POLAND - Legislative measures, administrative regulations, judicial decisions and other policies and measures that impose obligation on social media and search platforms and/or platform users to remove, restrict or otherwise regulate online content.

The main legislative measure within the competencies of the Ministry of Digital Affairs that pertains to the issue above is the Act of 18 July 2002 on the provision of services by electronic means (Journal of Laws 2017 item 1219, hereinafter referred to as “APSEM”), Article 14 of which specifies, in a simplified manner, in which situations a provider of so called hosting services should block access to the data placed by a user. In practice, this provision applies to all internet dealers who allow their users to place different contents in their network resources, thus encompassing various types of electronic services, information and auction portals, as well as social media which permit the users thereof the placement of opinions, statements, photos, footages, or any other materials on their websites. Under Article 14 of APSEM, such a dealer does not bear legal liability for unlawful contents left on a service by its users, if it does not know about unlawful nature of such contents, and in case it has received an official notice or obtained credible information about unlawful nature of contents, it should block the access thereto. Therefore, to establish if an entity is to remove contents placed by a user, first it should be determined whether such contents are unlawful, i.e. whether the placement thereof by a user infringes the provisions of generally applicable law. If content itself or its placement does not infringe provisions of law, there are no grounds for demanding that it be removed.

The requirement for the determination of the unlawfulness of actions exists also under the provisions on the protection of personal interests, i.e. Article 23 and 24 of the statute of 23 April 1964 - the Polish Civil Code (Journal of Laws No. 16, item 93 as amended, hereinafter "PCC"). Supplementing a constitutional regulation, the Civil Code stipulates that personal interests of a human, in particular, such as health, liberty, honour, freedom of conscience, a surname or pseudonym, image, secrecy of correspondence, immunity of residence, as well as scientific, creative, invention, and rationalisation activity are subject to legal protection. A person whose personal interests have been infringed may seek damages, compensation for injury, remedying the effects of an infringement, provided that a threat to or infringement of their personal interests is a result of unlawful conduct of a tortfeasor. Therefore, also in this case it should be first determined whether the actions threatening or infringing personal interests are unlawful, i.e. whether they are in breach of generally applicable provisions of law.

In the case of infringement of personal interests on an electronic medium, the appropriate means for asserting one's rights is filing a statement of claim with a civil court against the author of a post. Where the tortfeasor is an anonymous person, there is the possibility of asking an entity which operates a service for making the personal data of an author of a post available, in particular an email address, the IP number and any other data which may enable the identification of the author, justifying such a request with the need to file a statement of claim with a civil court. If an entity operating such a service refuses to make such data available, it will be possible to ask the Inspector General for the Protection of Personal Data for issuance of a decision imposing on the operating entity a duty to make the personal data of an author of a post available.

The aforementioned Act on the provision of services by electronic means states that providers of such services are exempt from the liability for unlawful contents placed by users, if two conditions are jointly met by them:

- a service provider (an entity administering a service) does not know that the contents placed by a user (an author of a post) are unlawful;
- it will, without undue delay, remove or make it impossible to access unlawful contents after learning that the contents are unlawful, e.g. it is notified of that fact.

In the case of publication of unlawful contents on the internet, a person wronged by that fact may notify (e.g. via an infringement reporting form described in the rules and regulations of a service) the persons operating a service of the fact that specific posts are false and infringe personal interests, thus being unlawful. If posts are false and unlawful, then an entity operating a service should remove them, and if it fails to do so, the entity may be held legally liable for storing in its resources unlawful contents, despite notifying it of that fact.

It should, however, be emphasised that notification by an injured person cannot be the only source of knowledge about the unlawfulness of a post. In certain situations, a service provider may acquire such knowledge and then if it fails to block access to unlawful contents, it cannot effectively refer to a principle excluding its liability. It was held so by the Supreme Court in the judgement of 30 September 2016 (file number I CSK 598/15). At the same time, the judgement of the Supreme Court does not contain guidelines that would assist in interpreting the interdependence of principles set forth in Article 14 and 15 of APSEM. It solely presents a thesis that moderating a forum is tantamount to having knowledge about unlawful nature of posts.

