

## The Court's subtle approach of online media platforms' liability for user-generated content since the 'Delfi Oracle'

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On 18 June 2015 Strasbourg Observers published [our blog post](#) '*Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers*'. It situated and commented the Grand Chamber judgment of 16 June 2015 in the first case before the European Court of Human Rights on online media liability for user-generated content. In particular the application and impact of Article 10 ECHR was tested with regard to the liability of an online news portal for offensive (anonymous) comments posted by its readers below an online news article (see the Grand Chamber judgment in [Delfi AS v. Estonia](#)). The Grand Chamber, by fifteen votes to two, found the imposition of liability of the Estonian news portal justified and proportionate, in particular because the users' comments had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis. The circumstance that Delfi had immediately removed the offensive content after having received notice of it, did not suffice to exempt Delfi from liability. Now this blog post, nearly five years after the final Delfi judgment, focusses on the impact of the Delfi case and gives a short overview of the further developments in the Court's case law determining the scope of liability of internet platforms or other online intermediaries for user-generated content. Finally we refer to the initiative by the Committee of Ministers of the Council of Europe recommending the member states to respect and apply a set of guidelines when implementing the legislative frameworks relating to internet intermediaries, including some principles guaranteeing users' rights to freedom of expression in the online environment.

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### The Grand Chamber's judgment

In an earlier stage of the procedure, the Human Rights Centre (HRC) of Ghent University had expressed its support for the request for referral to the Grand Chamber, after the First Section in its judgment of 10 October 2013 had found no violation of the right to freedom of expression in this case (see the chamber judgment in [Delfi AS v. Estonia](#), and our [critical post](#) on Strasbourg Observers). The HRC submitted its considerations in a [joint letter](#) to the European Court of Human Rights, signed by a list of 69 media organisations, internet companies, human rights groups and academic institutions, endorsing Delfi's request for a referral due to the concern that the chamber judgment of 10 October 2013 would have serious adverse repercussions and a censoring impact on the right to freedom of expression in the digital era. One and a half years later the Grand Chamber delivered its final judgment in this case.

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In essence, the *Delfi AS* judgment of 16 June 2015 considered the monitoring and removal of user comments taken on initiative of the provider of an online platform with user-generated content (UGC) as the necessary way to protect the rights of others, at least in cases where it concerned 'hate speech', including incitement to violence. The Grand Chamber emphasized the professional and

commercial character of the news platform at issue, together with the clearly unlawful content of the readers' comments as decisive arguments in order to justify the finding of the liability of the internet news portal for their readers' offending comments. The ECtHR held 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'.

Building on these principles and findings the ECtHR came to the conclusion that the Estonian courts' imposition of liability on Delfi AS, rather as a publisher and not as an internet service provider, 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. Accordingly, the Grand Chamber found that there had been no violation of Article 10 ECHR.

The Grand Chamber at the same time tried to limit the impact of its judgment by clarifying that the case did 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 channeled by any input from the forum's manager. Consequently, the Grand Chamber's judgment was neither applicable on a social media platform where the platform provider does not offer any content, nor in cases where the content provider is a private person running the website or a blog 'as a hobby'. By restricting the impact of its judgment both to hate speech and 'clearly unlawful content' with a direct threat to the physical integrity of individuals and to professional, commercially run online news platforms with UGC, the question remained how the Court would decide on the liability in other circumstances than those of the *Delfi* case.

#### Post-Delfi case law

On 2 February 2016, in [Maqyar Tartalomszolgáltatók Egyesülete \(MTE\) and Index.hu Zrt v. Hungary](#) (see our blog with Eva Lievens, [here](#)), the Court took the occasion to answer this question and it clarified the impact of the Delfi Grand Chamber judgment in a case which did not concern a form of hate speech nor direct threats against the physical integrity of individuals, but 'only' wanton insults and vulgar opinions, criticizing the business policy and commercial practices of a corporate company. In *MTE and Index.hu Zrt v. Hungary* the operators of two websites had immediately removed a series of offending comments once they were notified of the civil proceedings initiated against them by a corporate company. Still, MTE and Index.hu were held liable for the insulting comments at issue. The domestic courts rejected the applicants' argument that they were only intermediaries and that their sole obligation was to remove certain content, in case of a complaint or notification. Since the comments were injurious to the plaintiff, the operators of the websites bore objective liability for their publication. MTE and Index.hu Zrt complained that the rulings of the Hungarian courts establishing objective liability on Internet websites for the contents of users' comments amounted to a violation of the right to freedom of expression as provided in Article 10 ECHR. They argued that the application of the 'notice-and-take-down' rule, as a characteristic of the limited liability for internet hosting providers, was the adequate way of enforcing the protection of reputation of others.

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The European Court of Human Rights confirmed its Delfi-approach that Internet news portals, in principle, must assume duties and responsibilities. However, because of the particular nature of the Internet, these duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party content. Most crucially the ECtHR stated that by establishing objective liability on the side of the Internet websites, merely for allowing unfiltered comments that might be in breach of the law, would require 'excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet'. More than in Delfi, the Court in *MTE and Index.hu Zrt v. Hungary* considered the negative consequences of holding Internet portals liable for third-party comments, clarifying that

'such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet'.

And it added: 'This effect could be particularly detrimental for a non-commercial website, such as the first applicant'.

