafficking network in a Washington pizzeria. The owner and staff of the restaurant were sent death threats, and one person even entered the restaurant and fired a gun to rescue the children.⁵³ It was also revealed that a group known as the ‘Macedonian teenagers’ made their living in Veles, a poor Macedonian town, by producing and spreading fake news aimed at the American public.⁵⁴

3.1. The concept and problems of fake news

Lies in the media are, of course, by no means a recent phenomenon.⁵⁵ Various ancient, mediaeval, and modern examples are known portraying the deliberate dissemination of false information,⁵⁶ and this is one reason why only fragmentary knowledge can be obtained about human history. However, in the age of the Internet and social media in particular, the volume of this information and the speed at which it spreads constitute a new development that is changing the quality of the public sphere. For the time being, there appear to be no effective legal means of combatting

⁵³ Robb, 2017.

⁵⁴ Subramanian, 2017.

⁵⁵ Bernal, 2018, pp. 230–234.

⁵⁶ Darnton, 2017.

the spreading of fake news via online platforms. On these platforms, the competition is for the audience's attention, for the seconds a user spends on a piece of content,⁵⁷ so it is necessary to produce as exciting, interesting, and viral a piece of content as possible, even if it means lying.

The communication that takes places on these platforms has a fundamental impact on political culture and democratic processes in general, an impact which is negative in many respects, not only because of the ease with which lies can be spread, but also because it has led to the increasing superficiality of public debates. For economic reasons, platform providers are interested in creating public spaces that are as intensive—and thereby as superficial—as possible.⁵⁸ However, spreading lies *en masse* does not serve the interests of a democratic public sphere. It is also questionable whether this disregard for the truth is compatible with the traditional philosophical underpinnings of free speech. If one regards freedom of speech as a tool of community-based democratic decision making, then the deliberate publication of lies does not serve that purpose. At the same time, technological developments have spawned a new generation of lies, such as deepfake videos, where the face of a person in a real recording is replaced by someone else's face, thereby creating the false impression that the latter was saying or doing something, although they actually did not. In this way, any words can be put into the mouths of public figures; they can be portrayed in any awkward or embarrassing situation and the recording will be convincing.⁵⁹ Soon, no real original recording will be required to achieve this.

3.2. Punishment for misstatements—rules of general application

The possibility of prohibiting misstatements, including deliberate lies, and depriving them of the protection of freedom of speech is an issue that touches on several aspects of the legal system, although it can be stated that within the framework of the constitutional protection of freedom of speech, lying—in a general sense and due to its inherently untruthful nature—cannot be prohibited. At the same time, legal action against falsehoods is still possible in certain circumstances, for example, in Hungary in relation to defamation, the denial of the Nazi and Communist genocides, the denial of crimes against humanity, the spreading of scare stories, making false statements in election campaigns, and misleading commercial practices.

3.2.1. The question of the general prohibition of lying

According to the currently used doctrine, lies—in a general sense—cannot be prohibited under the framework of the protection of freedom of speech. Ferenc Deák, the prime minister of the first independent Government of Hungary, would certainly

⁵⁷ Wu, 2017; Hindman, 2019.

⁵⁸ Park, 2018, p. 7.

⁵⁹ Chesney and Citron, 2019.

be disappointed to hear this. Upon the codification of the first Hungarian Press Act in the spring of 1848,⁶⁰ he asserted that “If it were up to me, there would be only a single paragraph in the Press Act: ‘Lying is forbidden’” (although, who knows, maybe this quotation is itself fake news; after all, everyone quotes the pithy saying without citing the original source). Today’s press and media acts impose numerous obligations on journalists, save for the general prohibition of lying. However, this does not preclude broad restrictions or post-publication sanctions being imposed for false statements of facts.

3.2.2. *Protection of reputation*

One of the most important areas of the legal protection of human personality is the law of libel, the defamation law that serves the protection of reputation and honor and is intended to prevent unfavorable and unlawful changes to an individual’s image and external social perception. By means of these rules, the legal system aims to prevent any opinion published in the public sphere from damaging or even ruining an individual’s image without proper grounds, primarily through false statements. On this question, individual states’ approaches are remarkably diverse, but the common point of departure in Western legal systems is the strong protection of debates on public affairs; as such, the protection of the personality rights of public figures is forced into the background when compared to the protection of the freedom of speech.

