

**THE LITHUANIAN CASE-LAW AFTER THE JUDGMENTS  
OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE CASES OF  
DELFI AS V. ESTONIA AND MAGYAR TARTALOMSZOLGÁLTATÓK EGYESÜLETE  
& INDEX.HU ZRT V. HUNGARY**

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**Abstract**

The article **is aimed** at analysing the Lithuanian case-law after the judgments that were delivered by the European Court of Human Rights (hereinafter referred to as the "ECHR") on the cases of *Delfi AS v. Estonia* and *Magyar Tartalomszolgáltatók Egyesülete & Index.hu Zrt v. Hungary* (hereinafter referred to as the "*MTE & Index v. Hungary*").

**Methodology.** The theoretical methods (historical, comparative, analytical and systemic) are used in the article.

The research **results** proved that Lithuanian courts of general jurisdiction apply *de facto* the criteria that are formed in the ECHR case-law on determination of websites' liability for the consequences that are caused by the third parties' unlawful comments. However, usually they do not state this fact in their judgments. Therefore, it is difficult to determine whether the court actually followed the ECHR case-law or failed to behave so. Besides, when still guided by the ECHR judgments, it is an often case, when the courts cite separate assertions that confirm their position in the definite case, without, in fact, assessing the general legal and factual environment of the dispute. As such tendencies in the case-law may produce a negative impact on compatibility of the Lithuanian courts' and ECHR case-law, it is recommended to rely more often on the ECHR judgments, which meet the definite factual and legal context. It is positively assessed that the Lithuanian courts attach the essential significance not to the formal website operator's or website's status, but to the general context of comments and to the nature of comments, whereas the ECHR case-law is relied on, when analysing the issue on the liability of the authors of comments. Such tendencies in the Lithuanian case-law, which are focused on the definite entity's *role* in the process of publication and elimination of the unlawful comments, allow to balance maximally the interests of the parties to the dispute and meet the law interpretation direction that is formed by the ECHR. On the other hand, there is a lack of recognition of the website operator's obligation, which was singled out in the case of *Delfi AS v. Estonia*, to delete *on their own initiative* the clearly unlawful comments, though it is a significant criterion when settling the issue on the liability to be imposed on these entities, which can help to avoid the few years-long examination of the cases on elimination of the clearly unlawful comments. In summary, the Lithuanian national case-law is inevitably influenced by the analysed ECHR decisions, and the fact that the main Lithuanian courts' decisions on determination of websites' liability for the consequences that are caused by the third parties' unlawful comments were adopted after the judgements on the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary*, proves it. Currently the judgments of the Lithuanian courts basically meet the ECHR jurisprudence; however, the Lithuanian courts' decisions are rarely directly motivated by the rules adopted by the ECHR; therefore, sometimes it is difficult to evaluate the real impact of the ECHR practice.

**Research limits.** The judgments and rulings of the Lithuanian courts of general jurisdiction, in which the rules that were formed by the ECHR on the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary* were, could and / or had to be invoked, are being analysed in the article.

**Practical applicability.** *Firstly*, the research results are useful for the law applying entities - courts, mediators, various state institutions and public organizations that directly settle the disputes, which have arisen between the Internet users about the unlawful comments. *Secondly*, the research results are certainly useful for the legislator so as to be able to create on their grounds the rules of law, which are maximally suitable for solving the problematic situations, which arise in the electronic space. *Finally*, this research is useful for business entities and all other Internet users, who: a) are seeking for defending or are defending their rights, which were violated by the third parties' comments; b) themselves are brought to account because of their own written comments or the comments of the individuals, for whose actions they are potentially liable.

**Originality and significance.** The selected research object, except for L. Meškauskaitė's (2015) monograph<sup>1</sup>, not only in the national context, but also in the context of the private law on the European scale is *innovative and has not been, in principle, studied at the scientific level*. The judgment that was delivered by the ECHR on the case of *Delfi AS v. Estonia* deserved much attention, it was analysed separately or alongside the judgments on *MTE & Index v. Hungary* and / or the judgments of the Court of Justice of the European Union (hereinafter referred to as the "CJEU")<sup>2</sup>, *which were delivered by applying the Electronic commerce directive*<sup>3</sup>, by B. van der Sloot, R. Caddell, L. Brunner, H. J. McCarthy, R. Perry, N. Cox, M. E. Griffith, T. Z. Zarsky, W. Schulz, U. Gasser, E. Weinert. However, the analysis of the Lithuanian case-law from the point of view of its compliance with the mentioned ECHR judgments has not been done yet.

**Key words:** *Delfi AS v. Estonia, MTE & Index v. Hungary, Lithuanian case-law after the case of Delfi AS v. Estonia, Lithuanian case-law after the case of MTE & Index v. Hungary, website operators' liability, website operators' liability in Lithuania, Internet commentators' liability, liability of the authors of comments.*

**Type of the research:** general review.

## Introduction

The freedom of self-expression is a cornerstone component of the modern societies' political and social life; usually it is implemented in the contemporary virtual

<sup>1</sup> However, the judgment on the case of *MTE & Index v. Hungary* has not been delivered yet, when writing it.

<sup>2</sup> CJEU in joined cases C-236/08, *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA*, C-237/08, *Google France SARL v. Viaticum SA and Luteciel SARL* and C-238/08, *Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others* [2010], C-324/09, *L'Oréal SA and Others v eBay International AG and Others* [2011] and C-291/13, *Sotiris Pappasavvas v O Fileleftheros Dimosia Etaireia Ltd, Takis Kounnafi, Giorgos Sertis* [2014] stated that, under article 15 of the Electronic Commerce Directive, providers of the Internet services are not obliged to monitor the information that is being rendered or stored and to manifest their active interest in the facts or circumstances that prove the unlawful activities. Such provider is not liable for the *data that are stored at the advertiser' request*, if the provider was not aware of the stored data or had not been monitoring them, *unless, after having found out about their unlawfulness, failed to take urgent measures so as to delete the information or to block the possibility to make use of it.*

<sup>3</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. [2000] *OL L 178*.

spaces, when the users themselves create the content of the Internet, which is publicly and usually completely freely accessible. With taking into account the fact that the users themselves in this case choose the content of comments that are accessible on the Internet, it would be customary and correct to believe that also the negative consequences of inappropriate implementation of the freedom of self-expression must accrue, namely, to the text authors.

However, on the 10<sup>th</sup> of October of the year 2013 the First division of the European Court of Human Rights unanimously<sup>1</sup> and on the 16<sup>th</sup> of June of the year 2015 the ECHR Grand chamber<sup>2</sup> – by the majority of votes (15 Pros and 2 Cons), after having assessed the conclusions that were drawn by even seven institutions, delivered their judgments in the well-known case of *Delfi AS v. Estonia*, according to which the possibility of the liability of the operator of the Internet news portal for the Internet users' unlawful comments, which were not operatively deleted, was acknowledged. So far, this judgment is called unexpected (Synodinou, 2015), controversial, having a direct manifestation of restriction of the freedom of self-expression, potentially constraining the rights of the Internet users, able to change radically the information service providers' legal environment and even able to cause the social consequences (Cox, 2014; McCarthy, 2015; Human Rights Violations Online, 2014). Besides, the rules on the news website operators' liability, which are criticized in the doctrine because of the lack of their legal definiteness (van der Sloot, 2016), are formed therein.

The ECHR modified a little the criteria of ascertainment of the liability of the operators of the Internet news portals that were formed in the case of *Delfi AS v. Estonia* in its judgment in the case of *MTE & Index v. Hungary*<sup>3</sup> that was announced on the 2<sup>nd</sup> of February of the year 2016, by construing the criteria in a way that was more favourable for the website operators, and in the definite case stated the impossibility of liability of the news website operator for the comments of its visitors (violation of article 10 of the Convention<sup>4</sup>). Such change in the ECHR case-law, by specifying and modifying the rules on ascertainment of the liability to be imposed on the operators of the Internet news portals, must be regarded as a positive turning point, seeking for the maximal balancing of the rights of the Internet users and website operators (the Internet users and the website operators pursue different interests) – despite the fact that, under this judgment, the balance of the rights and obligations of the online space participants, which was disrupted by the judgment in the case of *Delfi AS v. Estonia*, was not restored (Weinert, 2016). On the other hand, the completely opposite judgments on the cases of *MTE & Index v. Hungary* and *Delfi AS v. Estonia* generally urge to raise an issue, whether the universal criteria of the Internet news portal's liability for the damage that was caused to the third party as a result of its visitors' comments are formulated in the ECHR case-law or still they are relative and must be rather applied *ad hoc* in each case.

However, despite the fact that the situation, which has developed due to the existence of different modes for ascertainment of the Internet intermediaries' (Gasser

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<sup>1</sup> *Delfi AS v. Estonia*, no. 64569/09, ECHR 10/10/ 2013.

<sup>2</sup> *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 16/06/2015.

<sup>3</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, ECHR 2016.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR)

and Schulz, 2015) liability, due to construing the heterogeneous ECHR law and practice of its application, is considered by scientists to be not fully explicit, defined and sometimes – even fragmented and incoherent (Van der Sloot, 2015), the online space, as the uniform virtual environment that is available everywhere, which is usually opposed to domestic jurisdictions of separate states that single out by their certain exceptional legal regulation features, *per se* requires the equal assurance and assessment of its participants' rights and obligations. Paradoxically, on the one hand, inconsistency of the ECHR case-law in this area is acknowledged, on the other hand, application of different standards for ascertainment of the liability of all the participants of the same virtual environment, in principle, would not be justified; an extremely difficult task, i.e. to balance at the *universally* acceptable scale the rights and obligations of such influential website operators, website visitors (commentators) and addressees of comments (the third parties) in the democratic society, accrues, namely, to the courts of *individual* states that examine the disputes arising between the Internet users. It means that the domestic courts must *consistently* apply among themselves the partly *contrasting* judgements on the cases of *Delfi AS v. Estonia* and *MTE and Index v. Hungary* in such a way, so that later on their application would not be recognized as the violation of the ECHR case-law.

With taking into account the circumstance that the deviation from the case-law, which was formed by ECHR, can mean the violation of the Convention and that the research, which was done in the other states, proves that the domestic courts do not always apply the ECHR case-law correctly, the present research is aimed at revealing the fact, whether the Lithuanian courts of general jurisdiction are guided in their practice by the rules, which were formulated by the ECHR in the cases of *Delfi AS v. Estonia* and *MTE and Index v. Hungary* (and, if they are guided by them, then – whether it is correctly done). With taking into consideration the fact that similar cases in Lithuania are being analysed several times in the appeal and cassation courts, there are reasonable doubts as to whether the national courts refer to the ECHR case-law. If the Lithuanian courts are not guided the ECHR case-law, Lithuania could be accused in breach of the Convention and experience negative financial consequences. This reason confirms undeniable relevance of the research. What is more, the research helps to evaluate whether the balance of the rights and obligations of victims, websites' managers and comments authors' is ensured in Lithuania.