Article 15 of APSEM provides for the possibility of moderating a forum or other space for expression by a service administrator. It is a non-statutory solution which allows for limiting a number of posts breaking the law, without restricting the freedom of expression. It should be emphasised that a decision on moderating and its nature is fully up to an entity which administers a given internet service because there are no (and cannot be) regulations requiring moderation. Under Article 15 of the Act on the provision of services by electronic means, an entity which provides i.a. hosting services (that is services consisting of i.a. the provision of a forum at which users place their posts) is not obliged to check the data from users which are transmitted, stored and made available by it. That means that entities operating electronic services which enable the publication of contents by users are not required to filter all the contents from users. Therefore, the providers of such services may but do not have to use moderation on their services. Article 15 of the Act on the provision of services by electronic means constitutes the implementation into national legal order of Article 15 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), which states that: *Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.* Therefore, the imposition on such service providers of a general obligation to e.g. moderate all posts of users could be deemed to be in breach of the provisions of the Directive on electronic commerce.

So far, the case-law and practice of the application of APSEM have assumed that the mere fact of using moderation was not automatically equated with having knowledge about unlawful nature of moderated data. The assessment of whether the contents placed by users are unlawful on many occasions require expertise and advanced legal and technical analyses. In some cases it may be relatively simple (e.g. child pornography), but there are also cases in which it takes years for courts to

assess whether an infringement occurred, the cases on the infringement of personal interests being an excellent example. It should not be held that a moderator ought to be capable of assessing immediately and perfectly whether any infringements of personal interests occurred, taking into account that it often takes courts years. Furthermore, the concept that moderation leads to automatic acquisition of knowledge about unlawful nature of data puts entities using moderation in a much worse legal situation in relation to entities not using moderation, which is most often used precisely in order to deny access to unlawful contents. In that connection, it should be held that if moderation is used, it is important to check each time whether a moderator was in fact aware that a moderated post breaks the law and despite that fact was admitted to publication (pre-moderation) or was not removed (post-moderation).

It should also be emphasised that, as the law now stands, the possibility of imposing on Internet providers the obligations to filter contents in order to verify false data and information raises serious doubts. Under Article 15 of the Directive 2000/31 on electronic commerce, the Member States may not impose i.a. on telecommunications services providers a general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. All general filtering systems may also collide with the principle of net neutrality, which prohibits discriminating against some categories of transmission and which is implemented into the legal order by the Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance).

Substitution of mechanisms of the *notice and action* type, which guarantee the removal of unlawful contents at source by means of different types of filters and blockades that censor information transmitted on the Internet should be considered as a simplistic solution, which raises many concerns of legal, social, and economic nature, the most important of them being:

- the European law excludes a legal obligation of monitoring and censoring the Internet at the level of telecommunications networks - as already mentioned above;
- such mechanisms are fairly regarded by the general public as censorship and a serious restriction on civil liberties;
- such mechanisms, being very costly and technically complicated, are on one hand circumvented very quickly and on the other hand they can erroneously censor contents which are absolutely lawful.
- the monitoring and filtering of the Internet traffic inevitably also leads to collecting very large amount of information on activity and conduct of the Internet users, which is a serious interference in privacy;
- blocking / filtering at the level of telecommunications networks is only sweeping the issue under the carpet because unlawful contents are still available in network resources and every person who is at least a bit determined to access them will find them, despite filters and blockades.

It should also be emphasised that the notice and action mechanisms themselves (like the solutions provisioned in art. 14 of APSEM) of should meet certain requirements as well:

- they should be used exclusively to remove contents which break the law, and not all other contents that for any reason may seem to reporting persons unwelcome or undesirable;

- they ought to provide the mechanisms of legal protection also to persons who place contents on the Internet so that only consents which are actually unlawful are to be removed; the mechanism of such control can be e.g. the right of a person placing contents to make an objection to reporting them for removal.

Sadly, it should be concluded that effective enforcement of law in relation to portals registered outside Poland is hampered. The legislative work conducted within the European Union gradually aims at covering entities registered outside Poland or the EU by the EU regulations. An example is the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). It applies to entities with its registered office outside the EU, insofar as they offer goods and services to persons located in the EU or monitor the conduct of persons which takes place in the EU. In the case of the provisions on the protection of personal interests there are mechanisms for the enforcement of law ensured in relation to portals registered outside the European Union.

In the fight against abuse of freedom of expression (especially with the growing problem of fake news), education as well as the implementation of principles of propriety and mutual respect on the Internet may yield better results than exercise of public authority. All self-regulatory initiatives in the form of codes of good practice also deserve to be supported, in which the internet sector could on its own develop the best solutions relating to combating undesirable and unlawful phenomena on the Internet. Therefore, we have established cooperation with social media which provide services to Polish users of the Internet. Its purpose will be to develop self-regulatory solutions which are to supplement the existing legal regulations so as to, on one hand, limit the infringement of law by unlawful contents published on internet services and, on the other hand, maintain the guarantees relating to the freedom of expression on the Internet as well as reduce the number of incidents of unauthorised blocking of contents.