The boundaries of the protection of the personality rights of public figures are primarily shaped by the decisions of the courts and the CC. As it relates to the constitutional protection of honor and reputation, the idea that statements relating to public affairs and damaging public figures’ reputation may legitimately claim some special protection only gained ground in Hungary after 1989. Initially, the limited protection of public figures’ personality rights was not based on statutory provisions. The point of departure on this issue was CC decision 36/1994. (VI. 24.) AB, which laid down the principles that serve as its foundation. According to the CC’s position, the possibility of publicly criticizing the activity of bodies and persons fulfilling state and local government tasks is an outstanding constitutional interest, as is ensuring that citizens may participate in political and social processes without uncertainty, compromise, and fear. As such, while the constitutionality of protecting the honor and reputation of such public figures by means of criminal law may not be excluded, the freedom of opinion—in comparison to that of private persons—may be limited to a rather narrow extent, only in order to protect those exercising state powers.

This test for establishing the perpetrator’s liability for deliberate lies or in the event of negligence is rather similar—but not identical—to ‘the *New York Times* rule’ developed in *New York Times v. Sullivan*. The codification of the Civil Code in 2013 is a milestone in the context of the possibility of limiting the protection of public figures’ reputation and honor under civil law, as a result of which the legislature

60 Act XVIII of 1848.

adopted statutory provisions to settle the issue of the protection of public figures' personality rights (Article 2:44). The Civil Code in its current form provides a broader framework for the discussion of public affairs and also defines its limits: The publication of opinions that offend human dignity cannot be considered to be speech protected by the freedom of expression, regardless of the status of the person concerned or the public nature of the issue under discussion. CC decision 7/2014. (III. 7.) AB, clarifying the test for protection of reputation, stipulated for statements of fact that "demonstrably false facts in themselves are not protected by the Constitution" (Paragraph [49]), thereby implying that, in certain cases, even false statements of facts can receive protection under the freedom of opinion. The decision also establishes that:

Even for those facts having no constitutional value which later turn out to be false, it is justified to take into account the interest of ensuring as free conditions for the discussion of public affairs as possible when determining the extent of imputability (attribution of liability) and the possible penalties in the course of the legal proceedings. (Paragraph [50])

3.2.3. *Genocide denial*

According to the Council Framework Decision on combating racism and xenophobia in the EU member states, a universal prohibition shall be applied to the denial of crimes against humanity, war crimes, and genocides.⁶¹ Most member states have a law prohibiting the denial of the crimes against humanity committed by the national socialists, questioning them, or downplaying their significance.⁶² According to the currently effective Hungarian regulation, if a person "in front of a large audience, denies, questions, belittles or seeks to justify the genocide and other crimes against humanity committed by the national socialist and communist regimes [he] is guilty of a felony" (Article 333 of the Criminal Code). The CC did not declare this provision of the Criminal Code to be unconstitutional. According to the statement of reasons:

Denying the sins of Nazism and Communism shall be considered as abuse of freedom of expression, which severely injures not only the dignity of the community of victims but the dignity of citizens committed to democratic values and identifying with or sympathising with the victims.⁶³

In addition to protecting human dignity (individual rights), the CC also considered the protection of public peace to be important, at the same time avoiding the controversial question of the degree of threat to public peace that may justify the

61 Council Framework Decision 2008/913/JHA.

62 See the French Gayssot Act (13 July 1990, amending the Press Act of 1881, by adding a new Section 24), and the German Strafgesetzbuch, s. 130(3).

63 Decision 16/2013 (VI. 20.) AB, para. 50.

restriction of a fundamental right and using the protection of public peace only as a secondary argument.

3.2.4. *Scaremongering*

Hungarian criminal law has sanctioned the dissemination of scaremongering (originally ‘frightening rumors’)⁶⁴ since the end of the nineteenth century. Based on the currently effective legislation, this offense is committed by anyone who, in a place where it constitutes a public danger, states or reports an untrue fact or distorts a true fact in a manner likely to cause confusion or disquiet among a large group of people in the place of public danger. In addition, since the spring of 2020, as one of the measures introduced relating to protection against the novel coronavirus, a new provision has been added to the law: “It is also considered spreading scare-stories if someone, during a special legal regime, states or spreads false facts or distorts true facts in a way that is likely to hinder or frustrate the effectiveness of the defence” (Articles 337(1)-(2) of the Criminal Code).