### **Factual circumstances and essence of the dispute in the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary***

Prior to analysing the issue, whether the Lithuanian courts appropriately apply the criteria of the Internet news portal's liability for non-elimination of the third parties' unlawful comments in the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary*, it is important to assess the specificity of the factual circumstances of these definite cases. Therefore, firstly, the factual circumstances of the mentioned cases and the concise essence of the domestic courts' judgments (*ratio decidendi*) are presented.

*Essence of the case of Delfi AS v. Estonia*

The publication<sup>1</sup> about the circumstance that the opening of the cheaper and faster ice roads, which connect the continental part of Estonia and its islands in winter, had to be postponed for several weeks because the ice was damaged as a result of change of the ferry routes that was organized by the shipping company SLK, which renders the public ferry transport services, was published on the 24<sup>th</sup> of January of the year 2006 in one of the largest Estonian news portal – [www.delfi.ee](http://www.delfi.ee). The unregistered users could anonymously comment the article, the comments were non-edited and it was published on the website that the authors are liable for the content of their comments. Besides, it was stated therein that Delfi AS provides only the technical platform for comments and has the right to delete the inappropriate comments and to restrict the possibility for the authors to comment. Within 24 hours the article received 185 anonymous comments of the readers, including approximately 20 comments (i.e. 10.81 perc.), the content of which consisted of the comments of the threatening and insulting nature in respect of the SLK Supervisory Board member and main shareholder L<sup>2</sup>.

On the 9<sup>th</sup> of March of the year 2006 L. addressed Delfi AS with the request to delete immediately the unlawful comments and to pay out the compensation for the non-pecuniary damage amounting to 32 000 Eur. Delfi AS deleted the comments on the same day, but refused to compensate the non-pecuniary damage. L. appealed to the Harju District Court with the plaint to adjudge the compensation for the non-pecuniary damage.

On the 25<sup>th</sup> of June of the year 2007 the Harju District Court dismissed L.'s plaint, but, when the Tallinn Court of Appeal returned the case for re-examination, the Court of first instance adjudged the compensation amounting to 320 EUR for the non-pecuniary damage from Delfi AS on the 27<sup>th</sup> of June of the year 2008. On the 16<sup>th</sup> of December of the year 2008 the Tallinn Court of Appeal and on the 10<sup>th</sup> of June of the year 2009 the Supreme Court of Estonia left that judgment in substance unchanged.

On the 4<sup>th</sup> of December of the year 2009 Delfi AS appealed to the ECHR, stating that the domestic courts, which delivered such judgments, violated Delfi AS freedom for self-expression that is guaranteed by article 10 of the Convention.

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<sup>1</sup> „SLK Destroyed Planned Ice Road“. SLK – abbreviation of the name of the company AS Saaremaa Laevakompanii.

<sup>2</sup>For example: 2. bloody shitheads... they bathe in money anyway thanks to that monopoly and State subsidies and have now started to fear that cars may drive to the islands for a couple of days without anything filling their purses. burn in your own ship, sick Jew!; 7. What are you whining for, knock this bastard down once and for all [.] In future the other ones ... will know what they risk, even they will only have one little life.; 8. ... is goddamn right. Lynching, to warn the other [islanders] and would-be men. Then nothing like that will be done again! In any event, [L.] very much deserves that, doesn't h; 18. ... if after such acts [L.] should all of a sudden happen to be on sick leave and also next time the ice road is destroyed ...20. you can't make bread from shit; and paper and internet can stand everything; and just for my own fun (really the state and [L.] do not care about the people's opinion) ... just for fun, with no greed for money – I pee into [L.'s] ear and then I also shit onto his head. :)"

*Essence of the case of MTE & Index v. Hungary*

*On the 5th of February of the year 2010 the MTE (the self-regulatory Association of Hungarian Internet Content Providers), the purpose of which is to ensure that the Internet content providers would comply with the provisions of the Codes of their professional activities and ethics, announced the opinion about the misleading practice that is exercised on two websites by one company, which is engaged in the real estate management, according to which the advertising services used to be rendered to the users for free within 30 days, whereas after the expiry of this term the users used to be charged without any preliminary warning. Moreover, the obsolete publications and personal data used to be deleted from the websites after the user had paid all the overdue charges, which used to be calculated without the user's knowledge. It was noted in the opinion that the preconditions for such company's behaviour were created by the fact that the users, who were registering themselves on the website, had to agree with the rules, which the service provider could unilaterally change.*

The registered users (however, it was allowed to use the pseudonym) could comment the articles, which used to be published on the MTE's website, whereas the content of comments never used to be edited. It was also published on the website that the comments, which violate the third parties' rights, cannot be placed in the portal, whereas if such ones occurred, they used to be deleted only after having obtained any reader's individual request. Besides, it was stated that the opinion of the authors of comments does not reflect the MTE's position, whereas the authors are liable for the content of their comments. That opinion received the negative comments of several users under the pseudonyms<sup>1</sup>.

After several days the MTE's opinion was discussed and its total text was submitted in the article that was published in one of the largest Internet news portal in Hungary [www.index.hu](http://www.index.hu), which belongs to the private company "Index", provided with the limited civil liability. The registered users (however, it was allowed to use the pseudonym) could comment the article, whereas the content of comments used to be partially edited. Also the prohibition to publish the comments that violate the third parties' rights was stated on the website; if such ones occurred, they used to be deleted either after having received any reader's request (in the usual manner), or even on the initiative of Index. Besides, it was stated that the opinion of the authors of comments does not reflect *Index's* position, whereas the authors of comments are liable for their comments.

One Index reader under the pseudonym submitted the unethical comment under this publication<sup>2</sup>. On the 17<sup>th</sup> of February of the year 2010 the company that manages the real estate websites, which were criticized, lodged its plaint to the court, according to which it required the liability from the MTE, Index and Zöld Újság Zrt<sup>3</sup> because the

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<sup>1</sup> "They have talked about these two rubbish real estate websites a thousand times already."; "Is this not that Benkő-Sándor-sort-of sly, rubbish, mug company again? I ran into it two years ago, since then they have kept sending me emails about my overdue debts and this and that. I am above 100,000 [Hungarian forints] now. I have not paid <...>".

<sup>2</sup> "People like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead."

<sup>3</sup> The MTE publication was reproduced on the Zöld Újság Zrt website [www.vg.hu](http://www.vg.hu), but no comments followed.

content of the opinion was misleading and insulting, whereas the later comments violated the company's right to a good reputation. Upon learning about the upcoming court proceedings, the defendants immediately and on their own initiative deleted the disputed comments.

On the 31<sup>st</sup> of March of the year 2011 the court partially satisfied the plaintiff, whereas on the 27<sup>th</sup> of October of the year 2011 the Budapest Regional Court of Appeal left the judgment in substance unchanged. On the 13<sup>th</sup> of June of the year 2012 the Supreme Court of Hungary adjudged 75 000 Hungarian Forints (about 243 EUR) from the MTE and Index (from each of them) for examination of the plaintiff, including the representation costs that were incurred by the plaintiff. When the applicants lodged the constitutional complaint, on the 27<sup>th</sup> of May of the year 2014 the Constitutional Court of Hungary stated that, without having ascertained the author of comments, the liability of the website operators for the readers' comments was constitutionally justified, since otherwise the aggrieved party would hardly or in general would not get the compensation for violation of its rights.

On the 28<sup>th</sup> of March of the year 2013 the MTE and Index appealed to the ECHR with the application stating that the domestic courts, by acknowledging the obligation of the website operators to control the content of the readers' comments and by imposing the liability on them for the third parties' actions, unreasonably restricted the freedom of self-expression that is guaranteed by article 10 of the Convention.

### *Similarities and differences of the mentioned cases*

So as to assess, which cases can and / or should be generally based on the rules, which were adopted by ECHR, it is necessary to distinguish clearly the essence of the cases that are being analysed and also to assess their similarities and differences. When summarizing, similarity of the factual circumstances of the cases of *MTE & Index v. Hungary* and *Delfi AS v. Estonia* can be stated.

1. The websites [www.delfi.ee](http://www.delfi.ee)<sup>1</sup> and [www.index.hu](http://www.index.hu) are among the main news portals in their countries.
2. The articles that are published on the topics, which are sensitive to the public ([www.delfi.ee](http://www.delfi.ee) – about the possibility, which was blocked by SLK, to make use of the public ice roads that ensure the cheaper and faster connection (than using the SLK ferries), whereas [www.index.hu](http://www.index.hu) – about the non-transparent practice of the real estate website operators, i. e. the money used to be collected for the service, which at the beginning used to be provided for free, without warning the users).
3. The articles, which received the comments, were issued in the proper style.
4. The readers of the web portals [www.delfi.ee](http://www.delfi.ee), [www.index.hu](http://www.index.hu) and [www.mte.hu](http://www.mte.hu) had the possibility to comment the articles, which were published therein.
5. It was stated on all websites that the authors are liable for the content of their comments.
6. The section containing the comments used to be not edited on all websites, the content of comments depended exclusively upon the commentators, whereas the

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<sup>1</sup> Up to 330 new articles in the Estonian and Russian languages used to be daily published in the Delfi news portal, when the application was submitted. The analogous portals in Latvia ([www.delfi.lv](http://www.delfi.lv)) and in Lithuania ([www.delfi.lt](http://www.delfi.lt)) also belong to the company.

comments used to be deleted only after having received the aggrieved party's request (though it is stated in the case that the content of comments on the website [www.index.hu](http://www.index.hu) could be partially edited<sup>1</sup>, and, if necessary, – deleted; judging from the data that are contained in the case, it remains unclear what the scope of such partial editing was).

7. All comments of the dispute were written in the sharp style.
8. The comments were already deleted when the courts had been examining the cases.

The essential differences of the factual circumstances in the mentioned cases are as follows:

1. *The website operator's legal status and the economic interest that is related to him.* The website [www.mte.hu](http://www.mte.hu) belongs to the public legal entity MTE that carries out its activities on the non-commercial grounds, the purpose of which is to ensure compliance with the provisions of the Codes of professional activities and ethics for the Internet content providers, whereas [www.delfi.ee](http://www.delfi.ee) is the professionally managed website, which is operated on the commercial basis and is interested to attract as many commentators of the articles as possible; not only the number of visitors, but also the income that is earned from advertising depends upon the number of commentators.
2. *The aggrieved parties' non-identity.* The publication, which was placed on [www.delfi.ee](http://www.delfi.ee), was related to the commercial activities that are carried out by the company (SLK), whereas the unlawful comments, which were published, were about its main shareholder and a member of the Supervisory board, i.e. the natural person. As the article, so the comments were published in the Hungarian portals about the same legal entity.
3. The different *nature of the infringed* interest arises from the above-mentioned aspect: the SLK's shareholder was defending his, as the natural person's, reputation, i.e. his moral right to honour and dignity, whereas the legal entity in the case of the MTE and Index was defending its commercial (business) reputation, which is not identical to the first one from the moral and valorem approach.
4. *The possibilities for commenting.* The anonymous commenting without registration was allowed on the website [www.delfi.ee](http://www.delfi.ee), whereas only the registered users (however, the pseudonym could be used) could express their opinion in the Hungarian portals.
5. *The system of deleting the unlawful comments was partially different.* The comments on all three websites (Delfi AS, Index and MTE) used to be eliminated after having received any reader's notification or application to behave so (for example, the other readers or even the author himself/herself could mark each comment on the website [www.delfi.ee](http://www.delfi.ee) as the one, which must be deleted and the comment used to be immediately deleted), whereas the content of comments only on the website [www.index.hu](http://www.index.hu) used to be partially<sup>2</sup> edited and the comment could be deleted on the initiative of Index. Besides, the

<sup>1</sup> As it is impossible to ascertain the scope of "partial editing", so this aspect will be mentioned when considering the differences.