The Ministry's priority in its actions concerning online content regulation is to maintain a balance between fundamental rights to freedom of speech, expression and opinion and protection of individuals whose rights are abuse by publication of unlawful online content. The Ministry realises that the practice regarding the application of, in particular, Article 14 of APSEM is not ideal. It is often the case that a wronged person has difficulty in asserting their rights and an internet dealer is put in an unreasonably privileged position. It does not apply only to the cases of failure to remove contents which are unlawful, infringe personal interests or being hate speech, but also to situations of unauthorised blocking of contents or accounts of a user by a service provider.

Therefore, the Ministry of Digitisation conducts conceptual work aimed at specification and harmonisation of the procedure for reporting and blocking access to unlawful data on the Internet (notice and action already mentioned above). In result also the implementation of these regulations by online service providers will be more uniform and their internal regulations more transparent. Thus it will be possible to limit the number of freedom of expression infringements by social portals and platforms. Combating the propagation on the Internet of contents infringing applicable provisions of law, such as incitement to hatred or copyright infringements, will also become more effective. The notice and action procedure is designed to make it easier for users of the Internet to report contents that infringe the provisions of generally applicable law, without imposing, at the same time, on service providers excessive bureaucratic burdens. At the same time, the Ministry

would like to emphasise that all radical legislative actions the purpose of which would be restricting the possibility of using services available online in an anonymous manner require a particularly careful debate and should be preceded with an in-depth analysis and thorough public debate with the general public and non-governmental organisations which deal with the protection of civil liberties, because any legislative actions in this scope may be regarded as unauthorised interference of the state in freedoms and liberties with which the Internet is identified.

Freedom of speech (the Ministry of Culture and National Heritage)

The freedom of speech and freedom of press in Poland are defined in the Constitution of the Republic of Poland and in the Press Law. According to the article 54 paragraph 1 of the Polish Constitution, the freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone. The article 54 paragraph 2 states that the preventive censorship of the means of social communication and the licensing of the press shall be prohibited. What's more, the article 1 of the Press Law refers to the constitutional rule of the freedom of press. According to the regulation mentioned above, press pursuant to the Constitution of the Republic of Poland, has the right to freedom of expression and realizes the right of citizens to reliable information, transparency of public life as well as social control and criticism.

When reviewing the applicable legal provisions regarding freedom of expression on the Internet, it is also necessary to indicate the provisions of the polish Penal Code.

In art. 212 § 2 of the Penal Code the legislator introduced a qualified type of slander crime, involving the committing of this act by means of mass communication. Thus, anyone who slanders another person, a group of people, a business entity or an organizational unit without the status of a business entity, about conduct, or characteristics that may discredit them in the face of public opinion, or result in a loss of confidence necessary to perform in a given position, occupation or type of activity is liable to a fine or the restriction of liberty. The paragraph 2 states that if the offender commits the act specified in § 1 through the mass media, he or she is liable to a fine, the restriction of liberty or imprisonment for up to 1 year. The prosecution of the offence specified in § 2 takes place at a private motion.

Antiterrorist Actions (the Ministry of the Interior and Administration)

As regards specific provisions, the 10 June 2016 Act on Antiterrorist Actions amended the 24 May 2002 Act on Internal Security Agency and Foreign Intelligence Agency by introducing measures aimed at countering Internet terrorist propaganda that allow to ban specified Internet data or services that are used with the intent to cause a terrorist event.

Pursuant to art. 32c para 1 of the Act on Internal Security Agency and Foreign Intelligence Agency the court may order (on a motion of the Head of the Internal Security Agency filed upon approval by the Prosecutor General) service providers to block access to specified data or services that are related to a terrorist event or used to cause a terrorist event. The abovementioned competence may only be used in order to prevent, counteract and investigate terrorist crimes. In this context it should be stated that the notion of "terrorist crime" is precisely defined in the Polish Criminal Code.

According to art. 115 para 20 of the Act of 6 June 1997 – Criminal Code a terrorist crime is "a prohibited act threatened with imprisonment, the upper limit of which is at least 5 years, committed with the aim to:

1) seriously intimidate many people,

2) compel a public authority of the Republic of Poland, other country or an authority of an international organization to take or refrain from certain activities,

3) cause a serious disturbance in the system or the economy of the Republic of Poland, another country or international organization

- as well as threat to commit such an act".

