



## Commercially-run Internet news portal was liable for the offensive online comments of its readers

In today's **Grand Chamber** judgment<sup>1</sup> in the case of [Delfi AS v. Estonia](#) (application no. 64569/09) the European Court of Human Rights held, by 15 votes to two, that there had been:

**no violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.

This was the first case in which the Court had been called upon to examine a complaint about liability for user-generated comments on an Internet news portal.

The applicant company, Delfi AS, which runs a news portal run on a commercial basis, complained that it had been held liable by the national courts for the offensive comments posted by its readers below one of its online news articles about a ferry company. 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 case therefore **concerned the duties and responsibilities of Internet news portals** which provided on a commercial basis a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engaged in clearly unlawful hate speech which infringed the personality rights of others. The Delfi case **did not concern other fora on the Internet** where third-party comments could be disseminated, for example an Internet discussion forum, a bulletin board or a social media platform.

**The question before the Grand Chamber** was not whether the freedom of expression of the authors of the comments had been breached but **whether holding Delfi liable for comments posted by third parties had been in breach of its freedom to impart information.**

The Grand Chamber found that the Estonian courts' **finding of liability against Delfi had been a justified and proportionate restriction on the 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; the steps taken by Delfi to remove the offensive comments without delay after their publication had been insufficient; and the 320 euro fine had by no means been excessive for Delfi, one of the largest Internet portals in Estonia.

### Principal facts

The applicant, Delfi AS, is a public limited company registered in Estonia. It owns one of the largest internet news sites in the country.

In January 2006, Delfi published an article on its webpage about a ferry company. It discussed the company's decision to change the route its ferries took to certain islands. This had caused ice to break where ice roads could have been made in the near future. As a result, the opening of these roads – a cheaper and faster connection to the islands compared to the ferry services – was postponed for several weeks. Below the article, readers were able to access the comments of other users of the site. Many readers had written highly offensive or threatening posts about the ferry operator and its owner.

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

At the request of the lawyers of the owner of the ferry company, Delfi removed the offensive comments about six weeks after their publication in March 2006.

The owner of the ferry company sued Delfi in April 2006, and successfully obtained a judgment against it in June 2008. The Estonian court 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).

An appeal by Delfi was dismissed by Estonia's Supreme Court in June 2009. The Supreme Court rejected the portal'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, finding that the portal exercised control over the publication of comments. It 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 both be considered "publishers/disclosers" ("*avaldajad*"). The Supreme Court therefore held Delfi liable under the relevant domestic law, notably the Constitution, the Civil Code (General Principles) Act and the Obligations Act, finding that the portal had not only failed to prevent the publication of comments which degraded human dignity, contained threats and were thus clearly unlawful but also to remove the comments from its portal on its own initiative.

Before the publication of the offensive comments, in September 2005, the Estonian Minister of Justice had had to respond to public criticism and concern about incessant taunting on public websites in Estonia, Delfi having been named as a source of brutal and arrogant mockery. In his response the Minister of Justice noted that victims of insults could bring a suit against Delfi and claim damages.

## Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, Delfi complained that the Estonian civil courts had found it liable for comments written by its readers.

The application was lodged with the European Court of Human Rights on 4 December 2009.

In its Chamber [judgment](#) of 10 October 2013 the Court held, unanimously, that there had been no violation of Article 10 (freedom of expression) of the European Convention. It found that the finding of liability by the Estonian courts had been a justified and proportionate restriction on the portal's right to freedom of expression, in particular, because: the comments were highly offensive; the portal had failed to prevent them from becoming public, profited from their existence, but allowed their authors to remain anonymous; and, the fine imposed by the Estonian courts had not been excessive.

On 9 January 2014 Delfi asked for the case to be referred to the Grand Chamber in accordance with Article 43 of the Convention<sup>2</sup> (referral before the Grand Chamber). On 17 February 2014 the Grand Chamber Panel [accepted](#) Delfi's request. A hearing was held on the case in Strasbourg on 9 July 2014.

The following organisations were given leave (under Article 36 § 2 of the Convention) to intervene as third parties in the written procedure: the Helsinki Foundation for Human Rights; Article 19; Access; Media Legal Defence Initiative, acting together with its 28 associated organisations; and the

<sup>2</sup> Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

European Digital Media Association, the Computer and Communications Industry Association and the pan-European association of European Internet Services Providers Associations, acting jointly.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,  
Josep **Casadevall** (Andorra),  
Guido **Raimondi** (Italy),  
Mark **Villiger** (Liechtenstein),  
Işıl **Karakaş** (Turkey),  
Ineta **Ziemele** (Latvia),  
Boštjan M. **Zupančič** (Slovenia),  
András **Sajó** (Hungary),  
Ledi **Bianku** (Albania),  
Nona **Tsotsoria** (Georgia),  
Vincent A. **de Gaetano** (Malta),  
Angelika **Nußberger** (Germany),  
Julia **Laffranque** (Estonia),  
Linos-Alexandre **Sicilianos** (Greece),  
Helena **Jäderblom** (Sweden),  
Robert **Spano** (Iceland),  
Jon Fridrik **Kjølbro** (Denmark),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

## Decision of the Court

### [The scope of the Court's assessment](#)

The Grand Chamber first noted the conflicting realities between the benefits of Internet, notably the unprecedented platform it provided for freedom of expression (as protected under Article 10 of the European Convention), and its dangers, namely the possibility of hate speech and speech inciting violence being disseminated worldwide in a matter of seconds and sometimes remaining available online indefinitely, in violation of personality rights (such rights being protected under Article 8 of the European Convention).

As this was the first case in which the Court had been called upon to examine such a complaint in an evolving field of technological innovation, it decided to narrow the scope of its inquiry both as concerned the nature of the applicant company as well as of the speech in question.