The CC, in its decision 15/2020. (VII. 8.) AB, aimed to assess the constitutionality of the regulation and concluded that the provision meets the constitutional requirements. The prohibition pertains only to a specific category of statements of facts. The scope of (untrue) information that could impede the effectiveness of the defense against the pandemic is relatively narrow, at least much narrower than all the published statements of fact in relation to the threat justifying the introduction of a special legal regime. The prohibited action must be objectively capable of hindering or frustrating the effectiveness of the defense, whether undertaken by the government or by other public, municipal, or even private actors acting in concert (Paragraphs [53], [60], [63]). To assist the application of the law, the decision lays down a constitutional requirement for a range of statements of facts and strengthens the protection of freedom of opinion. This is the case where the truth of a statement of fact contained in a communication cannot be established at the time of communication but subsequently proves to be false:

The statement of fact can only be punished if it is a statement of a fact that the offender must have known to be false at the time when the act was committed or that he himself distorted and that is capable of hindering or frustrating the defence during the special legal regime. (Operative part, Section 1)

3.2.5. *Election procedures and political advertisements*

Numerous specific rules apply to statements made during election campaigns. These can have a twofold purpose. On the one hand, they powerfully protect communication during a campaign: Political speech is the most strictly protected inner

64 See Act XL of 1879, art. 40.

core of freedom of speech, and what is said in a campaign is intimately related to the functioning of democracy and democratic procedures. On the other hand, these procedures must also be protected, so that a candidate, community, or party does not distort the democratic decision-making process and ultimately harm the democratic order. It is no coincidence that the fake news problem becomes most visible during election campaigns (e.g., the US presidential elections, the 2019 European Parliament elections, etc.).

Many European countries have laws in place that limit the publication of political advertisements in terms of their quantity, the equal distribution of media space, clients that can commission them, or the amount of money that can be spent on them. Their main purpose is to ensure a level playing field to the detriment of parties and candidates with greater financial resources and for the benefit of less privileged parties. In this respect, the Hungarian legislation is mixed. On the one hand, the possibility of publishing political advertisements in the media (television, radio) is heavily regulated,⁶⁵ while on the other hand, if the request for publication of the communication complies with the relevant legal provisions, media service providers are obliged to publish it without any discretion, i.e., they are not liable for the content of the political advertisements they publish.

Article 2(1)e of Act XXXVI of 2013 (the Election Procedures Act) requires all parties involved in the elections to exercise “their rights in a bona fide manner and with the proper intent,” and this requirement also includes the prohibition of disseminating false statements. However, the messages communicated during election campaigns belong to the most protected sphere of expression of opinion; therefore, if the statements made during election campaigns concern public figures and relate to their political activities, program, or credibility and suitability, it may be assumed that voters will deem these statements to be opinions, even if the statements were formulated in the indicative mood. With due consideration of this, the consideration of individual statements made during an election campaign clearly goes beyond an examination of the elements of the statement by applying the provability test and requires the evaluation of all the conditions relating to the case.⁶⁶

Furthermore, according to the case law, during an election campaign “freedom of expression must typically be interpreted and judged in the context of the interplay

65 Hence, for instance, the publication may take place only during the election campaign period or in connection with an ordered referendum (Media Act, art. 32(3)) and free of charge (Fundamental Law, art. IX(3) and Act XXXVI of 2013 on the Election Procedures (the Election Procedures Act), art. 147(3)); the media service provider is not allowed to express its opinion or provide any evaluative explanation to the political advertisement (Election Procedures Act, art. 147(2)); the person/entity commissioning the respective political advertisement must be clearly defined (Media Act, art. 32(4)); the public service media provider is obliged to publish political advertisements for a certain duration and under certain conditions (Election Procedures Act, arts. 147(A-E)); the national commercial media service provider is obliged to indicate until a pre-defined time if it intends to participate in the campaign, also indicating the duration intended for publication (Election Procedures Act, art. 147(F)).

66 Decision 3107/2018 (IV. 9.) AB.

between public figures” and competing candidates “may express themselves openly and even in an unvarnished manner.” If it becomes clear from the context of the statement to be assessed that the speaker did not intend to make a statement of fact but rather to express an opinion, the veracity of the communication should not be assessed, and consequently, publication cannot be restricted in this respect either. Therefore, the freedom of expression is “given increased protection in relation to value judgements which surface in a collision between opinions on public affairs, even if they are perhaps exaggerated and heightened.”⁶⁷

