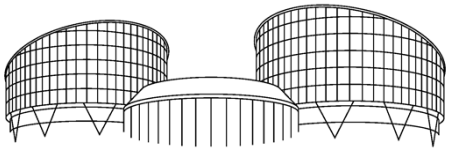

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF DELFI AS v. ESTONIA

(Application no. 64569/09)

JUDGMENT

STRASBOURG

16 June 2015

This judgment is final.

In the case of Delfi AS v. Estonia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Mark Villiger,
Işıl Karakaş,
Ineta Ziemele,
Boštjan M. Zupančič,
András Sajó,
Ledi Bianku,
Nona Tsotsoria,
Vincent A. De Gaetano,
Angelika Nußberger,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Helena Jäderblom,
Robert Spano,
Jon Fridrik Kjølbro, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 9 July 2014 and 18 March 2015,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 64569/09) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Delfi AS, a public limited liability company registered in Estonia ("the applicant company"), on 4 December 2009.

2. The applicant company was represented by Mr V. Otsmann and Ms K. Turk, lawyers practising in Tallinn. The Estonian Government ("the Government") were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant company alleged that its freedom of expression had been violated, in breach of Article 10 of the Convention, by the fact that it had been held liable for the third-party comments posted on its Internet news portal.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 February 2011 the Court changed

the composition of its Sections (Rule 25 § 1) and the application was assigned to the newly composed First Section. On 10 October 2013 a Chamber composed of Isabelle Berro-Lefèvre, President, Elisabeth Steiner, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Ksenija Turković, Dmitry Dedov, judges, and André Wampach, Deputy Section Registrar, delivered its judgment. It decided unanimously to declare the application admissible and held that there had been no violation of Article 10 of the Convention.

5. On 8 January 2014 the applicant company requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and a panel of the Grand Chamber accepted the request on 17 February 2014.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant company and the Government each filed further observations on the merits (Rule 59 § 1).

8. In addition, third-party comments were received from the following organisations, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a)): the Helsinki Foundation for Human Rights; the non-governmental organisation, Article 19; Access; Media Legal Defence Initiative, acting together with its twenty-eight associated organisations; and the European Digital Media Association, the Computer & Communications Industry Association and the pan-European association of European Internet Services Providers Associations, acting jointly.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 July 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms M. KUURBERG, *Agent*,
Ms M. KAUR,
Ms K. MÄGI, *Advisers*;

(b) *for the applicant company*
Mr V. OTSMANN,
Ms K. TURK, *Counsel*.

The Court heard addresses by Mr Otsmann, Ms Turk and Ms Kuurberg, as well as their replies to questions put by Judges Ziemele, Spano, Raimondi, Villiger and Bianku.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant company is a public limited liability company (*aktsiaselts*), registered in Estonia.

A. Background to the case

11. The applicant company is the owner of Delfi, an Internet news portal that published up to 330 news articles a day at the time of the lodging of the application. Delfi is one of the largest news portals on the Internet in Estonia. It publishes news in Estonian and Russian in Estonia, and also operates in Latvia and Lithuania.

12. At the material time, at the end of the body of the news articles there were the words "add your comment" and fields for comments, the commenter's name and his or her e-mail address (optional). Below these fields there were buttons labelled "publish the comment" and "read comments". The part for reading comments left by others was a separate area which could be accessed by clicking on the "read comments" button. The comments were uploaded automatically and were, as such, not edited or moderated by the applicant company. The articles received about 10,000 readers' comments daily, the majority posted under pseudonyms.

13. Nevertheless, there was a system of notice-and-take-down in place: any reader could mark a comment as *leim* (Estonian for an insulting or mocking message or a message inciting hatred on the Internet) and the comment was removed expeditiously. Furthermore, comments that included certain stems of obscene words were automatically deleted. In addition, a victim of a defamatory comment could directly notify the applicant company, in which case the comment was removed immediately.

14. The applicant company had made efforts to advise users that the comments did not reflect its own opinion and that the authors of comments were responsible for their content. On Delfi's website there were Rules on posting comments which included the following.

> "The Delfi message board is a technical medium allowing users to publish comments. Delfi does not edit the comments. An author of a comment is liable for his or her comment. It is worth noting that there have been cases in the Estonian courts where authors have been punished for the contents of a comment ...
>
> Delfi prohibits comments whose content does not comply with good practice.
>
> These are comments that
>
> – contain threats;
>
> – contain insults;

– incite hostility and violence;

– incite illegal activities ...

– contain off-topic links, spam or advertisements;

– are without substance and/or off topic;

– contain obscene expressions and vulgarities ...

Delfi reserves the right to remove such comments and restrict their authors' access to the writing of comments ..."

The functioning of the notice-and-take-down system was also explained in the Rules on posting comments.

15. The Government submitted that in Estonia Delfi had a notorious history of publishing defamatory and degrading comments. Thus, on 22 September 2005 the weekly newspaper *Eesti Ekspress* had published an open letter from its editorial board to the Minister of Justice, the Chief Public Prosecutor and the Chancellor of Justice in which concern was expressed about the incessant taunting of people on public websites in Estonia. Delfi was named as a source of brutal and arrogant mockery. The addressees of the public letter responded to it in the 29 September 2005 edition of *Eesti Ekspress*. The Minister of Justice emphasised that the insulted persons had the right to defend their honour and reputation in court by bringing a suit against Delfi and claiming damages. The Chief Public Prosecutor referred to the legal grounds which made threats, incitement to social hatred, and sexual abuse of minors punishable under criminal law, and noted that liability for defamation and insults was dealt with under civil procedure. The Chancellor of Justice referred to the legal provisions designed to ensure freedom of expression as well as the protection of everyone's honour and good name, including sections 1043 and 1046 of the Obligations Act (*Võlaõigusseadus*).

B. Article and comments published on the Internet news portal

16. On 24 January 2006 the applicant company published an article on the Delfi portal under the heading "SLK Destroyed Planned Ice Road". Ice roads are public roads over the frozen sea which are open between the Estonian mainland and some islands in winter. The abbreviation "SLK" stands for AS Saaremaa Laevakompanii (Saaremaa Shipping Company, a public limited liability company). SLK provides a public ferry transport service between the mainland and certain islands. At the material time, L. was a member of the supervisory board of SLK and the company's sole or majority shareholder.

17. On 24 and 25 January 2006 the article attracted 185 comments. About twenty of them contained personal threats and offensive language directed at L.

18. On 9 March 2006 L.'s lawyers requested the applicant company to remove the offensive comments and claimed 500,000 Estonian kroons (EEK) (approximately 32,000 euros (EUR)) in compensation for non-pecuniary damage. The request concerned the following twenty comments.

"1. (1) there are currents in [V]äinameri

(2) open water is closer to the places you referred to, and the ice is thinner.

Proposal – let's do the same as in 1905, let's go to [K]uressaare with sticks and put [L.] and [Le.] in a bag

2. bloody shitheads...

they're loaded anyway thanks to that monopoly and State subsidies and have now started to worry that cars may drive to the islands for a couple of days without anything filling their purses. burn in your own ship, sick Jew!

3. good that [La.'s] initiative has not broken down the lines of the web flamers. go ahead, guys, [L.] into the oven!

4. [little L.] go and drown yourself

5. aha... [I] hardly believe that that happened by accident... assholes fck

6. rascal!!! [in Russian]

7. What are you whining for, knock this bastard down once and for all[.] In future the other ones ... will know what they risk, even they will only have one little life.

8. ... is goddamn right. Lynching, to warn the other [islanders] and would-be men. Then nothing like that will be done again! In any event, [L.] very much deserves that, doesn't he.

9. "a good man lives a long time, a shitty man a day or two"

10. If there was an ice road, [one] could easily save 500 for a full car, fckng [L.] pay for that economy, why does it take 3 [hours] for your ferries if they are such good icebreakers, go and break ice in Pärnu port ... instead, fcking monkey, I will cross [the strait] anyway and if I drown, it's your fault

11. and can't anyone stand up to these shits?

12. inhabitants of Saaremaa and Hiiumaa islands, do 1:0 to this dope.

13. wonder whether [L.] won't be knocked down in Saaremaa? screwing one's own folk like that.

14. The people will chatter for a couple of days on the Internet, but the crooks (and also those who are backed and whom we ourselves have elected to represent us) pocket the money and pay no attention to this flaming – no one gives a shit about this.

Once [M.] and other big crooks also used to boss around, but their greed struck back (RIP). Will also strike back for these crooks sooner or later. As they sow, so shall they reap, but they should nevertheless be contained (by lynching as the State is powerless towards them – it is really them who govern the State), because they only live for today. Tomorrow, the flood.

15. this [V.] will one day get hit with a cake by me.

damn, as soon as you put a cauldron on the fire and there is smoke rising from the chimney of the sauna, the crows from Saaremaa are there – thinking that ... a pig is going to be slaughtered. no way

16. bastards!!!! Ofelia also has an ice class, so this is no excuse why Ola was required!!!

17. Estonian State, led by scum [and] financed by scum, of course does not prevent or punish antisocial acts by scum. But well, every [L.] has his Michaelmas ... and this cannot at all be compared to a ram's Michaelmas.[1] Actually feel sorry for [L.] – he's a human, after all... :D :D :D

18. ... if after such acts [L.] should all of a sudden happen to be on sick leave and also next time the ice road is destroyed ... will he [then] dare to act like a pig for the third time? :)

19. fucking bastard, that [L.]... could have gone home with my baby soon ... anyway his company cannot guarantee a normal ferry service and the prices are such that ... real creep ... a question arises whose pockets and mouths he has filled up with money so that he's acting like a pig from year to year

20. you can't make bread from shit; and paper and internet can stand everything; and just for my own fun (really the State and [L.] do not care about the people's opinion) ... just for fun, with no greed for money – I pee into [L.'s] ear and then I also shit onto his head. :)"

19. On the same day, that is about six weeks after their publication, the offensive comments were removed by the applicant company.

20. On 23 March 2006 the applicant company responded to the request from L.'s lawyers. It informed L. that the comments had been removed under the notice-and-take-down obligation, and refused the claim for damages.

C. Civil proceedings against the applicant company

21. On 13 April 2006 L. brought a civil suit in the Harju County Court against the applicant company.

22. At the hearing of 28 May 2007, the representatives of the applicant company submitted, *inter alia*, that in cases like that concerning the "Bronze Night" (disturbances of public order related to the relocation of the Bronze Soldier monument in April 2007) Delfi had removed between 5,000 and 10,000 comments per day, on its own initiative.

23. By a judgment of 25 June 2007, L.'s claim was dismissed. The County Court found that the applicant company's liability was excluded under the Information Society Services Act (*Infoühiskonna teenuse seadus*), which was based on Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society

1. This is an allusion to an Estonian saying, "Every ram has its Michaelmas", which historically refers to slaughtering wethers (castrated rams) in autumn around Michaelmas day (29 September) but is nowadays used to mean that one cannot escape one's fate.

services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). The court considered that the comments section on the applicant company's news portal was to be distinguished from its journalistic section. The administration of the former by the applicant company was essentially of a mechanical and passive nature. The applicant company could not be considered the publisher of the comments, nor did it have any obligation to monitor them.

24. On 22 October 2007 the Tallinn Court of Appeal allowed an appeal by L. It considered that the County Court had erred in finding that the applicant company's liability was excluded under the Information Society Services Act. The County Court's judgment was quashed and the case was referred back to the first-instance court for fresh consideration.

25. On 21 January 2008 the Supreme Court declined to hear an appeal by the applicant company.

26. On 27 June 2008 the Harju County Court, having re-examined the case, found for L. In accordance with the Court of Appeal's instructions, it relied on the Obligations Act and deemed the Information Society Services Act inapplicable. It observed that the applicant company had indicated on its website that comments were not edited, that the posting of comments that were contrary to good practice was prohibited, and that the applicant company reserved the right to remove such comments. A system was put in place whereby users could notify the applicant company of any inappropriate comments. However, the County Court considered that this was insufficient and did not allow adequate protection for the personality rights of others. The court found that the applicant company itself was to be considered the publisher of the comments, and it could not avoid responsibility by publishing a disclaimer stating that it was not liable for the content of the comments.

27. The County Court found that the news article itself published on the Delfi news portal was a balanced one. A number of comments, however, were vulgar in form; they were humiliating and defamatory, and impaired L.'s honour, dignity and reputation. The comments went beyond justified criticism and amounted to simple insults. The court concluded that freedom of expression did not extend to protection of the comments concerned and that L.'s personality rights had been violated. L. was awarded EEK 5,000 (EUR 320) in compensation for non-pecuniary damage.

28. On 16 December 2008 the Tallinn Court of Appeal upheld the County Court's judgment. It emphasised that the applicant company had not been required to exercise prior control over comments posted on its news portal. However, having chosen not to do so, it should have created some other effective system which would have ensured rapid removal of unlawful comments. The Court of Appeal considered that the measures taken by the applicant company were insufficient and that it was contrary to the principle

of good faith to place the burden of monitoring the comments on their potential victims.

29. The Court of Appeal rejected the applicant company's argument that its liability was excluded under the Information Society Services Act. It noted that the applicant company was not a technical intermediary in respect of the comments, and that its activity was not of a merely technical, automatic and passive nature; instead, it invited users to post comments. Thus, the applicant company was a provider of content services rather than of technical services.

30. On 10 June 2009 the Supreme Court dismissed an appeal by the applicant company. It upheld the Court of Appeal's judgment in substance, but partly modified its reasoning.

31. The Supreme Court held as follows.

> "10. The Chamber finds that the allegations set out in the appeal do not serve as a basis for reversing the judgment of the Court of Appeal. The conclusion reached in the Court of Appeal's judgment is correct, but the legal reasoning of the judgment must be amended and supplemented on the basis of Article 692 § 2 of the Code of Civil Procedure.
>
> 11. The parties do not dispute the following circumstances:
>
> (a) on 24 January 2006 the defendant's Internet portal 'Delfi' published an article entitled 'SLK Destroyed Planned Ice Road';
>
> (b) the defendant provided visitors to the Internet portal with the opportunity to comment on articles;
>
> (c) of the comments published [*avaldatud*[2]] on the aforementioned article, twenty contain content which is derogatory towards the plaintiff [L.];
>
> (d) the defendant removed the derogatory comments after the plaintiff's letter of 9 March 2006.
>
> 12. The legal dispute between the parties relates to whether the defendant as an entrepreneur is the publisher within the meaning of the Obligations Act, whether what was published (the content of comments) is unlawful, and whether the defendant is liable for the publication of comments with unlawful content.
>
> 13. The Chamber agrees with the conclusion of the Court of Appeal that the defendant does not fall within the circumstances precluding liability as specified in section 10 of the ISSA [Information Society Services Act].
>
> According to section 2(6) of the Technical Regulations and Standards Act, an information society service is a service specified in section 2(1) of the ISSA. According to this provision, 'information society services' are services provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being simultaneously present at the same location, and such services involve the processing, storage or transmission of data by electronic means intended for the digital processing and storage of data. Hence, important conditions for the provision of information society services are that the services are

2. The Estonian words *avaldama/avaldaja* mean both publish/publisher and disclose/discloser.

provided without the physical presence of the parties, the data are transmitted by electronic means, and the service is provided for a fee on the basis of a request by the user of the service.

Sections 8 to 11 of the ISSA establish the liability of providers of different information society services. Section 10 of the ISSA states that where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of the contents of the information and, as regards claims for damages, is not aware of any facts or circumstances indicating any illegal activity or information; (b) the provider, upon having knowledge or becoming aware of the aforementioned facts, acts expeditiously to remove or to disable access to the information. Hence, the provision in question is applied in the event that the service provided consists in storing data on [the service provider's] server and enabling users to have access to these data. Subject to the conditions specified in section 10 of the ISSA, the provider of such a service is exempted from liability for the content of information stored by it, because the provider of the service merely fulfils the role of an intermediary within the meaning of the provision referred to, and does not initiate or modify the information.

Since the Information Society Services Act is based on Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), the principles and objectives of that Directive must also be taken into account in the interpretation of the provisions of the Act in question. Articles 12 to 15 of the Directive, which form the basis for sections 8 to 11 of the ISSA, are complemented by Recital 42 of the preamble to the Directive, according to which the exemptions from liability established in Articles 12 to 15 cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored. Hence, the providers of so-called 'content services' who have control over the content of the information stored cannot rely on the exemptions specified in Articles 12 to 15 of the Directive.

The Chamber shares the opinion of the Court of Appeal that the activities of the defendant in publishing the comments are not merely of a technical, automatic and passive nature. The objective of the defendant is not merely the provision of an intermediary service. The defendant has integrated the comments section into its news portal, inviting visitors to the website to complement the news with their own judgments [*hinnangud*] and opinions (comments). In the comments section, the defendant actively calls for comments on the news items appearing on the portal. The number of visits to the defendant's portal depends on the number of comments; the revenue earned from advertisements published on the portal, in turn, depends on the [number of visits]. Thus, the defendant has an economic interest in the posting of comments. The fact that the defendant is not the author of the comments does not mean that the defendant has no control over the comments section. The defendant sets out the rules for the comments section and makes changes to it (removes a comment) if those rules are breached. By contrast, a user of the defendant's service cannot change or delete a comment he or she has posted. He or she can only report an

inappropriate comment. Thus, the defendant can determine which of the comments added will be published and which will not be published. The fact that the defendant does not make use of this possibility does not lead to the conclusion that the publishing of comments is not under the defendant's control. The Chamber agrees with the opinion of the Court of Appeal that the defendant, which governs the information stored in the comments section, provides a content service, for which reason the circumstances precluding liability, as specified in section 10 of the ISSA, do not apply in the present case.