As concerned the nature of Delfi, the Grand Chamber saw no reason to call into question the distinction made by the Supreme Court between a portal operator and a traditional publisher of printed media and considered that their duties and responsibilities might differ.

Next, the Grand Chamber noted the Supreme Court's characterisation of the comments posted on Delfi's portal as unlawful. This assessment was based on the fact that the comments were tantamount to hate speech and incitement to violence against the owner of the ferry company. The Grand Chamber thus considered that the remarks, established as manifestly unlawful, did not require any linguistic or legal analysis.

Consequently, the case concerned the duties and responsibilities of Internet news portals, under Article 10 § 2 of the Convention, which provided on a commercial basis a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engaged in clearly unlawful speech, which infringed the personality rights of others and amounted to hate speech and incitement to violence against them. The Grand Chamber

emphasised that Delfi was one of the biggest professionally managed Internet news portals in Estonia, run on a commercial basis, and published news articles which it invited its readers to comment on. Furthermore, Delfi had a wide readership and there was a known public concern about the controversial nature of the comments it attracted.

The case did not, on the other hand, concern other fora on the Internet where third-party comments could be disseminated, for example an Internet discussion forum or a bulletin board where users could freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider did not offer any content and where the content provider might be a private person running the website or a blog as a hobby.

### The restriction on Delfi's freedom of expression, its aim and application of the law

It was not in dispute that the national courts' decisions had constituted an interference with Delfi's right to freedom of expression and that that restriction had pursued the legitimate aim of protecting the reputation and rights of others.

The parties' opinions differed, however, as regards the law to be applied. Delfi argued in particular that the national courts had erred in applying the general provisions of the domestic law – in particular the Constitution, the Civil Code (General Principles) Act and the Obligations Act – to the facts of the case as they should have relied upon the domestic and European legislation on Internet service providers. Notably, the domestic courts, in interpreting and applying the relevant provisions of the domestic law, considered that Delfi was a “publisher/discloser” and could be held liable for the uploading of clearly unlawful comments on its news portal. The domestic courts chose to apply those norms, having found that the special regulation contained in the Information Society Services Act transposing the EU Directive on Electronic Commerce into Estonian law had not applied to Delfi's case since the Directive related to activities of a merely technical, automatic and passive nature, unlike Delfi's activities, which did not involve simply providing an intermediary service.

However, the Grand Chamber found that it was for national courts to resolve issues of interpretation and application of domestic law. Thus it did not address the issue under EU law and limited itself to the question of whether the Supreme Court's application of the domestic law to Delfi's situation had been foreseeable.

Indeed, as a professional publisher running an Internet news portal – one of the largest in Estonia – for an economic purpose, Delfi should have been familiar with the relevant legislation and case-law, and could also have sought legal advice. Moreover, public concern had already been expressed before the publication of the comments in question and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages. Thus, the Grand Chamber considered that Delfi had been in a position to assess the risks related to its activities and that it had to have been able to foresee, to a reasonable degree, the consequences which those activities could entail. It therefore concluded that the interference with Delfi's freedom of expression had been “prescribed by law”.

### Whether the restriction on Delfi's freedom of expression was necessary in a democratic society

The Grand Chamber considered that the offensive comments posted on Delfi's news portal, amounting to hate speech or incitement to violence, did not enjoy the protection of Article 10 and thus the freedom of expression of the authors of the comments was not at issue. The question before the Grand Chamber was rather whether the national courts' decisions, holding Delfi liable for comments posted by third parties, were in breach of its freedom to impart information as guaranteed by Article 10 of the Convention.

The Grand Chamber went on to examine whether that finding of liability by the domestic courts, notably the Supreme Court, had been based on relevant and sufficient grounds. The Grand Chamber agreed with the Chamber's assessment of the question which had identified four key aspects: the context of the comments; the liability of the actual authors of the comments as an alternative to Delfi being held liable; the steps taken by Delfi to prevent or remove the defamatory comments; and 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. 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. The owner of the ferry company could have attempted to sue the specific authors of the offensive comments as well as Delfi itself. However, Delfi allowed readers to make comments without registering their names, and the measures to establish the identity of the authors were uncertain. Nor had Delfi put in place any instruments to identify the authors of the comments making it possible for a victim of hate speech to bring a claim.

Thirdly, the steps taken by Delfi to prevent or remove without delay the defamatory comments once published had been insufficient. Delfi did have certain mechanisms for filtering hate speech or speech inciting violence, namely a disclaimer (stating that authors of comments were liable for their content, and that threatening or insulting comments were not allowed), an automatic system of deletion of comments containing a series of vulgar words and a notice-and-take-down system (whereby users could tell the portal's administrators about offensive comments by clicking a single button). Nevertheless, both the automatic word-based filter and the notice-and-take-down system had failed to filter out the manifest expressions of hatred and blatant threats to the owner of the ferry company by Delfi's readers and the portal's ability to remove offending comments in good time had therefore been limited. 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. Registered comments are now a possibility but anonymous comments are still predominant, with Delfi even having set up a team of moderators for their follow-up. Furthermore, the tangible result for Internet operators in post-Delfi cases before the national courts has been that they have taken down offending comments but have not been ordered to pay compensation.

Based on the concrete assessment of the above aspects and taking into account the reasoning of the Supreme Court in the present case, the Grand Chamber found that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the portal's freedom of expression. Accordingly, there had been no violation of Article 10 of the Convention.

## Separate opinions

Judges Raimondi, Karakaş, De Gaetano and Kjølbros expressed a joint concurring opinion. Judge Zupančič expressed a concurring opinion and Judges Sajó and Tsotsoria a joint dissenting opinion. These opinions are annexed to the judgment.

*The judgment is available in English and French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.