3.2.6. Advertising regulation and consumer protection

Advertisements do not exclusively serve the advertiser’s interests but may equally serve the interests of the recipients too, hence genuine and fair commercial communication enjoys protection. False or misleading statements published with a commercial purpose may not be afforded constitutional protection, however. This also follows from the European consumer protection rules.⁶⁸ In Hungary, both legal regulations implementing the EU rules and the industry-specific systems of self-regulation explicitly prohibit commercial practices communicating false information or communicating true information in a deceptive manner to consumers.⁶⁹ In order to prevent unfair competition, the Hungarian Competition Act prohibits communications that damage or jeopardize market participants’ reputation and credibility by stating or disseminating untrue facts or by misrepresenting a fact.⁷⁰

3.3. Correcting falsehood—media regulation tools

Media regulation applies to television, radio, on-demand audiovisual services, and radio media services, some of which may also be distributed on the Internet, although social media platforms are not covered by the regulation. With that said, it is worth reviewing the means by which media regulation tries to fight against false statements, as some of these may also serve as a model, or at least an inspiration, for regulating the platforms.

3.3.1. The principle of media pluralism

The regulation of television, radio, on-demand audiovisual services, and radio media services seeks to correct—by indirect means—public communication that may be distorted by the publication of falsehoods. In line with the theoretical requirement for media pluralism, the entire media market must provide collectively

67 Decision 5/2015. (II. 25.) AB.

68 Directive 2005/29/EC, arts. 6, 7.

69 See: Act XLVII of 2008, arts. 6, 7 and Annex; Hungarian Code of Advertising Ethics, art. 10.

70 Act LVII of 1996, art. 3.

for the diversity of opinions and available content, and establish a balance among them.⁷¹ This condition primarily imposes tasks on the state in respect of the regulation of the media market and these regulations mainly concern traditional broadcasting of television and radio services.

Article IX(2) of the Fundamental Law states that “Hungary recognises and protects the freedom and diversity of the press, and ensures the conditions for free information necessary for the development of a democratic public opinion.” Media regulation therefore not only establishes the importance of promoting pluralism in the media market and preventing information monopolies as a fundamental principle, but also sets a requirement to prevent unjustified restrictions of competition in the market (Article 4 of the Media Act). This rule of the Fundamental Law concerning the protection of the freedom and diversity of media also includes the obligation to fight against the possible establishment of information monopolies.

Media regulations seek to guarantee the pluralism of the media market and the prevention of the emergence of a dominant position by various means. On the one hand, in order to prevent the emergence of information monopolies, it imposes media market ownership restrictions on media outlets (media service providers) with an annual average audience share above a predefined threshold. On the other hand, it imposes extra obligations on media service providers that reach a certain audience share that can guarantee the maintenance of the diversity of the media market, as well as the promotion of the right to objective, pluralistic information and access to information (Article 67 of the Media Act). The other requirement aimed at preventing concentration of ownership concerns the market for radio media services. This requirement stipulates that media with a national, regional, or local reception area may only be owned by certain undertakings subject to certain limits: A media service provider may hold a maximum of one national, or two regional and four local, or twelve local media service provision rights (media licenses) at the same time (Article 71 of the Media Act).

3.3.2. The right of reply

Based on the right of reply, the legislator does not grant access to a media service provider’s content due to some external condition, but due to the service provider’s (previously) published content. Article 28 of the AVMS Directive makes it mandatory for EU member states to have legal regulations in place in respect of television broadcasting that ensure adequate legal remedy for those whose personality rights are infringed by the publication of false statements. Such regulations are known Europe-wide, typically imposing obligations on printed and online press alike.⁷² The Hungarian legislator has complied with the relevant Recommendation of the European

⁷¹ See Komorek, 2012.

⁷² Youm, 2008; Richter, 2018–2019, pp. 14–19; Koltay, 2013.

Parliament⁷³ under the Press Freedom Act, and as such, the right of reply obligation of media content providers falling under the scope of media regulations is also included in codified law.

In Hungary, the institution of the right of reply guarantees that if a false fact is stated or disseminated or a true fact is represented as false concerning a person, the person concerned has the right to demand the publication of a corrective statement (Article 12 of the Press Freedom Act). The right of reply can thus only be enforced in relation to statements of fact (hence, it is not granted for opinions that may be considered offensive), and this serves two purposes simultaneously: both protecting the person affected by the media content and satisfying the public's need to access information.