The abovementioned definition is compliant with 13 June 2002 framework decision 2002/475/JHA on combating terrorism.

Concluding: the regulation only allows to block access to data or services that are related to a terrorist event or are used to cause a terrorist event and only if it is done in order to prevent, counteract and investigate terrorist crimes – the definition of which is precise and compliant with international law. Moreover the decision to block access can only be made by the judiciary i.e. independently from the government. Therefore the regulation upholds international standards regarding freedom of speech.

Legal solutions and policies regarding freedom of speech on-line (the Ministry of Justice)

First of all, it is important to note that Art. 14 of the Polish Constitution provides that the Republic of Poland shall ensure freedom of the press and other means of social communication, while Art. 54 (1) sets out that the freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone. According to Art. 54 (2) of the Constitution, preventive censorship of the means of social communication and the licensing of the press shall be prohibited. (…)

In the Polish legal system, Constitutional provisions are further elaborated in such acts as the Act of 26 January 1984 on Press Law (Journal of Laws of 7 February 1984 no 5, item 24). According to Art. 1 of this Act, the press has the right to freedom of expression and realizes the right of citizens to reliable information, transparency of public life as well as social control and criticism. Art. 5 (1) of the cited Act provides that in accordance with the freedom of speech and the right to criticism each citizen may provide information to the press. No one should be placed at a disadvantage or face censure for providing information to the press if acting within the law (Art. 5 (2) of the Press Law).

Art. 5 highlights the role of freedom of speech and freedom to collect materials by the press. Everyone can give information to the press, including critical information, because freedom of speech consists in presenting the mass media with any kind of information. Freedom to provide information to the press entails freedom of the mass media to make public and disseminate the information that they were provided with. This is closely related to the obligation of a journalist to show special conscientiousness and diligence when collecting, selecting and presenting material that was provided by other people (Monika Brzozowska-Pasieka, Press Law. Practical Commentary, Lexis Nexis 2013).

It needs to be emphasized that today Polish press is available not only in paper form, but also in electronic form, i.e. on-line. In its decision of 15 December 2010 in case no III KK 250/10, the Supreme Court found that "magazines and journals do not lose the features of a press title if they appear on-line, neither when the on-line version accompanies the print, paper one as a different, electronic form available on-line, nor when the content is available only on-line but appears only occasionally and meets the requirements laid down in Art. 7(2) of the Press Law."

In its decision of 7 May 2008, file no III KK 234/07, the Supreme Court defined the term 'mass media' as all media that promulgate various content on a mass scale, including printed press, radio and television broadcasting, books, posters, films and Internet outreach.

It is worth noting that the Polish legal order includes the Act on Providing Services by Electronic Means (Journal of Laws of 2017, item 1219, consolidated version), which defines the obligations of a service provider related to rendering services by electronic means, the rules of releasing service providers from legal liability for the provision of services by electronic means, and rules for the protection of personal data of natural persons using services provided by electronic means (Art. 1).

Freedom of expression that is guaranteed by the Constitution cannot, however, violate personal interests of a human being that are protected by Polish law, such as in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic, inventive, and improvement activities (Art. 23 of the Polish Civil Code).

Pursuant to Art. 24 § 1 of the Civil Code, "a person whose personal interests are jeopardized by another person's action may demand that the action be abandoned, unless it is not illegal. In the case of actual violation, he/she may also demand that the person who committed the violation performs acts necessary to remove its consequences, in particular that the latter make a statement of a relevant content and in a relevant form. On the basis of the principles provided for by the Code, he/she may also demand pecuniary compensation or a payment of an adequate sum for a specified community purpose.

§ 2. If, as a result of a violation of personal interest damage to the property was inflicted, the injured party may demand it to be redressed on the basis of general principles."

A person who claims that his/her personal interest was violated in a press material (disseminated in paper form or by electronic means), or in commentaries, records, photos, etc. that were posted on websites (also by private individuals who use the Internet), has the right to institute an action before the court for violating his/her personal interests against the direct offender and against the service provider that renders services by electronic means (who makes ICT system resources available), making claims that are specified in Art. 24 of the Civil Code and claims arising under acts that can be applied to the specific case.

As far as the press is concerned, according to Art. 37 of the Press Law, general rules apply to the liability for an infringement caused by publishing a press material unless otherwise provided for by the Act. The basis for civil liability will most frequently be Article 24 of the Civil Code quoted above, whereas Articles 212 and 216 of the Penal Code described below provide the basis for penal liability.

