“Blind” lawsuit or rather a blind alley – Adam Zwierzyński on the legislative bill on the protection of freedom of speech on the Internet

Proceedings against persons of unknown identity will not lead to any of the intended goals.

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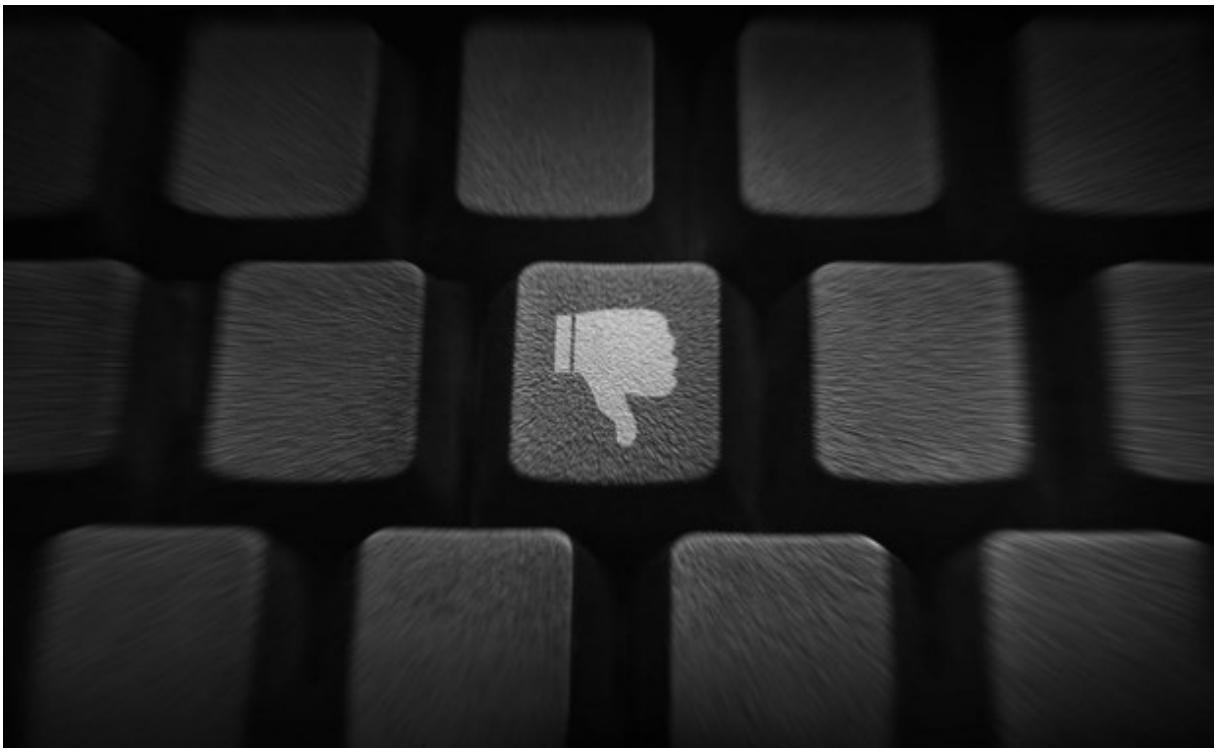

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In January the Chancellery of the Prime Minister received a legislative bill proposing the Act on the protection of freedom of speech on online social networking services. The bill was prepared by the Ministry of Justice (it can be accessed on its website). It assumes the appointment of the Council for Freedom of Speech, whose task will be to force social networking services (such as Facebook or Twitter) to publish unjustly (in the opinion of the Council) blocked posts of their users. The bill also provides for a new instrument, the lawsuit against unnamed defendant (“blind” lawsuit), to be introduced to the Code of Civil Procedure (CCP). I leave the Council for Freedom of Speech to political commentators (because that is precisely the nature of this body). I will now address the new procedural instrument.

The Ministry does not explain

According to the release issued by the Ministry of Justice, the lawsuit against unnamed defendant is meant to protect persons whose personal interests have been infringed by anonymous Internet users. The new regulations will allow a party to file a suit for protection

of personal interests without indicating the defendant's details, which would be established by the court in the course of proceedings.