Under the legislation, any statement (whether it be untrue or true but misrepresented) published in any media content can be used as grounds to enforce the right of reply. According to Point 7 of Article 1 of the Media Act, media content comprises content published in media services and press products, meaning that this notion includes linear and on-demand media services, as well as print and online press products, including all content published in these. Based on the regulations, the right of reply (publication of corrective statements) can only be requested in respect of content that falls under the scope of the media regulation. Thus, for instance, since reader comments on articles published in online press products do not constitute edited content in principle—without prior moderation, that is, without a conscious editorial decision to publish them—and are therefore not part of the press product itself, hence they are not considered media content, there is no right of reply against them either. Similarly, there is no right of reply against newspapers that do not meet the definition of a 'press product' as defined in the Press Freedom Act, particularly those that are not provided as a 'business service' (such as blogs, university student newspapers, association newsletters, political party websites, etc.).

3.3.3. The obligation of impartial news coverage

Among the rules that support media pluralism is the requirement of impartial news coverage, which requires that information programs report on public affairs in an unbiased and balanced manner. Regulation may apply to both television and radio broadcasters, and it is implemented in several states in Europe.⁷⁴ The obligation pertaining to the diversity of the press, as stipulated under Article IX(2) of the Fundamental Law, is achieved partly through the requirement of impartial coverage. The content of this obligation is specified jointly by Article 13 of the Press Freedom Act and Articles 12 (1)-(2) of the Media Act. The requirement of impartial coverage is laid down in the Press Freedom Act in relation to information and news programs

⁷³ Recommendation 2006/952/EC.

⁷⁴ See, for instance, the German (Rundfunkstaatsvertrag, ss. 25-34) and the British regulations (Communications Act 2003, s. 319(2)c-d, s. 319(8) and s. 320; Broadcasting Code, s. 5).

published by linear media services providing information services. Under the provisions of the Act, such programs should provide balanced coverage of local, country-level, national and European issues that may be of interest to the general public and on any events and debated issues bearing relevance to the citizens of Hungary and the members of the Hungarian nation.

The requirement of impartial news coverage—which stems from the recognition of the media’s public interest duties—has been an integral part of Hungarian media regulation since its inception dating back to 1996. Television and radio are thus required to provide balanced coverage of events of public interest and controversial issues (Article 13 of the Press Freedom Act). Accordingly, based on the rule, information on and coverage of community affairs must represent the opposing views. The relevant positions on a given issue have to be collected and presented to the public, enabling them to reach a well-founded decision on the issue, thereby also furthering the ideal of democracy. It should be noted that according to the relevant interpretation of the CC, the requirement of impartial coverage is not contrary to the fundamental right of freedom of the press; however, it is a constitutional requirement that the balanced nature of coverage must be examined within individual programs or in the entirety of the programs as a whole, depending on the nature of the program (see: CC decision 1/2007. (I. 18.) AB). It is important to emphasize that certain communications containing an untrue element cannot in themselves lead to the establishment of a breach of this legal provision, only if they also result in a breach of the requirement of impartial coverage, as defined above.

4. Summary

The legal relationship between social media platforms and their users (which is not affected by the constitutional doctrines of free speech) is also governed by law through the contract concluded by and between the parties. However, it does not seem possible to enforce the principles and doctrines of free speech in the online world with the same fervor as can be done offline. With the rise of the Internet, the right to the freedom of speech seems to have entered a new phase of development, the future consequences of which we can only guess at today.

Government decision makers and shapers of public policy need to adopt a systemic approach that considers the distinctive features of gatekeepers’ activities, keeps track of the changes in them, provides an accurate definition of what gatekeepers are expected to do and what they might expect from the law, and accurately lays down gatekeepers’ duties and the scope of their liability. Gatekeepers’ impact on public communication and the strengthening of private regulation necessitate the use of new, creative, and innovative regulatory methods and institutions, the invention

of new ways of establishing rules, and a degree of cooperation between public and private actors that is unprecedented in this field.

As far as the problem of fake news is concerned, the current doctrine of freedom of speech as applied in Europe does not exclude the prohibition of the publication of falsehoods, hence these cannot enjoy general constitutional protection. False statements of fact can, in certain cases, be restricted. However, their general prohibition is hard to imagine. At the same time, this is a serious and massive problem for public communication and the discussion of public affairs, especially on large online platforms. Any possible regulation is either contrary to the principles of freedom of speech or is likely to be ineffective. For the time being, states seem to accept that they will not be able to regulate the public sphere without the platforms themselves, and they are deliberately handing over to the platforms their former exclusive state function of setting the boundaries of freedom of speech.

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