

How the authority and the public prosecutor will fight for freedom of speech

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In an administrative procedure, without any witnesses, hearing or even participation of the party whose personal interests have been infringed by a post on the Internet, and when necessary, by a public prosecutor's decision. This is how the Ministry of Justice wants to defend freedom of speech on the web, allegedly threatened by social media.

The plans of the Ministry...

In January the Chancellery of the Prime Minister received a legislative bill signed by the Ministry of Justice proposing the Act on the protection of freedom of speech on online social networking services (it can be accessed on the Ministry's website). According to the release issued along with the bill, the bill is supposed, among others, to counteract removing posts or blocking accounts of Polish users of large social media (such as Facebook, Twitter or YouTube) if their content does not break the law. This must have been inspired by the high-profile case of former U.S. President Donald Trump's accounts being blocked by the above services in response to the so-called storming of the Capitol in January.

Whether a post breaks the law is to be decided by the Council for Freedom of Speech (RWS). It is a new administrative body to be appointed by the Sejm by a simple majority of the votes (if the first vote does not reach a majority – by 3/5). Its members are required by the bill to have higher education in law or knowledge in linguistics or new technologies. If the Sejm decides that the candidate has knowledge, he or she does not even need to have a Maturity Certificate.

According to the legislative bill, a user whose post on social media has been removed will be able to lodge a complaint with the service provider, and after its refusal, a complaint with the Council. The Council will order, by way of decision, reinstatement of the removed post if it determines that the post does not constitute unlawful content. What is unlawful content? According to the bill, it is among others content that infringes personal interests.

...vs reality

Let us put the proposed regulations into practice. Let us assume that a service has published a post infringing personal interests of another person. Such a person will probably demand that the service remove the post. If the service considers the request justified, it will probably remove the post, otherwise it will risk becoming responsible for its dissemination. Here we enter the scope of the proposed regulation. In response to the removal of the post, its author may lodge a complaint. If the complaint is rejected, the case will be submitted to the RWS. There, in a closed session (Article 11 of the proposed Act), without the participation of the person to whom the post pertains (Article 23(1)), without any witnesses, hearing of the parties, opinions of experts or inspection (Article 26) and within seven days (Article 25(2)), the Council decides whether the post infringes personal rights of the person who does not participate in the proceedings (the person at whose request the service removed the post). If the Council upholds the complaint, it will issue a decision ordering the service provider to reinstate the post within 24 hours (Article 28(2)). The decision will be final and failure to implement it will be subject to a fine of up to PLN 50 million (Article 32(3)). The possibility of suspending the enforceability of the decision is to be excluded (Article 30(2)).

Further, the decision of the Council may be appealed to an administrative court (and not to a common court), but only by the service provider and by the user whose post has been removed (the person whose interests have been infringed by the post cannot bring an appeal). In the administrative court proceedings, effectively no evidence will be taken (supplementary evidence from documents may be admitted as an exception). At a later stage, too, the decision about the infringement of personal interests of the person affected by the post on social media will be made without the participation of that person and by means of hardly any evidence. If this further stage takes place at all, because it can hardly be supposed that service providers have any interest in appealing against decisions that order reinstatement of a post.

Questions without answers

The finishing touch is the proposed Article 29, according to which the service provider may not again restrict access to the content that was examined by the Council. A person affected by a post which the service provider has removed, but the RWS has ordered for it to be reinstated, will therefore be in a stalemate. He or she will not be entitled to lodge a complaint with the Council. Formally, such a person will be able to request removal of the post by civil action at a common court (Article 19(5)). Will the common court grant such a request contrary to the decision of the Council ordering reinstatement of the post? How could a court order a service provider to remove a post when the proposed Article 29 is to prohibit this explicitly? If a court ordered removal of a post, would the service provider be supposed to weigh up which obligation (administrative or judicial) to comply with? Is it conceivable, for example, to grant an injunction ordering removal of a post contrary to the decision? Would a common court consider the proceedings before the Council as an obstacle justifying a stay of civil proceedings?

Even if the person aggrieved by the post obtained a favourable judgment in a civil case, how would they be able to have it enforced by the service provider (given the gigantic fines for a breach of a decision ordering reinstatement of the post)? Thus, the bill in fact restricts the right to a court for those affected by a post whose reinstatement the RWS has ordered, and raises serious doubts as to its constitutionality.

Increasing by limiting

This, however, is not the end of the story. Under the banner of seeking to increase the freedom of speech, the bill provides the public prosecutor with instruments to restrict that freedom. If the prosecutor determines that a post on a service contains criminal content and further access to that content creates a risk of effects that are difficult to reverse (Article 36), the public prosecutor is to immediately issue a decision ordering the service provider to prevent access to the content.

What is criminal content? Well, it is among others content that has constituent elements of a prohibited act (Article 3(7)). Prohibited acts include e.g. libel (Article 212 of the Criminal Code) or insult (Article 216 of the Criminal Code). Statements violating personal interests may therefore be freely considered as criminal content by the public prosecutor. Undoubtedly, dissemination of content that infringes personal interests may cause effects which are difficult to reverse. In conclusion, the bill gives the prosecutors the right to block the users' posts which they consider to infringe personal interests of others.

The prosecutor's decision will be immediately enforceable, and failure to implement it will result in a fine of up to PLN 50 million. An appeal is allowed only for the service provider (Article 36(4)). This is, therefore, another example of proceedings in which the rights of individuals will be decided without their participation (neither

the user whose post was blocked by the prosecutor nor the entity whose interests were allegedly affected will be parties to the proceedings).

In conclusion, the freedom of speech on the Internet, and at the same time the compliance with constitutional standards in our country, will be best served if the legislative bill proposed by the Ministry of Justice is not implemented and does not become applicable law. ©®

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