14. It is not disputed that the defendant is the publisher of an article entitled 'SLK Destroyed Planned Ice Road', published on the Delfi Internet portal on 24 January 2006. The County Court also found that the defendant must be regarded as the publisher of the comments. The Court of Appeal, agreeing with that opinion, noted that the fact that the defendant relied on a violation of its right to freedom of expression showed that it considered itself – and not the authors of the comments – to be the publisher of the comments. In the opinion of the Chamber, in the present case both the defendant and the authors of the comments are the publishers of the comments within the meaning of the Obligations Act. The plaintiff has the right to choose against whom to bring the suit. The suit has only been brought against the defendant [Delfi].

The Chamber has explained the definitions of "disclosure" and "discloser" in paragraph 24 of its judgment of 21 December 2005 in civil case no. 3-2-1-95-05, finding that for the purposes of section 1047 of the Obligations Act, disclosure [*avaldamine*] means communication of information to third parties and the discloser is a person who communicates the information to third parties. In addition, the Chamber explained that in the case of publication [*avaldamine*] of information in the media, the discloser/publisher [*avaldaja*] can be a media company as well as the person who transmitted the information to the media publication. Publishing of news and comments on an Internet portal is also a journalistic activity [*ajakirjanduslik tegevus*]. At the same time, because of the nature of Internet media [*internetiajakirjandus*], it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication [*trükiajakirjanduse väljaanne*]. While the publisher [(*väljaandja*) of a printed media publication] is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher [*väljaandja*] of printed media and an Internet portal operator are publishers/disclosers [*avaldajad*] as entrepreneurs.

In cases concerning a value judgment [*väärtushinnang*] that prejudices and denigrates a person's honour and good name, in determining the definition of publication/disclosure and publisher/discloser it is irrelevant whether the value judgment is derived from the published/disclosed information or is derogatory because of its substantive meaning ... Hence, publication/disclosure is communication to third parties of a value judgment on a person (section 1046(1) of the Obligations Act) and/or of information which allows a value judgment to be made, and a publisher/discloser is a person who communicates such judgments [*hinnangud*] and information to third parties. In the present case the comments have been made accessible to an unlimited number of persons (the general public).

15. In reply to the allegations in the defendant's appeal to the effect that the Court of Appeal wrongly applied Article 45 of the Constitution since, in justifying the interference with freedom of expression, it relied on the principle of good faith, and

not the law, and that the removal of a comment from the portal is an interference with the freedom of expression of the person posting the comment, the Chamber explains the following.

The exercise of any fundamental right is restricted by Article 19 § 2 of the Constitution, which provides that everyone must honour and consider the rights and freedoms of others, and must observe the law in exercising his or her rights and freedoms and in fulfilling his or her duties. The first sentence of the first paragraph of Article 45 of the Constitution provides for everyone's right to freedom of expression, that is, the right to disseminate information of any content in any manner. That right is restricted by the prohibition on injuring a person's honour and good name, as laid down in the Constitution (Article 17). The Chamber is of the opinion that in handling the conflict between freedom of expression on the one hand, and honour and good name on the other, regard must be had to the fact that Article 17 of the Constitution, which is formulated as a prohibition, does not completely preclude any interference with a person's honour and good name, but only prohibits defamation thereof (section 1046 of the Obligations Act). In other words, disregarding the aforementioned prohibition would not be in conformity with the Constitution (Article 11 of the Constitution). The second sentence of the first paragraph of Article 45 of the Constitution includes the possibility of restricting the freedom of expression by law in order to protect a person's honour and good name.

In the interests of the protection of a person's honour and good name, the following provisions of the Obligations Act may be regarded as restricting the freedom of expression: sections 1045(1)(4), 1046(1), 1047(1), (2) and (4), 1055(1) and (2), and 134(2). The County Court found that injuring the plaintiff's honour was not justified and was therefore unlawful; as there was no discussion of the [news] topic in the comments, the plaintiff was simply insulted in order to degrade him. The Court of Appeal also agreed with that opinion. The Chamber finds that if section 1046 of the Obligations Act is interpreted in conformity with the Constitution, injuring a person's honour is unlawful. The legal assessment by the courts of the twenty comments of a derogatory nature is substantiated. The courts have correctly found that those comments are defamatory since they are of a vulgar nature, degrade human dignity and contain threats.

The Chamber does not agree with the opinion of the Court of Appeal that the removal of comments of an unlawful nature interfering with the personality rights of the plaintiff is not an interference with the freedom of expression of the authors of the comments. The Chamber considers that the application of any measure restricting a fundamental right in any manner may be regarded as an interference with the exercise of that fundamental right. Interference by an Internet portal operator with the freedom of expression of persons posting comments is, however, justified by the obligation of the portal operator-entrepreneur to respect the honour and good name of third parties, as arising from the Constitution (Article 17) and the law (section 1046 of the Obligations Act), and to avoid causing them harm (section 1045(1)(4) of the Obligations Act).

16. According to the judgment of the Court of Appeal, the contents of the comments were unlawful; they were linguistically inappropriate. Value judgments ... are inappropriate if it is obvious to a sensible reader that their meaning is vulgar and intended to degrade human dignity and ridicule a person. The comments did not contain any information which would have required excessive verification on the initiative of the portal operator. Hence, the defendant's allegation that it was not and should not have been aware of the unlawfulness of the comments is groundless.

On account of the obligation arising from law to avoid causing harm, the defendant should have prevented the publication of comments with clearly unlawful content. The defendant did not do so. In accordance with section 1047(3) of the Obligations Act, the disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has verified the information or other matters with a thoroughness which corresponds to the gravity of the potential violation. The publication of linguistically inappropriate value judgments injuring another person's honour cannot be justified by relying on the circumstances specified in section 1047(3) of the Obligations Act: such judgments are not derived from any information disclosed but are created and published for the purpose of damaging the honour and good name of the party concerned. Hence, the publication of comments of a clearly unlawful nature was also unlawful. After the disclosure, the defendant failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative. In such circumstances, the courts have reasonably found that the defendant's inactivity is unlawful. The defendant is liable for the damage caused to the plaintiff, since the courts have established that the defendant has not proved the absence of culpability [*süü*] (section 1050(1) of the Obligations Act)."

D. Subsequent developments

32. On 1 October 2009 Delfi announced on its Internet portal that persons who had posted offensive comments were not allowed to post a new comment until they had read and accepted the Rules on posting comments. Furthermore, it was announced that Delfi had set up a team of moderators who carried out follow-up moderation of comments posted on the portal. First of all, the moderators reviewed all user notices of inappropriate comments. The compliance of comments with the Rules on posting comments was monitored as well. According to the information published, the number of comments posted by Delfi's readers in August 2009 had been 190,000. Delfi's moderators had removed 15,000 comments (about 8%), mainly consisting of spam or irrelevant comments. The percentage of defamatory comments had been less than 0.5% of the total number of comments.

II. RELEVANT DOMESTIC LAW AND PRACTICE

33. The Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) provides as follows.

Article 17

"No one's honour or good name shall be defamed."

Article 19

"1. Everyone has the right to free self-realisation.

2. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law in exercising his or her rights and freedoms and in fulfilling his or her duties."

Article 45

"1. Everyone has the right freely to disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be restricted by law to protect public order, morals, and the rights and freedoms, health, honour and the good name of others. This right may also be restricted by law for State and local government public servants, to protect a State or business secret or information received in confidence which has become known to them by reason of their office, and the family and private life of others, as well as in the interests of justice.

2. There is to be no censorship."

34. Section 138 of the Civil Code (General Principles) Act (*Tsiviilseadustiku üldosa seadus*) provides that rights are to be exercised and obligations performed in good faith. A right must not be exercised in an unlawful manner or with the aim of causing damage to another person.

35. Subsection 2 of section 134 of the Obligations Act (*Võlaõigusseadus*) provides:

"In the case of an obligation to compensate for damage arising from ... a breach of a personality right, in particular from defamation, the obligated person shall compensate the aggrieved person for non-pecuniary damage only if this is justified by the gravity of the breach, in particular by physical or emotional distress."

36. Section 1043 of the Obligations Act provides that a person (tortfeasor) who unlawfully causes damage to another person (victim) must compensate for the damage if the tortfeasor is culpable (*süüdi*) of causing the damage or is liable for causing the damage pursuant to the law.

37. Section 1045 of the Obligations Act provides that the causing of damage is unlawful if, *inter alia*, it results from a breach of a personality right of the victim.

38. The Obligations Act further provides.

Section 1046 – Unlawfulness of damage to personality rights

"(1) Injuring a person's honour, *inter alia*, by passing an undue value judgment, unjustified use of a person's name or image, or breaching the inviolability of a person's private life or another personality right, is unlawful unless otherwise provided by law. In establishing such unlawfulness, the type of the breach, the reason and motive for the breach and the gravity of the breach relative to the aim pursued thereby shall be taken into consideration.

(2) The breach of a personality right is not unlawful if the breach is justified in view of other legal rights protected by law and the rights of third parties or public interests. In such cases, unlawfulness shall be established on the basis of a comparative assessment of the different legal rights and interests protected by law."

Section 1047 – Unlawfulness of disclosure of incorrect information

"(1) A breach of personality rights or interference with the economic or professional activities of a person by way of disclosure [*avaldamine*] of incorrect information, or by way of incomplete or misleading disclosure of information concerning the person or the person's activities, is unlawful unless the person who discloses such information proves that, at the time of such disclosure, he or she was not aware and was not required to be aware that such information was incorrect or incomplete.

(2) Disclosure of defamatory matters concerning a person, or matters which may adversely affect a person's economic situation, is deemed to be unlawful unless the person who discloses such matters proves that they are true.

(3) Regardless of the provisions of subsections (1) and (2) of this section, the disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has verified the information or other matters with a thoroughness which corresponds to the gravity of the potential breach.

(4) In the event of disclosure of incorrect information, the victim may demand that the person who has disclosed such information refute the information or publish a correction at his or her own expense, regardless of whether the disclosure of the information was unlawful or not."

Section 1050 – Culpability [*süü*] as basis for liability

"(1) Unless otherwise provided by law, a tortfeasor is not liable for the causing of damage if the tortfeasor proves that he or she is not culpable [*süüdi*] of causing the damage.

(2) The situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration in the assessment of the culpability [*süü*] of the person for the purposes of this Chapter.

(3) If several persons are liable for compensation for damage and, pursuant to law, one or more of them are liable for compensation for unlawfully caused damage regardless of whether or not they are culpable, the wrongfulness of the behaviour and the form of the culpability of the persons liable for compensation for the damage shall be taken into consideration in apportioning among them the obligation to compensate for the damage."

Section 1055 – Prohibition on damaging actions

"(1) If unlawful damage is caused continually or a threat is made that unlawful damage will be caused, the victim or the person who is threatened has the right to demand the cessation of the behaviour causing the damage or of the threats of such behaviour. In the event of bodily injury, damage to health or a breach of the inviolability of personal life or of any other personality rights, it may be demanded, *inter alia*, that the tortfeasor be prohibited from approaching others (restraining order), that the use of housing or communications be regulated, or that other similar measures be applied.

(2) The right to demand the cessation of behaviour causing damage as specified in subsection (1) of this section shall not apply if it is reasonable to expect that such behaviour can be tolerated in conditions of human coexistence or in view of a

significant public interest. In such cases, the victim shall have the right to make a claim for compensation for damage caused unlawfully.

..."

39. The Information Society Services Act (*Infoühiskonna teenuse seadus*) provides as follows.

Section 8 – Restricted liability in the case of mere transmission of information and provision of access to a public data communications network

"(1) Where a service is provided that consists of the mere transmission in a public data communication network of information provided by a recipient of the service, or the provision of access to a public data communication network, the service provider shall not be liable for the information transmitted, on condition that the provider:

1. does not initiate the transmission;

2. does not select the receiver of the transmission; and

3. does not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access within the meaning of subsection 1 of this section include the automatic, intermediate and transient storage of the information transmitted, in so far as this takes place for the sole purpose of carrying out the transmission in the public data communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission."

Section 9 – Restricted liability in the case of temporary storage of information in cache memory

"(1) Where a service is provided that consists of the transmission in a public data communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information if the method of transmission concerned requires caching for technical reasons and the caching is performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service at their request, on condition that:

1. the provider does not modify the information;

2. the provider complies with conditions on access to the information;

3. the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used in the industry;

4. the provider does not interfere with the lawful use of technology which is widely recognised and used by the industry to obtain data on the use of the information;

5. the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court, the police or a State supervisory authority has ordered such removal."

Section 10 – Restricted liability in the case of provision of an information storage service

"(1) Where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that:

1. the provider does not have actual knowledge of the content of the information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

2. the provider, upon obtaining knowledge or awareness of the facts specified in paragraph 1 of this subsection, acts expeditiously to remove or to disable access to the information.

(2) Subsection 1 of this section shall not apply when the recipient of the service is acting under the authority or the control of the provider."

Section 11 – No obligation to monitor

"(1) A service provider specified in sections 8 to 10 of this Act is not obliged to monitor information upon the mere transmission thereof or provision of access thereto, temporary storage thereof in cache memory or storage thereof at the request of the recipient of the service, nor is the service provider obliged actively to seek information or circumstances indicating illegal activity.

(2) The provisions of subsection 1 of this section shall not restrict the right of an official exercising supervision to request the disclosure of such information by a service provider.

(3) Service providers are required promptly to inform the competent supervisory authorities of alleged illegal activities undertaken or information provided by recipients of their services specified in sections 8 to 10 of this Act, and to communicate to the competent authorities information enabling the identification of recipients of their service with whom they have storage agreements.

..."

40. Articles 244 et seq. of the Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*) provide for pre-trial taking of evidence (*eeltõendamismenetlus*) – a procedure in which evidence may be taken before the judicial proceedings have even been initiated if it can be presumed that evidence might be lost or that using the evidence afterwards might involve difficulties.

41. In a judgment of 21 December 2005 (case no. 3-2-1-95-05), the Supreme Court found that, for the purposes of section 1047 of the Obligations Act, disclosure (*avaldamine*) meant disclosure of information to third parties. A person who transmitted information to a media publisher (*meediaväljaanne*) could be considered a discloser (*avaldaja*) even if he or she was not the publisher of the article (*ajaleheartikli avaldaja*) in question. The Supreme Court has reiterated the same position in its subsequent judgments, for example in a judgment of 21 December 2010 (case no. 3-2-1-67-10).

42. In a number of domestic cases, actions for defamation have been brought against several defendants, including, for example, a publisher of a newspaper and the author of an article (Supreme Court judgment of 7 May 1998 in case no. 3-2-1-61-98), a publisher of a newspaper and an interviewee (Supreme Court judgment of 1 December 1997 in case no. 3-2-1-99-97), and solely against a publisher of a newspaper (Supreme Court judgments of 30 October 1997 in case no. 3-2-1-123-97, and 10 October 2007 in case no. 3-2-1-53-07).

43. Following the Supreme Court's judgment of 10 June 2009 in the case giving rise to the present case before the Court (case no. 3-2-1-43-09), several lower courts have resolved the issue of liability in respect of comments relating to online news articles in a similar manner. Thus, in a judgment of 21 February 2012, the Tallinn Court of Appeal (case no. 2-08-76058) upheld a lower court's judgment concerning a defamed person's claim against a publisher of a newspaper. The publisher was found liable for defamatory online comments posted by readers in the newspaper's online comments section. The courts found that the publisher was a content service provider. They rejected the publisher's request for a preliminary ruling from the Court of Justice of the European Union (CJEU), finding that it was evident that the defendant did not satisfy the criteria for a passive service provider as previously interpreted by the CJEU and the Supreme Court, and that the relevant rules were sufficiently clear. Therefore, no new directions from the CJEU were needed. The courts also noted that, pursuant to the judgment of 23 March 2010 of the CJEU (Joined Cases C-236/08 to C-238/08, *Google France SARL and Google Inc.* [2010] ECR I-2417), it was for the national courts to assess whether the role played by a service provider was neutral, in the sense that its conduct was merely technical, automatic and passive, pointing to a lack of knowledge of or control over the data which it stored. The courts considered that this was not the case in the matter before them. As the publisher had already deleted the defamatory comments by the time of the delivery of the judgment, no ruling was made on that issue; the plaintiff's claim in respect of non-pecuniary damage was dismissed. A similar judgment was handed down by the Tallinn Court of Appeal on 27 June 2013 (case no. 2-10-46710). In that case as well, an Internet news portal was held liable for defamatory comments posted by readers and the plaintiff's claim in respect of non-pecuniary damage was dismissed.

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. Council of Europe documents

44. On 28 May 2003, at the 840th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted a declaration on freedom of communication on the Internet. The relevant parts of the declaration read as follows.

"The member states of the Council of Europe,

...

Convinced also that it is necessary to limit the liability of service providers when they act as mere transmitters, or when they, in good faith, provide access to, or host, content from third parties;

Recalling in this respect Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);

Stressing that freedom of communication on the Internet should not prejudice the human dignity, human rights and fundamental freedoms of others, especially minors;

Considering that a balance has to be found between respecting the will of users of the Internet not to disclose their identity and the need for law enforcement authorities to trace those responsible for criminal acts;

...

Declare that they seek to abide by the following principles in the field of communication on the Internet:

Principle 1: Content rules for the Internet

Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.

...

Principle 3: Absence of prior state control

Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.

