

the whole, only administered each others' repertoires for the home country of the administrating collecting society.

Despite the obvious benefits of the joint venture, the Commission's investigation identified that the transaction raised serious doubts as to its compatibility with the common market in relation to the provision of copyright administration services to larger publishers. These publishers typically license the mechanical rights themselves and license the performing rights via a mandate from the PRSfM, but rely on collecting societies for administration services. Without commitments, post-merger, the Commission had concerns that the parties could have obliged these publishers to source all their administration services from the joint venture and not use any competing collecting society for such services. The Commission was also concerned that the merger would bundle administration services or impose exclusivity clauses, all of which would foreclose competing collecting societies from the market.

However, the Commission ultimately cleared the transaction under Article 8(2) EU Merger Regulation, on the basis of behavioural commitments offered by the parties. In particular, the parties committed to maintain market access for competing collecting societies by offering copyright administration services to other collecting societies on fair reasonable and non-discriminatory terms compared with the terms offered to the JV parents, not imposing exclusivity provisions in its contracts, not forcing large publishers or service providers to obtain their copyright administration services from the joint venture and lastly not to impose barriers to switching.

Analysis

This joint venture is of particular significance because it represents a step towards reducing barriers to online trade between Member States, which is the Commission's stated aim in carrying out its e-commerce sector enquiry and in its imminent review of copyright rules across the EU.

The joint venture is also notable in that the commitments accepted by the Commission are behavioural commitments. In general the Commission prefers structural commitments that remedy its concerns with one clean 'strike', while behavioural commitments often need to be scrutinized by a monitoring trustee and involve an ongoing obligation for the parties.

Practical significance

The joint venture is a step closer to pan-European licensing. Before this joint venture, online platforms needed to obtain a licence from each collecting society across multiple territories. Similarly, this will be the first time that numerous collecting societies provide copyright administration services on a multi-territorial basis.

The joint venture is the next step in opening up competition between collecting societies for the provision of licensing

and copyright administration services across Member States. This has been a vexed issue between the Commission and collecting societies for a long time. For years the Commission has been trying to untangle the knot of reciprocal representation agreements which entrenched licensing and administration of copyright protected musical rights along national boundaries. The latest development in this 'battle' has been the publication of the Collective Management Directive, setting out certain 'rights' of rights holders which prevent collecting societies partitioning the licensing and administration of copyright protected musical works across national boundaries.

What does the future hold?

It is unclear how this brave new world for collecting societies will play out in practice, or whether the Collective Management Directive will fulfil its aim of fostering competition between collecting societies by providing rights holders with the right to switch to a different society irrespective of the territory of their residency or that of the collecting society. The new rules may mean that rights holders will switch to those collecting societies providing the biggest repertoires and the deepest pockets to deliver pan-European administration services to the detriment of smaller collecting societies.

What is certain is that the impact of the Collective Management Directive is just beginning to be felt. It may well encourage more innovative outcomes along the lines of the above joint venture. It is, however, unlikely to mark the end of the tussle between the Commission and collecting societies. Furthermore, the Commission's review of copyright is also likely to have a significant impact on the administration of copyright across the European Union going forward.

Elisabetta Rotondo

Bristows

Email: elisabetta.rotondo@bristows.com

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■ General monitoring of third-party content: compatible with freedom of expression?

Delfi AS v Estonia, European Court of Human Rights, App. No. 64569/09, 16 June 2015

The European Court of Human Rights (ECtHR) has recently affirmed its earlier *Delfi AS v Estonia* decision of 2013, in which the court rejected the complaint of a news portal that was exposed to civil liability before notification in respect of third-party comments made on its website under one of the news items. The Grand Chamber has now upheld the ruling, according to which the imposition of a general obligation to control third-party content can

in some circumstances constitute a justified interference with the intermediary's freedom of expression.

