

Romania, High Court of Cassation and Justice, decision no. 3216/2014, 19 november 2014

Deciding bodies and decisions

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Subject matter

What is the balance between freedom of expression and reputation in case of comment of online articles?

Who is responsible in case of comments to online articles?

Which are the remedies for the breach of reputation rights?

Summary Facts Of The Case

The case concerns defamatory statements against several persons who were running financial activities. Their full name was given in several statements published on an online website related to complaints regarding the security market, administered by the defendant. Several articles were posted from the readers of this site for the duration of several months, including various defamatory statements, some even with criminal connotations against the complainant, such as whether he can be accused of having committed illegal acts such as evasion, money laundering and deception, supported by few legal arguments but subjected to excessive value judgments, such as the "scam", the "bullet jumble", the "screaming of the charlatans", etc., for which the proof of good faith has not been made and which were of the nature to affect the complainant dignity, honor and self-esteem, values respected and protected.

Some of the subjects of these statements brought a liability action against the administrator of the website before the ordinary court. Both the first and second instance courts found the administrator guilty, with the only difference that the second instance court reduced the amount of civil damages from 25,000 lei to 10,000 lei. He then followed a complaint before the last instance court, the High Court of Cassation and Justice. In a very detailed judgment of approx. 20 pages, the Court set out the guidelines on how to balance the freedom of expression with the right to reputation, where to strike the balance, and what are the remedies in case the manifestation of freedom of expression in the online forum endangers the reputation of a person. Its judgment is heavily based on the judgments of the Grand Chamber of the ECtHR on freedom of expression and right to reputation regarding online statements.

The High court of Cassation and Justice addressed the case firstly affirming that expressing opinions on the professional, moral and personal qualities of a person who is accused of unlawful acts (such as evasion, money laundering and deception) without any specific proofs or arguments, are such as to affect his dignity, honour and self-esteem, values to be respected and protected.

Against this background, while recognizing the importance of the right to freedom of expression in a democratic society, the Court considered that the virtual space could not be transformed into an ad hoc court in which anyone may affirm the existence of facts with criminal connotations without showing a solid factual basis in this respect, nor can it become a tribune of insults against natural persons, without proper sanction, insults that have acquired racial connotations, which is also unacceptable.

The overall evaluation of the articles posted on the website brings the court to the conclusion that they were, in the opinion of the reader, likely to outline a negative perception of the reputation of the complainant.

From that perspective, the court addressed the legal conditions for the admissibility of the liability of the defendant in respect of the existence of an unlawful act (the disclosure on the website of information liable to infringe the right to the image of to an individual) as well as to the existence of damage (adversely affecting that person's image).

After having established the causal link between the unlawful act consisting in the publication of defamatory statements against the applicant's person and the damage to the image caused to the latter, the Court addressed the admissibility of civil liability for the defendant's guilt. Here, the court refers to the case law of the European Court of Human Rights (*Delfi AS v. Estonia* and *Öztürk v. Turkey*), whereby the responsibility for publishing defamatory statements against a person is based on the dissemination of such information to the public.

The court then addressed in detail the correspondence between Art 30 (6) and (7) of the Romanian Constitution with Art 10 ECHR on freedom of expression, where both include the possibility of limitation on the basis of the protection of reputation and dignity. In particular the Court refers to the ECtHR jurisprudence on duties and responsibilities applicable to journalists as well as to persons who have the opportunity to inform the public on matters of general interest. These duties and responsibilities may be of particular importance if there is a risk of harming the reputation of others, thus endangering the rights of others (*Tănăsescu v. Romania*, *Tammer v. Estonia*).

The Court affirms that the fact that the articles posted were taken based on articles published in other websites does not exonerate the defendant from the duties and responsibilities provided by art. 10 of the Convention, including those to respect the right to good reputation guaranteed by art. 8 of the Convention.

Finally, the court supports its reasoning by returning to the decision in *Delfi AS v. Estonia* where the interference provided for by national law to freedom of expression was deemed to be legitimate also in a case of a national website specialized in news services.

The court then concluded that since on the website administered by the defendant, a series of defamatory articles, some even with a criminal connotation, coming from the site's readers, were posted in regard to the complainant, the webmaster not only is responsible for failing to fulfill his positive censor obligations or preventing the publication of messages with defamatory content, but he also encouraged the expression of insulting opinions to those who are active in the financial market by publishing the articles in which these views were presented by presumed readers.

When assessing the limits to the freedom of expression on the basis of the need to respect the right to privacy, namely the right to image and the right to reputation, the Court cited the ECtHR judgment in *Niculescu Dellakeza v. Romania*, as to whether there is a public interest in the debated issue (the *Bugan v Romania*), the good faith of the journalist (the case of the criticism, the style and the context of the critical message, the context in which the article was drafted, the case of *Ileana Constantinescu v. Romania*), the relationship between value judgments and factual situations, the exaggeration of the artistic language, the proportionality of the sanction with the deed and the motivation of the judgment (*Bugan v Romania*, *Dumitru v Romania*).

Also in *Delfi v Estonia* (judgment of 10 October 2013), analyzed by the Court of First Instance in a broad and coherent manner, ECtHR considered relevant issues in assessing the existence of an

interference with the right to free expression: the context of messages posted on the Internet, the measures that Delfi took to prevent the defamatory messages, the individual responsibility of the authors of these messages, but also the difficulty of identifying them, given that a large part of the messages were anonymous and the postings were made without the authors' obligation to reveal their identity, by the national court.

By virtue of the legal norms set out and the considerations set out, it is clear that the appellant (defendant), as the administrator of the website, is responsible for failing to fulfill his positive obligations to censor or hinder the publication of messages with defamatory content and, moreover, encouraged the expression of insulting opinions to those who are active in the financial market by publishing the articles in which these views were presented by presumed readers.

As regards the existence of the damage, as an essential element of the civil liability in question, the Court in agreement with the first instance court, noted that the factual elements listed by the appellant as not likely to cause harm, such as: the position of director of the complainant; the fact that the plaintiff was known by his or her immediate relatives as a professional operating on the capital market, the applicant's young age, a fresh graduate may, on the contrary, constitute elements relevant to determining the existence of damage to the individual's image, since not only persons with a certain professional experience or advanced age enjoy protection, but every person has the right to private life, with the distinctions made by the ECtHR that the intimate private life and social private life, the young people being obviously included in this category and having the legal protection against the excess and arbitrariness presumed to overcome the legal limits in the exercise of freedom of expression.

In the same sense, in terms of personality, it is important not only what others think about you, reflecting your image, but also your own subjectivity, which can be harmed through insulting phrases by third parties in public, virtual space.

The High Court of Cassation and Justice confirmed the judgment of the second instance court as regards qualification and damages.

Relation to the scope of the Charter

The High Court of Cassation and Justice did not refer to the Charter, however it referred extensively to the judgments of the Grand Chamber of the ECtHR on the legitimate limitations to the freedom of expression.