Provided that the safeguards of Article 10, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms are respected, measures may be taken to enforce the removal of clearly identifiable Internet content or, alternatively, the blockage of access to it, if the competent national authorities have taken a provisional or final decision on its illegality.

...

Principle 6: Limited liability of service providers for Internet content

Member states should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

Member states should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.

In all cases, the above-mentioned limitations of liability should not affect the possibility of issuing injunctions where service providers are required to terminate or prevent, to the extent possible, an infringement of the law.

Principle 7: Anonymity

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police."

45. In its Recommendation CM/Rec(2007)16 to member States on measures to promote the public service value of the Internet (adopted on 7 November 2007), the Committee of Ministers noted that the Internet could, on the one hand, significantly enhance the exercise of certain human rights and fundamental freedoms while, on the other, it could adversely affect these and other such rights. It recommended that the member States draw up a clear legal framework delineating the boundaries of the roles and responsibilities of all key stakeholders in the field of new information and communication technologies.

46. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (adopted on 21 September 2011) reads as follows.

"...

The Committee of Ministers, under the terms of Article 15. *b* of the Statute of the Council of Europe recommends that member states:

– **adopt a new, broad notion of media** which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content

(for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents;

– **review regulatory needs in respect of all actors** delivering services or products in the media ecosystem so as to guarantee people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship;

– **apply the criteria set out in the appendix hereto when considering a graduated and differentiated response** for actors falling within the new notion of media based on relevant Council of Europe media-related standards, having regard to their specific functions in the media process and their potential impact and significance in ensuring or enhancing good governance in a democratic society;

..."

The Appendix to the Recommendation states as follows, in so far as relevant.

"7. A differentiated and graduated approach requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European Convention on Human Rights and other relevant standards developed by the Council of Europe.

...

30. Editorial control can be evidenced by the actors' own policy decisions on the content to make available or to promote, and on the manner in which to present or arrange it. Legacy media sometimes publicise explicitly written editorial policies, but they can also be found in internal instructions or criteria for selecting or processing (for example verifying or validating) content. In the new communications environments, editorial policies can be embedded in mission statements or in terms and conditions of use (which may contain very detailed provisions on content), or may be expressed informally as a commitment to certain principles (for example netiquette, motto).

...

32. Editorial process can involve users (for example peer review and take down requests) with ultimate decisions taken according to an internally defined process and having regard to specified criteria (reactive moderation). New media often resort to *ex post* moderation (often referred to as post-moderation) in respect of user generated content, which may at first sight be imperceptible. Editorial processes may also be automated (for example in the case of algorithms *ex ante* selecting content or comparing content with copyrighted material).

...

35. Again, it should be noted that different levels of editorial control go along with different levels of editorial responsibility. Different levels of editorial control or

editorial modalities (for example *ex ante* as compared with *ex post* moderation) call for differentiated responses and will almost certainly permit best to graduate the response.

36. Consequently, a provider of an intermediary or auxiliary service which contributes to the functioning or accessing of a media but does not – or should not – itself exercise editorial control, and therefore has limited or no editorial responsibility, should not be considered to be media. However, their action may be relevant in a media context. Nonetheless, action taken by providers of intermediary or auxiliary services as a result of legal obligations (for example take down of content in response to a judicial order) should not be considered as editorial control in the sense of the above.

...

63. The importance of the role of intermediaries should be underlined. They offer alternative and complementary means or channels for the dissemination of media content, thus broadening outreach and enhancing effectiveness in media's achievements of its purposes and objectives. In a competitive intermediaries and auxiliaries market, they may significantly reduce the risk of interference by authorities. However, given the degree to which media have to rely on them in the new ecosystem, there is also a risk of censorship operated through intermediaries and auxiliaries. Certain situations may also pose a risk of private censorship (by intermediaries and auxiliaries in respect of media to which they provide services or content they carry)."

47. On 16 April 2014 Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users was adopted. The relevant part of the Guide reads as follows.

Freedom of expression and information

"You have the right to seek, receive and impart information and ideas of your choice, without interference and regardless of frontiers. This means:

1. you have the freedom to express yourself online and to access information and the opinions and expressions of others. This includes political speech, views on religion, opinions and expressions that are favourably received or regarded as inoffensive, but also those that may offend, shock or disturb others. You should have due regard to the reputation or rights of others, including their right to privacy;

2. restrictions may apply to expressions which incite discrimination, hatred or violence. These restrictions must be lawful, narrowly tailored and executed with court oversight;

...

6. you may choose not to disclose your identity online, for instance by using a pseudonym. However, you should be aware that measures can be taken, by national authorities, which might lead to your identity being revealed."

B. Other international documents

48. In his report of 16 May 2011 (A/HRC/17/27) to the Human Rights Council, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated the following.

"25. As such, legitimate types of information which may be restricted include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

...

27. In addition, the Special Rapporteur emphasizes that due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals' reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate. ...

...

43. The Special Rapporteur believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf ...

...

74. **Intermediaries play a fundamental role in enabling Internet users to enjoy their right to freedom of expression and access to information. Given their unprecedented influence over how and what is circulated on the Internet, States have increasingly sought to exert control over them and to hold them legally liable for failing to prevent access to content deemed to be illegal.**"

49. A Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE (Organization for Security and Co-operation in Europe) Representative on Freedom of the Media and the OAS (Organization of American States) Special Rapporteur on Freedom of Expression, adopted on 21 December 2005, stated the following:

"No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content."

IV. RELEVANT EUROPEAN UNION AND COMPARATIVE LAW MATERIAL

A. European Union instruments and case-law

1. Directive 2000/31/EC

50. The relevant parts of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of

information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) provide as follows.

"(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

...

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for 'mere conduit' and for 'caching' when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

...

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

...

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) 'information society services': services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) 'service provider': any natural or legal person providing an information society service;

(c) 'established service provider': a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

...

Section 4: Liability of intermediary service providers

Article 12

'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

2. Directive 98/34/EC as amended by Directive 98/48/EC

51. Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC, provides as follows:

Article 1

"For the purposes of this Directive, the following meanings shall apply:

...

2. 'service', any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– 'at a distance' means that the service is provided without the parties being simultaneously present,

– 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

– radio broadcasting services,

– television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC."

3. Case-law of the CJEU

52. In a judgment of 23 March 2010 (Joined Cases C-236/08 to C-238/08 *Google France SARL and Google Inc.*), the CJEU considered that,

in order to establish whether the liability of a referencing service provider could be limited under Article 14 of the Directive on electronic commerce, it was necessary to examine whether the role played by that service provider was neutral, in the sense that its conduct was merely technical, automatic and passive, pointing to a lack of knowledge of or control over the data which it stored. Article 14 of the Directive on electronic commerce had to be interpreted as meaning that the rule laid down therein applied to an Internet referencing service provider in the event that that service provider had not played an active role of such a kind as to give it knowledge of or control over the data stored. If it had not played such a role, that service provider could not be held liable for the data which it had stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it had failed to act expeditiously to remove or to disable access to the data concerned.

53. In a judgment of 12 July 2011 (Case C-324/09, *L'Oréal SA and Others*), the CJEU ruled that Article 14 § 1 of the Directive on electronic commerce was to be interpreted as applying to the operator of an online marketplace where that operator had not played an active role allowing it to have knowledge of or control over the data stored. The operator played such a role when it provided assistance which entailed, in particular, optimising the presentation of the offers for sale in question or promoting them. Where the operator of the online marketplace had not played such an active role and the service provided fell, as a consequence, within the scope of Article 14 § 1 of the Directive on electronic commerce, the operator none the less could not, in a case which could result in an order to pay damages, rely on the exemption from liability provided for under that Article if it had been aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question had been unlawful and, in the event of it being so aware, had failed to act expeditiously in accordance with Article 14 § 1 (b) of the Directive on electronic commerce.

54. In a judgment of 24 November 2011 (Case C-70/10, *Scarlet Extended SA*), the CJEU ruled that an injunction could not be made against an Internet service provider requiring it to install a system for filtering all electronic communications passing via its services, in particular those involving the use of peer-to-peer software, which applied indiscriminately to all its customers, as a preventive measure, exclusively at its expense and for an unlimited period, and which was capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claimed to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which would infringe copyright.

55. In a judgment of 16 February 2012 (Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*) the

CJEU held that the Directive on electronic commerce and Directives 2000/31/EC, 2001/29/EC and 2004/48/EC precluded a national court from issuing an injunction against a hosting service provider requiring it to install a system for filtering information stored on its servers by its service users, which applied indiscriminately to all those users, as a preventive measure, exclusively at its expense and for an unlimited period, and which was capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claimed to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

56. In a judgment of 13 May 2014 (Case C-131/12, *Google Spain SL and Google Inc.*), the CJEU was called upon to interpret Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It found that the activity of an Internet search engine was to be classified as "processing of personal data" within the meaning of Directive 95/46/EC and held that such processing of personal data, carried out by the operator of a search engine, was liable to affect significantly the fundamental rights to privacy and to the protection of personal data (guaranteed under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union) when the search by means of that engine was carried out on the basis of an individual's name, since that processing enabled any Internet user to obtain through the list of results a structured overview of the information relating to that individual that could be found on the Internet and thereby to establish a more or less detailed profile of him or her. Furthermore, the effect of the interference with the rights of the data subject was heightened on account of the important role played by the Internet and search engines in modern society, which rendered the information contained in such a list of results ubiquitous. In the light of the potential seriousness of that interference, it could not be justified merely by the economic interest of the operator. The CJEU considered that a fair balance should be sought between the legitimate interest of Internet users in having access to the information and the data subject's fundamental rights. The data subject's fundamental rights, as a general rule, overrode the interest of Internet users, but that balance might, however, depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information. The CJEU held that in certain cases the operator of a search engine was obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, even when its publication in itself on the web pages in question was lawful. That was so in particular where the data appeared to be inadequate, irrelevant or no longer relevant,

or excessive in relation to the purposes for which they had been processed and in the light of the time that had elapsed.

57. In a judgment of 11 September 2014 (Case C-291/13, *Sotiris Papasavvas*), the CJEU found that, since a newspaper publishing company which posted an online version of a newspaper on its website had, in principle, knowledge of the information which it posted and exercised control over that information, it could not be considered to be an "intermediary service provider" within the meaning of Articles 12 to 14 of Directive 2000/31/EC, whether or not access to that website was free of charge. Thus, it held that the limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31/EC did not apply to the case of a newspaper publishing company which operated a website on which the online version of a newspaper was posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on the website, since it had knowledge of the information posted and exercised control over that information, whether or not access to the website was free of charge.

B. Comparative law material

58. From the information available to the Court, it would appear that in a number of the member States of the Council of Europe – which are also member States of the European Union – the Directive on electronic commerce, as transposed into national law, constitutes a primary source of law in the area in question. It would also appear that the greater the involvement of the operator in the third-party content before online publication – whether through prior censoring, editing, selection of recipients, requesting comments on a predefined subject or the adoption of content as the operator's own – the greater the likelihood that the operator will be held liable for that content. Some countries have enacted certain further regulations specifically concerning the take-down procedures relating to allegedly unlawful content on the Internet, and provisions concerning distribution of liability in this context.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

59. The applicant company complained that holding it liable for the comments posted by the readers of its Internet news portal infringed its freedom of expression as provided for in Article 10 of the Convention, which reads as follows.

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

60. The Government contested that argument.

A. The Chamber judgment

61. In its judgment of 10 October 2013, the Chamber noted at the outset that the parties' views diverged as to the applicant company's role in the present case. According to the Government, the applicant company was to be considered the discloser of the defamatory comments, whereas the applicant company was of the opinion that its freedom to impart information created and published by third parties was at stake, and that the applicant company itself was not a publisher of the third-party comments. The Chamber did not proceed to determine the exact role to be attributed to the applicant company's activities and noted that it was not, in substance, in dispute between the parties that the domestic courts' decisions in respect of the applicant company constituted an interference with its freedom of expression guaranteed under Article 10 of the Convention.

62. As regards the lawfulness of the interference, the Chamber rejected the applicant company's argument that the interference with its freedom of expression was not "prescribed by law". The Chamber observed that the domestic courts had found that the applicant company's activities did not fall within the scope of the Directive on electronic commerce and the Information Society Services Act. It considered that it was not its task to take the place of the domestic courts and that it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Chamber was furthermore satisfied that the relevant provisions of the civil law – although they were quite general and lacked detail in comparison with, for example, the Information Society Services Act – along with the relevant case-law, made it clear that a media publisher was liable for any defamatory statements made in its publication. The Chamber had regard to the fact that the applicant company was a professional publisher which operated one of the largest news portals in Estonia, and also that a degree of notoriety had been attributable to comments posted in its commenting area. Against that background, the

Chamber considered that the applicant company had been in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail.

63. The Chamber further found that the restriction of the applicant company's freedom of expression had pursued the legitimate aim of protecting the reputation and rights of others. In the Chamber's view, the fact that the actual authors of the comments were also in principle liable did not remove the legitimate aim of holding the applicant company liable for any damage to the reputation and rights of others.

64. As regards the proportionality of the interference, the Chamber noted that there was no dispute that the comments in question had been of a defamatory nature. In assessing the proportionality of the interference with the applicant company's freedom of expression, the Chamber had regard to the following elements. It examined firstly the context of the comments, secondly, the measures applied by the applicant company in order to prevent or remove defamatory comments, thirdly, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and, fourthly, the consequences of the domestic proceedings for the applicant company.

65. In particular, the Chamber considered that the news article published by the applicant company that had given rise to the defamatory comments had concerned a matter of public interest and the applicant company could have foreseen the negative reactions and exercised a degree of caution in order to avoid being held liable for damaging the reputation of others. However, the prior automatic filtering and notice-and-take-down system used by the applicant company had not ensured sufficient protection for the rights of third parties. Moreover, publishing news articles and making readers' comments on them public had been part of the applicant company's professional activities and its advertising revenue depended on the number of readers and comments. The applicant company had been able to exercise a substantial degree of control over readers' comments and it had been in a position to predict the nature of the comments a particular article was liable to prompt and to take technical or manual measures to prevent defamatory statements from being made public. Furthermore, there had been no realistic opportunity of bringing a civil claim against the actual authors of the comments as their identity could not easily be established. In any event, the Chamber was not convinced that measures allowing an injured party to bring a claim only against the authors of defamatory comments would have guaranteed effective protection of the injured party's right to respect for his or her private life. It had been the applicant company's choice to allow comments by non-registered users, and by doing so it had to be considered to have assumed a certain responsibility for such comments. For all the above reasons, and considering the moderate amount of damages the applicant company had been ordered to pay, the restriction on its freedom of

expression was considered to have been justified and proportionate. There had accordingly been no violation of Article 10 of the Convention.

B. The parties' submissions to the Grand Chamber

1. The applicant company

(a) General remarks

66. The applicant company argued that in today's world, Internet media content was increasingly created by the users themselves. User-generated content was of high importance – comments on news stories and articles often raised serious debates in society and even informed journalists of issues that were not publicly known, thereby contributing to the initiation of journalistic investigations. The possibility for "everyone" to contribute to public debate advanced democracy and fulfilled the purposes of freedom of expression in the best possible way. It was a great challenge in this setting to hold those who infringed the rights of others accountable while avoiding censorship.

67. As regards user-generated content, the applicant company was of the opinion that it was sufficient for a host to expeditiously remove third-party content as soon as it became aware of its illegal nature. If this was deemed insufficient by the Court, anonymous public speech would be prohibited or there would be arbitrary restrictions on commenters' freedom of communication by the intermediary, which would be impelled to err on the side of caution to avoid possible subsequent liability.

(b) Delfi's role

68. The applicant company called on the Grand Chamber to look at the case as a whole, including the question whether the applicant company was to be characterised as a traditional publisher or an intermediary. A publisher was liable for all content published by it regardless of the authorship of the particular content. However, the applicant company insisted that it should be regarded as an intermediary and it had as such been entitled to follow the specific and foreseeable law limiting the obligation to monitor third-party comments. It argued that intermediaries were not best suited to decide upon the legality of user-generated content. This was especially so in respect of defamatory content since the victim alone could assess what caused damage to his reputation.

(c) Lawfulness

69. The applicant company argued that the interference with its freedom of expression – including its right to store information and to enable users to impart their opinions – was not prescribed by law. It submitted that there

was no legislation or case-law stating that an intermediary was to be considered a publisher of content which it was not aware of. On the contrary, the applicable law expressly prohibited the imposition of liability on service providers for third-party content. In this connection, the applicant company referred to the Directive on electronic commerce, the Estonian Information Society Services Act and the Council of Europe Declaration on freedom of communication on the Internet. The Directive provided for limited and notice-based liability with take-down procedures for illegal content. Service providers were exempted from liability where, upon obtaining actual knowledge of illegal activities, they acted expeditiously to remove or disable access to the information concerned. Such removal or disabling of access had to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level (Recital 46 of the Preamble to the Directive). The applicant company argued that this law was indisputably formulated with sufficient precision to enable a citizen to regulate his conduct. According to the applicant company, its behaviour had been in full compliance with the applicable law as it had removed the defamatory comments the same day it had been notified by the original plaintiff.

70. The applicant company further argued that even the existing tort law did not classify disseminators (postal workers, libraries, bookstores and others) as publishers. Thus, it remained entirely unclear how the existing tort law had been applied to a "novel area related to new technologies" as held in the Chamber judgment, that is, to an online news portal operator providing a service enabling users to interact with journalists and each other and to contribute valuable ideas to the discussion of matters of public interest. There was no law imposing an obligation on the applicant company to proactively monitor user comments.

