European Court of Human Rights: Delfi AS v. Estonia

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On 10 October 2013, the European Court of Human Rights found that one of Estonia's largest news portals on the Internet, Delfi, is not exempt from liability for grossly insulting remarks in its readers' online comments. The news portal was found liable for violating the personality rights of the plaintiff (a captain of industry), although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The European Court, in a unanimous decision, found no violation of Article 10 ECHR.

The European Court accepted the Estonian authorities' approach that Delfi's news portal is to be considered as a publisher, rather than as an internet service provider (ISP). The consequence is that, as a publisher, Delfi could not rely on the specific provisions of the Directive 2001/31/EC on Electronic Commerce (Art. 14-15) and the Estonian Information Society Services Act (Sections 10-11) exempting internet service providers, including host-providers, from liability in cases where they expeditiously remove or disable access to content emanating from third parties, as soon as they obtain knowledge or become aware of the illegal nature of the information. The E-Commerce Directive and the Estonian Act also guarantee that no general obligation to monitor should be imposed on the internet service providers, nor a general obligation to seek facts or circumstances indicating illegal activity. The general principle is indeed that expeditious removal upon (notified) knowledge of illegal content exempts the ISP from liability. The reason why Delfi could not rely on the ISP liability exemption is that the news portal had integrated the readers' comments into its news portal and that it had invited the users to post comments, having also an economic interest in exploiting its news platform with the integrated comment environment. Because Delfi was considered a provider of content services, rather than a provider of technical services, it should have effectively prevented clearly unlawful comments from being published. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the effects of the non-treating of Delfi as an ISP were compatible with Article 10 of the Convention.

The Court found that the interference with Delfi's right to freedom of expression was prescribed by law and was necessary in a democratic society to protect the rights of others. This finding was based on a set of arguments. The Court considered that Delfi should have anticipated that the users' comments could go

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beyond the boundaries of acceptable criticism and that therefore it should have taken steps in order to avoid being held liable for an infringement of other persons' reputations. Next, the Court is of the opinion that the word-based technical filter that was installed to delete vulgarities, threats or obscene expressions, was shown to be insufficient. Also the notice-and-take-down facility according to which anyone, by simply clicking on a button designed for that purpose, could notify inappropriate comments to the administrators of the portal, had not prevented the grossly insulting comments from being published on the platform. The Court is of the opinion that Delfi exercised a substantial degree of control over the comments published on its portal, although it did not make as much use of this possibility as it could have done. As Delfi allowed comments by non-registered users, and as it would appear disproportionate to put the onus of identifying authors of the offensive comments on the injured person, the Court is of the opinion that Delfi must be considered to have assumed a certain degree of responsibility for these comments and that it should have prevented defamatory or insulting statements from being made public. The Court refers to the danger that information once made public on the internet will remain and circulate forever. Finally the Court noted that Delfi was ordered to pay EUR 320 in non-pecuniary damages, being by no means a disproportionate sanction for a professional media platform such as Delfi. Based on these elements and "in particular the insulting and threatening nature of the comments" the Court came to the conclusion that the Estonian courts' finding that Delfi was liable for the defamatory comments posted by readers on its Internet news portal was a justified and proportionate interference with Delfi's right to freedom of expression.

Judgment by the European Court of Human Rights (First Section), case of Delfi AS v. Estonia, Appl. No. 64569/09/07 of 10 October 2013

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