

## European Court of Human Rights judgments on the right to freedom of expression

### Bulletin LV: LIABILITY FOR USER COMMENTS

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#### *Delfi v. Estonia*

European Court of Human Rights (Grand Chamber), Application no. 64569/09, 16 June 2015

On 16 June 2015, the Grand Chamber of the European Court of Human Rights handed down a standard-setting judgment on the question who is liable for comments left on a news website by its readers. The judgment was handed down in a case from Estonia and the European Court ruled that the website was liable for the comments, which it qualified as “hate speech” and “clearly unlawful”.

#### Facts

*Delfi* is one of the largest news websites in Estonia. In 2006, it published an article about a ferry company which had changed its winter routes, as a result of which ice roads had been broken up. Because ice roads – winter roads over frozen sea ice – are a cheaper and faster connection to the islands compared to the ferry services, the ferry company's decision to break up the ice thereby making the ice roads unusable was an issue of hot contention. People who would normally drive to the islands were now compelled to use the ferry. While the news piece itself was in keeping with journalistic ethics, many readers had left highly offensive or threatening comments below the news item about the ferry operator and its owner. At the request of the lawyers of the owner of the ferry company, *Delfi* removed the offensive comments about six weeks after their publication. The owner of the ferry company sued *Delfi* and the Estonian courts found that the comments were defamatory, and that *Delfi* was responsible for them. The owner of the ferry company was awarded 5,000 kroons in damages (around 320 euros). *Delfi's* appeals were dismissed, and Estonia's Supreme Court rejected *Delfi's* argument that, under EU Directive 2000/31/EC on Electronic Commerce, its role as an information society service provider or storage host was merely technical, passive and neutral, and that it therefore should not be liable for the comments. The Supreme Court did recognise that there was a difference between a portal operator and a traditional publisher of printed media, pointing out that the former could not reasonably be required to edit comments before publishing them in the same

manner as the latter. However, both had an economic interest in the publication of comments and should therefore be considered “publishers” of information.

### Court ruling

The Grand Chamber of the European Court of Human Rights ruled on the case after *Delfi* requested the case to be referred to it, following a ruling of one of the European Court's lower 'chambers'. The Grand Chamber noted that while the internet offered great possibilities for the fulfilment of the right to freedom of expression, it also meant that hate speech could be published around the world in a matter of seconds and sometimes remain available online indefinitely, in violation of personality rights (such rights being protected under Article 8 of the European Convention).

The Grand Chamber accorded significant weight to the Estonian Supreme Court's finding that the comments posted on *Delfi's* portal were clearly “unlawful” and tantamount to hate speech (the owner of the ferry company was of Jewish descent, and some of the comments were clearly anti-semitic). Furthermore, the Grand Chamber held that it would not consider the question whether, under EU law, *Delfi* should be seen as a 'passive' intermediary. The Supreme Court had considered that *Delfi* should be regarded as a publisher both with regard to its own news content and with regard to comments left by users, and the Grand Chamber found that this was a matter for national courts to decide.

Considering the comments themselves, the Grand Chamber considered that they were not only offensive but that they clearly amounted to hate speech or incitement to violence – they referred to the ferry owner's Jewish ethnicity and incited hatred on anti-Semitic grounds. As such, they were not protected under the right to freedom of expression. The Grand Chamber went on to consider whether *Delfi* could be held liable for them. It identified four key aspects in this regard: (1) the context of the comments; (2) the liability of the actual authors of the comments as an alternative to *Delfi* being held liable; (3) the steps taken by *Delfi* to prevent or remove the defamatory comments; and (4) the consequences of the proceedings before the national courts for *Delfi*.

Firstly, as regards the context, the Grand Chamber attached particular weight to the extreme nature of the comments and the fact that *Delfi* was a professionally managed Internet news portal, run on a commercial basis, which sought to attract a large number of comments on news articles published by it. Moreover, as the Supreme Court had pointed out, *Delfi* had an economic interest in the posting of the comments: more views and 'clicks' meant more income. The actual authors of the comments could not modify or delete their comments once they were posted, only *Delfi* had the technical means to do this. The Grand Chamber therefore agreed with the Chamber and the Supreme Court that, although *Delfi* had not been the actual writer of the comments, that did not mean that it had no control over the comment environment and its involvement in making the comments on its news article public had gone beyond that of a passive, purely technical service provider.

Secondly, *Delfi* had not ensured a realistic prospect of the authors of the comments being held liable. *Delfi* allowed readers to make comments without registering their names, and it was almost impossible to establish the identity of the authors. This meant that pursuing the authors of the comments was also impossible.

Thirdly, the Grand Chamber found that the steps taken by *Delfi* to prevent or remove without delay the defamatory comments once published had been insufficient. *Delfi* did have certain mechanisms in place to filter hate speech, including an automatic system of deletion of comments which contained certain keywords and a notice-and-take-down system (whereby users could tell the portal's administrators about offensive comments by clicking a single button). Nevertheless, these had failed to filter out the manifest expressions of hatred and blatant threats to the owner of the ferry company. As a consequence, the comments had remained online for six weeks. The Grand Chamber considered that it was not disproportionate for *Delfi* to have been obliged to remove from its website, without delay, clearly unlawful comments, even without notice from the alleged victims or from third parties whose ability to monitor the Internet was obviously more limited than that of a large commercial Internet news portal such as *Delfi*.

Finally, the Grand Chamber agreed with the Chamber that the consequences of *Delfi* having been held liable were small. The 320 euro fine was by no means excessive for *Delfi*, one of the largest Internet portals in Estonia, and the portal's popularity with those posting comments had not been affected in any way – the number of comments posted had in fact increased. Furthermore, the tangible result for Internet operators in post-*Delfi* cases before the national courts had been that they have taken down offending comments but have not been ordered to pay compensation.

For these reasons, the Grand Chamber did not find that *Delfi's* right to freedom of expression had been violated.

### Comment

This was the first Grand Chamber case which concerned the question of liability for user comment and for that reason, it sets an important landmark. The main implication is that it will not be considered a violation of the right to freedom of expression if national laws require large, commercially run news websites to monitor their sites and remove “clearly unlawful” comments. At the same time, the Grand Chamber's judgment includes many caveats. In particular, the Grand Chamber stresses repeatedly that this ruling only applies to large commercial websites, and the nature of the anti-Semitic comments which the Grand Chamber repeatedly characterises as “clearly unlawful” may well have influenced its judgment. The Court's refusal to consider the imposition of liability against EU law also leaves considerable doubt as regards the applicability of the “notice and take down” exemption for liability formulated under EU law. It is therefore likely that further cases will need to be brought, to the European Court of Human Rights in Strasbourg as well as the European Court of Justice in Luxembourg, to more precisely define the parameters in this area of law.

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