(d) Legitimate aim

71. The applicant company did not dispute that the interference in question had a legitimate aim.

(e) Necessary in a democratic society

72. According to the applicant company, the interference was not necessary in a democratic society. It argued that as a result of the Chamber judgment it had two choices. Firstly, it could employ an army of highly trained moderators to patrol (in real time) each message board (for each news article) to screen any message that could be labelled defamatory (or that could infringe intellectual property rights, *inter alia*); at the end of the day, these moderators would, just in case, remove any sensitive comments and all discussions would be moderated so that they were limited to the least controversial issues. Otherwise, it could simply avoid such a massive risk and shut down these fora altogether. Either way, the technological capability

to provide ordinary readers with an opportunity to comment freely on daily news and assume responsibility independently for their own comments would be abandoned.

73. The applicant company argued that the Supreme Court's judgment had had a "chilling effect" on freedom of expression and that it had restricted the applicant company's freedom to impart information. It amounted to the establishment of an obligation to censor private individuals.

74. In support of its argument that the interference was not necessary in a democratic society, the applicant company relied on the following factors.

75. Firstly, it argued that the comments were reactions from members of the public to an event caused by the Saaremaa Shipping Company and not to the article as such. Furthermore, the article was a balanced and neutral one. It addressed an issue of great importance to the residents of the biggest island of Estonia affecting their everyday lives. The readers' negative reactions had not been caused by the article but by the shipping company.

76. Secondly, the applicant company had taken sufficient measures to prevent or remove defamatory comments; in the present case, the comments in question had been removed on the same day that the applicant company had been notified of them.

77. Thirdly, the applicant company argued that the actual authors of the comments should bear responsibility for their contents. It disagreed with the Chamber's finding that it was difficult to establish the identity of the authors of the comments and contended that the authors' identities could be established in the "pre-trial taking of evidence" procedure under Article 244 of the Code of Civil Procedure. Once the names and addresses of the authors were established, a claim against them could be brought without any difficulties.

78. Fourthly, the applicant company insisted that there was no pressing social need for a strict liability standard for service providers. It argued that there was a European consensus that no service provider should be liable for content of which it was not the author. Accordingly, the margin of appreciation afforded to the Contracting States in this respect was necessarily a narrow one. Furthermore, it considered that the modest sum it had been ordered to pay in compensation for non-pecuniary damage did not justify the interference. It also emphasised that if the applicant company enjoyed limited liability the original plaintiff would not have been left without a remedy – he could have sued the actual authors of the comments. The applicant company objected to the establishment of private censorship and contended that it was sufficient to have a two-pronged system for the protection of the rights of third parties: a notice-and-take-down system and the possibility of bringing a claim against the authors of defamatory comments. There was no convincingly established "pressing social need" for the liability of Internet service providers.

79. The applicant company also emphasised the importance of anonymity for free speech on the Internet; this encouraged the full involvement of all, including marginalised groups, political dissidents and whistle-blowers, and allowed individuals to be safe from reprisals.

80. Lastly, the applicant company contended that the domestic courts had clearly misinterpreted European Union (EU) law. It submitted that the Chamber judgment had created a collision of obligations and legal uncertainty since adhering to EU law on the issue of liability for host service providers would render the State liable under the Convention, whereas adhering to the test set out in the judgment would not be in conformity with EU law.

2. The Government

(a) General remarks

81. The Government made the following remarks in respect of the scope of the case. Firstly, according to the Court's case-law it was for the domestic courts to decide on the domestically applicable law and interpret it. Furthermore, interpretation of EU law was the task of the CJEU. The domestic courts, in reasoned decisions, had found that the Obligations Act, rather than the Directive on electronic commerce or the Information Society Services Act, was applicable. The Grand Chamber should also proceed from this presumption and the applicant company's allegations regarding the applicability of EU law were inadmissible. Secondly, the Government stressed that there existed a number of different types of Internet portals and the issue of their operators' liability could not be generalised. The present case was limited to the activities of the Delfi portal at the material time. In that connection the Government pointed out that Delfi had actively invited readers to comment on the articles it had chosen itself; it had published anonymous comments posted on those articles and in the same section; and the comments could be amended or deleted only by Delfi. The applicant company's liability should be assessed in that specific context.

82. The Government emphasised that there was no dispute that the comments in question had been defamatory.

83. The Government noted that, despite the applicant company's allegations to that effect, it had not been forced to disable anonymous comments or to change its business model. On the contrary, Delfi remained the largest Internet portal in Estonia; it was still possible to post anonymous comments on the portal and the number of comments had risen from 190,000 comments a month in 2009 to 300,000 in 2013. According to an article published on 26 September 2013, Delfi deleted 20,000 to 30,000 comments monthly (7-10% of all comments). Postimees, the second-largest portal, deleted up to 7% of a total of 120,000 comments. Both portals had five employees who dealt with taking down insulting comments. Since

December 2013 Delfi had used a two-tier comments section where registered comments and anonymous comments were shown separately.

(b) Lawfulness

84. The Government insisted that the interference with the applicant company's rights had been "prescribed by law". They referred to the domestic legislation and case-law summarised in paragraphs 32 to 36, 38 and 39 of the Chamber judgment, as well as the Court's relevant case-law as summarised in the Chamber judgment. The Government also pointed out that there was no Estonian case-law on the basis of which Delfi – which encouraged the posting of comments on the articles selected and published by it – could have presumed that the owner of an Internet portal as a new media publication was not liable for the damage caused by comments posted on its articles, which formed an integral part of the news and which only Delfi could administer. Further, by the time the domestic judgments had been handed down in *Delfi*, it was more than clear that Internet media had a wide influence over the public and that, in order to protect the private life of others, liability rules had to apply to new media as well.

85. The Government reiterated that the applicant company's references to EU law and the Information Society Services Act should be disregarded. The Grand Chamber could only assess whether the effects of the interpretation of the Obligations Act were compatible with Article 10 § 2 of the Convention and could not assess the legislation the domestic courts had found not to be applicable. They also pointed out that the domestic courts had paid sufficient attention to the question whether the applicant company might be regarded as a caching or hosting service provider. However, they had found this not to be the case. In particular, in the event of hosting, the service provider merely provided a data storage service, while the stored data and their insertion, amendment, removal and content remained under the control of the service users. In Delfi's comments section, however, commenters lost control of their comments as soon as they had entered them, and they could not change or delete them. Having regard also to the other aspects of the case – Delfi chose the articles and their titles; Delfi invited readers to comment and set the Rules on posting comments (including that the comments had to be related to the article); the amount of advertising revenue Delfi received increased the more comments were posted; Delfi also selectively monitored the comments – the domestic courts had found that Delfi had not acted only as a technical intermediary service provider and could not be classified either as a cache or as a host. The Government also emphasised that the CJEU had never adjudicated on a case similar to the Delfi case. In any event, even if the CJEU's case-law, such as *L'Oréal SA and Others* (cited above), was of relevance, it could be concluded that the role played by Delfi was an active one and it could not be

granted the exemptions from liability provided in the Directive on electronic commerce.

(c) Legitimate aim

86. The Government submitted that the interference with the applicant company's rights under Article 10 had the legitimate aim of protecting the honour of others.

(d) Necessary in a democratic society

87. As regards the question whether the interference was necessary in a democratic society, the Government emphasised at the outset the importance of the balance between Articles 10 and 8 of the Convention.

88. The Government referred extensively to the relevant reasoning of the Chamber judgment. In addition, they emphasised the following.

89. Firstly, as regards the context of the comments, the Government noted that the domestic courts had attached importance to the fact that the selection and publication of the news articles and the publication of readers' comments on these articles in the same section had been part of the applicant company's professional activity as a discloser of information. Delfi invited readers to comment on its articles – often giving the articles provocative headlines and showing the number of comments on the main page immediately after the title of an article in bold red, so that commenting on an article would be more enticing – which in turn brought in advertising revenue.

90. Secondly, in respect of the measures applied by the applicant company, the Government stressed the importance of ensuring the protection of third parties in relation to the Internet, which had become an extensive medium available to the majority of the population and used on a daily basis. The Government added that the applicant company's responsibility for the comments had also been obvious as the actual writers of comments could not modify or delete their comments once they were posted on the Delfi news portal – only the applicant company had the technical means to do this. The Government also pointed out that any information communicated via the Internet spread so quickly that measures taken weeks or even days later to protect a person's honour were no longer sufficient because the offensive comments had already reached the general public and done the damage. The Government further argued that the biggest international news portals did not allow anonymous (that is, unregistered) comments and referred to an opinion that there was a trend away from anonymity. At the same time, anonymous comments tended to be more insulting than the comments by persons who had registered, and harsh comments attracted more readers. The Government argued that Delfi had been notorious for exactly this reason.

91. Thirdly, as regards the liability of the actual authors, the Government submitted that in civil proceedings – a remedy which was preferable to criminal remedies in defamation cases – investigative measures such as surveillance procedures were not accessible. In respect of the procedure for "pre-trial taking of evidence", the Government argued that this was not a reasonable alternative in the case of anonymous comments for the following two reasons: (a) the relevant Internet Protocol (IP) addresses could be not always established, for example if the user data or the comment had been deleted or an anonymous proxy had been used; and (b) even if the computers used for posting the comments could be identified, it could still prove impossible to identify the persons who had posted them, for example in cases where a public computer, a Wi-Fi hotspot, a dynamic IP address or a server in a foreign country had been used, or for other technical reasons.

92. Fourthly, as regards the consequences of the domestic proceedings for the applicant company, the Government noted that Delfi had not needed to change its business model or disallow anonymous comments. In fact, the total number of comments – the majority of which were anonymous – had increased, while Delfi now employed five moderators. The Government also pointed out that the finding of liability was not aimed at obtaining huge or punitive awards of compensation. Indeed, in Delfi's case the compensation it had been obliged to pay for non-pecuniary damage was negligible (EUR 320), and in the subsequent case-law (see paragraph 43 above) the courts had held that finding a violation or deleting a comment could be a sufficient remedy. The Government concluded that the applicant company's civil liability had not had a "chilling effect" on the freedom of expression, but was justified and proportionate.

93. Lastly, referring to the legislation and practice of several European countries, the Government contended that there was no European consensus on or trend towards excluding the liability of an Internet portal owner which acted as a content service provider and the discloser of anonymous comments on its own articles.

C. The third-party interveners' submissions

1. The Helsinki Foundation for Human Rights

94. The Helsinki Foundation for Human Rights in Warsaw emphasised the differences between the Internet and traditional media. It noted that online services like Delfi acted simultaneously in two roles: as content providers with regard to their own news, and as host providers with regard to third-party comments. It submitted that moderation of user-generated content or the power to remove access to it should not be regarded as having effective editorial control. Intermediary service providers should not be

treated as traditional media and should not be subject to the same liability regime.

95. The Helsinki Foundation argued that authors should be accountable for their defamatory comments and the State should provide a regulatory framework making it possible to identify and prosecute online offenders. At the same time, it also contended that the possibility of publishing anonymously on the Internet should be regarded as a value.

2. Article 19

96. Article 19 argued that one of the most innovative features of the Internet was the ease with which it allowed any person to express his or her views to the entire world without seeking the prior approval of publishers. Comment platforms enabled and promoted public debate in its purest form and this had very little to do with the provision of news. As a matter of fact and form, comments sections on news websites were better understood as newspapers appropriating the private discussion model that was native to the Internet rather than the other way round. Article 19 argued that making websites responsible for comments made by users would impose an unacceptable burden on websites.

97. Article 19 contended that the Directive on electronic commerce was meant to shield websites from liability for their users' comments, regardless of their own content. Article 19 insisted that, while the normal liability rules should continue to apply to online news sites for the articles they published, they should be regarded as hosts – rather than publishers – for the purposes of the comments section on their website. As hosts, online news sites should in principle be immune from liability for third-party content in circumstances where they had not been involved in directly modifying the content in issue. They should not be held liable when they took all reasonable steps to remove content upon being notified, and they should not automatically be held liable simply because they decided not to remove a comment reported to them.

3. Access

98. According to Access, anonymity and pseudonymity supported the fundamental rights of privacy and freedom of expression. A regulatory prohibition on anonymous use of the Internet would constitute an interference with the rights to privacy and freedom of expression protected under Articles 8 and 10 of the Convention, and blanket restrictions on anonymous and pseudonymous expression would impair the very essence of these rights. Access referred to the long-standing case-law of several countries protecting the right to anonymous communication, both on and offline.

99. Furthermore, Access pointed out that services designed to provide enhanced confidentiality and anonymity while using the Internet had become more popular in the wake of revelations of mass surveillance online. It further argued that restricting Internet users to identified expression would harm the Internet economy, and referred to research which had concluded that the most important contributors online were those using pseudonyms.

100. As regards real-name policy, evidence from China showed that such a measure had caused a dramatic drop in the number of comments posted. Experience in South Korea had demonstrated that real-name policy failed to improve meaningfully comments, whereas it was discriminatory against domestic Internet companies, as the users had sought alternative, international platforms that still allowed anonymous and pseudonymous comments.

4. Media Legal Defence Initiative

101. Media Legal Defence Initiative (MLDI) made its submissions on behalf of twenty-eight non-governmental and media organisations and companies. It noted that the vast majority of online media outlets allowed reader comments. Through the comments facility, readers could debate the news amongst themselves as well as with journalists. This transformed the media from a one-way flow of communication into a participatory form of speech which recognised the voice of the reader and allowed different points of view to be aired.

102. MLDI noted that the boundaries between access and content were now increasingly blurred and "intermediaries" included enhanced search services, online marketplaces, web 2.0 applications and social networking sites. From the users' perspective, they all facilitated access to and use of content and were crucial to the realisation of the right to freedom of expression.

103. MLDI contended that it was the States' task to ensure a regulatory framework that protected and promoted freedom of expression whilst also guarding other rights and interests. It provided a detailed overview of the regulatory framework for intermediary liability in the United States of America and in the European Union. It noted that approaches in these jurisdictions were distinct, but nevertheless similar in that it was acknowledged that some level of protection for intermediaries was vital and that there was no requirement that intermediaries should monitor user content. It also noted that in some member States notice-and-take-down procedures had resulted in excessive liability on intermediaries and the taking down of legitimate content.

104. MLDI also elaborated on the emerging good practices in the regulation of user-generated content by online media. It pointed out that the majority of publications in North America and Europe did not screen or

monitor comments before they were posted. They did, however, engage in some kind of post-publication moderation. Many online media outlets also ran filtering software and had mechanisms in place to block users who consistently broke the rules. The majority of online media, including leading European news outlets, required user registration but users were not required to disclose their real names.

5. EDiMA, CCIA Europe and EuroISPA

105. The European Digital Media Association (EDiMA), the Computer & Communications Industry Association (CCIA Europe) and EuroISPA, a pan-European association of European Internet Services Providers Associations, made joint submissions as third parties.

106. The third-party interveners argued that there was an established balance struck to date in legislation, international agreements and recommendations according to which, firstly, host service providers were exempt from liability for content in the absence of "actual knowledge" and, secondly, States were prohibited from requiring host providers to carry out general monitoring of content.

107. They noted that, while some information available online came from traditional publishing sources such as newspapers, and was rightly regulated by the law applicable to publishers, a large amount of online content came instead from individual speakers who could state their views unmediated by traditional editorial institutions. Comment facilities allowed for a right of reply and were thus fundamentally different from traditional publications, where no such right existed.

108. The third-party interveners argued that the technology and operating processes for an online news discussion forum like Delfi were technologically indistinguishable from hosting services such as social media/networking platforms, blogs/microblogs and others. Content composed and uploaded by users was automatically made publicly visible without human intervention. For many hosts considerations of scale made proactive human review of all user content effectively impossible. For small websites and start-ups, content control was likely to be particularly challenging and could be so costly as to be prohibitive.

109. The third-party interveners argued that established law in the European Union and other countries envisaged the notice-and-take-down system as a legal and practical framework for Internet content hosting. This balance of responsibilities between users and hosts allowed platforms to identify and remove defamatory or other unlawful speech, whilst at the same time enabling robust discussion on controversial topics of public debate; it made the operation of speech-hosting platforms practicable on a large scale.

D. The Court's assessment

1. Preliminary remarks and the scope of the Court's assessment

110. The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognised by the Court on previous occasions (see *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012, and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, nos. 3002/03 and 23676/03, § 27, ECHR 2009). However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Articles 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, 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 the possibility of imposing liability for defamatory or other types of unlawful speech must, in principle, be retained, constituting an effective remedy for violations of personality rights.

111. On this basis, and in particular considering that this is the first case in which the Court has been called upon to examine a complaint of this type in an evolving field of technological innovation, the Court considers it necessary to delineate the scope of its inquiry in the light of the facts of the present case.

112. Firstly, the Court observes that the Supreme Court recognised (see paragraph 14 of its judgment of 10 June 2009, set out in paragraph 31 above) that "[p]ublishing of news and comments on an Internet portal is also a journalistic activity. At the same time, because of the nature of Internet media, it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication. While the publisher [of a printed media publication] is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator are publishers/disclosers as entrepreneurs."

113. The Court sees no reason to call into question the above distinction made by the Supreme Court. On the contrary, the starting-point of the Supreme Court's reflections, that is, the recognition of differences between

a portal operator and a traditional publisher, is in line with the international instruments in this field, which manifest a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audio-visual media, on the one hand and Internet-based media operations, on the other. In the recent Recommendation of the Committee of Ministers to the member States of the Council of Europe on a new notion of media, this is termed a "differentiated and graduated approach [that] requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European Convention on Human Rights and other relevant standards developed by the Council of Europe" (see paragraph 7 of the Appendix to Recommendation CM/Rec(2011)7, quoted in paragraph 46 above). Therefore, the Court considers that because of the particular nature of the Internet, the "duties and responsibilities" that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher as regards third-party content.