The bill proposes the introduction of a separate procedure in five Articles of the Code of Civil Procedure (Articles 505[40]-505[44] CCP) in a new Chapter 2 "Proceedings for the protection of personal interests against persons of unknown identity" in the existing Section VIII "Electronic proceedings". The Ministry of Justice does not explain why lawsuit against unnamed defendant should be in the section dealing with electronic proceedings, even though it does not provide (unlike the preceding Chapter 1 "Electronic proceedings by writ of payment") for the possibility of filing letters electronically.

According to the proposed Article 505[40] § 1 CCP, the provisions of the new chapter will be applied in cases regarding the protection of personal interests if the infringement was committed via a service provider within the meaning of the Act of 18 July 2002 on the provision of services by electronic means and the claimant does not know the first name and surname or name, or the address of residence or registered office, of the defendant that has infringed his or her personal interests.

Bearing in mind that in the logic of law "and" denotes a conjunction, it must be concluded that a statement of claim against unnamed defendant cannot be filed if only the defendant's first name or surname is known. It is difficult to understand the purpose of this restriction. The authors of the bill also exclude from the outset suing in one proceeding the perpetrator of the infringement and the service provider on whose website the unlawful post was published. This is incomprehensible because the service provider that, despite obtaining reliable information about the unlawful nature of the post (e.g. as a result of a request made by the person whose interests were affected by the post), does not remove the post, will also be liable for infringement of interests and will naturally be a co-participant in such proceedings.

Pursuant to Article 505[40] § 3 CCP, instead of personal data and address details, the statement of claim should include information that makes it possible to identify the person who has committed the infringement, in particular the profile name or user login. If the login or profile name contains either the first name or surname, the problem will arise as to whether the case qualifies for this separate procedure.

In accordance with the proposed Article 505[40] § 2 CCP, cases brought as a claim against unnamed defendant are to be heard by a regional court competent for the claimant's place of residence or registered office in Poland. It should be noted here that the Code of Civil Procedure already contains a similar regulation. In accordance with Article 351 CCP, an action for protection of personal interests infringed by means of mass media may be brought before a court competent for the place of residence or registered office of the claimant. The proposed provision is therefore a so-called *superfluum*.

Doubt after doubt

Pursuant to Article 505[41] § 1.1 CCP, a claim against unnamed defendant should include a motion for injunction requiring the service provider to provide the defendant's details specified in Article 18(1)-(5) of the Act on the provision of services by electronic means (among others, personal data) based on the information provided by the claimant.

The first doubt: why should the data be obtained via a motion for injunction? The service provider is not (and since its data are known, cannot be at all) a defendant in a lawsuit

against unnamed defendant. Injunction is granted only against a party to the proceedings and it is systemically flawed to impose by means of an injunction an obligation on a party that is outside the lawsuit.

Secondly, the reference made to injunction means that it is necessary to consider the prerequisites for granting an injunction as specified in Article 730[1] CCP. Therefore, it would be necessary to examine whether the probability of the claim has been proven and the interest in being granted the injunction, and to issue a separate appealable decision on the injunction. However, it results from the proposed Article 505[42] in conjunction with Article 505[43] § 1 CCP that if the court does not dismiss the claim as manifestly unfounded, it will in each and every case request the service provider to send the requested data.

Formulating a request for providing the address in the form of injunction is a significant mistake, especially as it is completely unnecessary. It would be sufficient to leave in the proposed Article 505[41] § 1.1 CCP only the passage: motion to require the service provider to provide the address, or even remove this point altogether (since the court has to request the address anyway in accordance with Article 505[41] § 1 CCP).

In the light of the proposed Article 505[41] § 3 CCP, a claim against unnamed defendant may contain motions for injunction that consists of: (1) preventing access to the publication, (2) marking it with the information about a dispute over the publication. This solution duplicates the shortcomings discussed earlier. Perhaps the introduction of new ways of securing non-pecuniary claims to the Civil Procedure Code is justified, but only in cases against a service provider that cannot be a defendant (or a co-defendant) in a case based on a claim against unnamed defendant. It is unacceptable to impose an obligation by way of injunction on an entity not participating in the proceedings.

In accordance with the proposed Article 505[42] CCP, the court will dismiss a claim against unnamed defendant in a closed session if it is manifestly unfounded, violates the principles of social coexistence or aims at circumvention of the law, in particular the provisions on the protection of personal data. Such a judgment will be served only on the claimant. This mode refers to the legal concept of dismissal of a manifestly unfounded claim without serving the statement of claim on the defendant, which was introduced to the Code of Civil Procedure in 2019. It therefore raises the same doubt as the latter legal concept – should it be allowed to have a judgment given in proceedings without the defendant's participation and on the assumption that the defendant will not know about it? It also raises another doubt: why should an action for protection of personal interests be dismissed on the grounds of a breach of personal data protection legislation?

