**Court of Rome, Facebook v. CasaPound, April 29, 2020**

**Summary and Outcome**

The Court of Rome rejected the appeal against the preliminary injunction ordering Facebook to reinstate the social media accounts of CasaPound. According to Facebook, in the lack of any legal basis, it is not required to comply with obligations characterizing public services. Facebook operates as a private company and, therefore, its activity would fall within the economic freedom established by art. 41 of the Italian Constitution. CasaPound underlined that its messages only aim to reframe historical fascism in the current society. According to the defendant, freedom of expression protected by art. 21 of the Italian Constitution provides that the manifestations of adherence by CasaPound to fascist ideology would be relevant only if the limits provided by the criminal provisions were exceeded. The Court underlined that, although the relationship between Facebook and users is governed by contract law, this agreement is not without limits but subject to the general restrictions to private autonomy provided by the Italian legal order in light of constitutional principles. Therefore, the Court considered that the contractual clauses at stake fully comply with the general limits of private autonomy provided that the definition of the associations excluded from the service and the conducts prohibited is based on the laws of the state that defines the limits of freedom of association and freedom of expression according to constitutional principles and supranational sources.

**Facts**

On September 9 2019, Facebook Ireland (‘Facebook’) deactivated the account page of the far-right political party and organization CasaPound Italia (‘CasaPound’) together with the pages of representatives and supporters of the association without providing any notice or explanation for their decision. Facebook argued that the removal of CasaPound’s pages was legitimate on the grounds that they included content which constituted hate speech and incitement to violence, in violation of Facebook’s Community Standards. The Court reasoned that Facebook holds a special position and its mission aims to uphold freedom of expression. Therefore, the Court recognised that the deactivation of CasaPound’s page violated its rights as a political party to participate in public debate and “contribute by democratic means to national policy” under article 49 of the Constitution. The Court of Rome ordered Facebook to immediately reactivate the page of the Social Promotion Association CasaPound Italia at https://www.facebook.com/casapounditalia/ and the personal profile of Davide Di Stefano, as administrator of the page, setting a penalty of € 800.00 for each day of violation.

Against this preliminary injunction, Facebook complained that the order has erroneously recognised, *inter alia*, the special nature of the contract between the social network and the user, which instead is an ordinary contract under civil law. In the absence of any legal basis, according to Facebook, it is not possible to attribute to private actors public service obligations. Facebook is a private company operating for profit protected by art. 41 of the Constitution. Likewise, without any legal basis, Facebook is not required to ensure special protection to some users such as organizations engaged in political activities by virtue of their role in the political debate. Besides, Facebook complained that the Court had not taken into account the general activity of CasaPound aimed to share hate and violence resembling fascists positions even outside Facebook.

Casa Pound underlined that its conduct should be evaluated exclusively within the framework of the contractual relationship and, consequently, any evaluation of conduct unrelated to the use of the Facebook service would be precluded. It argues, however, that the Facebook’s claims are unfounded and unproven. CasaPound underlined that it proposes an update of historical fascism that exclusively values its social policies, and that it has publicly condemned racial laws. It has also recalled that freedom of expression protected by art. 21 of the Italian Constitution provides that the manifestations of adherence by CasaPound to fascist ideology would be relevant only if the limits provided by the criminal provisions were exceeded.

Facebook asked the Court of Rome the complete reform and rejection of the contested order.

**Decision Overview**

The Court underlined that there is no doubt that Facebook and the user are bound by an ordinary contract under civil law. Precisely, this relationship is governed by an atypical contract in which the operator provides free of charge content sharing services. In this case, users are required to comply with certain conditions established in the agreement with the social network. Therefore, the legitimacy of the termination by the service provider must be assessed primarily on the basis of the rules of contract law.

Nonetheless, according to the Court, qualifying this relationship within the framework of contractual law and the lack of special regulatory provisions in this case do not imply that the relationship between Facebook and its users is not unrestricted. It is subject to the limits ordinarily recognized for private autonomy, precisely the general clauses of public order, morality, good faith and the prohibition of abuse of the law, to interpret according to constitutional principles.

The Court underlined that these general principles are critical in the execution and interpretation of contracts, as per articles 1175, 1366 and 1375 of the Italian Civil Code. They are relevant both in terms of identifying contractual obligations and balancing the conflicting interests of the parties and allow the judge to intervene even in an amending or supplementing sense on the content of the contract. Besides, the direct application of constitutional parameters as a limit to private autonomy cannot be excluded. According to the Court, private autonomy cannot limit the exercise of users’ constitutional rights by sanctioning their exercise with negative consequences at the contractual level, or in the absence of objective justifications in the function recognized in the contract.

Therefore, the position of Facebook is groundless. While Facebook can rely on its economic freedom provided by art. 41 of the Italian Constitution, users can express their ideas and opinions according to art. 21 of the Italian Constitution. Besides, CasaPounds also enjoy the right to association pursuant to art. 18 of the Italian Constitution. As underlined by the Court, the right to freedom of expression and association are at higher level in the constitutional hierarchy. The contractual discipline cannot justify the termination of the contract because of the manifestations of thought or allow the exclusion of association. The limits connected to the respect of the freedom of thought and association are general and do not refer to special categories of users, nor do they imply the need for any additional check by Facebook.

The Court considered that the contractual clauses fully comply with the general limits of private autonomy provided that the definition of the associations excluded from the service and the conducts prohibited is based on the laws of the state that defines the limits of freedom of association and freedom of expression according to constitutional principles and supranational sources. These external limits to the agreement between Facebook and users are also consistent with the obligations on Facebook under the e-Commerce Directive which could not be invoked to cover limitations of an exclusively contractual nature.

According to the Court, it is not possible recognizing to private actors, such as Facebook, contractual powers substantially affecting the freedom of expression of thought and association, such as to exceed the limits that the legal systems provided to certain expression as sanctioned by criminal law. Besides, CasaPound cannot be considered an illicit association in the Italian legal system. The court also underlined that it is not its task of to generally attribute to an association a "license" of lawfulness, since the condition and limit of the activity of any association is the respect of the law whose respect is scrutinized by the judicial power.

Therefore, the Court recognized that the exclusion of CasaPound from the platform is unjustified. The complaint has been dismissed and the order confirmed.

**Mixed Outcome**

The case expands freedom of expression in so far as the Court of Rome rejected the complaints of Facebook, thus, confirming the reinstatement of the social media accounts. Nonetheless, this decision increases the uncertainty about platforms’ obligations in online content moderation. The horizontal application of fundamental rights is a safeguard against abuse of powers in private relationship. At the same time, it is worth considering that, in the lack of a clear legal framework of content moderation, platforms would be exposed to legal uncertainty. These actors would be encouraged to increase the monitoring activities of online content to mitigate the risk to be responsible, thus, increasingly challenging the system of exemption of liability established by the e-Commerce Directive which is based on the passive role of online intermediaries.