114. Secondly, the Court observes that the Supreme Court of Estonia found that the "legal assessment by the courts of the twenty comments of a derogatory nature [was] substantiated. The courts [had] correctly found that those comments [were] defamatory since they [were] of a vulgar nature, degrade[d] human dignity and contain[ed] threats" (see paragraph 15 of the judgment, set out in paragraph 31 above). Further, in paragraph 16 of its judgment, the Supreme Court reiterated that the comments degraded "human dignity" and were "clearly unlawful". The Court notes that this characterisation and analysis of the unlawful nature of the comments in question (see paragraph 18 above) is obviously based on the fact that the majority of the comments are, viewed on their face, tantamount to an incitement to hatred or to violence against L.

115. Consequently, the Court considers that the case concerns 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 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.

116. Accordingly, the 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 topic without the discussion being channelled by any input

from the forum's manager; or 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 blog as a hobby.

117. Furthermore, the Court notes that the applicant company's news portal was one of the biggest Internet media publications in the country; it had a wide readership and there was a known public concern regarding the controversial nature of the comments it attracted (see paragraph 15 above). Moreover, as outlined above, the impugned comments in the present case, as assessed by the Supreme Court, mainly constituted hate speech and speech that directly advocated acts of violence. Thus, the establishment of their unlawful nature did not require any linguistic or legal analysis since the remarks were on their face manifestly unlawful. It is against this background that the Court will proceed to examine the applicant company's complaint.

2. Existence of an interference

118. The Court notes that it was not in dispute between the parties that the applicant company's freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts' decisions. The Court sees no reason to hold otherwise.

119. Such an interference with the applicant company's right to freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

3. Lawfulness

120. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 52, ECHR 2001-VI; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Gawęda v. Poland*, no. 26229/95, § 39, ECHR 2002-II; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A; and *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II).

121. One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient

precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV, and *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 141).

122. The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (ibid., § 142). The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see *Lindon, Otchakovsky-Laurens and July*, cited above, § 41, with further references to *Cantoni v. France*, 15 November 1996, § 35, *Reports* 1996-V, and *Chauvy and Others v. France*, no. 64915/01, §§ 43-45, ECHR 2004-VI).

123. In the present case the parties' opinions differed as to whether the interference with the applicant company's freedom of expression was "prescribed by law". The applicant company argued that there was no domestic law according to which an intermediary was to be taken as a professional publisher of comments posted on its website by third parties regardless of whether it was aware of their specific content. On the contrary, the applicant company relied on the domestic and European legislation on Internet service providers and argued that it expressly prohibited the imposition of liability on service providers for third-party content.

124. The Government referred to the relevant provisions of the civil law and domestic case-law to the effect that media publishers were liable for their publications along with the authors. They added that there was no case-law on the basis of which the applicant company could have presumed that the owner of an Internet news portal as a new media publication was not liable for the comments posted on its articles. In their view the Court should proceed from the facts as established and the law as applied and interpreted by the domestic courts and not take account of the applicant company's references to EU law. In any event, the EU law referred to by the applicant company actually supported the domestic courts' interpretations and conclusions.

125. The Court observes that the difference in the parties' opinions as regards the law to be applied stems from their diverging views on the issue

of how the applicant company is to be classified. According to the applicant company, it should be classified as an intermediary as regards the third-party comments, whereas the Government argued that the applicant company was to be seen as a media publisher, including with regard to such comments.

126. The Court observes (see paragraphs 112-13 above) that the Supreme Court recognised the differences between the roles of a publisher of printed media, on the one hand, and an Internet portal operator engaged in media publications for an economic purpose, on the other. However, the Supreme Court found that because of their "economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator [were] publishers/disclosers" for the purposes of section 1047 of the Obligations Act (see paragraph 14 of the judgment, set out in paragraph 31 above).

127. The Court considers that, in substance, the applicant company argues that the domestic courts erred in applying the general provisions of the Obligations Act to the facts of the case as they should have relied upon the domestic and European legislation on Internet service providers. Like the Chamber, the Grand Chamber reiterates in this context that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among others, *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 140, and *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999-III). The Court also reiterates that it is not for it to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004-I). Thus, the Court confines itself to examining whether the Supreme Court's application of the general provisions of the Obligations Act to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.

128. Pursuant to the relevant provisions of the Constitution, the Civil Code (General Principles) Act and the Obligations Act (see paragraphs 33-38 above), as interpreted and applied by the domestic courts, the applicant company was considered a publisher and deemed liable for the publication of the clearly unlawful comments. The domestic courts chose to apply these norms, having found that the special regulation contained in the Information Society Services Act transposing the Directive on electronic commerce into Estonian law did not apply to the present case since the latter related to activities of a merely technical, automatic and passive nature, unlike the applicant company's activities, and that the objective pursued by the applicant company was not merely the provision of an intermediary service (see paragraph 13 of the Supreme Court's judgment, set out in

paragraph 31 above). In this particular context the Court takes into account the fact that some countries have recognised that the importance and the complexity of the subject matter, involving the need to ensure proper balancing of different interests and fundamental rights, call for the enactment of specific regulations for situations such as that pertaining in the present case (see paragraph 58 above). Such action is in line with the "differentiated and graduated approach" to the regulation of new media recommended by the Council of Europe (see paragraph 46 above) and has found support in the Court's case-law (see, *mutatis mutandis*, *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, no. 33014/05, §§ 63-64, ECHR 2011). However, although various legislative approaches are possible in legislation to take account of the nature of new media, the Court is satisfied on the facts of this case that the provisions of the Constitution, the Civil Code (General Principles) Act and the Obligations Act, along with the relevant case-law, made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments, of the type in issue in the present case, on its news portal.

129. The Court accordingly finds that, as a professional publisher, the applicant company should have been familiar with the legislation and case-law, and could also have sought legal advice. The Court observes in this context that the Delfi news portal is one of the largest in Estonia. Public concern had already been expressed before the publication of the comments in the present case and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages (see paragraph 15 above). Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

4. Legitimate aim

130. The parties before the Grand Chamber did not dispute that the restriction of the applicant company's freedom of expression had pursued the legitimate aim of protecting the reputation and rights of others. The Court sees no reason to hold otherwise.

5. Necessary in a democratic society

(a) General principles

131. The fundamental principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law (see, among other

authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports* 1998-VI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012; and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013) and have been summarised as follows.

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

132. Furthermore, the Court has emphasised the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313, and Bladet Tromsø *and Stensaas*, cited above, § 59). The limits of permissible criticism are narrower in

relation to a private citizen than in relation to politicians or governments (see, for example, *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV; and *Tammer v. Estonia*, no. 41205/98, § 62, ECHR 2001-I).

133. Moreover, the Court has previously held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general (see *Ahmet Yıldırım*, cited above, § 48, and *Times Newspapers Ltd*, cited above, § 27). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see *Editorial Board of* Pravoye Delo *and Shtekel*, cited above, § 63).

134. In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audio-visual media often have a much more immediate and powerful effect than the print media (see *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, Decisions and Reports 70, p. 262). The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question (see *Jersild*, cited above, § 31).

135. The Court has held that the "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild*, cited above, § 35; *Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001-III; and, *mutatis mutandis*, *Verlagsgruppe News GmbH v. Austria*, no. 76918/01, § 31, 14 December 2006, and *Print Zeitungsverlag GmbH v. Austria*, no. 26547/07, § 39, 10 October 2013).

136. Moreover, the Court has held that speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention. The examples of such speech examined by the Court have included statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia (see *Lehideux and Isorni v. France*, 23 September 1998, §§ 47 and 53, *Reports* 1998-VII; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI; *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005; and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007).

137. The Court further reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the

right to respect for private life (see *Chauvy and Others*, cited above, § 70; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009, and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

138. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10, and, on the other, the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; and *Axel Springer AG*, cited above, § 84).

139. The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who was the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see *Axel Springer AG*, cited above, § 87, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, with further references to *Hachette Filipacchi Associés (*ICI PARIS*)*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, cited above, § 88, and *Von Hannover*, cited above, § 107, with further references to *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, ECHR 2011). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95

and 28443/95, § 113, ECHR 1999-III; and *Ashby Donald and Others v. France*, no. 36769/08, § 40, 10 January 2013).

(b) Application of the above principles to the present case

(i) Elements in the assessment of proportionality

140. The Court notes that it is not disputed that the comments posted by readers in reaction to the news article published in the comments section on the applicant company's Internet news portal were of a clearly unlawful nature. Indeed, the applicant company removed the comments once it was notified by the injured party, and described them as "infringing" and "illicit" before the Chamber (see paragraph 84 of the Chamber judgment). Moreover, the Court is of the view that the majority of the impugned comments amounted to hate speech or incitements to violence and as such did not enjoy the protection of Article 10 (see paragraph 136 above). Thus, the freedom of expression of the authors of the comments is not in issue in the present case. Rather, the question before the Court is whether the domestic courts' decisions, holding the applicant company liable for these comments posted by third parties, were in breach of its freedom to impart information as guaranteed by Article 10 of the Convention.

141. The Court observes that, although the applicant company immediately removed the comments in question from its website upon notification by L.'s lawyers (see paragraphs 18-19 above), the Supreme Court held the applicant company liable on the basis of the Obligations Act as it should have prevented the publication of comments with clearly unlawful contents. It then referred to section 1047(3) of the Obligations Act, according to which disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has verified the information or other matters with a thoroughness which corresponds to the "gravity of the potential violation". The Supreme Court thus held that, after the disclosure, the applicant company had failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative. The inactivity of the applicant company was thus deemed unlawful as it had not "proved the absence of culpability" under section 1050(1) of the Obligations Act (see paragraph 16 of the Supreme Court judgment, set out in paragraph 31 above).

142. In the light of the Supreme Court's reasoning, the Court must, according to its consistent case-law, examine whether the domestic courts' finding of liability on the part of the applicant company was based on relevant and sufficient grounds in the particular circumstances of the case (see paragraph 131 above). The Court observes that, in order to resolve the question whether the domestic courts' decisions holding the applicant

company liable for the comments posted by third parties were in breach of its freedom of expression, the Chamber identified the following aspects as relevant for its analysis: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company (see paragraphs 85 et seq. of the Chamber judgment).

143. The Court agrees that these aspects are relevant for the concrete assessment of the proportionality of the interference in issue within the scope of the Court's examination of the present case (see paragraphs 112-17 above).

(ii) Context of the comments

144. As regards the context of the comments, the Court accepts that the news article about the ferry company, published on the Delfi news portal, was a balanced one, contained no offensive language and gave rise to no arguments regarding unlawful statements in the domestic proceedings. The Court is aware that even such a balanced article on a seemingly neutral topic may provoke fierce discussions on the Internet. Furthermore, it attaches particular weight, in this context, to the nature of the Delfi news portal. It reiterates 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. The Court observes that the Supreme Court explicitly referred to the fact that the applicant company had integrated the comments section into its news portal, inviting visitors to the website to complement the news with their own judgments and opinions (comments). According to the findings of the Supreme Court, in the comments section, the applicant company actively called for comments on the news items appearing on the portal. The number of visits to the applicant company's portal depended on the number of comments; the revenue earned from advertisements published on the portal, in turn, depended on the number of visits. Thus, the Supreme Court concluded that the applicant company had an economic interest in the posting of comments. In the view of the Supreme Court, the fact that the applicant company was not the author of the comments did not mean that it had no control over the comments section (see paragraph 13 of the judgment, set out in paragraph 31 above).

145. The Court also notes in this regard that the Rules on posting comments on the Delfi website stated that the applicant company prohibited the posting of comments that were without substance and/or off topic, were contrary to good practice, contained threats, insults, obscene expressions or vulgarities, or incited hostility, violence or illegal activities. Such comments could be removed and their authors' ability to post comments could be restricted. Furthermore, the actual authors of the comments could not

modify or delete their comments once they were posted on the applicant company's news portal – only the applicant company had the technical means to do this. In the light of the above and the Supreme Court's reasoning, the Court agrees with the Chamber's finding that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal.

146. In sum, the Court considers that it was sufficiently established by the Supreme Court that the applicant company's involvement in making public the comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider. The Court therefore finds that the Supreme Court based its reasoning on this issue on grounds that were relevant for the purposes of Article 10 of the Convention.

(iii) Liability of the authors of the comments

147. In connection with the question whether the liability of the actual authors of the comments could serve as a sensible alternative to the liability of the Internet news portal in a case like the present one, the Court is mindful of the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media. It also refers in this connection to a recent judgment of the Court of Justice of the European Union in *Google Spain SL and Google Inc.* (cited above), in which that court, albeit in a different context, dealt with the problem of the availability on the Internet of information seriously interfering with a person's private life over an extended period of time, and found that the individual's fundamental rights, as a rule, overrode the economic interests of the operator of a search engine and the interests of other Internet users (see paragraph 56 above).

148. The Court observes that different degrees of anonymity are possible on the Internet. An Internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of verification – ranging from limited verification (for example, through activation of an account via an e-mail address or a social network account) to secure authentication, be it by the use of national electronic identity cards or online banking authentication data allowing rather more secure identification of the user. A service provider may also allow an extensive degree of anonymity for its users, in which case the users are not required to identify themselves at all and they may only be traceable – to a limited extent – through the

information retained by Internet access providers. The release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to restrictive conditions. It may nevertheless be required in some cases in order to identify and prosecute perpetrators.

149. Thus, in the judgment in *K.U. v. Finland*, concerning an offence of "malicious misrepresentation" of a sexual nature against a minor, the Court found that "[a]lthough freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others" (see *K.U. v. Finland*, no. 2872/02, § 49, ECHR 2008). The Court in that case rejected the Government's argument that the applicant had had the possibility of obtaining damages from the service provider, finding that this was not sufficient in the circumstances of the case. It held that there had to be a remedy enabling the actual offender to be identified and brought to justice, whereas at the relevant time the regulatory framework of the respondent State had not provided for the possibility of ordering the Internet service provider to divulge the information required for that purpose (ibid., §§ 47 and 49). Although *K.U. v. Finland* concerned a breach classified as a criminal offence under the domestic law and involved a more sweeping intrusion into the victim's private life than the present case, it is evident from the Court's reasoning that anonymity on the Internet, while an important factor, must be balanced against other rights and interests.

150. As regards the establishment of the identity of the authors of the comments in civil proceedings, the Court notes that the parties' positions differed as to its feasibility. On the basis of the information provided by the parties, the Court observes that the Estonian courts, in the "pre-trial taking of evidence" procedure under Articles 244 et seq. of the Code of Civil Procedure (see paragraph 40 above), have granted requests by defamed persons for the disclosure by online newspapers or news portals of the IP addresses of authors who had posted allegedly defamatory comments and for the disclosure by Internet access providers of the names and addresses of the subscribers to whom the IP addresses in question had been assigned. The examples provided by the Government show mixed results: in some cases it had proved possible to establish the computer from which the comments had been made, while in other cases, for various technical reasons, this had proved impossible.

151. According to the Supreme Court's judgment in the present case, the injured person had the choice of bringing a claim against the applicant company or the authors of the comments. The Court considers that the

uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose with a view to making it possible for a victim of hate speech to bring a claim effectively against the authors of the comments, are factors that support a finding that the Supreme Court based its judgment on relevant and sufficient grounds. The Court also refers, in this context, to the judgment in *Krone Verlag GmbH & Co. KG v. Austria (no. 4)* (no. 72331/01, § 32, 9 November 2006) in which it found that shifting the risk of the defamed person obtaining redress in defamation proceedings to the media company, which was usually in a better financial position than the defamer, was not as such a disproportionate interference with the media company's right to freedom of expression.

(iv) Measures taken by the applicant company

152. The Court notes that the applicant company highlighted the number of comments on each article on its website, and therefore the articles with the most lively exchanges must have been easily identifiable for the editors of the news portal. The article in issue in the present case attracted 185 comments, apparently well above average. The comments in question were removed by the applicant company some six weeks after they were uploaded on the website, upon notification by the injured person's lawyers to the applicant company (see paragraphs 17-19 above).

153. The Court observes that the Supreme Court stated in its judgment that "[o]n account of the obligation arising from law to avoid causing harm, the [applicant company] should have prevented the publication of comments with clearly unlawful contents". However, it also held that "[a]fter the disclosure, the [applicant company had] failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative" (see paragraph 16 of the judgment, set out in paragraph 31 above). Therefore, the Supreme Court did not explicitly determine whether the applicant company was under an obligation to prevent the uploading of the comments to the website or whether it would have sufficed under domestic law for the applicant company to have removed the offending comments without delay after publication to escape liability under the Obligations Act. The Court considers that, when assessing the grounds upon which the Supreme Court relied in its judgment entailing an interference with the applicant company's Convention rights, there is nothing to suggest that the national court intended to restrict its rights to a greater extent than that required to achieve the aim pursued. On this basis, and having regard to the freedom to impart information as enshrined in Article 10, the Court will thus proceed on the assumption that the Supreme Court's judgment must be understood to mean that had the applicant company removed the comments without delay after publication, this would have sufficed for it to escape liability under domestic law.

