

Delfi AS v. Estonia - 64569/09
Judgment 10.10.2013 [Section I]

Background

The case arose as a result of a defamation claim against a newspaper internet site which hosted user comments. It was the anonymous comments of a user in response to a story that the newspaper had run that were defamatory. The story was published in January 2006; in March the majority shareholder of the company the subject of the story ('L') objected. L's lawyers contacted Delfi asking Delfi to take down the comments and to pay damages. Delfi took down the comments on the same day it received the request, but refused the claim for damages.

The matter then came before the courts with L being successful, but awarded a much smaller sum in damages that had been originally claimed. The national court held that the remarks in issue were defamatory, that Delfi should be considered the publisher because it had control over the content of the site and that moreover it did not fall within the intermediary exceptions in the e-Commerce Directive (Directive 2000/31/EC). Further, the domestic courts noted that Delfi drew profits from the comments section of its website. The domestic courts concluded that while Delfi responded swiftly to the request to take comments down, it should have taken clearly unlawful comments down of its own initiative.

ECHR Chamber Decision

Delfi complained that finding it liable for the comments of its users infringed its freedom of expression rights under Article 10 ECHR. In a unanimous decision, the chamber found that there had been no violation and it broadly accepted the reasoning of the national courts. The Court held that the finding of liability by the Estonian courts was a justified and proportionate restriction on the portal's right to freedom of expression. It identified the following factors:

- the comments were highly offensive;
- the portal failed to prevent them from becoming public, profited from their existence, but allowed their authors to remain anonymous; and
- the fine imposed by the Estonian courts was not excessive.

While Delfi argued that it should have been exempt from liability under the e-Commerce Directive, the Court commented that it did not rule on matters of national law and that its role was 'ascertaining whether the effects of such an interpretation are compatible with the Convention' (para 74). In this it followed long-standing jurisprudence. Equally in applying the three stage test in Article 10(2), it was applying established principles in terms of the identification of a legitimate aim; lawfulness and 'necessary in a democratic society'.

The Court took a reasonably tough stance as regards whether the application of the rules were foreseeable enough to satisfy the 'lawful' test. It commented, 'that, as a professional publisher, the applicant company must at least 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, and also that a degree of notoriety has been attributable to comments posted in its commenting area. 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' (para 76).

It phrased the test for ‘necessary in a democratic society’ as being ‘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’ (para 81). Relevant factors to take into account are ‘contribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed’ (para 83). In carrying out the balancing the court noted that while the story itself was balanced and on a matter of public interest:

by publishing the article in question, could have realised that it might cause negative reactions against the shipping company and its managers and that, considering the general reputation of comments on the Delfi news portal, there was a higher-than-average risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech. It also appears that the number of comments posted on the article in question was above average and indicated a great deal of interest in the matter among the readers and those who posted their comments. Thus, the Court concludes that the applicant company was expected to exercise a degree of caution in the circumstances of the present case in order to avoid being held liable for an infringement of other persons’ reputations. (para 86)

The issue then turned into to one of the company’s ‘duty of diligence’ in preventing harm, in respect of content from which Delfi made money (a pertinent factor according to the Court in assessing proportionality) and over which the company had control (given it set the news agenda). The Court also noted ‘the importance of the wishes of Internet users not to disclose their identity in exercising their freedom of expression. At the same time, the spread of the Internet and the possibility – or for some purposes the danger – that information once made public will remain public and circulate forever, calls for caution’.

Criticism

The decision has been criticised for not considering the role of intermediaries and for equating the site to being a publisher, specifically in relation to the comments of users. The implication of the application of journalistic ethics stands to user generated content and the duty to prevent harm suggest that far from being neutral, pro-active monitoring by intermediaries should be carried out. This is problematic given the volume of comments and other material that some sites deal with. How general an obligation this is was unclear in the judgment: the Court had highlighted the fact that Delfi was a professional news organisation, it set the news agenda and it made money from the site (or specifically from the user generated sections of the site). The relative weight of these factors was not elaborated. From a newspaper’s perspective there are three worrying aspects:

- the notice and take down system used by Delfi was not sufficient. Given that Delfi took down material as soon as it was notified of it, it would be very difficult to rely on a notice and take down system generally (and this is what a lot of sites use given the structure of the e-Commerce Directive, as well as national laws relating to defamation).
- The Court implied that greater care is required where anonymous postings are allowed, because the site operator would be unable to shift the liability on to the poster.
- Thirdly, the court held that a site should be able to predict when defamatory comments will be placed on its site after a story.

In this case, it seems that the intermediary was in the position of having to justify doing nothing, rather than the State justifying the interference with freedom of expression.

Some commentators have made much of an alleged incompatibility of the Court's ruling with the ECJ's approach in e-Commerce, which specifically states that pre-emptive monitoring should not be required. For example, *Netlog* (Case C-360/10) concerned a social networking site which received a request from SABAM, the Belgian copyright society, to implement a general filtering system to prevent the unlawful use of musical and audio-visual work by the users of its site. In addition to confirming the prohibition in Art 15 on monitoring, the ECJ noted that a filter might not be able to distinguish between lawful and illegal content, thus affecting users' freedom of expression (access to information). In this the ECJ seems to be reflecting the position the ECtHR took in *Yildirim*, regarding 'collateral censorship'. There is a limitation on carrying the ideas in *Netlog* across to *Delfi* in that the rules in Article 15 apply to neutral intermediaries and it is unclear whether the ECJ would find a news site to be neutral in this sense.

In *L'Oreal* (Case C-324/09), the Court held that the Article 14 exemption should not apply where the host plays an "active role" in the presentation and promotion of offers for sale posted by its users so as to give it knowledge of, or control over, related data. Further, if a host has knowledge of facts that would alert a "diligent economic operator" to illegal activity, it must remove the offending data to benefit from the Article 14 exemption. In *the Google Adwords case* (Joined Cases C-236/08, C-237/08 and C-238/08), the ECJ held that the test for whether a service provider could benefit from Article 14 ECD was whether it was "neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores" (para 114).

Applying these tests in *Papasavvas v O Fileleftheros*, a case concerning on-line defamation in relation to a news story posted by a newspaper on its site, the ECJ ruled:

Consequently, since a newspaper publishing company which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an 'intermediary service provider' within the meaning of Articles 12 to 14 of Directive 2000/31, whether or not access to that website is free of charge. [45]

There are some similarities to the Strasbourg court's reasoning, in that both courts point to the idea about control over information. There are differences, however, in that the control over the defamatory material in *Papasavvas* was much more direct than in *Delfi*, and the predictive abilities of newspapers about their audience's response to stories not in issue. Nonetheless, it is far from clear that the ECJ would reject the agenda-setting argument the Strasbourg court used, especially given its reasoning in *L'Oreal* regarding the 'promotion' of particular content and the requirements of a diligent economic operator.