Legal context

According to Article 10 of the European Convention on Human Rights, 'Everyone has the right to freedom of expression' and '[t]his right . . . include[s] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

Facts

Delfi is one of the largest news portals in Estonia, publishing up to 330 news articles a day. Each news entry can be anonymously commented upon by users. The part for reading comments left by others was a separate area. The comments were uploaded automatically and were, as such, not edited or moderated. The articles received about 10 000 readers' comments daily, the majority of them posted under pseudonyms. Delfi had a system of notice-and-takedown in place and also used an automatic filtration system for comments that included certain stems of obscene words.

On 24 January 2006, comments appeared under an article on the Delfi portal with the headline 'SLK Destroyed Planned Ice Road'. Ice roads are toll-free public roads (bridges) over the frozen sea, which are open between the Estonian mainland and some islands in winter, when they serve as substitutes for the summer ferry service. SLK is a local monopolist operating ferries. The news entry described how SLK destroyed some of the ice roads in order to keep Estonian citizens dependent on its commercial ferries.

Mr L was a member of the supervisory board of SLK and the company's sole or majority shareholder at the material time. The article attracted 185 comments. About twenty of them contained personal threats and offensive language directed against Mr L. As a consequence, Mr L notified the internet news portal and requested damages. The portal removed the offensive comments on the same date, but refused to pay any damages. Three weeks later, Mr L brought a civil suit against the news portal.

The first instance court shielded the portal from liability, applying the hosting safe harbour of Art. 14 of the E-Commerce Directive. Mr L appealed. The second instance sided with him and opined that the safe harbour did not apply, because the provider was *not* merely passive. When the first instance *de novo* decided the case, applying this interpretation, it deemed the news portal ineligible for safe harbour and qualified it as a co-publisher of the comments. The news portal appealed. The second instance then confirmed the liability of Delfi for third-party comments.

The Supreme Court of Estonia confirmed the decision, stressing that Delfi had integrated the comment environment

into its news portal and invited users to post comments. Therefore, both Delfi and the authors of the comments were to be considered publishers. The court also found that, on the basis of its legal obligation to avoid causing damage to other persons (§§ 1043, 1045, 1046 of the Estonian Law of Obligations), Delfi should have prevented clearly unlawful comments from being published and, after the comments had been published, it had failed to remove them *on its own initiative*.

Delfi filed a complaint against the Supreme Court decision before the ECtHR, claiming that the imposition of this obligation violated its right to freedom of expression. The First Section of the ECtHR disagreed. On 10 October 2013, it held that the imposed civil liability was (i) sufficiently prescribed by the law, (ii) followed a legitimate aim of protecting the reputation of others and that (iii) Delfi's rights under Article 10 were not *excessively restricted* by holding it liable for comments posted by third parties before notification. The First Section, like the Estonian courts, attached great importance to the fact that the publication of the news articles and the very hosting of the readers' comments was part of Delfi's professional activity (*see* M. Husovec, 'ECHR Rules on Liability of ISPs as a Restriction of Freedom of Speech', *Journal of Intellectual Property Law & Practice*, 2014, Vol. 9 (2)).

The applicant, with significant support of civil society, requested that the case be referred to the Grand Chamber for reconsideration, in accordance with Article 43 of the Convention. This request was granted. The final ruling, upholding the earlier decision, was issued one and half years later, with seven judges concurring or dissenting.

Analysis

The court's task, in exercising its supervisory jurisdiction, was not to take the place of the competent national authorities but rather to review this general monitoring obligation under Article 10 of the Convention. The main question was whether the domestic courts' decisions, holding that the applicant company was liable for comments posted by third parties even before receiving notification of their illicit nature, went too far in limiting the freedom of expression as guaranteed by Article 10 of the Convention. Since the Estonian Supreme Court did not explicitly determine (i) whether the applicant company was under an obligation to prevent any *publication* of the comments on the website or (ii) whether it would have sufficed to remove the offending comments *without delay after publication*, irrespective of absence of a notice, the ECtHR:

proceed[ed] on the assumption that . . . the subsequent removal of the comments by the applicant company, without delay after publication, would have sufficed for it to escape liability under domestic law (§ 153).

As a starting point, the court acknowledged that ‘user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression’ (§ 110). Intermediaries also separately enjoy protection enshrined in Article 10 of the Convention with respect to third-party content which they process. Citing the documents of the Council of Europe, the court agreed as a starting point that the user-generated content posted on internet platforms should be treated differently from the editorial content of the traditional media. This:

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 (§ 113).