The ECtHR was of the opinion that the comments on MTE and Index.hu were related to a matter of public interest, being posted in the context of a dispute over the business policy of the real estate company. It also observed that the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals. The ECtHR noticed that the applicants had taken certain measures to prevent defamatory comments on their portals or to remove them: they had a disclaimer in their general terms and conditions and had a notice-and-take-down system in place, whereby anybody could indicate unlawful comments to the service provider so that they be removed. The ECtHR came to the conclusion that the rigid stance of the Hungarian courts imposing liability in such circumstances as in the case of MTE and Index.hu reflected a notion of liability which effectively precluded the balancing between the competing rights under Articles 8 and 10 ECHR. Hence, the Court found that imposing liability on MTE and Index.hu for the offensive comments posted by their readers on their respective websites amounted to a violation of Article 10 ECHR.

In *MTE and Index.hu Zrt v. Hungary* the ECtHR has also developed and applied five relevant criteria for the assessment of the proportionality of an interference in situations of platform liability not involving hate speech or calls to violence. These criteria are: (1) the context and content of the impugned comments, (2) the liability of the authors of the comments, (3) the measures taken by the website operators and the conduct of the injured party, (4) the consequences of the comments for the injured party, and (5) the consequences for the applicants.

By developing, explaining and applying these criteria the ECtHR has established some valuable guiding principles in dealing with the duties and responsibilities of Internet intermediaries in terms of liability for user generated content, especially when posted by anonymous users (for an analysis of the 'autopoeitic' narrative of this case law, see [here](#)). These principles and criteria are reflected in more recent case law, such as in [Rolf Anders Daniel Pihl v. Sweden](#), [Payam Tamiz v. the United Kingdom](#) and [Høiness v. Norway](#). These cases all concern complaints for alleged violations of the applicants' right to privacy and reputation by an Internet portal and the findings by the domestic

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courts that there was no need for further action against or compensation by the internet intermediaries. In all three cases the ECtHR, applying the reasoning and principles developed in *MTE and Index.hu Zrt v. Hungary*, found that there was no breach of Article 8 ECHR. In each of these cases, the ECtHR observed that the impugned comments did not amount to hate speech or incitement to violence, hence limiting, as the domestic courts had done, the liability of the internet platform or the operator of a blog when it concerns defamation, and not incitement to violence.

#### Also limited liability for hyperlinking

In a judgment of 8 December 2018, in *Magyar Jeti Zrt v. Hungary*, the ECtHR took the opportunity to clarify that holding media companies automatically liable for defamatory content hyperlinked in their reports violates their right to freedom of expression under Article 10 ECHR (see blog [here](#)). The Court referred to the very purpose of hyperlinks to allow Internet-users to navigate to and from online material and to contribute to the smooth operation of the Internet by making information accessible through linking it to each other. The ECtHR cannot accept a strict or objective liability for media platforms embedding, in their editorial content, a hyperlink to defamatory or other illegal content. It finds that objective liability such as applied in the case at issue 'may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control'. Inspired by *MTE and Index.hu Zrt v. Hungary* the ECtHR found that such an objective liability 'may have, directly or indirectly, a chilling effect on freedom of expression on the Internet'. The ECtHR however did not exclude that, 'in certain particular constellations of elements', the posting of a hyperlink may potentially engage the question of liability, for instance where a journalist does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism.

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#### In search of a subtle balance

With *Delfi AS v. Estonia* and the succeeding judgments and decisions on liabilities for online platforms with user-generated content and hyperlinking, the ECtHR has tried to find a subtle balance and develop some relevant criteria in applying Article 10 ECHR, without neglecting the right of others, especially those who are targeted, offended, insulted or threatened by user-generated content on the Internet. The Court however has not fully succeeded to take the consequence of its consideration that the obligation to (pre-)monitor, filter and remove certain types of 'clearly unlawful' comments by users on online platforms puts an 'excessive and impracticable' burden on the operators and risks to oblige them to install a monitoring system 'capable of undermining freedom of the right to impart information on the Internet'.

In the meantime, the principles and criteria developed in the European Court's case law have been integrated and further developed in the [Recommendation CM/Rec\(2018\)2](#) of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries (7 March 2018). One example is in the principles (1.3.7) of the Recommendation where

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'States should ensure, in law and in practice, that intermediaries are not held liable for third-party content which they merely give access to or which they transmit or store. State authorities may hold intermediaries co-responsible with respect to content that they store if they do not act expeditiously to restrict access to content or services as soon as they become aware of their illegal nature, including through notice-based procedures. State authorities should ensure that notice-based procedures are not designed in a manner that incentivises the takedown of legal content, for example due to inappropriately short timeframes'.

However, when internet intermediaries act more as a publisher, other principles will be applicable. According to principle 1.3.9. of the Recommendation

‘where intermediaries produce or manage content available on their platforms or where intermediaries play a curatorial or editorial role, including through the use of algorithms, State authorities should apply an approach that is graduated and differentiated, in line with Recommendation [CM/Rec\(2011\)7](#) of the Committee of Ministers to member States on a new notion of media. States should determine appropriate levels of protection, as well as duties and responsibilities according to the role that intermediaries play in content production and dissemination processes, while paying due attention to their obligation to protect and promote pluralism and diversity in the online distribution of content’.

In the near future, the ECtHR will certainly be confronted with new challenges and developments in relation to online freedom of expression, such as the politics in more and more European countries of imposing additional liability on internet platforms for ‘fake news’, ‘disinformation’ and ‘hate speech’. The principles and criteria developed in *Delfi AS v. Estonia* and in *MTE and Index.hu v. Hungary* combined with the guiding principles expressed in the Council of Europe Recommendation CM/Rec(2018)2 are expected to safeguard the right to freedom of expression in the digital world. It will be crucial that the ECtHR holds the position that interferences that have directly or indirectly a chilling effect on freedom of expression on the Internet and on debates about matters of public interest cannot be justified in a democratic society.

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