Consequently, and taking account of the above findings (see paragraph 145) to the effect that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal, the Court does not consider that the imposition on the applicant company of an obligation to remove from its website, without delay after publication, comments that amounted to hate speech and incitements to violence, and were thus clearly unlawful on their face, amounted, in principle, to a disproportionate interference with its freedom of expression.

154. The pertinent issue in the present case is whether the national court's findings that liability was justified, as the applicant company had not removed the comments without delay after publication, were based on relevant and sufficient grounds. With this in mind, account must first be taken of whether the applicant company had put in place mechanisms that were capable of filtering comments amounting to hate speech or speech entailing an incitement to violence.

155. The Court notes that the applicant company took certain measures in this regard. There was a disclaimer on the Delfi news portal stating that the writers of the comments – and not the applicant company – were accountable for them, and that the posting of comments that were contrary to good practice or contained threats, insults, obscene expressions or vulgarities, or incited hostility, violence or illegal activities, was prohibited. Furthermore, the portal had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down system in place, whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose to bring it to the attention of the portal administrators. In addition, on some occasions the administrators removed inappropriate comments on their own initiative.

156. Thus, the Court notes that the applicant company cannot be said to have wholly neglected its duty to avoid causing harm to third parties. Nevertheless, and more importantly, the automatic word-based filter used by the applicant company failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court reiterates 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 L. 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 whose content did not constitute protected speech under Article 10 of the Convention (see paragraph 136 above). The Court notes that as a consequence of this failure of the filtering mechanism these clearly unlawful comments remained online for six weeks (see paragraphs 18-19 above).

157. The Court observes in this connection that on some occasions the portal administrators did remove inappropriate comments on their own initiative and that, apparently some time after the events of the present case, the applicant company set up a dedicated team of moderators. Having regard to the fact that there are ample opportunities for anyone to make his or her voice heard on the Internet, the Court considers that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the present case – can by no means be equated to "private censorship". While acknowledging the "important role" played by the Internet "in enhancing the public's access to news and facilitating the dissemination of information in general" (see *Ahmet Yıldırım*, cited above, § 48, and *Times Newspapers Ltd*, cited above, § 27), the Court reiterates that it is also mindful of the risk of harm posed by content and communications on the Internet (see *Editorial Board of* Pravoye Delo *and Shtekel*, cited above, § 63; see also *Mosley*, cited above, § 130).

158. Moreover, depending on the circumstances, there may be no identifiable individual victim, for example in some cases of hate speech directed against a group of persons or speech directly inciting violence of the type manifested in several of the comments in the present case. In cases where an individual victim exists, he or she may be prevented from notifying an Internet service provider of the alleged violation of his or her rights. The Court 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.

159. Lastly, the Court observes that the applicant company has argued (see paragraph 78 above) that the Court should have due regard to the notice-and-take-down system that it had introduced. If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases such as the present one, 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 (see paragraph 136 above), the Court considers, as stated above (see paragraph 153), 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.

(v) Consequences for the applicant company

160. Finally, turning to the question of consequences of the domestic proceedings for the applicant company, the Court notes that it was obliged to pay the injured person the equivalent of EUR 320 in compensation for

non-pecuniary damage. It agrees with the finding of the Chamber that this sum, also taking into account the fact that the applicant company was a professional operator of one of the largest Internet news portals in Estonia, can by no means be considered disproportionate to the breach established by the domestic courts (see paragraph 93 of the Chamber judgment). The Court notes in this connection that it has also had regard to the post-*Delfi* domestic case-law on the liability of the operators of Internet news portals (see paragraph 43 above). It observes that in these cases the lower courts have followed the Supreme Court's judgment in *Delfi* but no awards have been made for non-pecuniary damage. In other words, the tangible result for the operators in post-*Delfi* cases has been that they have taken down the offending comments but have not been ordered to pay compensation for non-pecuniary damage.

161. The Court also observes that it does not appear that the applicant company had to change its business model as a result of the domestic proceedings. According to the information available, the Delfi news portal has continued to be one of Estonia's largest Internet publications and by far the most popular for posting comments, the number of which has continued to increase. Anonymous comments – now existing alongside the possibility of posting registered comments, which are displayed to readers first – are still predominant and the applicant company has set up a team of moderators carrying out follow-up moderation of comments posted on the portal (see paragraphs 32 and 83 above). In these circumstances, the Court cannot conclude that the interference with the applicant company's freedom of expression was disproportionate on that account either.

(vi) Conclusion

162. Based on the concrete assessment of the above aspects, taking into account the reasoning of the Supreme Court in the present case, in particular the extreme nature of the comments in question, the fact that the comments were posted in reaction to an article published by the applicant company on its professionally managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to remove without delay after publication comments amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable, and the moderate sanction imposed on the applicant company, the Court finds that the domestic courts' imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression.

Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds, by fifteen votes to two, that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 June 2015.

Johan Callewaert	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Raimondi, Karakaş, De Gaetano and Kjølbro;

(b) concurring opinion of Judge Zupančič;

(c) joint dissenting opinion of Judges Sajó and Tsotsoria.

D.S.
J.C.

JOINT CONCURRING OPINION OF JUDGES RAIMONDI, KARAKAŞ, DE GAETANO AND KJØLBRO

1. We agree that there has been no violation of Article 10 of the Convention. However, we would like to clarify our position as regards two issues: (a) the Court's reading of the Supreme Court's judgment, and (b) the principles underlying the Court's assessment of the complaint.

2. Firstly, the Court's reading of the Supreme Court's judgment (see paragraphs 153-54 of the present judgment) is decisive for the assessment of the case.

3. In reaching its decision the Supreme Court stated, *inter alia*, that it followed from the obligation to avoid causing harm that Delfi "should have prevented the publication of the comments with clearly unlawful content". Furthermore, the Supreme Court held that Delfi, after the disclosure of the comments in question, had "failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative". The Supreme Court found that Delfi's "inactivity [was] unlawful", and that Delfi was liable as it had "not proved the absence of culpability" (see the extract quoted in paragraph 31 of the present judgment).

4. There are two possible readings of the Supreme Court's judgment: (a) Delfi was liable as it did not "prevent" the unlawful comments from being published, and its liability was aggravated by the fact that it did not subsequently "remove" the comments; or (b) Delfi did not "prevent" the unlawful comments from being published and, as it did not subsequently "remove" the comments without delay, it was liable for them.

5. The Court has decided to read the Supreme Court's judgment in the second sense, thereby avoiding the difficult question of the possible liability of a news portal for not having "prevented" unlawful user-generated comments from being published. However, had the Court read the Supreme Court's judgment in the first sense, the outcome of the case might have been different.

6. If the Supreme Court's judgment were to be understood in the first sense, it would enshrine an interpretation of domestic legislation that would entail a risk of imposing excessive burdens on a news portal such as Delfi. In fact, in order to avoid liability for comments written by readers of its articles, a news portal would have to prevent such comments from being published (and would also have to remove any such comments that were published). This might, in practice, require an effective monitoring system, be it automatic or manual. In other words, a news portal might have to pre-monitor comments in order to avoid publishing clearly unlawful comments made by readers. Furthermore, if the liability of a news portal was closely linked to the clearly unlawful nature of the comments, without it being necessary for the plaintiff to prove that the news portal knew or ought to

have known that the comments would be or had been published on the portal, the portal would in practice be obliged to act on the assumption that such comments could be made by readers and therefore to take the necessary measures to avoid them being published, which in practice would require pre-monitoring measures to be adopted.

7. Therefore, in our view, finding a news portal liable for not having "prevented" the publication of user-generated comments would in practice imply that the portal would have to pre-monitor each and every user-generated comment in order to avoid liability for any unlawful comments. This could in practice lead to a disproportionate interference with the news portal's freedom of expression as guaranteed by Article 10.

8. Secondly, the Court should have stated more clearly the underlying principles leading it to find no violation of Article 10. Instead, the Court has adopted case-specific reasoning and at the same time has left the relevant principles to be developed more clearly in subsequent case-law.

9. In our view, the Court should have seized the opportunity to state more clearly the principles relevant to the assessment of a case such as the present one.

10. A news portal such as Delfi, which invites readers of articles to write comments that are made public on the portal, will assume "duties and responsibilities" as provided for in domestic legislation. Furthermore, it follows from Article 8 of the Convention that member States have an obligation to protect effectively the reputation and honour of individuals. Therefore, Article 10 of the Convention cannot be interpreted as prohibiting member States from imposing obligations on news portals such as Delfi when they allow readers to write comments that are made public. In fact, member States may in certain circumstances have an obligation to do so in order to protect the honour and reputation of others. Thus, member States may decide that a news portal is to be regarded as the publisher of the comments in question. Furthermore, they may prescribe that news portals may be held liable for clearly unlawful comments, such as insults, threats and hate speech, which are written by users and made public on the portal. However, in exercising their power to do so, member States must comply with their obligations under Article 10 of the Convention. Therefore, domestic legislation should not restrict freedom of expression by imposing excessive burdens on news portals.

11. In our view, member States may hold a news portal, such as Delfi, liable for clearly unlawful comments such as insults, threats and hate speech by readers of its articles if the portal knew, or ought to have known, that such comments would be or had been published on the portal. Furthermore, member States may hold a news portal liable in such situations if it fails to act promptly when made aware of such comments published on the portal.

12. The assessment of whether the news portal knew or ought to have known that clearly unlawful comments may be or have been published on

the portal may take into account all the relevant specific circumstances of the case, including the nature of the comments in question, the context of their publication, the subject matter of the article generating the comments, the nature of the news portal in question, the history of the portal, the number of comments generated by the article, the activity on the portal, and how long the comments have appeared on the portal.

13. Therefore, holding a news portal liable for clearly unlawful comments such as insults, threats and hate speech under such circumstances will in general be compatible with Article 10 of the Convention. Furthermore, member States may also hold a news portal liable if it has failed to take reasonable measures to prevent clearly unlawful comments from being made public on the portal or to remove them once they have been made public.

14. In our view, these underlying principles should have been stated more clearly in the Court's judgment.

15. Having regard to the clearly unlawful nature of the comments in question, as well as the fact that they remained on the news portal for six weeks before they were removed, we do not find it disproportionate for the Supreme Court to find Delfi liable as it had "failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative". In fact, not being aware of such clearly unlawful comments for such an extended period of time almost amounts to wilful ignorance, which cannot serve as a basis for avoiding civil liability.

16. Therefore, we did not have any problems voting together with the majority. However, the Court should, in our view, have seized the opportunity to clarify the principles underlying its assessment, irrespective of the sensitive nature of the questions raised by the application.

CONCURRING OPINION OF JUDGE ZUPANČIČ

In general, I agree with the outcome in this case. However, I would like to add a few historical and simply ethical observations.

The substance of the case concerns the protection of personal integrity, that is, of personality rights in Estonia and also, after this case, elsewhere in Europe. For many years personality rights were, so to speak, discriminated against *vis-à-vis* freedom of expression, specifically the freedom of the press. In my concurring opinion in *Von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI), I wrote that "[t]he *Persönlichkeitsrecht* doctrine imparts a higher level of civilised interpersonal deportment", and I believe the facts of the case at hand confirm this finding.

The problem derives from the great dissimilarity between the common law on the one hand and the Continental system of law on the other hand. The notion of privacy in American law, for example, only derived from the seminal article by Warren and Brandeis[1], who happened, because he had been schooled in Germany, to be able to instruct himself about personality rights in German. The notion of privacy as a right to be left alone, especially by the media, was, until that time, more or less unfamiliar to the Anglo-American sphere of law. The article itself addressed precisely the question of abuse by the media. Obviously, at that time there were only printed media but this was sufficient for Justice Brandeis to show his own extreme indignation.

On the other hand, the Continental tradition concerning personality rights goes back to Roman law's *actio iniurirarum*, which protected against bodily injury but also against non-bodily *convicium*, *adtemptata pudicitia* and *infamatio*[2]. Thus, personality rights can be seen as the predecessor and the private-law equivalent of human rights. Protection, for example, against defamation and violations of other personality rights has a long and imperative tradition on the Continent, whereas libel and slander are the weak corresponding rights in Anglo-American law.

According to Jean-Christophe Saint-Paul:

> "*Les droits de la personnalité constituent l'ensemble des prérogatives juridiques portant sur des intérêts moraux (identité, vie privée, honneur) et le corps humain ou les moyens de leur réalisation (correspondances, domicile, image), exercés par des personnes juridiques (physiques ou morales) et qui sont sanctionnés par des actions en justice civiles (cessation du trouble, réparation des préjudices) et pénales.*

1. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", 4(5) *Harvard Law Review* 193-201 (1890). The article is available in its entirety at www.jstor.org/stable/1321160?origin=JSTOR-pdf&seq=1#page_scan_tab_contents (updated on 23 March 2015).
2. See Gert Brüggemeier, Aurelia Colombi Ciacchi, Patrick O'Callaghan (eds.), *Personality Rights in European Torts Law*, Cambridge University Press, Cambridge 2010, p. 18 and note 51.

> *Au carrefour du droit civil (personnes, contrats, biens), du droit pénal et des droits de l'homme, et aussi des procédures civile et pénale, la matière fait l'objet d'une jurisprudence foisonnante, en droit interne et en droit européen, fondée sur des sources variées nationales (Code civil, Code pénal, Loi informatique et libertés, Loi relative à la liberté de la presse) et internationales (CESDH, PIDCP, DUDH, Charte des droits fondamentaux), qui opère une balance juridictionnelle entre la protection de la personne et d'autres valeurs telles que la liberté d'expression ou les nécessités de la preuve.*[3]"

The situation in Germany is as follows:

> "The general right of personality has been recognised in the case-law of the *Bundesgerichtshof* since 1954 as a basic right constitutionally guaranteed by Articles 1 and 2 of the Basic Law and at the same time as an 'other right' protected in civil law under Article 823 § 1 of the BGB [*Bundesgesetzbuch* – German Civil Code] (constant case-law since BGHZ [Federal Court of Justice, civil cases] 13, 334, 338 ...). It guarantees as against all the world the protection of human dignity and the right to free development of the personality. Special forms of manifestation of the general right of personality are the right to one's own picture (sections 22 et seq. of the KUG [*Kunsturhebergesetz* – Artistic Copyright Act]) and the right to one's name (Article 12 of the BGB). They guarantee protection of the personality for the sphere regulated by them.[4]"

Thus, it is almost difficult to believe that this private-law parallel to the more explicit constitutional-law and international-law protection of human personality rights has been not only disregarded but often simply overridden by contrary considerations.

Also, in my opinion, it is completely unacceptable that an Internet portal or any other kind of mass media should be permitted to publish any kind of anonymous comments. We seem to have forgotten that "letters to the editor", not so long ago, were double-checked as to the identity of the author before they were ever deemed publishable. The Government argued

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3. See Jean-Christophe Saint-Paul (ed.), "Droits de la personnalité", 2013 at http://boutique.lexisnexis.fr/jcshop3/355401/fiche_produit.htm (Updated on 23 March 2015). Translation: "Personality rights are the set of legal prerogatives relating to moral interests (identity, private life, honour) and the human body or the means of realising them (correspondence, home, image); they are exercised by anyone with legal personality (natural persons or legal entities) and are enforced by means of actions in the civil courts (injunctions to desist, claims for damages) and the criminal courts.
This issue, at the crossroads of civil law (persons, contracts, property), criminal law and human rights law and also civil and criminal procedure, has given rise to an extensive body of case-law at domestic and European level, based on various sources of national law (Civil Code, Criminal Code, Data Processing and Civil Liberties Act, Freedom of the Press Act) and international law (European Convention on Human Rights, International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, Charter of Fundamental Rights), involving a judicial balancing exercise between protection of the person and of other values such as freedom of expression or evidentiary needs."

4. See the *Marlene Dietrich Case*, BGH 1 ZR 49/97, at Institute for Transnational Law – Foreign Law Translations, Texas University School of Law, at www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=726 (updated on 23 March 2015).

(see paragraph 90 of the present judgment) that the biggest international news portals did not allow anonymous (that is, unregistered) comments and referred to an opinion that there was a trend away from anonymity. At the same time, anonymous comments tended to be more insulting than the comments by persons who had registered, and harsh comments attracted more readers. The Government argued that Delfi had been notorious for exactly this reason.

On the other hand, in *Print Zeitungverlag GmbH v. Austria* (no. 26547/07, 10 October 2013), a judgment delivered on the same day as the Chamber judgment in *Delfi*, the Court held that an award of damages amounting to 2,000 euros (EUR) for the publication of an anonymous letter in print was – and rightly so! – compatible with its previous case-law[5].

The mass media used to be run according to the obvious principle that the great freedom enjoyed by the press implied a commensurate level of responsibility. To enable technically the publication of extremely aggressive forms of defamation, all this due to crass commercial interest, and then to shrug one's shoulders, maintaining that an Internet provider is not responsible for these attacks on the personality rights of others, is totally unacceptable.

According to the old tradition of the protection of personality rights, which again go back to Roman law, the amount of approximately EUR 300 awarded in compensation in the present case is clearly inadequate as far as damages for the injury to the aggrieved persons are concerned. The mere comparison with the above-mentioned judgment in *Print Zeitungverlag GmbH*, which involved only two aggrieved persons and a printed medium with very limited distribution, demonstrates that a much higher award of damages was called for in the present case.

I do not know why the national courts hesitate in adjudicating these kinds of cases and affording strict protection of personality rights and decent compensation to those who have been subject to these kinds of abusive verbal injuries, but I suspect that our own case-law has something to do with it.

However, the freedom of expression, like all other freedoms, needs to end precisely at the point where somebody else's freedom and personal integrity is negatively affected.