<sup>2</sup> It is impossible to ascertain the conditions and scope of such partial editing from the data of the case.

word selection system, which blocks the comments having the indecent word roots, had been operating on the website [www.delfi.ee](http://www.delfi.ee).

6. *The pre-trial settlement of the dispute.* As regards the case of *Delfi AS v. Estonia*, the aggrieved party that was asking to delete the unlawful comments addressed Delfi AS (though 6 weeks passed from the moment of appearance of the comments) and the latter deleted them on the same date. As regards the case of *MTE & Index v. Hungary*, the aggrieved party did not address the operators of the websites, but directly appealed to the court (however, the MTE and Index deleted the comments as soon as they became aware about the upcoming court proceedings).

All these aspects are important in assessing whether the rules, which were adopted from ECHR, should be applied in a particular case or the approach must be contrary due to the essential differences of the facts. In addition, the mentioned differences revealed the directions and trends of the ECHR case-law, which is definitely important when making decisions in the future.

#### **Rules that were formulated in the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary* as well as the scope of their application**

After having assessed the aspect in the case of *Delfi AS v. Estonia* that the preliminary editing of comments in a usual way for the traditional mass media cannot be required from the website operator due to the unique nature of the Internet as well as that a higher risk of violation of the private life on the online space emerges due to the supra-national nature and spread of the Internet, easy accessibility to it in any part of the world and, in fact, unlimited possibilities for spreading the information that is circulated therein, the ECHR modified to some extent the criteria of assessing the balance between articles 8 and 10 of the Convention, which were singled out in the cases of *Axel Springer AG v. Germany* and *Von Hannover v. German* and, based on the factual circumstances of the definite case, formulated the criteria of the Internet news portal's liability for the damage that was caused by the third parties' comments, which were submitted to it, namely: (i) *the context of comments*, (ii) *the preventive measures or the measures that ensure the operative elimination of comments, which were taken by the website operator*, (iii) *the possibility of the liability of the real authors of comments as an alternative to the liability of the web-portal operator* and (iv) *the consequences of the liability that were applied in the domestic law towards Delfi AS*. However, just after half a year the ECHR singled out two criteria of liability in addition to the previous ones that were singled out in the judgment that was delivered in the case of *MTE and Index v. Hungary*, i.e. (v) *the aggrieved party's behaviour* and (vi) *the consequences of comments for the aggrieved party*. The content of these criteria is briefly discussed below.

***Context of comments and disputed content of comments<sup>1</sup>***

After having comprehensively assessed the important circumstances of evaluation of the context of comments in both cases, the context of comments must be assessed according to the following criteria: *(i) the nature of the article, its topic and discussion that has arisen in the public and their compliance with the public interest<sup>2</sup>; (ii) monitoring of the comments section by the website operator and the commentators' right to edit their own comments, (iii) the nature of comments (unlawfulness), which (especially evident) determines the obligation of the website operator, who has the sufficient control over comments, to delete them (though a more acute language structures and more emotional level are typical of the Internet, the right to self-expression is not compatible with the unjustified attack and insulting of the person/entity; thus, it is necessary to make a clear distinction between criticism and insulting<sup>3</sup>); (iv) the status of the news website operator as well as the purpose and objective of the website that are closely related to it: imposing of the liability is significantly more justified with respect to the website operator, who seeks for commercial objectives, particularly if he is economically interested in the number or content of comments, if compared with the non-profit making entity.*

***Possibility of imposing the liability on the authors of comments as a certain alternative***

From the most general point of view, this criterion is to be described as follows: the fewer possibilities to impose the liability on the authors of comments for the consequences, which were caused by their comments, exist, the more justified the liability of the operators of the news websites is, particularly if the latter operate on the commercial basis and, though declaring the liability of the authors of comments for the unlawful comments, failed to take sufficient measures so as to ensure the possibility to identify them (for example, they allowed the unregistered users to publish their comments and, thus, assumed a certain liability for their comments).

***Measures that were taken by the website operator<sup>4</sup>***

With taking into account the argumentation of both judgments that were delivered by the ECHR, the conclusion is to be drawn that a website operator must not take all possible measures so as to block the way for appearance of the unlawful

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<sup>1</sup> *The content of comments* was named as the first criterion in the case of *Delfi AS v. Estonia*, whereas in the case of *MTE & Index v. Hungary – the context of comments and the content of disputable comments*. As the content of comments was also evaluated in the case of *Delfi AS v. Estonia*, the subsequent ECHR formulation must be considered as clarification of the name of the first criterion.

<sup>2</sup> It was emphasized in the case of *Delfi AS v. Estonia* that the portal, which published the article on the issue that was topical to the society could expect the negative reaction (particularly, after having evaluated the general nature of comments), reaching the level of undeserved insults and hate.

<sup>3</sup> *Wojtas-Kaleta v. Poland*, no. 20436/02, ECHR 2009; *Stoll v. Switzerland* (GC), no. 69698/01, ECHR 2007.

<sup>4</sup> As regards the case of *MTE & Index v. Hungary*, the measures, which were taken by the website operator, and the criteria of the aggrieved party's behaviour are discussed in one part; however, according to the author, they are independent criteria.

comments; however, he must *ensure the urgent deleting of the already published comments* in accordance with the following procedure: a) *the evidently* unlawful comments must be urgently deleted *on his own initiative* after their appearance; b) it is sufficient to delete *the non-obviously* unlawful comments, immediately after having received such application.

### *Consequences of imposing the liability on the website operator*

When examining the issue on the liability of the news website operator for the third parties' unlawful comments, which were published therein, not only the negative financial or non-financial consequences that are *ad hoc* arising for the *definite* mass media means (and wider than from the aspect of fulfilment of the judgment), but *in general* the possible *impact* of the court decision on the conception of the free mass media, which reflects the guarantee of the freedom of speech in the democratic society, must be assessed.

### *Aggrieved party's behaviour<sup>1</sup>*

Although there is a lack of analysis of the aggrieved party's actions in the judgment on the case of *Delfi AS v. Estonia*, not only *the contradictory business practice of the company and the fact of the investigation, which was initiated with regard to it*, was reasonably taken into account in the case of *MTE and Index v. Hungary*, but also *the personal commentators' experience*, which forms the factual basis for comments, was investigated therein. According to the author, *the actions of the aggrieved party* (the natural person – the SLK's shareholder) and *of the company, which is managed by him<sup>2</sup>*, also had to be assessed in the case of *Delfi AS v. Estonia* – both *prior to the appearance* of comments (i.e. assessing the factual basis of comments) and *after their appearance* (especially, with taking into account the circumstance that the aggrieved party had not been taking any legal protection actions within 1,5 months, though the aggrieved party undoubtedly had to see and could see the comments earlier). Thus, when assessing the possibility of the aggrieved party's contribution to the appearance or increase of the damage, the following aspects are to be analysed, i.e. whether the aggrieved party's real behaviour determined the content of comments and what actions were taken by him both prior to publishing the comments and after their appearance. However, when only asking to delete a certain comment, it is enough to establish whether it transcends the limits of the freedom of self-expression that are consolidated in article 10 of the Convention.

### *Consequences of comments for the aggrieved party*

The *objective* consequence of publishing the comments that are assessed in each case – their accessibility for the unlimited number of people – is usually clear without

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<sup>1</sup> Based on the arguments of the judgment, the author of the article attributed the aggrieved party's contribution to the independent category.

<sup>2</sup> It must be held, after having evaluated similarity of the factual circumstances, that this circumstance had to be investigated and ascertained in the case of *Delfi AS v. Estonia*. It is an interesting fact that only the main shareholder of the company (but not SLK) considered himself to be the aggrieved party.

the deeper analysis, whereas the *subjective* consequences are associated with the negative consequences, to which the definite aggrieved party is faced. It is the non-pecuniary damage that was incurred by the SLK's shareholder in the case of *Delfi AS v. Estonia*, whereas the negative impact of the comments on the company's commercial reputation had to be ascertained in the case of *MTE & Index v. Hungary*. The ECHR noted in that case that in certain cases comments about the company may harm the non-pecuniary interests (though, from the point of view of their value, they fall into a completely different dimension) of the natural persons, who are related to the company, whereas the court judgments may be aimed at indirect protecting, namely, these natural persons against the unlawful statements. However, it was stated in the case of *MTE and Index v. Hungary* that a number of investigations on the possibly unlawful actions of the companies (applicants) had been carried out; thus, according to the ECHR, there was a low likelihood that the discussed comments could significantly influence the relevant users' attitude and could produce some additional and significant impact on the relevant users' attitude towards the aggrieved company. As the Hungarian courts did not investigate, whether the comments in fact harmed or could harm the plaintiff's right to the business reputation, so the ECHR stated the violation of article 10 of the Convention.

### *Scope of application of the ECHR judgments*

It is emphasized in the ECHR judgments that the cases, which are being analysed, are not related to the web portals of the other nature, in which only the other persons' comments are published (for example, via the Internet discussion forums or message boards), as well as are not related to the social networks, the operators of which do not offer any content, and to the websites or *blogs* that are filled in and monitored by private persons. Although this statement may suggest that the criteria of liability, which were singled out by the ECHR, for the consequences that were caused by the third parties' comments are applied only to the operators of the news websites (and are not applied to the administrators of all the other websites that are not aimed at publishing the news), such standpoint, according to the author, would be perverse and would create the formal preconditions for the operators of the websites to avoid unjustifiedly the liability and would prevent the courts from referring directly to the most advanced judgments of international courts. Several reasons justify the possibility to apply the criteria, which were singled out by the ECHR, also to the websites of the other nature.

*Firstly*, it is an often case, when it is difficult to attribute the website to some category (Griffith, 2016; Brunner, 2016) because of its multifaceted role (sometimes it is difficult to distinguish between the active and passive Internet intermediaries (Van der Sloot, 2015), however, the website operators of any type can actively urge the third parties to publish their comments.

*Secondly*, the users can publish their (usually unedited) comments (Griffith, 2016; Brunner, 2016) on almost all modern websites.

*Thirdly*, in most cases the unlawful comments are exactly typical of the social mass media and amateur websites that have less visitors (Caddell, 2016).

*Fourthly*, the statements in the comments, the scale of their spreading on the Internet and the consequences that are caused by it, but not the nature of the website,

not the operators' legal status and not the circumstance, whether the operator of the Internet news portal seeks for and/or gets the economic benefit, mainly determine the aggrieved party's losses. Therefore, the position, i.e. that the general principles of imposing the liability and non-discrimination require to assess not the formal nature of the website or the *legal form* of its operator, but, namely, the website operator's role in the process of publishing and elimination of the unlawful comments, is to be accepted (Griffith, 2016; Brunner, 2016)<sup>1</sup>. Thus, the criteria (which were singled out by the ECHR) of liability of the news websites for their visitors' comments, according to the author, are to be applied to the operators of all websites, who: a) create the conditions for the third parties to publish the unedited comments and b) fail to take the actions so as to immediately delete the unlawful comments.

