

Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers

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On 16 June 2015 the Grand Chamber of the European Court of Human Rights has delivered the long awaited final judgment in the case of *Delfi AS v. Estonia*, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles. The Grand Chamber has come to the conclusion that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the news portal's freedom of expression, in particular because the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis. Furthermore the steps taken by Delfi to remove the offensive comments without delay after their publication had been insufficient and the 320 euro award of damages that Delfi was obliged to pay to the plaintiff was by no means been excessive for Delfi, one of the largest internet portals in Estonia.

Some background...

In an earlier stage of the procedure, the Human Rights Centre (HRC) of Ghent University has expressed its support for the request for referral to the Grand Chamber, after the First Section in its judgment of 10 October 2013 had found no violation of the right to freedom of expression in this case (see the chamber judgment in [Delfi AS v. Estonia](#)). The HRC has submitted its considerations in a [joint letter](#) to the European Court of Human Rights, signed by a list of 69 media organisations, internet companies, human rights groups and academic institutions. In the letter to the Court, the HRC together with the other signatories, endorsed Delfi's request for a referral due to the concern that the chamber judgment of 10 October 2013 would have serious adverse repercussions for freedom of expression and democratic openness in the digital era. On 17 February 2014 the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber. A critical post on the Chamber judgment in *Delfi AS v. Estonia*, published on Strasbourg Observers can be found [here](#).

The Court's Chamber judgment of 10 October 2013 confirmed the findings by the domestic courts that the Delfi news platform was to be considered a provider of content services, rather than a provider of technical services, and that therefore it should have effectively prevented clearly unlawful comments from being published. The circumstance that Delfi had immediately removed insulting content after having received notice of it, did not suffice to exempt Delfi from liability. The reason why Delfi could not rely on the limited liability for internet service providers (ISP) in the terms of Article 12-15 of the E-Commerce Directive (no liability in case of expeditious removal after obtaining actual knowledge of illegal content and no duty of pre-monitoring) is that the news portal had integrated the readers' comments into its news portal, that

it had some control over the incoming or posted comments and that it had invited the users to post comments, having also an economic interest in exploiting its news platform with the integrated comment environment. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the *effects* of the non-treating of Delfi as an ISP were compatible with Article 10 of the Convention.

The Grand Chamber's judgment – a Delphi's Oracle?

The Grand Chamber has confirmed the non-finding of a breach of Article 10 of the Convention, on very similar, but not identical grounds as the Chamber's judgment. For the facts of the case we refer to [the Court's judgment of 16 June 2015](#) and our blog commenting the Chamber's judgment ([here](#)). In essence the news portal is found liable for violating the personality rights of a plaintiff who had been grossly insulted in about 20 comments posted by readers on the Delfi news platforms' field for comments, although Delfi had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The plaintiff was awarded 320 euro in non-pecuniary damages. Regardless of a technical system filtering vulgarity and obscene wordings, regardless of a functioning notice-and-take-down facility, and, most importantly, regardless of an effective and immediate removal of the offensive comments at issue after being notified by the victim about their grossly insulting character, the Grand Chamber shares the opinion that Delfi was liable for having made accessible for some time the grossly insulting comments on its website. The Grand Chamber agrees with the domestic courts, that Delfi was to be considered a publisher and deemed liable for the publication of the clearly unlawful comments. The Grand Chamber is of the opinion that Delfi exercised a substantial degree of control over the comments published on its portal and that because it was involved in making public the comments on its news articles on its news portal, Delfi "went beyond that of a passive, purely technical service provider" (§ 146).

The Grand Chamber furthermore refers to the "duties and responsibilities" of internet news portals, under Article 10 § 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users - whether identified or anonymous - engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Grand Chamber, in more general terms states that:

"where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law (..), the Court considers (..) that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful

comments without delay, even without notice from the alleged victim or from third parties” (§ 159)

The Grand Chamber is of the opinion that the Estonian courts’ finding of liability against Delfi has been a justified and proportionate restriction on the portal’s freedom of expression. The Court agrees that the Information Society Services Act transposing the Directive on Electronic Commerce (2000/31/EC) into Estonian law, including the provisions on the limited liability of ISPs, did not apply to the present case since the latter related to activities of a merely technical, automatic and passive nature, while Delfi’s activities reflected those of a media publisher, running an internet news portal. The interference by the Estonian authorities in Delfi’s freedom of expression was sufficiently foreseeable and sufficiently precisely prescribed by law and was justified by the legitimate aim to protect the reputation and rights of others. While the Court acknowledges that important benefits can be derived from the internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.

The special duties of care of a news portal run on a commercial basis

The Court emphasises that the present case relates to a large professionally managed internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them. Furthermore Delfi is considered to have exercised a substantial degree of control over the comments published on its portal. The Grand Chamber notes that Delfi cannot be said to have wholly neglected its duty to avoid causing harm to third parties, but the automatic word-based filter failed to select and remove odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court recalls that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats: they were manifest expressions of hatred and blatant threats to the physical integrity of the insulted person. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments that can be qualified as “hate speech”, not constituting protected speech under Article 10 of the Convention. The Court notes that as a consequence of this failure of the filtering mechanism, such clearly unlawful comments remained online for six weeks. The Court considers that a large news portal has an obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence and it attaches weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the internet is more limited than the ability of a large commercial internet news portal to prevent or rapidly remove such comments.

By way of conclusion, the Grand Chamber takes the view that the steps taken by Delfi to remove the offensive comments had been insufficient. Furthermore the compensation of 320 euro that Delfi had been obliged to pay for non-pecuniary damages, was not to be considered as an excessive interference with the right to freedom of expression of the applicant media company. Therefore, the Grand Chamber finds that the domestic courts' imposition of liability on Delfi was based on relevant and sufficient grounds, and that this measure did not constitute a disproportionate restriction on Delfi's right to freedom of expression. By fifteen votes to two, the Grand Chamber holds there has been no violation of Article 10 of the Convention.

Collateral damage for online freedom of expression?

The attention is to be drawn on one of the Grand Chamber's important considerations that the Delfi case does not concern "other fora on the Internet" where third-party comments can be disseminated, for example an internet discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any input from the forum's manager. The Grand Chamber's finding is neither applicable on a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby. The Court indeed emphasises very strongly the liability when it concerns a professionally managed internet news portal, run on a commercial basis. There are severe doubts however if this limitation of the impact of the judgment holding an online forum liable for user generated comments, is a pertinent one, reserving the (traditional) high level of freedom of expression and information only for social media, personal blogs and "hobby" (§ 116). It is indeed hard to imagine how this "damage control" will help. As the two dissenting judges observe: "Freedom of expression cannot be a matter of a hobby".

The Grand Chamber also makes clear that the impugned comments in the present case, mainly constituted hate speech and speech that directly advocated acts of violence. Hence, the establishment of their unlawful nature did not require any linguistic or legal analysis by Delfi, since the remarks were on their face manifestly unlawful. According to the Grand Chamber its judgment is not to be understood as imposing a form of "private censorship". However, the judgment considers interferences and removal taken on initiative of the providers of online platforms as the necessary way to protecting the rights of others, while there are other ways that can achieve the same goal, but with less overbroad (pre-)monitoring of all user generated content or with less collateral damage for freedom of expression and information, such as taking action against the content providers, an effectively install obligations for providers to help to identify the (anonymous) content providers in case of manifest hate speech or other illegal content. Obliging online platforms to monitor users' comments in order to prevent any possible liability for illegal content creates a new paradigm for participatory online media.