5. See http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126629 (updated on 24 March 2015).

JOINT DISSENTING OPINION OF JUDGES SAJÓ AND TSOTSORIA

To explain our dissent, we will offer a detailed and traditional analysis of the case, as is common in the Court's practice. There are, however, some broader issues which are more important than our dissatisfaction with this judgment's troubling departure from the prevailing understanding of the case-law. These fundamental concerns will be spelled out first.

I.

Collateral censorship

17. In the present judgment the Court has approved a liability system that imposes a requirement of constructive knowledge on active Internet intermediaries[1] (that is, hosts who provide their own content and open their intermediary services for third parties to comment on that content). We find the potential consequences of this standard troubling. The consequences are easy to foresee. For the sake of preventing defamation of all kinds, and perhaps all "illegal" activities, all comments will have to be monitored from the moment they are posted. As a consequence, active intermediaries and blog operators will have considerable incentives to discontinue offering a comments feature, and the fear of liability may lead to additional self-censorship by operators. This is an invitation to self-censorship at its worst.

18. We regret that the Court did not rely on the prophetic warnings of Professor Jack Balkin[2]. As Professor Balkin has demonstrated, the technological infrastructure behind digital communication is subject to less visible forms of control by private and public regulators, and the Court has just added another such form to this panoply. Governments may not always be directly censoring expression, but by putting pressure and imposing liability on those who control the technological infrastructure (Internet service providers, etc.), they create an environment in which collateral or private-party censorship is the inevitable result. Collateral censorship "occurs when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B's speech"[3]. Because A is liable for someone else's speech, A has strong incentives to over-censor, to limit access, and to deny B's ability to communicate using the platform that A controls. In effect, the

1. The term is used in the literature: see Justin Hurwitz, "Trust and Online Interaction", *University of Pennsylvania Law Review*, Vol. 161: 1579.
2. Jack M. Balkin, "Old-School/New-School Speech Regulation", 127 *Harvard Law Review* 2296 (2014).
3. Ibid., p. 2309.

fear of liability causes A to impose prior restraints on B's speech and to stifle even protected speech. "What looks like a problem from the standpoint of free expression ... may look like an opportunity from the standpoint of governments that cannot easily locate anonymous speakers and want to ensure that harmful or illegal speech does not propagate.[4]" These technological tools for reviewing content before it is communicated online lead (among other things) to: deliberate overbreadth; limited procedural protections (the action is taken outside the context of a trial); and shifting of the burden of error costs (the entity in charge of filtering will err on the side of protecting its own liability, rather than protecting freedom of expression).

19. The imposition of liability on intermediaries was a major obstacle to freedom of expression for centuries. It was the printer Harding and his wife who were arrested for the printing of the *Drapier's Letters* and not the anonymous author (Jonathan Swift), who continued to preach undisturbed. It was for this reason that exempting intermediaries from liability became a crucial issue in the making of the first lasting document of European constitutionalism, the Belgian Constitution of 1831[5]. This is the proud human rights tradition of Europe that we are called upon to sustain.

The general context

20. It is argued in the present judgment that the Court is called upon to decide the case at hand, but this is only part of our duty and such an argument is dangerous in its one-sidedness. As the Court summarised matters in *Rantsev v. Cyprus and Russia* (no. 25965/04, § 197, ECHR 2010)[6]:

> "[The Court's] judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and

4. Ibid., p. 2311.

5. See E. Chevalier Huyttens (ed.), *Discussion du Congrès national de Belgique 1830-1831 (Tome premier, 10 novembre-31 décembre 1830)*, Brussels, Société typographique belge Adolphe Wahlen et Cie (1844). See Nothomb's speech, pp. 651-52.
The specific language of the 1831 Constitution was a compromise and did not reflect the principled approach of the liberals who stood for Constitutionalism (writ large), but even this compromise, which we find today reproduced in Article 25 of the Belgian Constitution, states that "When the author is known and resident in Belgium, neither the publisher, the printer nor the distributor can be prosecuted". Back to 1830?

6. Confirmed most recently by the Grand Chamber in *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012.

> extending human rights jurisprudence throughout the community of the Convention States (see *Karner*, cited above, § 26, and *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII)."

21. Further, as the Court stated in *Animal Defenders International v. the United Kingdom* ([GC] no. 48876/08, § 108, ECHR 2013):

> "It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (see *James and Others* [*v. the United Kingdom*, 21 February 1986], § 36[, Series A no. 98])."

22. The present judgment expressly deals with the general context (see the "Preliminary remarks" section starting at paragraph 110) but without determining "issues on public-policy grounds". The Internet is described as an "unprecedented platform" and while there is reference to benefits, it is described as posing "certain dangers", the advantages being scarcely mentioned. We disagree. The Internet is more than a uniquely dangerous novelty. It is a sphere of robust public discourse with novel opportunities for enhanced democracy. Comments are a crucial part of this new enhanced exchange of ideas among citizens. This has been the Court's understanding so far in its case-law (see *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013, and also *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 58, 16 July 2013)[7].

23. It is noteworthy in this context that the thirteen lines of comparative-law analysis in the present judgment do not refer to specific national practices. While there are novel restrictions on posting on the Internet in the recent legislation of a couple of European countries, the Estonian approach is rather unique. In the overwhelming majority of the member States of the Council of Europe, and also in genuine democracies all over the world, the regulatory system (in conformity with the expectations of the rule of law) is based on the concept of actual knowledge. A safe harbour is provided by the rule of notice and action (primarily "notice-and-take-down"). This Court has not been known for developing rights restrictions which go against the prevailing standards of the member States, except in a few cases where a narrow majority found that deeply held moral traditions justified such an exception.

Consequences

24. The Court has endorsed the standard of the Estonian Supreme Court, namely that active intermediaries must remove comments "without delay"

7. While the passage from *Editorial Board of* Pravoye Delo *and Shtekel* (*v. Ukraine*, no. 33014/05, §§ 63-64, ECHR 2011) quoted in the judgment (see paragraph 128) seems to take a neutral position on the balance between the good and bad sides of the Internet, it is important to note that in that judgment the negative aspects did not prevail and the "risk of harm" argument was followed by a "nevertheless", opting in favour of Internet freedoms.

after publication (see paragraph 153 of the present judgment), and not upon notice or on other grounds linked to actual knowledge. Active intermediaries are therefore invited to exercise prior restraint. Moreover, member States will be forced to introduce a similar approach because otherwise, according to the logic of the present judgment, there is no proper protection for the rights of those who feel defamed by comments. To avoid trouble, for active intermediaries the safe harbour will simply be to disable comments[8].

25. The Court is aware of the unhappy consequences of adopting a standard that can be satisfied only by constant monitoring of all comments (and implicitly, all user-generated content). For the Court, "the case does not concern other fora on the Internet ... or a social media platform ... where the content provider may be a private person running the website or blog as a hobby" (see paragraph 116 of the present judgment). It is hard to imagine how this "damage control" will help. Freedom of expression cannot be a matter of a hobby.

II.

Delfi's role as active intermediary

26. Turning to the specific case, we find that the Estonian Supreme Court did not provide relevant and sufficient reasons for the very intense interference with the applicant company's rights and did not apply an appropriate balancing exercise. This amounts to a violation of the Convention.

27. This case is about interference with the freedom of expression of Delfi as an *active* intermediary. Delfi published an article on the destruction of ice roads by a public service ferry company on its news portal and it enabled comments on the article. It is undisputed that there was nothing illegal in the article. It was accepted by the national courts, and we could not agree more, that Delfi was engaged in journalistic activities and that the opening up of a comments section formed part of the news portal. However, the news portal was not the author of the unedited comments. Furthermore, at least in the Chamber's view (see paragraph 86 of its judgment), the debate concerned a matter of "a certain degree" of public interest. We believe that the article dealt with a matter of public interest and that the comments, even the impugned ones, were part of the debate even though

8. Social media operators have already institutionalised over-censorship by allowing a policy of banning sites and posts which have been "reported", without conducting a serious investigation into the matter. The policy adopted by Facebook is another victory for the troll mentality. Note that Facebook requires (all) user-imposed censorship to take place in a legal environment that grants service providers immunity under section 230 (a) of the Communications Decency Act. Imagine what will happen where there is no immunity.

they may have been excessive or impermissible. Delfi was held liable under the Civil Code of Estonia for defamation originating from comments posted in the comments section of the article. This concerned twenty comments.

The nature of the comments

28. Throughout the whole judgment the description or characterisation of the comments varies and remains non-specific. The Supreme Court of Estonia has its own interpretation: it refers to "insult in order to degrade" and "degrade human dignity and ridicule a person" and finds Delfi liable for disrespecting the honour and good name of the person concerned. According to paragraph 117 of the present judgment, "the impugned comments ... *mainly* constituted hate speech and speech that directly advocated acts of violence"[9] (see also paragraph 140). However, according to paragraph 130 ("the legitimate aim of protecting the reputation and rights of others"), the offence in issue concerned the reputation and unspecified rights of others. It is not clear to which comments the Court is referring. Does the comment "a good man lives a long time, a shitty man a day or two" (comment no. 9 – see paragraph 18 of the judgment) amount to advocating violence[10]?

29. It is unfortunate that the characterisation of the comments remains murky. What is really troubling here is never spelled out: that some of the comments are racist. Comment no. 2 is a recital of anti-Semitic stereotypes ending with a reference to the annihilation by fire of the addressee as a Jew.

30. We are not going to discuss here to what extent some of the references satisfy the strict requirements of incitement to violence, given the nature of the Internet. Does a call for violence or a wish to see someone

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9. "Hate speech" remains undefined. "There is no universally accepted definition of 'hate speech'. The term encompasses a wide array of hateful messages, ranging from offensive, derogatory, abusive and negative stereotyping remarks and comments, to intimidating, inflammatory speech inciting violence against specific individuals and groups. Only the most egregious forms of hate speech, namely those constituting incitement to discrimination, hostility and violence, are generally considered unlawful" (Report of the Special Rapporteur on minority issues, Rita Izsák (A/HRC/28/64), Human Rights Council, Twenty-eighth session).
See more at:
www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15716&LangID=E#sthash.XYM1WUqO.dpuf
The lack of an identifiable concept in twenty very different comments makes the application of the judgment unforeseeable.

10. The Court has rather clear requirements as to what amounts to an impermissible call for violence (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV; *Dağtekin v. Turkey*, no. 36215/97, 13 January 2005; *Erbakan v. Turkey*, no. 59405/00, § 56, 6 July 2006; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 56-58, ECHR 2007-IV; *Otegi Mondragon v. Spain*, no. 2034/07, § 54, ECHR 2011; and *Vejdeland and Others v. Sweden*, no. 1813/07, § 55, 9 February 2012).

killed have the same effect on the Internet as a similar statement made in a face-to-face encounter in a situation like the present one? This is not a call to arms by an extremist group. The answer has to be established by means of a proper judicial process. No criminal action against the commenters was taken, notwithstanding the reference to lynching[11]. The question of the extent to which such comments amount to a real threat would have deserved proper analysis. However, the judgment simply accepts the findings of the Supreme Court, which says only that the illegality of the comments is manifest (and then, like the judgment, characterises them in different ways).

31. We will also refrain from an analysis of the impact of the hateful messages regarding their capacity to incite imminent violence or even to build up lasting hatred resulting in harassment or real threats against L. Racism and constraining others to live in an environment full of hatred and real threats cannot find refuge in freedom of expression. This legitimate concern must not, however, blind those who are called upon to take action, and they must be reminded that "hate-speech regulations put actual feelings, often honourable ones, ahead of abstract rights – which seems like common sense. It takes an active effort to resist the impulse to silence the jerks who have wounded you"[12].

Interference and the right of active intermediaries

32. There is general agreement that the Estonian Supreme Court's judgment interfered with Delfi's freedom of expression, though the nature of the right remains somewhat non-specific. In our view the rights concerned are the rights of the press. User comments may enrich the article. The rights of an active intermediary include the right to enable others to impart and receive information.

Lawfulness of the interference: the problem of foreseeability

33. According to the prevailing methodology of the Court, the next question to be asked concerns the lawfulness of the measure. This entails a review of the foreseeability of the law. It is accepted by the Court that the applicable law was the Civil Code and not the Information Society Services Act. The Information Society Services Act apparently exempts service providers and provides a "safe harbour" in the sense that, once the service provider becomes aware of the illegal content and removes it expeditiously, it cannot be held liable. Neither the domestic authorities nor the Court

11. It was of relevance in *Stoll v. Switzerland* ([GC], no. 69698/01, § 54-56, ECHR 2007-V), in the determination of the Government interest at stake, that no criminal action was taken against the applicant; hence the argument relating to the protection of national security was found to be of no relevance.

12. George Packer, "Mute Button", *The New Yorker*, 13 April 2015.

explain why the provision of binding European law that is part of the national legal system is immaterial, except to say that the present case concerns a matter of publication rather than data storage. It is, of course, not for this Court to interpret European Union law as such. This does not mean that we should not regard it as part of the domestic system, attributing to it its proper constitutional weight. Be that as it may, section 10 (liability for storage) of the Information Society Services Act provides a "safe harbour" rule for service providers in the case of storage. In these circumstances, a reasonable justification should be required for the choice of the higher level of liability under the Civil Code. The (highly problematic) choice of a publisher's liability does not address the issue of the supremacy of European Union law or the problem of *lex specialis*. It is possible that where the information storage provider generates content, the Information Society Services Act is inapplicable, but this must be demonstrated and must also be foreseeable. Moreover, the service provider in the present case did not generate the impugned content: that content was user-generated. To argue that the commercial nature of the data storage brings the activity within the liability regime applicable to publishers is not convincing. Storage is considered to be a commercial activity but that did not change the equation for the Information Society Services Act, which allowed a "safe harbour" regime.

34. One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV)[13]. A legal adviser could not have informed Delfi with sufficient certainty that the Directive on certain legal aspects of information society services did not apply. The applicable law was not obvious, to the extent that even in 2013 a court in Cyprus found it necessary to ask the Court of Justice of the European Union for a preliminary ruling in a related matter, namely the liability of news portal publishers (see Case C-291/13, *Papasavvas*, CJEU). If there was uncertainty in 2013 in the

13. It is remarkable to note that the rest of this quotation is not taken into consideration in this judgment. The original paragraph contains an important qualification: "Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." In the present case, however, the issue is not the use of vague terms, for example the fact that the Directive employs a vague term when it refers to "service provider". The issue was that there were two laws and the applicant company believed that the Directive was applicable as European Union law and as special law, whereas the Supreme Court took the view that the other law was applicable, because the service provider was a publisher.

European Union on a similar but less complicated matter, which was clarified in 2014, how could learned counsel have been sufficiently certain in 2006?

35. More importantly, it was not foreseeable that the applicant company's liability under the Civil Code would be that of a publisher. The Supreme Court judgment itself refers to another Supreme Court judgment of 21 December 2005. That judgment, perhaps already available to Delfi on 24 January 2006 (the date of the article), was summarised by the Supreme Court as follows:

> "[F]or the purposes of section 1047 of the Obligations Act disclosure [*avaldamine*] means communication of information to third parties and the discloser is a person who communicates the information to third parties. ... in the case of publication [*avaldamine*] of information in the media, the discloser/publisher [*avaldaja*] can be a media company as well as the person who transmitted the information to the media publication."

The Supreme Court applied this consideration in the following way:

> "Publishing of news and comments on an Internet portal is also a journalistic activity. At the same time, because of the nature of Internet media, it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication. While the publisher is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher [*väljaandja*] of printed media and an Internet portal operator are publishers/disclosers [*avaldajad*] as entrepreneurs."

36. This (too) raises serious concerns as to the foreseeability of the Civil Code as applied in the present case. The Supreme Court clearly states that "it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication". The Internet portal operator is called a "publisher/discloser" in the English translation. The term used in the original Estonian does not look the same as that used for a publisher ("*väljaandja*") but appears to be a different one ("*avaldajad*"). The applicant company argued that other "disclosers" or disseminators (libraries, bookstores) were not held to be publishers under existing tort law. Why would one assume that an Internet operator falls under the duty of care applicable to "*väljaandja*" instead of "*avaldajad*"? There is a contradiction here that hampers foreseeability. As the Chamber rightly acknowledged (see paragraph 75 of its judgment), the text of the relevant provisions of the Constitution, the Civil Code (General Principles) Act and the Law of Obligations Act was "quite general and lack[ed] detail". The provisions of the Law of Obligations Act are all directed at a person or entity that defames – the *tortfeasor*, in this instance, being the author of the comments in question on the applicant company's website – and do not directly address the novel situation of an intermediary

providing a platform for such expressive activity while not being the author or a traditional publisher. Only divine legal counsel could have been sufficiently certain that a portal operator would be liable for a comment it was not aware of, under a kind of strict liability that applied to publishers (editors) who operated in full knowledge of the whole publication. It is noteworthy that the three competent levels of jurisdiction applied three different theories of liability. Vaguely worded, ambiguous and therefore unforeseeable laws have a chilling effect on freedom of expression. A troubling uncertainty persists here[14].

37. The Court has previously held that "the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned" (see *Editorial Board of* Pravoye Delo *and Shtekel*, cited above, § 63). This point of principle provides an important benchmark when examining whether the application of domestic law in the present case was reasonably foreseeable for the applicant company, as regards user-generated content on its website. In Recommendation CM/Rec(2011)7 on a new notion of media, the Committee of Ministers noted that "[t]he roles of each actor can easily change or evolve fluidly and seamlessly" and called for a "**differentiated and graduated approach**".