Hereafter, we shall review how this approach is reflected in the Lithuanian case-law of general jurisdiction.

### **Review of the Lithuanian case-law after the ECHR judgments that are being analysed**

Until the 10<sup>th</sup> of July of the year 2015 the cases on the legal consequences as a result of unlawful comments used to be examined as in accordance with the civil procedure, so in accordance with the criminal procedure under the Criminal Code of the Republic of Lithuania (hereinafter referred to as the CrC<sup>2</sup>), in the course of which also the civil issues – on compensation of the non-pecuniary damage – used to be solved under the Civil Code of the Republic of Lithuania (hereinafter referred to as the CC). With taking into account that usually the unlawful comments, which are ascertained in criminal cases, meet the delict concept, and, after having eliminated certain articles of the CrC, the analogous cases will be examined in accordance with the civil procedure, so the Lithuanian case-law in the cases of both types, which were examined after the delivery of the ECHR judgment in the case of *Delfi AS v. Estonia* on the 10<sup>th</sup> of October of the year 2013, is being analyzed in the present article, with taking into account the subsequent ECHR judgments.

### ***Review of the civil cases***

The research revealed that the famous ECHR judgment on the case of *Delfi AS v. Estonia* was cited only three times<sup>3</sup> in the Lithuanian case-law and only once was

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<sup>1</sup> Also the case of *MTE & Index v. Hungary* proves that the criteria of the website operator's liability, which were formed in the case of *Delfi AS v. Estonia*, can be applied to the websites of the other nature.

<sup>2</sup> Article 155 of the CrC remained in force until the deadline; it envisaged the liability for public insulting humiliation of the person by actions, either orally or in writing, and under part 2 - for non-public insulting of the person. Until the 01<sup>st</sup> of April of the year 2016, the liability under p.1 of article 290 of the CrC could be imposed also on the person, who insulted the public servant or the person, who performs the public administration functions.

<sup>3</sup> Kaunas County Court, Criminal Division, 27 February 2015, ruling of the board of judges in the criminal case (No. 1A-52-317/2015); The Supreme Court of Lithuania, Criminal Division, 13 January 2015, ruling of the board of judges in the criminal case (No. 2K-57-693/2015), The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

referred to in substance<sup>1</sup> in one civil case, whereas the judgment on the case of *MTE & Index v. Hungary*, in general, has never been mentioned. It was also ascertained that at present the former position of the Lithuanian courts, according to which the fact that *it is not always possible to identify the authors of messages due to the newest technologies <..>, does not serve as the grounds to consider that the damage, which was caused as a result of announcement of the data, must be compensated by mass media <...>, therefore, ascertainment of the conditions for the civil liability and their proof have no legal significance*<sup>2</sup>, at has changed; the compensation for the consequences that were caused by the third parties' comments, which were published on the websites, was never adjudged from the operators of the news websites in favour of the aggrieved party by the Lithuanian courts. Besides, usually the direct authors of comments are held liable in Lithuania for the content of their comments, which were published on the Internet; therefore, the courts in general have little possibilities to refer to the ECHR case-law and factual circumstances in similar cases. On the other hand, even if the mentioned ECHR judgments are not directly stated and/or the authors of comments are held accountable, the conclusion can be drawn that the similar rules that resemble the ones, which were formulated by the ECHR, are applied *de facto* in the Lithuanian case-law and there are no grounds to think that they would change, if the defendant indicates the operator of the news website.

Thus, from the point of view of compatibility with the judgments that were delivered by the EHRC, it is possible to single out the following trends of cases that are examined by Lithuanian courts of the general competence.

*Firstly*, the majority of cases that are examined by Lithuanian courts arise because of comments on the identical specialized websites for providing complaints<sup>3</sup>, which do not conform to the legal status of the news website; however, the Lithuanian courts do not overemphasize the explanation that was provided in the ECHR judgment on the case *Delfi AS v. Estonia* stating that this case is not associated with the **web portals of the nature, where only comments of the other persons are published (for example, the online discussion forums or notice boards)** as well as social networks, where the operators do not offer any content and websites or *blogs* that are owned by private persons. So, the Lithuanian courts apply the rules that were formulated by EHRC also in the cases, when the website operator does not conform to the status of the mass media outlet in the meaning that is provided in the Law on Public Information<sup>4</sup> and the status of the news website in the meaning that is used for the cases that were examined by EHRC, but according to the Law on Information Society Services<sup>5</sup> and the E-Commerce Directive, may be assessed as the provider of the

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<sup>1</sup>The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>2</sup>Kaunas County Court, Civil Division, 24 May 2012, ruling of the board of judges in the civil case (No. 2A-852-324/2012);

<sup>3</sup>See Klaipėda County Court, Civil Division, 27 March 2015, ruling of the judge in the civil case (No. e2S-670-777/2015), in which the defendant asked to allow her to publish the refutation on the other website ([www.skundziu.lt](http://www.skundziu.lt), [www.skundai.lt](http://www.skundai.lt), [www.skundailt.com](http://www.skundailt.com) or [www.skundai.net](http://www.skundai.net)) instead of the non-functioning [www.skusk.lt](http://www.skusk.lt).

<sup>4</sup>Law of the Republic of Lithuania on Public Information. Official Gazette, 1996, Nr. 71-1706.

<sup>5</sup>Law of the Republic of Lithuania on the Information Society Services. Official Gazette, 2006, Nr. 65-2380.

information society services (such as announcing of public comments)<sup>1</sup>. Such position of the courts must be assessed as progressive and reasonable, because, as it was mentioned, namely the role of the website in the process of publishing and deleting the unlawful comments, but not the formal character of the website or the *legal form* of its operator is important.

*Secondly*, the Lithuanian courts, with taking into account the fact that the comments provided online "*were accessible to any persons without any restrictions*", state the necessity to assess *the scope of spread of the information*<sup>2</sup> or directly point out that "*the scope of spread of the information is evidently broad*"<sup>3</sup>. Based on the EHRC case-law in the case of *Delfi AS v. Estonia*, the Supreme Court of Lithuania pointed out that "*on assessing the proportionality of the website operator's liability according to the criteria of the way of getting the information, its faithfulness, contents, form and consequences, the aspect of space for discussions (the online space) that inevitably dictates the specific requirements on restrictions of the freedom of self-expression appears to be important*", and "*for a large portal, in case of publishing an article on the sensitive problems and keeping in mind the general character of the related comments, a higher-than-average risk of outstepping the limits of acceptable criticism in the online discussion and achieving the level of groundless offence and hate exists*"<sup>4</sup>. Thus, the Court of Cassation took into account the position of the EHRC on the spread of Internet and the possibility that any information once published in it will remain public and will circulate for ever, so it requires cautiousness, particularly because of simplicity of the information disclosure on the Internet and the large amount of information therein that aggravates the ability to find the statements and to delete them not only for the affected person that has less resources for constant monitoring the online information, but also for the website operator. In addition, Lithuanian case-law highly appreciates both purposefulness of the website and its audience<sup>5</sup>, whereas some lack of them takes place in the ECHR judgments.

*Thirdly*, as the comments that are related to the disputes, which are analyzed by the Lithuanian courts, are usually published not on the news websites (except for the rare cases<sup>6</sup>), but on the specialized websites for complaints, *the character of the article and its content* most frequently are not relevant in assessing the context of comments and their unlawfulness. However, the mentioned fact does not prevent from assessing the other criteria of liability for the unlawful comments, which were singled out by EHRC. Their application is discussed further on.

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<sup>1</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014). The operator of the websites [www.skundai.lt](http://www.skundai.lt) and [www.skundailt.com](http://www.skundailt.com) was acknowledged as such one, because he played an active role, allowing him to be aware and to monitor these data, and his role was not neutral. It also meets the CJEU case law.

<sup>2</sup> Klaipėda County Court, Civil Division, 27 February, ruling of the board of judges in the civil case (No. 2A-142-538/2014), The Supreme Court of Lithuania, Civil Division, 9 November 2010, ruling of the board of judges in the civil case (No. 3K-3-441/2010).

<sup>3</sup> Klaipėda County Court, Civil Division, 27 February, ruling of the board of judges in the civil case (No. 2A-142-538/2014).

<sup>4</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014)

<sup>5</sup> The Supreme Court of Lithuania, Civil Division, 4 July 2014, ruling of the board of judges in the civil case (No. 3K-3-371/2014).

<sup>6</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

(i) *The character of the discussion* having arisen in the public *and its conformity to the public interest*. The Lithuanian courts duly follow the ECHR case-law, according to which the character of the public discussion and its context may influence the limits of the freedom of assessments made by courts, which are set in the article 10 of the Convention<sup>1</sup>. For example, the Supreme Court of Lithuania, based on the explanation, which was provided by EHRC in the case of *Delfi AS v. Estonia*, that the portal having published the article on the problem, which is important for the public, could expect negative reactions with taking into account the general character of comments in the portal, which will overstep the limits of permissible criticism and achieve the level of wanton insults and hatred, decided in one process that in case of the dispute, the character of the portal ([www.skundai.lt](http://www.skundai.lt) [www.skundailt.com](http://www.skundailt.com)), i.e. lodging of complaints, is also related to the increased risk of undermining somebody's reputation and this presupposes the higher need in carefulness and attention. Besides, the Court recognized that the discussion on employer's labour methods, working environment and working conditions (i.e. the problems, which are topical for a potential employee) that arose in the comments was also linked with a certain public interest – the employees' right for safe and healthy working conditions, the fair remuneration for work, etc., and in such a discussion some broader limits of self-expression (such as the trenchant speech, criticism) and the narrower limits of the freedom of assessments made by courts are permissible<sup>2</sup>. It was stated in the other case that prior to the publication of negative comments (criticism) on the same aspects related to the plaintiff, there were already some negative comments in the other portals and telecasts, so the negative comments (criticism) of the defendant ought not to be unexpected for the plaintiff and cause strong negative emotions to him or negatively affect his professional activities. Moreover, only the fact that the plaintiff spent much time for protection of his honour and dignity as well as the plaintiff's good financial situation do not serve as the sufficient basis for adjudging the compensation for the non-pecuniary damage<sup>3</sup>.

(ii) *The possibility of the commentators to edit their comments* was never analyzed in any of the examined cases (maybe, because the commentators avoided exercising their right); however, *monitoring of the column of comments that is possessed by the website operator was assessed* before the announcement of the ECHR judgments. It was stated in the Lithuanian case-law that the provider of the information society services (the website operator) plays an active role that enables him to have knowledge about the information, which is provided online by recipients of the service, or to monitor it; the website operator must not be recognized as the intermediate provider of the information society services and is liable for all the materials that are published on the website; whereas the role of the intermediate provider of services is neutral, whereas his actions are the ones of the technical character only and he is liable for the unlawful information only in the case, when he was aware of unlawfulness of such information, but took no measures for elimination

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<sup>1</sup> Part 2 of article 10 of the ECHR leaves little space for restrictions on the freedom of self-expression in the political discussion and discussion on the issues of the public interest, whereas there are more possibilities to restrict the freedom of self-expression in commercial discussions.