According to the proposed Article 505[43] § 2 CCP, if the service provider fails to send the data concerning the defendant within three months from the court's request, the proceedings will be discontinued. The decision on discontinuance is served only on the claimant and may be appealed "horizontally" – by the same court composed of three judges. This solution is in line with the trend, unfavourable for the clients of the judicial system, to replace appeals based on devolution with horizontal ones (one of the symbols of the so-called reform of the Code of Civil Procedure of November 2019).

If the service provider fails to send the requested data without good cause, the court will order a fine according to the provisions on penalties just as for failure of a witness to appear (proposed Article 505[43] § 5 CCP). This means the risk of a fine up to PLN 3,000 (Article

163 CCP). Imposing a fine will exhaust the means by which the court may force the service provider to provide information.

If the requested data concerning the defendant are submitted, the court will examine the case in accordance with general provisions (the proposed Article 505[44] CCP). It is unclear whether this means exclusion of the application of provisions concerning other separate procedures (e.g. commercial or intellectual property proceedings) which may coincide with the unnamed defendant procedure. At the same time, exclusion of at least the latter (in which cases for protection of personal interests in connection with scientific activity or inventions are heard) significantly worsens the situation of the claimant. On the other hand, the bill also provides for a fixed fee of PLN 1,000 on the statement of clam against unnamed defendant (the proposed Article 13f of the Act on court costs in civil cases). In "ordinary" cases the damages are subject to a 5% proportional fee. This means, for example, that if a party demands damages of PLN 500,000 for e.g. libel committed on a blog, the fee will be PLN 1,000 if the details of the infringer are unknown or PLN 25,000 if the details are known.

Examination for its own sake

In conclusion, the bill in question is underdeveloped, inconsistent and goes against the systematics of the Code of Civil Procedure. It also fails to fully fulfil any of the objectives with which the problem of the unidentified defendant may be associated.

Since what is the purpose of a lawsuit against unnamed defendant? Two basic purposes come to mind. It should always aim at getting the data necessary to bring an action. It is worth considering whether it should additionally include solutions allowing proceedings to be conducted also in the temporary absence (until the data is established) of the defendant, somewhat along the lines of the curator for service of process already present in Articles 143-147 CCP.

In the first respect, the proposed regulation will be ineffective. It does not provide real instruments for extracting data from the service provider (the risk of a relatively small fine is not enough). In the second respect, it allows for examination of the case, but only in a negative way for the claimant (judgment in a closed session, among others, because the claim is manifestly unfounded).

In my opinion, solutions allowing for examination of a case against an entity whose data are unknown should not be proposed at all. This is partly examination for its own sake (if the data can never be established), and partly a threat to the fairness of the legal process (if it is not guaranteed that all actions taken in the defendant's absence will be repeated).

The focus should not be on an action against unnamed defendant, but on a separate interlocutory instrument (similar to e.g. securing of evidence) aimed at obtaining, under the control of the court, the data of an unidentified person who has infringed the claimant's rights, in a manner increasing the chances of their actual recovery from the entity which has such data. A party to this procedure should not be an unknown person, but the entity from which the data would come, and its effect should be an enforcement order. It may be considered whether such a procedure should go beyond the protection of personal interests and apply also to other infringements, e.g. torts related to motor vehicles (where the registration number may be the means of establishing the data).

A separate examination procedure against unidentified persons is unnecessary and will only create confusion and inconsistency in the system. It is difficult to see why the problem in question should be solved in the form of a lawsuit. As far as interrupting the limitation period is concerned, in the case of protection of personal interests it is either out of the question (non-material claims are not subject to the statute of limitations) or a long limitation period of six years applies (in the case of damages).

The piece of legislation at issue may lead to interesting conflicts. This is because the Council for Freedom of Speech may order a service provider in an administrative procedure to publish some content, which has been prohibited by a common court in a civil procedure. Appeals against the Council's decisions (immediately enforceable and not subject to stay) will be heard by an administrative court, but statements of claim and motions for injunction (e.g. for removal of the same publications) will be heard by a common court. This, however, is a subject for a separate article.

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