European Court of Human Rights: Delfi AS v. Estonia (Grand Chamber)

IRIS 2015-7:1/1

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On 16 June 2015, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered the long-awaited final judgment in the case of Delfi AS v. Estonia, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles. It was the first case in which the European Court has been called upon to examine, from the perspective of the right to freedom of expression, a complaint about liability for user-generated comments on an internet news portal. By a Chamber judgment of 10 October 2013, the ECtHR had first unanimously held that there had been no violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights (see IRIS 2014-1/2). The Court confirmed the findings by the domestic courts that the Delfi news platform was to be considered a provider of content services, rather than a provider of technical services, and that therefore it should have effectively prevented clearly unlawful comments from being published. The fact that Delfi had immediately removed insulting content after having received notice of it did not suffice to exempt Delfi from liability. The reason why Delfi could not rely on the limited liability regime for internet service providers (ISPs) of Article 12 to 15 of the Directive 2001/31/EC on Electronic Commerce (no liability in case of expeditious removal after obtaining actual knowledge of illegal content and no duty of pre-monitoring) was, according to the Estonian courts, that the news portal had integrated the readers' comments into its news portal, it had some control over the incoming or posted comments and it had invited the users to post comments, while it also had an economic interest in exploiting its news platform through the integrated comment environment. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the effects of refusing to treat Delfi as an ISP were compatible with Article 10 of the Convention. The Chamber's judgment however did not become final as, on 17 February 2014, the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber of the ECtHR (see IRIS 2014-4/1).

The Grand Chamber has now confirmed the non-finding of a breach of Article 10 of the Convention, on very similar, but not identical grounds as those given in the Chamber's judgment. The Grand Chamber started by considering that the case concerns the "duties and responsibilities" of Internet news portals, under Article 10 paragraph 2 of the Convention, when they provide for economic purposes a

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platform for user-generated comments on previously published content and some users - whether identified or anonymous - engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Grand Chamber is of the opinion that the Estonian courts' finding of liability against Delfi was a justified and proportionate restriction on the portal's freedom of expression. The Court agreed that the Information Society Services Act transposing the E-Commerce Directive into Estonian law, including the provisions on the limited liability of ISPs, did not apply to the present case, since the latter related to activities of a merely technical, automatic and passive nature, while Delfi's activities reflected those of a media publisher running an internet news portal. Delfi's involvement in making public the comments on its news articles on its news portal went beyond that of a passive, purely technical service provider. The Grand Chamber was of the opinion that the interference by the Estonian authorities in Delfi's freedom of expression was sufficiently foreseeable and sufficiently precisely prescribed by law and was justified by the legitimate aim of protecting the reputation and rights of others. While the Court acknowledged that important benefits can be derived from the Internet in the exercise of freedom of expression, it was also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained as an effective remedy for violations of personality rights.

The Court emphasised that the case concerned 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. The Grand Chamber agreed with the Chamber's finding that Delfi must be considered to have exercised a substantial degree of control over the comments published on its portal. It noted that Delfi cannot be said to have wholly neglected its duty to avoid causing harm to third parties, but that the automatic word-based filter used by Delfi 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 recalled that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats: they were manifest expressions of hatred and blatant threats to the physical integrity of the insulted person. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments that can be qualified as "hate speech" and do not constitute protected speech under Article 10 of the Convention. The Court noted that, as a consequence of this failure of the filtering mechanism, such clearly unlawful comments remained online for six weeks. The Court considered 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". The Grand Chamber attached weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the

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

It is important to draw attention to one of the Grand Chamber's considerations that the Delfi case does not affect "other fora on the Internet" where third-party comments can be disseminated, for example Internet discussion fora or bulletin boards where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager. The Grand Chamber's finding is also not applicable to a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby. The Court indeed emphasised very strongly that the case concerned a professionally managed Internet news portal, run on a commercial basis.

The Grand Chamber also made clear that the impugned comments in the present case mainly constituted hate speech and speech that directly advocated acts of violence. Hence, the establishment of their unlawful nature did not require any linguistic or legal analysis by Delfi, since the remarks were on their face manifestly unlawful. According to the Grand Chamber its judgment is not to be understood as imposing a form of "private censorship".

Judgment by the Grand Chamber of the European Court of Human Rights, case of Delfi AS v. Estonia, Appl. No. 64569/09/07 of 16 June 2015

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