<sup>2</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>3</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

of such violation or otherwise contributed to the violation<sup>1</sup>. For example, it was ascertained in one of the cases that „<...> a complaint is not publicly visible until the *www.skundai.lt* operator makes sure, whether the new complaint meets the specified requirements; if it meets the requirements, <...> the operator ticks it and presses "to show publicly". <...> it is foreseen that the *www.skundai.lt* operator does not make complaints public and they are deleted, if the complaint contains words of the offensive character<sup>2</sup>". Therefore, when it is established that the website operator could fully control the content of the website and only the decision of the operator predetermined the public visibility of comments of the certain content, the civil liability could be imposed on him. In summary, the civil liability must be imposed on the provider of the online services, if all the preconditions of its application (such as damage, unlawful actions, their causality and the service provider's guilt) exist and if it is established that the service provider's activities do not conform to the exceptional cases of exemption from the liability that is set in articles 12-14 of the Law on Information Society Services<sup>3</sup>.

(iii) *Character of comments (unlawfulness)*. As it was mentioned above, the procedure of elimination of the evidently unlawful comments and the procedure of elimination of non-evidently unlawful comments are different in the ECHR case-law; however, the assessed *evident unlawfulness criterion* depends on the formulation of the comment, provided details of the situation and assessing whether the comment is only the expressed anger and discontent or the causes explaining it are provided<sup>4</sup>, etc. For example, accusations of committing criminal acts, especially serious ones, are recognized in the ECHR case-law as the ones, which are able to cause a considerable damage to the person's honour and dignity and even may prevent from exercising the right to respect his private life that is set in article 8 of the Convention (the same principle was repeated in the *Delfi* case)<sup>5</sup>. It is also recognized in the case-law of the Supreme Court of Lithuania that the data about the crime committed by a person in absence of the conviction as well as the accusation of concealment of the criminal act, are *evidently* humiliating and defamatory, so their humiliating character does not need proving<sup>6</sup>, and the public presentation and spreading of the ostensibly truthful data that are aimed at the public condemnation of the other persons because of their

<sup>1</sup> The Supreme Court of Lithuania, Civil Division, 13 November 2012, ruling of the board of judges in the civil case (No. 3K-3-479/2012); 21 December 2012 ruling of the board of judges in the civil case (No. 3K-3-586/2012). Under the E-commerce directive and the Law on Information Society Services, the exceptions pertain only to the providers of the information society services, who, in principle, mediate between the users and providers of the Internet content, whereas the operator of [www.skundai.lt](http://www.skundai.lt) in fact had been monitoring the comments that were published on the website.

<sup>2</sup> The Supreme Court of Lithuania, Civil Division, 13 November 2012, ruling of the board of judges in the civil case (No. 3K-3-479/2012).

<sup>3</sup> The Supreme Court of Lithuania, Civil Division, 21 December 2012 ruling of the board of judges in the civil case (No. 3K-3-586/2012).

<sup>4</sup> For example, the ECHR acknowledged such statements as "some kind of idiot", "limited personality", "obvious cretin" that were contained in the letter, which was addressed to the judge, as insulting ones, whereas the ECHR did not treat the comparison of the prosecutor with the "blonde" in the press as the insulting one. (žr. *Bodrožić and Vujan v. Serbia*, no. 38435/05, ECHR, 2009).

<sup>5</sup> *Björk Eidsdóttir v. Iceland*, no. 46443/09, ECHR, 2012.

<sup>6</sup> The Supreme Court of Lithuania, Civil Division, 26 March 2008, ruling of the board of judges in the civil case (No. 3K-3-183/2008); 30 January 2006 ruling of the board of judges in the civil case (No. 3K-3-65/2006).

actions with the signs of criminal deeds cannot be tolerated and assessed either as the aggressive criticism, or the inaccuracy of information<sup>1</sup>.

On the other hand, although *the accusation of committing the criminal deed is considered evidently unlawful*, as regards the Lithuanian case-law, the other person is usually accused of certain deeds, which are negatively assessed by the public and have the criminal character, by anonymous comments; this proves that the preventive function of the courts is quite passive. Moreover, even such comments sometimes are duly assessed only during the third hearing at the Court of Appeal<sup>2</sup>, after prior reasoning about "the salary in the envelope", "black finance", "avoidance to pay for work", "exploitation", "slavery" and other statements, which single out by serious accusations of committing unlawful deeds that are prohibited by punitive laws and unacceptable in the aspect of the law and good morals that were provided in the comments, which were submitted to the Supreme Court of Lithuania<sup>3</sup>. Thus, the Court of Appeal analyzed them in details only during the third hearing and ascertained that the deeds prohibited by the criminal law that are mentioned in the comments (fraud, stealing, negligent and false bookkeeping (paying of salaries in envelopes)) are of the evidently offensive character and must be recognized as the information that is forbidden to be published in the meaning of article 19 of the Law on Public Information, and the ignorance of the rules for conclusion and execution of the employment contract or the rules of bookkeeping ("salaries in envelopes"), violations of the procedure for calculation and payment of the wages, dishonesty or ignominy were not fixed by decisions of any authorities, so the public announcement about violation of the administrative law from the side of the legal entity in absence of any evidence supporting the mentioned circumstance must be classified as the statement that may cause a serious harm to the plaintiff's business reputation. In addition, it is also stated that the jargon "put the horns for 800 Litas" must be understood as a conscious striving to deceive, to steal, to appropriate things or money, not supported by any evidences, and is expressed in the unduly unethical form; some formulations and statements, such as "the Mikai clan", "swindlers", "Mickey mouse company", "this company, like a fish, rots from its head", "bloodsuckers and deceivers", etc., <..> are expressed in an indecent and unethical form and must be attributed to the information that causes harm to the plaintiff's business reputation; it was ascertained that the accusation of non-payment of salaries to all employees of the company and striving for a benefit at the expense of the employees were groundless, because there were no data on initiation of the bankruptcy proceedings against the plaintiff. The earlier formulations of the comments in the case that was initiated against the same defendant, such as "the nest of swindlers", "through the fault of such unsuccessful advocates", "pull the wool over the eyes of clients", were recognized offensive and causing harm to the business reputation<sup>4</sup>, and if such statements do not provide any

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<sup>1</sup> Vilnius County Court, Civil Division, 18 September 2015, decision of the board of judges in the civil case Nr. 2A-1567-798/2015; The Supreme Court of Lithuania, Civil Division, 7 March 2011, ruling of the board of judges in the civil case (No. 3K-3-97/2011).

<sup>2</sup> Kaunas County Court, Civil Division, 6 November 2014, ruling of the board of judges in the civil case (No. 2A-887-343/2014).

<sup>3</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>4</sup> The Supreme Court of Lithuania, Civil Division, 13 November 2012, ruling of the board of judges in the civil case (No. 3K-3-479/2012).

information on the public interest, they could not be justified even in the context of the discussion on the issues that are related to the public interest. On the other hand, the liability may arise even from the correct information provided in a misleading way and such information, upon taking into account the way of its expression, the purposefulness of the website, its audience and other circumstances, may be attributed even to category of "news"<sup>1</sup>.

It must be noted that there was no analysis of *individual* comments in the judgments that were delivered by the EHRC; therefore the case-law is particularly welcomed where it is recognized that on assessing the certainty, contents and form of the published information as well as its consequences by *generalized assessment of the comments, the real <...> character of the statements is not disclosed*", and "*in such a case, not only the context of the totality of all comments, but also each individual comment should be analyzed*"; however, it is simultaneously emphasized that "*<...> cannot be assessed only individual <...> statements <...>, but their totality (related to the defendant) and the way of their presentation<sup>2</sup> as well as the context of the situation, in which the statements were provided, must be taken into account*"<sup>3</sup>. Besides, the necessity of general assessment of the total formulation with taking into account its link with the other verified information provided in the formulation is notable<sup>4</sup>. Thus, the Lithuanian case-law reasonably recognizes the necessity to assess both the unlawfulness of individual comments and the general context of their presentation. For example, the case was sent back to the Court of Appeal for reexamination, because *the said court analyzed the information, which was proposed to be deleted, in general terms only, failing to provide at least the minimum fact-based substantiation for each statement and attributed all the comments to the category of "opinions"*<sup>5</sup>. This note of the Court of Cassation was duly implemented by Kaunas County Court<sup>6</sup>.

(iv) *The status of the operator of the news website as well as the purpose and the aims of the website* are duly assessed by the Lithuanian court. For example, in the case-law, *the character of the website (provision of complaints)* and the circumstance that *the provision of complaints causes a higher risk of harming the business reputation and business disruption*, and the said risk supposes the serious duty of carefulness for the authors of comments and the subject involved in their storage<sup>7</sup>"; if the said duty is not duly implemented, the duty to prove the conformity of the stored

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<sup>1</sup> The Supreme Court of Lithuania, Civil Division, 4 July 2014, ruling of the board of judges in the civil case (No. 3K-3-371/2014).

<sup>2</sup> Eg., the recital tone, means of expression (eg., the application in capital letters).

<sup>3</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

<sup>4</sup> The Supreme Court of Lithuania, Civil Division, 4 July 2014, ruling of the board of judges in the civil case (No. 3K-3-371/2014).

<sup>5</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>6</sup> Kaunas County Court, Civil Division, 6 November 2014, ruling of the board of judges in the civil case (No. 2A-887-343/2014).

<sup>7</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014)

comments with the reality emerges. Besides, the *commercial* aspect of the discussion is emphasized as well<sup>1</sup>.

*Fourthly*, usually the cases that are examined by the Lithuanian courts are initiated against the authors of comments and the necessity to involve the operator of the portal is not recognized<sup>2</sup>. However, if the identity of the real authors of comments is not established (although it may be supposed that that the priority must be attached namely to their liability<sup>3</sup>), the possibility of their liability, as a certain alternative, is duly assessed. It is notable that the author (spreader) of comments according to the Lithuanian case-law can be considered also as the *person, who provides the other persons with a free remote access to the own wireless communication WIFI network (router) and forms in such a way the conditions for violation of the third persons' rights*, if the information on the said access is confidential and the dossier does not contain any data on the other person, would have the access to the Internet or would be aware of the confidential information<sup>4</sup>; also *the person, whose e-mail box was used for the data spreading*, could be considered as the spreader of the data<sup>5</sup>. Besides, when the author of the information, who is obliged to prove faithfulness of the spread data<sup>6</sup>, keeps anonymity, under the case-law of the Supreme Court of Lithuania, the necessity to substantiate the legitimacy of his refusal to delete the spread information<sup>7</sup> accrues to the website operator, because the illegal character (non-publication) of the information is not associated in the law with the

<sup>1</sup> The Supreme Court of Lithuania did not directly single out the interest of the operator of the economic website [www.skundai.lt](http://www.skundai.lt) ([www.skundailt.com](http://www.skundailt.com)) in the number of comments, but evaluated his declarations on the advertising revenue.