Necessary in a democratic society

38. The next question to answer is to what extent the measure aimed at the avoidance of hate speech[15] (which was the most likely justification for the interference, at least in the Court's view, but not that of the domestic authorities – see paragraph 140 of the present judgment) was necessary in a democratic society[16]. The reference to the conflict between Article 8 and Article 10 rights in paragraph 139 points to the applicability of a balancing exercise with a wider margin of appreciation.

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14. In *Editorial Board of* Pravoye Delo *and Shtekel* (cited above), involving an Internet-related dispute under Article 10, although different from the one presented here, the Court found a violation of Article 10 on the sole basis that the interference was not adequately prescribed by law, taking account, amongst other things, of the special problems arising in the Internet era.

15. Sometimes incitement to violence is also mentioned.

16. Where the balancing exercise between these two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 88, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). It is probably for this reason that the Court's analysis in the present case focuses on the sufficiency of the reasons provided by the domestic courts. However, the domestic courts have *only selectively* considered the criteria laid down in the Court's case-law.

39. The Court first states, and we agree, that *some* of the impugned statements are not protected by the Convention. That does not in itself solve the problem, as one cannot, in the circumstances of the case, equate the expressions used by the commenters with the activities of an active intermediary.

Shift to a "relevant and sufficient reasons" analysis

40. The Court considers in paragraph 142 of the present judgment that within the proportionality analysis its task is to examine "[i]n the light of the Supreme Court's reasoning ... whether the domestic courts' finding of liability on the part of the applicant company was based on relevant and sufficient grounds in the particular circumstances of the case (see paragraph 131 above)". No reference is made here to the established principle that the Court, in the exercise of its supervisory role, is not satisfied if the respondent State exercised its discretion only reasonably, carefully and in good faith. Sufficient reasons are more than simply reasonable.

41. More importantly, the "relevant and sufficient grounds" test is only part of the proportionality analysis[17]. Once the Court has found that the reasons given are relevant and sufficient, the proportionality analysis begins rather than ends. The "relevant and sufficient grounds" test is a threshold question to determine whether and how the margin of appreciation is to be applied; it is relevant in the determination of the existence of a pressing social need (see all the authorities cited in paragraph 131 of the present judgment). Why is there a need to determine that the grounds relied upon by the domestic authorities were relevant and sufficient (which is *more* than simply reasonable – see above)? Because, as the Court has always said, and as it also reiterates in this case (see paragraph 131), "the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts" (The Court did not go into an evaluation of the national authorities' assessment of the relevant facts, although this consideration might have been relevant.)

17. The principles quoted in the judgment refer to relevant and sufficient reasons as part of the consideration of the margin of appreciation. This makes sense, for example, when the national authorities provide reasons on the appropriateness of the means or the aims; if these are relevant the margin of appreciation may change and the level of scrutiny may diminish. In the present case, however, the requirement that relevant and sufficient reasons be given becomes detached from the margin of appreciation. A restriction of a Convention right, where the reasons for the limitation are not provided, is arbitrary and therefore cannot be held to be necessary in a democratic society. It is important for the rule of law and the exercise of rights that the restrictive measure itself contain reasons and that these are not made up *ex post facto*. It would be even less acceptable to allow this Court to speculate about possible reasons of its own motion.

42. The Court has concluded that the Estonian Supreme Court did provide relevant and sufficient reasons for the level of liability it applied. It reached this conclusion after considering the following relevant points: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company. These may be relevant, but there may be other relevant considerations as well. We will address only the sufficiency of some of these elements.

Publishers' liability extended: base economic interest

43. The Estonian Supreme Court's judgment is based on the assumption that an active intermediary is a publisher. The case-law of the Court has so far pointed in the opposite direction[18]. The international-law documents cited by the Court emphasise the importance of differentiation, given the specific nature of Internet technology. It has already been mentioned that such differentiation had been recognised a few months previously by the Estonian Supreme Court. However, in the present case, the Estonian Supreme Court equated publishers with active intermediaries: "[b]ecause of [their] economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator are publishers/disclosers as entrepreneurs" (see paragraph 112 of the present judgment). The Court sees no reason to call into question the above approach, although it notes there has been "a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audio-visual media, on the one hand, and Internet-based media operations, on the other. ... Therefore, the Court considers that because of the particular nature of the Internet, the 'duties and responsibilities' that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher as regards third-party content" (see paragraph 113). We could not agree more, but for us it is impossible to see how a recognition of difference may result in eliding publishers and active intermediaries on the sole basis of their commercial nature. The Court seems to accept as relevant and sufficient the position of the Estonian Supreme Court. In this approach, economic interest is sufficient for the identification of the active intermediary with a publisher, although the two were considered to be different just a sentence earlier. No explanation is offered as to how this is compatible with the point of reference of the Court, namely the Committee of Ministers' Recommendation CM/Rec(2011)7

18. See *Ashby Donald and Others*, cited above, § 34, and *Węgrzynowski and Smolczewski*, cited above, § 58.

(quoted in paragraph 46 of the present judgment), which calls for a "graduated approach" to apply to the intermediary. The additional reasons referred to in paragraphs 115 to 117 concern the nature of the expression and the size of the intermediary, which are neither relevant nor sufficiently connected to the liability of a traditional publisher.

44. To find that responsibility of the press (or of any speaker, for that matter) is enhanced by the presence of an economic interest does not sit comfortably with the case-law. It is true that the margin of appreciation is broader in the commercial sphere (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 61, ECHR 2012). "It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest" (see *Hertel v. Switzerland*, 25 August 1998, § 47, *Reports of Judgments and Decisions* 1998-VI). The fact that the original article and the comments section (offered to the general public for free!) is part of the economic activity of a news portal operator does not change the equation. The article and the related, dedicated comments section are protected because they facilitate and take part in a debate on a matter of public interest.

45. Over the last three hundred years, ideas have been generated for money and this has never been held to reduce the level of protection otherwise granted to speech. We do not live in the aristocratic world of the Roman *auctor* who could afford not to care about the financial return on ideas (though very often being dependent on imperial pleasure). It cannot be held against a newspaper or publisher that they operate an outlet as a commercial enterprise. One cannot expect the production of ideas for free. There will be no generation of ideas without adequate financial means; the material reward and the commercial nature of the press enterprise are not (and cannot be) grounds for diminishing the level of protection afforded to the press. Information is costly; its efficient communication is not a mere hobby. The same platform that has been understood as commercial, and thus subject to increased liability, is also a platform for enhanced, interactive discourse on a matter of public interest. This aspect has not been taken into consideration in the balancing exercise.

46. However, the Court does provide at least one relevant consideration for extending the liability of an active intermediary. It is certainly true that the active intermediary can exercise control over the comments that appear on its site and it is also true that by creating a comments section, and inviting users to participate, it engages in an expressive activity that entails responsibility. But the nature of the control does not imply identification with a traditional publisher.

47. There are additional differences between a publisher (understood here as a newspaper editor, someone who controls content) and an active intermediary:

(a) in a newspaper the journalist is typically an employee (although there are good reasons to protect a journalist against his or her editor/employer); and

(b) in principle, the editor is in a position to know in advance the content of an article to be published and has the decision-making power and the means to control the publication in advance.

Contrary to the case of a publisher, these elements are only partially present in the case of active intermediaries who host their own content and actively monitor all data (that is to say, are in a position to read it and remove it after the data are made accessible), as in the case of Delfi. The active intermediary has prior control only to the extent that this is made possible by a filtering mechanism. It also has the power to remove a message or block access to it. However, in normal circumstances the active intermediary has no personal control over the person who posts the message. The commenter is not the employee of the publisher and in most cases is not known to the publisher. The publication occurs without the decision of the editor. Hence the level of knowledge and control differs significantly.

48. Control *presupposes* knowledge. In this regard the difference between the editor/publisher and the active intermediary is obvious.

The level of responsibility

49. While Delfi cannot be defined as a publisher, the company does voluntarily provide an opportunity for people to post comments and, even if this activity is a matter of freedom of expression of a journalistic nature, this does not exempt the activity from liability. The Information Society Services Act does envisage such liability, among other things for storage, as is the case here. The Act bases liability on "actual knowledge" and entails a duty of expeditious removal. The Court found this to be insufficient.

50. The Court finds it to be a relevant and sufficient consideration that the Supreme Court limited the responsibility of the applicant company to post-publication liability. However, as quoted in paragraph 153 of the present judgment, the Supreme Court stated that the applicant company "should have *prevented* the publication of comments". The fact that it "also held" that there was a duty of removal after the disclosure does not change the first statement. Both pre- and post-disclosure liability are being advocated here and this cannot be disregarded when it comes to the evaluation of "sufficient reasons"[19]. It was under this standard that Delfi

19. We read the evaluation given by the Court as a declaration of lack of clarity with regard to the Supreme Court judgment: "Therefore, the Supreme Court did not explicitly determine whether the applicant company was under an obligation to prevent the uploading of the comments to the website or whether it would have sufficed under domestic law for the applicant company to have removed the offending comments without delay after

was found to be at fault for the disclosure of the information, which could not have been undone by removal upon request.

51. The duty to remove offensive comments without actual knowledge of their existence and immediately after they are published means that the active intermediary has to provide supervision 24/7. For all practical purposes, this is absolute and strict liability, which is in no sense different from blanket prior restraint. No reasons are given as to why only this level of liability satisfies the protection of the relevant interests.

52. Are there sufficient reasons for this strict liability[20], disguised by the fault rules of the Civil Code? The Court reviewed the precautionary measures applied by Delfi and found them inadequate. These were fairly standard measures: a disclaimer as to illegality, a filtering mechanism, the separation of the comments section from the article, and immediate removal upon notice. It was decisive for the Court that the filtering mechanism failed. There is no review of the adequacy of the filtering mechanism (was it state-of-the-art; can there be a duty to apply state-of-the-art systems; is there any reason for being held liable with a state-of-the-art filtering system?). The Court itself found that filtering must have been a simple task and that the system failed. No expert opinion, no cross-examination. We are simply assured that setting up a dedicated team of moderators is not "private censorship". There is no consideration of the possibility of less intrusive measures; only removal "without delay", that is, upon posting (see paragraph 159 of the present judgment), satisfies the goal of eliminating hate speech and its progeny[21]. This insatiable appetite for preventive protection results in circular reasoning: a publisher has a similar liability, therefore an active intermediary is like a publisher.

53. Neither the domestic courts nor the judgment provide sufficient and relevant reasons for a *de facto* strict liability rule. The Court was satisfied that it could find relevant and sufficient reasons in the Estonian Supreme Court's judgment in view of the extreme nature of the comments, the nature of the commercial operation, the insufficiency of the measures applied by the applicant company, the interest in ensuring a realistic prospect of the authors of such comments being held liable, and the mildness of the sanction. Apparently these are the reasons that compelled the Court to endorse constructive knowledge. The Court found that the absolute duty of

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publication to escape liability under the Obligations Act" (see paragraph 153 of the present judgment).

20. There is no way to exculpate the active intermediary as it should have known that illegal content had been posted and should have removed it immediately.

21. In a standard liability case the contribution of the victim is a matter for consideration. Delfi was blamed for the fact that the illegal content remained online for six weeks. Why did L. and his company not follow an article on a very important news portal concerning their economic activities and report these comments earlier?

immediate take-down on publication (as applied to the applicant company) was proportionate to the aim of protecting individuals against hate speech.

54. We would claim, in conformity with all the international documents cited, that an active intermediary which provides a comments section cannot have absolute liability – meaning an absolute duty of knowledge or, in practice, construed (constructive) knowledge. The protection of freedom of expression cannot be turned into an exercise in imposing duties. The "duties and responsibilities" clause of Article 10 § 2 is not a stand-alone provision: it is inserted there to explain why the exercise of the freedom in question may be subject to restrictions, which must be necessary in a democratic society. It is only part of the balance that is required by Article 10 § 2.

Balancing (lack of)

55. If one applies a balancing approach, then the other side of the balance must also be considered. According to the case-law, there must be proper consideration of the following factors, among others:

(a) the interference concerns the press and journalism. Delfi pursued journalistic activities, both in providing a news portal and by attaching a comments section to an article. Journalism is not exempt from liability, but it triggers stricter scrutiny. "[T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism" (see *Stoll v. Switzerland* [GC], no. 69698/01, § 103, ECHR 2007-V)[22]. There is no consideration of good faith in the judgment. Moreover, when it comes to online journalism and the responsibility of an active intermediary, due consideration must be given to the role of self-regulation of the profession;

(b) the Court has held that the "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are

22. The Court did not include this part of the established case-law in its analysis of journalistic responsibilities in paragraph 132 of the present judgment, where it mentions that the duty of the press "is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest". Here, the Court is dealing with a case involving a debate on a matter of public interest. This is not the place to express our doubts regarding the construction of press rights as duties, but we note that alternative language is also in use in our case-law: "Not only do the media have *the task* of imparting such information and ideas; the public also has a right to receive them" (see *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 56, ECHR 2000‑I; *Dupuis and Others v. France*, no. 1914/02, § 35, 7 June 2007; and *Campos Dâmaso v. Portugal*, no. 17107/05, § 31, 24 April 2008). See also *Axel Springer AG* (cited above), §§ 80 and 79.

particularly strong reasons for doing so" (see *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298). The Court has found this to be a relevant principle and we agree that this is of importance for the press, including news portals and active intermediaries. However, this principle is simply not discussed in the judgment;

(c) the opening of a comments section provides a forum for the expression of views concerning public matters. As such it contributes to more robust speech, and enables others to receive and impart information that does not depend on centralised media decisions. Any restriction imposed on the means necessarily interferes with the right to receive and impart information (see, for example, *Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI);

(d) the debate was about a matter of public interest. The comments related to the highly controversial behaviour of a large corporation.

56. The Court is reluctant to consider the possibility of less intrusive means, but in our view at least some justification is needed to explain why only the equivalent of prior restraint and absolute liability satisfies the non-specific duties and responsibilities of active intermediaries.

57. Without speculating on the outcome of the balancing analysis, we note that these considerations have been left out. Where part of the required considerations were not included in the balancing exercise carried out by the domestic court, the Court must find a violation.

58. We do not intend to close our eyes to the problem of racist speech. The fact that the comments section technically facilitated the dissemination of racism should be part of the proportionality analysis. In fact, the comments section facilitates the dissemination of all views equally. However, we accept, even without specific evidence, that the more comments there are, the higher the likelihood that racist comments are made. We accept this, though only as a hypothesis, as no evidence to this effect was produced in the proceedings, or referred to by the Court.

59. Even assuming such increased likelihood of racist comments on comment sites (once again, a matter subject to proof), it remains appropriate to consider what the proper level of care is in the face of such risk. Perhaps the filtering mechanism was inadequate to meet this challenge. This was the position taken by the Court, without defining what the appropriate level of care would have been in 2006 in Estonia. We do not know and cannot know. The Court cannot replace the lack of a domestic analysis with its own analysis. Moreover, it is not for the Court to take on the role of national legislator. We cannot rule out that the need to fight racist speech (a matter of public order and not simply a personality right) might dictate a duty of care that would impose duties beyond the measures applied by Delfi. But the task of the Court is to determine whether the interference by the domestic authorities was actually based on proper and credible grounds. These are absent here; hence there was a violation of the Convention.

APPENDIX

We trust that this is not the beginning (or the reinforcement and speeding up) of another chapter of silencing and that it will not restrict the democracy-enhancing potential of the new media. New technologies often overcome the most astute and stubborn politically or judicially imposed barriers. But history offers discouraging examples of censorial regulation of intermediaries with lasting effects. As a reminder, here we provide a short summary of a censorial attempt that targeted intermediaries.

In Reformation England, the licensing system of the Catholic Church was taken over by the State and it became a State tool for control of all printed publications. Licensing provided the Crown with "censorship prior to publication and easy conviction of offenders"[23]. These laws cut seditious material off at the place of mass production – the printer. Initially involving prosecution by the Star Chamber, the licensing scheme punished any printer who failed to receive a licence for the material he intended to print (a licence conditional on royal approval). With the abolition of the Star Chamber there was a brief end to the licensing laws during the English Civil War. Parliament, however, did not like the spreading of radical religious and political ideas. It decided to replace Crown censorship with its own, also in order to protect the vested business interests of the printers' guild. The result was the Licensing Order of 14 June 1643, which reintroduced for Parliament's benefit the previously despised order of the Star Chamber Decree (prepublication licensing; registration of all printed material with the names of author, printer and publisher; search, seizure and destruction of any books offensive to the government; and punishment of printers and publishers). Post-revolution, people tend to reinvent the same tools of oppression that the revolutionaries stood up against. (See also the Alien and Sedition Act enacted in the United States.) The Stationers' Company was given the responsibility of acting as censor, in return for a monopoly on the printing trade. The licensing system, with the financial interest of the publishers'/printers' guild, was a more effective censor than seditious libel laws.

This restored licensing system became John Milton's target in *Areopagitica: A Speech of Mr John Milton for the Liberty of Unlicens'd Printing* in November 1644. It was resistance to the self-censorship imposed on intermediaries (the printers) that produced *Areopagitica*, the first and most important manifesto of freedom of expression. *Areopagitica* attempted to persuade Parliament that licensing had no place in the free pursuit of truth. It argued that an unlicensed press would lead to a marketplace of ideas

23. Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press", 37 *Stanford Law Review* 661, 673 (1985). See also John Feather, *A History of British Publishing*, Routledge, second edition (2002).

in which truth might prevail. It could not undo the bigotry of Parliament. We hope that it will have more success today.