The author, editor, or any other person who has brought about the publishing of press material faces civil liability for an infringement caused by publishing the material; it does not exclude the publisher's liability. Property liability of those persons is joint and several (Article 38 of the Press Law).

A person whose personal interest was violated starts civil action most frequently by demanding a specific statement (an apology) and pecuniary compensation. It is worth quoting the Supreme Court judgement of 27 March 2003, file no V CKN 4/01 (concerning claims regarding content disseminated in the press), in which it finds that "publishing unreliable information, i.e. information that is unchecked or unverified despite the existence of a reliable source, may amount to violating a personal interest within the meaning of Art. 23 of the Civil Code, which is protected both by the Code and the press law."

In the event of an action brought against a provider of services rendered by electronic means, the legal basis of his/her liability can only be the provisions of the Act of 18 July 2002 on Providing Services by Electronic Means (Journal of Laws of 2017, item 1219, consolidated version).

This position is justified in the Supreme Court judgement of 30 September 2016, file no ICSK 598/15, which found that "in the event of violating personal interests by posts of anonymous Internet users published on a website, the administrator's liability should be examined based on Art. 24 § 1 of the Civil Code in conjunction with Art. 14(1) of the Act of 2002 on Providing Services by Electronic Means."

According to Art. 14(1) of the Act on Providing Services by Electronic Means, "the responsibility for the stored data shall not be borne by the person who, making the resources of an ICT system available for the purposes of data storage by a service recipient, is not aware of the unlawful nature of the data or the activity related to them and in the event of having been officially informed or having received a reliable message on the unlawful nature of the data or the activity related to them, promptly prevents access to such data.

A service provider who has received a formal notice on the unlawful character of stored data that were provided by a service recipient, and who has made access to them impossible, shall not bear responsibility towards such service recipient for any damage resulting from impossibility to access these data. (Art. 14 (2)) .

A service provider who has received a reliable message on the unlawful character of stored data that were provided by a service recipient, and who has made access to these data impossible, shall not bear responsibility towards such service recipient for any damage resulting from impossibility to access these data, if he/she has immediately notified the service recipient of his/her intention to make access to the data impossible (Art. 14(3))."

In the event of finding a violation of personal interests by a provider of services rendered by electronic means, the court hearing the case may order that data leading to the violation be permanently deleted from the website. The Warsaw Appeal Court judgement of 13 October 2017, file no I ACa 1208/16 and the Siedlce Regional Court judgement of 28 November 2013, file no I C 1113/12 (attached) can be given as examples here.

Freedom of press and other means of social communication that is guaranteed under Art. 14 of the Polish Constitution extends also to the mass media as referred to in Art. 216 § 2 and Art. 212 § 2 of the Penal Code. The Internet is one of the mass media as referred to in Art. 212 § 2 and Art. 216 § 2 of the Penal Code, which can be used as an instrument for slander or insult (Supreme Court decision of 7 May 2008, file no III KK 234/07).

People who commit slander using the mass media are liable to a fine, the restriction of liberty or imprisonment for up to one year - Art. 212 § 2 of the Penal Code. People who commit insult are liable to the same punishment (Art. 216 § 2 of the Penal Code).

Neither the Penal Code nor the Code of Criminal Procedure contains provisions that would enable a direct interference in the content published on-line, specifically by a judicial order to delete or change it. Any actions that an offender may voluntarily undertake after committing an offence, such as deleting or changing the post, may affect the assessment of the noxiousness of an act to society and thus the penalty imposed.

Working translation.

Judgement

of the Warsaw Appeal Court

of 13 October 2017

file no I ACa 1208/16

Title: Condition of effectiveness of a claim of violating the principle of free appraisal of evidence. Criterion for liability of website administrator.

1. In order for the claim of infringement of Art. 233 § 1 of the Code of Civil Procedure to be effective, it is necessary to indicate reasons for disqualifying judicial proceedings and to determine which appraisal criteria have been violated by the court when appraising specific evidence by finding them unreliable and without the force of evidence or by wrongly finding them reliable and with the force of evidence, or to conclude that the court has flagrantly violated the rules of logical reasoning and life experience and that such violation could have affected the outcome of the case. At the same time, the claim of infringement of Art. 233 § 1 of the Code of Civil Procedure can be justified only by an appraisal that is flagrantly wrong or clearly inconsistent with the content of evidence and that is contrary to the rules of logical reasoning or life experience.
2. The criterion for the liability of a website administrator can only be the awareness of an unlawful action performed by a website user, or his/her lack of reaction to the abovementioned action, i.e. failure to delete the unlawful content after receiving notice thereof.