<sup>2</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

<sup>3</sup> Having failed to ascertain the real commentators, the provider of the information society services is considered to be the appropriate defendant. The Supreme Court of Lithuania, Civil Division, 21 December 2012 ruling of the board of judges in the civil case (No. 3K-3-586/2012).

<sup>4</sup> The data of the dispute in the definite case were published via the Internet access to <...>, which belongs to the JSC "Pusbroliai", Ltd. Under the publicly announced <...> terms of the agreement, the company was obliged not to violate the third parties' rights and lawful interests, principles of good morals and public order and not to allow the third parties to make use of the service. Klaipėda County Court, Civil Division, 27 February, ruling of the board of judges in the civil case (No. 2A-142-538/2014).

<sup>5</sup> The e-letter was sent from the e-mail box [dinaka@delfi.lt](mailto:dinaka@delfi.lt), which was acceded <...> via the IP address, <...> the computer name was "DINAKA". There aren't any data in the case, which would prove that the other person/entity sent the message, serving as the subject of the dispute, or had the access to the mentioned computer, or knew the confidential information (the password, user's name), for protection and storage of which the holders are liable. The Court of Appeal of Lithuania, Civil Division, 1 September 2005, ruling of the board of judges in the civil case (No. 2A-189/2005).

<sup>6</sup> The Supreme Court of Lithuania, Civil Division, 13 November 2012, ruling of the board of judges in the civil case (No. 3K-3-476/2012); The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>7</sup> The requirement to delete the unlawful information, which is rendered and (or) stored by the provider of the information society services, is independent from the point of view of the legal liability for storing and spreading of such information, whereas the following facts must be ascertained so as to meet it: a) unlawfulness of the information (non-publication), b) the fact of its rendering and (or) storing; c) the defendant, acting as the provider of the information society services. It is important, even if acknowledgement of the data as the data, which do not meet the reality and which humiliate one's honour and dignity, was not formulated as the subject of the plaint. The Supreme Court of Lithuania, Civil Division, 27 February 2013, ruling of the board of judges in the civil case (No. 3K-3-50/2013); 21 December 2012 ruling of the board of judges in the civil case (No. 3K-3-586/2012).

person, who has created and spread it<sup>1</sup>; in addition, it is not important who is the author or the source of the information, whether they are established or not and what their opinion (position) on the request to delete information is. On the other hand, in the author's opinion, *evidently* unlawful comments that are fixed in the definite case must be immediately deleted on the initiative of the website operator in accordance with EHRC case-law; thus, the position of the court that also the *evidently* unlawful character of comments must be substantiated<sup>2</sup> is not in line with the EHRC jurisprudence.

*Fifthly*, the preventive measures that were initiated by the website operator for protection of the third parties' rights are also taken into account in the case-law. For example, it was stated in one of the cases, which were examined by the Supreme Court of Lithuania, that "the provider of the information society services allowed the non-registered users to provide their comments; therefore, it must be considered that he has assumed a certain liability for such comments<sup>3</sup>". On the other hand, the position of the Hungarian national courts (in the case of *MTE & Index v. Hungary*, which was examined by EHRC) that, when allowing to provide the non-edited comments, the applicants could foresee that some comments can violate the legal norms, recognized that the excessive and unavoidable criterion of liability can violate the freedom of spreading the information on the Internet. Thus, the former position of the Lithuanian Court of Cassation (especially, the position that was formed before *MTE & Index v. Hungary*) cannot be overemphasized and is applicable only with taking into account the later alterations of the EHRC case-law.

*Sixthly*, it was reasonably assessed in the case-law, prior to the judgment in the case of *MTE & Index v. Hungary*, which was delivered by EHRC on the 02<sup>nd</sup> of February of the year 2016, whether the influence of the aggrieved party's actions on appearance of certain comments<sup>4</sup>, including the investigation, played the decisive role or the content of comments was predetermined by the personal experience of their authors. For example, the Court of Cassation as early as on the 19<sup>th</sup> of February of the year 2014 sent the case for reexamination, because the Court of Appeal "*had not analyzed and discussed the specific "subjects" of the said personal experience or at least the probability of the possible experience of the definite employee (taking into account the details provided in the comment and the used formulations). For example, the disclosed circumstances on entering into employment contracts would provide the*

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<sup>1</sup> The Supreme Court of Lithuania, Civil Division, 27 February 2013, ruling of the board of judges in the civil case (No. 3K-3-50/2013).

<sup>2</sup> The nature of comments prevents from drawing the conclusion that they could be acknowledged as the ones, which are not obviously unlawful.

<sup>3</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>4</sup> If the activity of the legal entity, which is defending its reputation, is "ordinary" (not attributable to the public interest), it is sufficient to prove that the assessment of its properties, activities and results or the attitude towards it has changed as a result of spread of the information, whereas, if the activity of the entity, which is defending its business reputation, is controversially assessed, it must prove the serious consequences as a result of spread of the information: the financial losses, negative impact on the owners, employees, etc. Klaipėda County Court, Civil Division, 27 February, ruling of the board of judges in the civil case (No. 2A-142-538/2014); The Supreme Court of Lithuania, Civil Division, 24 November 2004, ruling of the board of judges in the civil case (No. 3K-3-630/2004); 3 March 2009 ruling of the board of judges in the civil case (No. 3K-3-100/2009); 9 November 2010, ruling of the board of judges in the civil case (No. 3K-3-441/2010).

*precondition to believe that it is the opinion that is based on the personal experience*)<sup>1</sup>. The courts established in the other case that the aggrieved party (the plaintiff), who was simultaneously employed by nine employers, violated the requirement to work for no longer than twelve hours per day, although it was mentioned in various portals, telecasts and even the pretrial investigation was initiated. Thus, the courts considered the defendant's explanation to be reasonable, i.e. that the comment<sup>2</sup> was aimed at describing the plaintiff's 22-hour working per day as impossible <...> and at assessing the published information on the maladies <...> that took place in public purchasing as well as the other information on employment of the plaintiff by the other employers, which was obtained from the other sources <...><sup>3</sup>. Besides, the defendant's opinion was predetermined by explanations that were provided by the plaintiff's husband (the former head of the hospital) about the plaintiff's (as a former employee of the hospital) personal and professional activities related to his work in the hospital and to his interrelations with the staff. Also the parties themselves drew the courts' attention to the aggrieved party's actions: for example, the court was asked to assess the circumstance that "the plaintiff consciously failed to exercise her right to apply for deleting the comment"<sup>4</sup>. Nevertheless, the aggrieved party's actions are not always duly assessed by courts: in one case, the actions of the aggrieved company were assessed only in the course of the third hearing on appeal<sup>5</sup>.

Thus, the personal experience of the authors of comments was assessed in the Lithuanian case-law before making the said judgment by EHRC. With taking into account that the factual basis of the comments was not investigated (however, had to be – *the author's note.*) in the case of *Delfi AS v. Estonia* and there were no similar precedents in the Lithuanian courts, such Lithuanian case-law must be assessed as progressive and being in conformity with the interests of the parties to the dispute.

*Seventhly*, the consequences, to which the aggrieved party is faced, are also properly assessed in the courts. For example, after having ascertained that the negative comments were expressed in two web portals and in three telecasts prior to the public announcement of the negative comments on the same aspects that are related to the aggrieved party, it was acknowledged that the negative comments (criticism) should not have been unexpected to him and cause strong negative emotions or the negative impact on his professional activities<sup>6</sup>. It was ascertained in the other case that the company did not incur the real losses, but the discomfort,

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<sup>1</sup> The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>2</sup> "used to get money without working; it's good that <...> the money is paid for work, but not for doing scam, which was ascertained by the Public procurement service". Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

<sup>3</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

<sup>4</sup> Klaipėda County Court, Civil Division, 27 March 2015, ruling of judge in the civil case (No. e2S-670-777/2015).

<sup>5</sup> When repeatedly examining the case, the Court of the appellate instance held the company's activity as controversial, based on the article, which was published after appearance of the comments; thus, again this case is returned for re-examination, seeking for the detailed assessment of the person's contribution (by his actions) to potential criticism. (The Supreme Court of Lithuania, Civil Division, 19 February 2014, ruling of the board of judges in the civil case (No. 3K-3-30/2014).

<sup>6</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015).

which is associated with the undermining of its reputation and with the decrease in its positive assessment, allowed the court to draw the conclusion about the real and factual undermining of its business reputation. Besides, The Supreme Court of Lithuania stated that, due to the extremely close relationship between the companies (eg., the same nature of activities, the same executives, the common name, etc.), the non-pecuniary damage that was incurred by one company can lead to the damage of the rest companies, but not automatically: the link between these companies, particularly the close relationship between them, perception that they are a unit of one group must be proved for this. However, the negative impact on the business reputation of one company cannot spontaneously lead to the non-pecuniary damage of the other companies due to the identity of the published information<sup>1</sup>. It is also acknowledged in the case-law that the comments, according to which the company is accused of the slave regime and inhuman treatment of its employees as well as the opinion is formed that the company fails to comply with the terms of the employment contract, the psychological pressure is used, are in themselves offensive. <...>, slander the company and cause harm to its employees' honor and dignity. The latter two cases comply with the ECHR position that was stated in the judgment on the case of *MTE & Index v. Hungary*, i.e. that the comments about the company can cause harm also to the non-pecuniary interests of the natural persons, who are related to it, and an attempt can be made to protect indirectly namely these natural persons by judgments.

On the other hand, the consequences, which emerged for the definite aggrieved party, but not the circumstances, which emerged for the abstract third parties, must be assessed; thus, the comments must be related with plaintiffs. However, the mere fact that in two comments out of 201 comments of the article one plaintiff's surname (the plaintiff's CV was stated in one comment, whereas the plaintiff was named as Mr.B., Me.B., Mr.L. in ther other comment) and in the other one – the other plaintiff's surname were stated, but the commentators were guessing various other possible surnames the article subjects, did not serve as the basis for the court to state that the comments pertained to the plaintiffs<sup>2</sup> and to defend the natural persons' honour and dignity. The courts noted that the readers could just randomly guess their surnames; therefore, there were no grounds to think that the commentators identified namely the plaintiffs. However, the choice of the ways of defence of the individual's honour and dignity is not associated with any definite actions of the individual, who spread the data – the court examines the claim on compensation of the pecuniary and non-pecuniary damage regardless of the fact, whether the person, who spread the data, has or has not denied them (part 3 of article 2.24 of the CC)<sup>3</sup>.

*Eighthly*, it is encouraging that the Lithuanian courts principally defend the rights of the Internet users, even when the defendants are trying by all possible means to avoid responsibility. For example, when settling the dispute on the request to prohibit all possible accesses to the unlawful information that was stored on the website *www.skundai.lt* and to adjudge the compensation of the non-pecuniary

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<sup>1</sup> The Supreme Court of Lithuania, Civil Division, 4 July 2014, ruling of the board of judges in the civil case (No. 3K-3-371/2014).

<sup>2</sup> Vilnius County Court, Civil Division, 11 May 2015, ruling of the board of judges in the civil case (No. 2A-439-567/2015).

<sup>3</sup>The Supreme Court of Lithuania, Civil Division, 7 December 2010, ruling of the board of judges in the civil case (No. 3K-3-498/2010).

damage, the defendant submitted the information that in the course of examination of the case he established the legal entity provided with the limited liability "Prime Vision Limited", which acquired the domain [www.skundait.com](http://www.skundait.com), to which the whole content, which was published on the website [www.skundai.lt](http://www.skundai.lt), was moved. Besides, the defendant stated that currently the "Company Services, Ltd." is the owner of the mentioned company; therefore, only the owner or the operator of the website and/or of the data, i.e. the company "Prime Vision Limited", and/or the "Company Services, Ltd.", but not he, which can fulfil the court ruling to prohibit the access to the comments that are seen on the Internet. However, the court ascertained that the defendant did not intend to cause legal consequences as a result of moving the content of the website [www.skundai.lt](http://www.skundai.lt) to [www.skundait.com](http://www.skundait.com) and of conceding this website to the foreign companies: the users are automatically transferred from the website [www.skundai.lt](http://www.skundai.lt) to [www.skundait.com](http://www.skundait.com), on which the information, which was stored namely by [www.skundai.lt](http://www.skundai.lt), is seen (including also the publications, which are asked to be deleted), the new website is meant for the Lithuanian market; thus, after having formally transferred management of the website page to the offshore companies, which were registered abroad by the defendant himself, the defendant continues to operate factually the mentioned websites (the data about the defendant's income for the year 2013 that was earned from advertising clients, which were submitted by the State Tax Inspectorate to the case, indirectly prove this fact). Thus, the court drew the conclusion that moving of the content of the website [www.skundai.lt](http://www.skundai.lt) to [www.skundait.com](http://www.skundait.com), which was acquired on behalf of the company "Prime Vision Limited" that was established by the defendant and the change of the operator/owner of this website by conceding the website to the "Company Services, Ltd.", was performed by the defendant, seeking for avoiding the liability for the information that was placed on the website [www.skundai.lt](http://www.skundai.lt); this circumstance allowed *ex-officio* (p.5 of art. 1.78 of the CC) to acknowledge the deals, which were mentioned by the Kaunas County Court, as alleged and void, based on article 1.86 of the CC (and to leave the judgment of the Kaunas District Court of the 22<sup>nd</sup> of December of the year 2011 unchanged)<sup>1</sup>.

In the author's opinion, this case is a real example of implementation of the pecuniary justice, which prevents from avoiding the other possible violations of the individuals' rights.

### *Review of the criminal cases*

The freedom of self-expression, which is consolidated in part 1 of article 10 of the Convention, is one of the essential grounds of the democratic society and one of the most important conditions for its progress and each individual's development; therefore, it is to be applied not only to the neutral or favourable, but also to the insulting, shocking or disturbing information and ideas. The exceptions of this freedom, which is established in article 10 of the Convention, are to be strictly construed, whereas the necessity of any restrictions must meet the vital social need. On the other hand, it is necessary to respect the other individuals' rights in the

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<sup>1</sup> Kaunas County Court, Civil Division, 6 November 2014, ruling of the board of judges in the civil case (No. 2A-887-343/2014).

general interest debates, by avoiding the insulting formulations (see *Constantinescu v. Romania*).

In accordance with the ECHR case-law (see *Kanellopoulou v. Greece*), the nature and strictness of the imposed sanctions also must be taken into account, when assessing the proportionality of restriction. Therefore, prior to cancellation of the criminal liability for insulting the individual, the existence of which is assessed by the aggrieved party itself (*Constantinescu v. Romania*), the position prevailed in the Lithuanian case-law that the individual's honor and dignity, *first of all*, must be defended by less restrictive means – in accordance with the civil procedure<sup>1</sup>. However, usually the aggrieved parties are inclined to defend their rights because of the unlawful comments, being guided, namely by articles 154<sup>2</sup> and 155 of the CrC, by restrictions according to the objective features: usually not the definite negative facts, but the negative or lewd and insulting<sup>3</sup> comments about the aggrieved party's personality, his / her qualities, features, etc.<sup>4</sup> are not stated and it does not matter, whether such assessment is in line with the truth<sup>5</sup>. However, as the mentioned articles of the CrC are to be applied only when acting “with the direct intent<sup>6</sup>”, the pre-trial investigations, which were started based on them, do not always end fruitfully<sup>7</sup> (though sometimes successful cases<sup>8</sup> occur).

<sup>1</sup> Kaunas County Court, Criminal Division, 27 February 2015, verdict of the board of judges in the criminal case (No. 1A-52-317/2015).

<sup>2</sup> Under part 1 of article 154 of the Criminal Code, the liability is imposed on the person, who spread the information about the person, which does not meet the reality and can despise and humiliate the person or can undermine confidence in him/her, whereas under part 2 – on the one, who defamed the person, supposedly he/she committed a serious or very serious offense, or via the mass media or the printout.

<sup>3</sup> Vilnius County Court, Criminal Division, 12 July 2012, ruling of the board of judges in the criminal case (No. 1A-641-468/2012). Užgaulumas suprantamas kaip veiksmi ar vertinimai, akivaizdžiai prieštaraujantys įprastoms elgesio taisyklėms, bendražmogiškos moralės reikalavimams. Šiauliai County Court, Criminal Division, 4 January 2012, verdict of the board of judges in the criminal case (No. 1A-32-354/2012).

<sup>4</sup> The Supreme Court of Lithuania, Criminal Division, 4 October 2011, ruling of the board of judges in the criminal case (No. 2A-4/2011).

<sup>5</sup> Vilnius County Court, Criminal Division, 12 July 2012, ruling of the board of judges in the criminal case (No. 1A-641-468/2012).

<sup>6</sup> The Supreme Court of Lithuania, Criminal Division, 4 October 2011, ruling of the board of judges in the criminal case (No. 2A-4/2011).

<sup>7</sup> For example, the pre-trial investigation was not started under article 154 of the CrC for the comment "the chief executive is bearable, but his wife is "diesel", as the words "hunband" and "wife" are not a slander without stating the reliable facts. Besides, the applicants were not chief executives, they were only the owners; thus, there aren't any objective data that the comments pertained to the applicants. Also there aren't any data that the persons perceived the abusive and humiliating nature of their actions and sought to humiliate, but not to express their opinion; therefore, there the constituent elements of article 155 of the CrC are missing. Vilnius County Court, Criminal Division, 26 June 2013, ruling of the judge in the criminal case (No. 1S-536-312/2013); "being guided only by <.> guessing, i.e. it isn't possible, judging from the content of the comments and style of writing,, that <.>, it was exactly she, who wrote them because the other data do not prove it"; " <.> had been acting indirectly intentionally" (Kaunas County Court, Criminal Division, 27 February 2015, ruling of the board of judges in the criminal case (No. 1A-52-317/2015).

<sup>8</sup> The Supreme Court of Lithuania, Criminal Division, 13 January 2015, ruling of the board of judges in the criminal case (No. 2K-57-693/2015).

However, with taking into account the circumstance that the authors of the Lithuanian Internet comments are usually – and often systematically<sup>1</sup> – inclined to accuse anonymously the other individuals of certain criminal offenses, which the latter did not actually commit, on the website, which is assigned for complaints, sometimes as if expressing their pre excuse that their comments are aimed only at "warning<sup>2</sup>" or even naming the comment as the "fact, rather than slander", the choice to defend one's rights, namely, in accordance with the criminal procedure does not too much surprise. For example, it is stated in the comments that were assessed in one case that *"The warning <...>. M.K., under the guise of the administrator, illegally takes the money, acts unofficially and then disappears <...>. He does not reply to inquiries, if You have already paid. <...>"; „<...> he does not have any rights to process that information and has neither the issued permits, nor the other documents <...>. Not to mention the taxes"; „infocatalogue.lt – the deceiver's project, <...>. The deceiver <...> does more things, some of them are illegal. <...> the people find more information. It is an often case – it is not very much legal or illegal; "until then harm can be caused to more and more people; therefore, the purpose of this entry is TO WARN and to resist this..."*. In the other case, the convict, when talking about the surgery, which was performed by the doctor, stated that *"he cut off the whole elbow nerve, nerves of the arm, five tendons, everything that was possible, all was cut off"; "the doctor, gobbling and picking the pieces of šakotis (a cake) out of his teeth, is coming", "he cut off absolutely everything that was possible"; "then they tied me up"; I say: "Please, let me go because it does not work" <...> Then I am getting a stronger anasthesia or some kind of sedatives, they are tethering my hand and then this bloody job, a le rendering of the aid continues<sup>3</sup>"; "the doctor-loser, who can be directly called a simpleton"*. It was stated in one more case that the comments, i.e. *"<...> Mrs. used to get money without working <...> for committing fraud; the public procurement service has revealed it". "<...> when Mrs. barks, even the foam starts to fall from her mouth; probably, nine-jobbed Barbie's ass is on fire..."*, are also untrue<sup>4</sup>.

As the freedom, which is guaranteed by article 10 of the Convention, to express one's own convictions and to spread the information is incompatible with the criminal deeds, among the other things – slander and misinformation (part 4 of article 25 of the Constitution), so the strictest form of restriction of the freedom of self-expression – the criminal liability for its inappropriate implementation – for slander and insulting was reasonably imposed on the authors of the mentioned comments (articles 154 and 155 of the CrC). However, the rules that were formulated by the ECHR in the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary* are, first of all, intended for dealing

<sup>1</sup> Klaipėda County Court, Criminal Division, 3 October 2013, verdict of the board of judges in the criminal case (No. 1A-778-651/2013); 26 June 2014, verdict of the board of judges in the criminal case (No. 1A-555-462/2014); The Supreme Court of Lithuania, Criminal Division, 29 April 2014, verdict of the board of judges in the criminal case (No. 2K-174/2014); 13 January 2015, ruling of the board of judges in the criminal case (No. 2K-57-693/2015).

<sup>2</sup> Klaipėda County Court, Criminal Division, 26 June 2014, verdict of the board of judges in the criminal case (No. 1A-555-462/2014);.

<sup>3</sup> The Supreme Court of Lithuania, Criminal Division, 13 January 2015, ruling of the board of judges in the criminal case (No. 2K-57-693/2015).

<sup>4</sup> Vilnius County Court, Civil Division, 9 July 2015, ruling of the board of judges in the civil case (No. e2A-2230-392/2015); Kaunas County Court, Criminal Division, 7 January 2013, verdict of the board of judges in the criminal case (No. 1A-16-397/2013).

with the civil consequences of the unlawful comments; thus, we shall discuss them further on.

*The research revealed that the following aspects are evaluated in substance when assessing the issue on compensation of the non-pecuniary damage in criminal cases: (i) the context of comments (the nature of the arisen debate); (ii) the relationship between the content of comments and the legal consequences that emerged for the aggrieved party; (iii) the accused person's characteristic and (iv) his/her property status. The examples from several criminal cases are submitted further on.*

*Example 1<sup>1</sup>:*

(ii) <...> the comments <...> associated <...> with the issue on the public interest – with health care, namely, with the quality of medical services that were rendered in the public hospital.

(ii) <...> the aggrieved party was humiliated several times by comments in three popular, highly rated telecasts and website portal, his standing, as the doctor, and his professional prestige were belittled in the eyes of participants of the show and spectators (including the potential patients), therefore, the number of patients, who would like to be operated by him, and, accordingly, his income decreased. The aggrieved party had been suffering the spiritual experiences and negative emotions because his, as the doctor's, spoilt reputation could determine the end of his practice, whereas the fact that the false and insulting information about the doctor became available to a large part of the society, had led to even greater aggrieved party's uncertainty about his future and stronger spiritual experiences: the doctor's reputation is crucial for him not only as for the individual, but as for the professional as well, for whom the working activities serve as the source of his livelihood. No objective shortcomings of the doctor's work (the surgery was properly performed), which could justify the particularly broad limits for criticizing him, were ascertained in the case; the consequences for the accused person emerged as a result of the postoperative complications.

(iii) It was ascertained that the surgery complications were caused by the inadequate postoperative care, because the accused refused to undergo the in-patient treatment. Besides, a certain period of time passed since the operation, within which the accused person's health condition improved. Though the accused person did not fully recover at the moment of commenting, he was aware of his health condition, whereas his insulting comments were non-spontaneously expressed not once, but in three shows within a relatively long period (from the 23<sup>rd</sup> of February until the 17<sup>th</sup> of May). The courts decided that the accused person's behaviour was determined by his personal experience, education and by his shoddy cultural level, which predetermined non-absorption into the problems of the situation as well as the circumstance that he applied his own opinion and assessments towards the information (the reasonableness of which was checked by him) that was actually collected from the other sources. Moreover, he perceived a part of the expressed information about the events in the hospital, the course of the operation and the behaviour of the participants of the operation, being affected by alcohol and pharmaceuticals that were used during the operation.

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<sup>1</sup> The Supreme Court of Lithuania, Criminal Division, 13 January 2015, ruling of the board of judges in the criminal case (No. 2K-57-693/2015).

(iv) The courts assessed in the case the circumstances of the aggrieved party's honour and dignity as well as the culprit's and aggrieved party's situation: the doctor was publicly defamed and insulted in several popular telecasts, as a result of which his income got reduced; the culprit was a businessman, i.e. the owner of the real estate. As the analogous cases<sup>1</sup> had not been examined in the Lithuanian case-law, the courts resolved that the adjudgment of 20 000 Lt in favour of the aggrieved party for compensation of the damage that was incurred by the latter, meets the provisions of article 6.250 of the CC.

*Example 2<sup>2</sup>:*

(i), (ii) *"The aggrieved party <...> is not to be regarded as a public figure (a politician, personal (political) confidence civil servant, official, etc.), therefore, it cannot be considered that the mentioned comments, which were placed on the website, could **actually** cause damage to his career. <...> there aren't any objective data, <...> that the defamation, which was ascertained in the case, affected his professional career and salary opportunities, internal motivation and prospects. It was ascertained that <...> the aggrieved party had been complaining of general weakness, loss of appetite, anxiety, but <...> he is suffering from chronic viral hepatitis B, which is also characterized by <...> the mentioned symptoms. <...> there are no grounds to assert that the aggrieved party's health condition was determined only by the accused person's deed, though <...> it had an impact on the aggrieved party's general experiences";*

(iii) *"The convict realizes hazardousness of his deed, assesses critically his behaviour, admits his guilt and does not try to avoid the liability. Besides, he tried to prove by his behaviour after committing the offence that he will not commit any new dangerous deeds in the future. <...> the data that are contained in the case allow to state that the convict in general is not inclined to create the conflict situations and that the offence of the continuous nature is more random in nature and does not reflect his real orientation towards the values."*

*Example 3<sup>3</sup>:*

(i) *The comments, due to which <..> she was prosecuted, are related not only to the topic, which is important and sensitive to her, but also to the issue on the public interest, i.e. the possible election of the person for the elected posts in the municipality. At that time the aggrieved party was a candidate to the municipal council, i.e. she candidated for the position, which is equated to the position of the public servant, who provides public services, the limits of which are much broader, if compared with the ordinary private person. She expressed her own opinion and comments about the future public servant. Besides, the comments are based on the accused person's personal experience and painful experiences.*

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<sup>1</sup> The courts must take into account amounts of the non-pecuniary damage that were adjudged in the analogous cases. The Supreme Court of Lithuania, Civil Division, 14 August 2008, ruling of the board of judges in the civil case (No. 3K-3-393/2008); 9 January 2013 ruling of the board of judges in the civil case (No. 3K-3-81/2013).

<sup>2</sup> Klaipėda County Court, Criminal Division, 26 June 2014, verdict of the board of judges in the criminal case (No. 1A-555-462/2014).

<sup>3</sup> Kaunas County Court, Criminal Division, 27 February 2015, ruling of the board of judges in the criminal case (No. 1A-52-317/2015).

(ii) It was ascertained in the case that the both parties initiated the criminal proceedings against each other not because of the actually committed offenses, but because of their mutual hostility.

(iii) "<...>, she was honestly mistaken, when expressing her opinion. Not only the lack of adequate legal education, but also the misleading information that was submitted by other people and her painful personal experience, which was conditioned by constant disputes and conflicts with D. P. as well as the systematic litigation with her, predetermined it".

*The research proved that the Lithuanian courts are guided by the ECHR judgments (though they were directly mentioned only twice), when also deciding the issue on the civil consequences as a result of the committed offences. Such practice is to be positively assessed because an individual's rights must be equally defended, regardless of the aspect, in which proceedings the judgment on restoring his/her violated rights is delivered. On the other hand, after having abolished articles 155 and 290 of the CrC, the disputes on the insult will be examined in accordance with the civil procedure, whereas this circumstance is likely to raise new issues on interpretation and application of the law, which call for a separate independent analysis.*

### **Conclusions**

The research revealed that the case of *Delfi AS v. Estonia* was mentioned just in three (twice – by the Court of Cassation) judgments in practice of the Lithuanian courts of general jurisdiction, whereas the judgment on the case of *MTE and Index v. Hungary* so far was never cited, though more than a year has already passed since its rendering. Besides, the case of *Delfi AS v. Estonia* was only once mentioned in two judgments in the general context, without referring directly to it. Moreover, usually separate statements, confirming the court's position in the definite case, without assessing the general legal and factual environment of the dispute, are cited in the cases, when the courts are still guided by the ECHR judgments. It must be pointed out that also the ECHR case-law is not cited, if it does not comply with the trend that is chosen by the court for argumentation.

Though the Lithuanian courts of general jurisdiction apply *de facto* most of the criteria that are formed in the ECHR case-law on determination of the websites' liability for the consequences, which are caused by the third parties' unlawful comments, usually they do not refer to them in their judgments. For example, Lithuanian courts assess the context of comments and the disputed content of comments, pay attention to the character of the discussion, which has arisen in the public, and to its conformity to the public interest; however, the possibility of the commentators to edit their comments was never analysed in any of the examined cases. Still monitoring of the column of comments, which is possessed by the website operator, and the personal experience of the authors of comments were assessed in the Lithuanian case-law before the announcement of the ECHR judgments. As the comments that are related to the disputes, which are analysed by the Lithuanian courts, are usually published on the specialized websites for complaints, the character of the article and its content most frequently are not relevant in assessing the context of comments and their unlawfulness. However, the mentioned fact does not prevent from assessing the other criteria of liability for the unlawful comments, which were

singled out by EHRC. Thus, the preventive measures that were initiated by the website operator for protection of the third parties' rights, the status of the operator of the news website, the purpose and the aims of the website as well as the aggrieved party's behaviour and the consequences of comments for the aggrieved party are duly assessed by the Lithuanian court. It must be noted that the influence of the aggrieved party's actions on appearance of certain comments was reasonably assessed in the Lithuanian case-law prior to the judgment in the case of *MTE & Index v. Hungary*.

On the other hand, usually the cases, which are examined by the Lithuanian courts, are initiated against the authors of comments and the necessity to involve the operator of the portal is not recognized. What is more, under the Lithuanian case-law, the author (spreader) of comments can be considered also as the person providing the other persons with a free remote access to the own wireless communication WIFI network (router), thus, forming the conditions for violation of the third persons' rights. Moreover, as it was already mentioned, the majority of cases that are examined by Lithuanian courts arise as a result of comments on the identical specialized websites for providing complaints, which do not conform to the legal status of the news website. However, the Lithuanian courts apply the rules that were formulated by EHRC in the cases of *Delfi AS v. Estonia* and *MTE & Index v. Hungary* also in the cases, when analysing the issue on the liability of the website operator or of the authors of comments, who do not conform to the status of the mass media. Such position of the courts must be assessed as progressive and reasonable as it is namely the role of the website or the author of the comments in the process of publishing and deleting the unlawful comments, but not the *legal form of them*, which is most important. Such case-law leads to the conclusion that attaching the essential importance not to the formal status of the website operator or of the website, but to the general nature of the context of comments and to the comments themselves, is typical of the Lithuanian courts. Such tendencies of the Lithuanian case-law, which are oriented to the definite entity's *role* in the process of announcing and elimination of unlawful comments, allow to balance maximally the interests of the parties to the dispute and must be assessed as the highly advanced tendencies. *Besides, also the necessity to assess the legality of each comment, which is emphasised in the Lithuanian case-law, is to be positively assessed, as there was a lack of analysis of separate comments in the ECHR judgments.* Finally, the Lithuanian courts' brave position to acknowledge the deals, which are aimed at avoidance of the liability, which threatens the website operator, is praiseworthy.

On the other hand, although it is an often case, when the persons of anonymous comments are accused of certain negatively assessed deeds and even of offences, and the manifestations of differentiation of the *clearly* and *non-clearly* unlawful comments can be found in the Lithuanian courts, but the author did not find any cases, in which the obligation of the website operator to delete the evidently unlawful comments *on his own initiative* would be recognized. In the author's opinion, the acknowledgement of the website operator's liability for the immediate elimination of the obviously unlawful comments *on his own initiative* can facilitate the settlement of the disputes of such nature and can help to avoid the years-long examination of the cases on elimination of the clearly unlawful comments.

In summary, the Lithuanian national case-law is inevitably influenced by the analysed ECHR decisions; the fact that the main Lithuanian courts' decisions on

determination of websites' liability for the consequences that are caused by the third parties' unlawful comments were adopted after the judgements on the cases of *Delphi AS v. Estonia* and *MTE & Index v. Hungary*, proves it. Currently the judgments of the Lithuanian courts basically meet the ECHR jurisprudence, but the Lithuanian courts' decisions are rarely directly motivated by the rules, which were adopted by the ECHR. Therefore, sometimes it is difficult to evaluate the real impact of the ECHR case-law upon the Lithuanian case-law.

*Although no real negative consequences have emerged for the parties to the dispute in the cases, which were analysed, seeking for ensuring the proper protection of all entities' / persons' rights and legitimate interests, it is recommended for the law applying bodies to be guided more often by the ECHR case-law, corresponding to the factual and legal context; thus, simultaneously the potential incompatibility between the Lithuanian and ECHR case-law will be avoided.* It is also necessary to apply the ECHR practice in light of prerequisites of the tort law, which are set in the national legal system.

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