Therefore, the duties and responsibilities ‘may differ to some degree from those of a traditional publisher, as regards third-party content’ (§ 113). Before delving into the case, the court was very careful in stressing that it did not concern other forums on the internet where third-party comments can be disseminated, such as discussion forums, bulletin boards or social media platforms (§ 116). ‘It is hard to imagine how this “damage control” will help. Freedom of expression cannot be a matter of a hobby’, responded two dissenting judges who apparently did not find this unusual disclaimer of the court very useful.

After reviewing the facts of the case, the court confirmed that the initial article was balanced and that there was nothing objectionable about it (§ 140). The third-party comments, however, in the opinion of the court, mainly constituted hate speech and speech that directly advocated acts of violence, which did not enjoy the protection afforded by Article 10 (§ 140). This ‘unlawful speech’ then directly infringed a right to reputation guaranteed by Article 8 of the Convention. The ECtHR repeated several times that the comments were ‘clearly unlawful on their face’, which should have triggered a higher responsibility of the platform.

The court next agreed with the legal analysis of the Estonian Supreme Court which found that the news portal ‘exercised a substantial degree of control over the comments published on its portal’ (§ 145). The court inferred this from the following two facts: first, that the platform had a technical and legal possibility of removing the third-party comments and secondly that the actual authors of the comments could not modify or delete their comments once they were posted. These two factors together, in the opinion of the ECtHR, sufficiently established that the intermediary’s ‘involvement in making public the comments . . . went beyond that of a passive, purely technical service provider’

(§ 146), considerations that are also ‘relevant for the purposes of Article 10 of the Convention’.

In order to assess whether imposing such strict liability is necessary in a democratic society, the court considered the alternative remedy: liability of the authors of the comments. It reiterated its earlier case law (*K.U. v Finland* App no. 2872/02) on the positive obligation of the state to secure the identity disclosures of the alleged perpetrators, but found it to be of uncertain effectiveness, also because:

the release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to restrictive conditions (§ 148).

The court did *not*, however, consider other liability models for intermediaries. It only noted that:

[t]he Court attache[d] 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 (§ 157).

Referring to the earlier case law concerning traditional media (*Krone Verlags v Austria* (No. 4), App no. 72331/01), the court reiterated that the shift of the risk to the media company, which is usually in a better financial position (§ 151), was already accepted by the court as not amounting to a disproportionate interference with the media’s right to freedom of expression.

Consequently, the court summarized the proportionality analysis by concluding that, owing to (i) the professional nature of activities of an intermediary, (ii) its substantial degree of control over the comments and (ii) clearly unlawful hate speech of third parties,

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 (§ 159).

In the opinion of the court, an obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence can ‘by no means’ be equated to ‘private censorship’ (§ 157).

Practical significance

First, if the domestic *Delfi* decision was read as prescribing an obligation to pre-moderate every third-party comment before publication in order to avoid liability, ‘the outcome of the case might have been different’ (concurring opinion of the judges Raimondi, Karakas, De Gaetano and Kjolbro). It seems that the most of the judges of the Grand Chamber were convinced that lack of effective action to remove clearly unlawful hate speech on the platform’s own initiative, without waiting for a notice, amounted to culpable behav-

ious, rather like wilful ignorance or 'light' negligence (where the party in question 'ought to have known'). Even the two dissenting judges, who otherwise harshly criticized the decision, did not view this case as one of strict liability and also did not call the alleged active nature of the Delfi's services into question.

Although it is not the ECtHR's responsibility to remedy possibly incorrect applications of European Union law at a domestic level, it is striking that the court was willing to accept, without any proper analysis, what is arguably a very controversial application of the E-Commerce Directive. The Estonian Supreme Court used two main arguments to support the active character of Delfi's services. First, the newspaper is of a profit-making nature and comments contribute to its business; secondly, the newspaper designed the technical architecture and invited users to contribute. If the ECtHR had consulted CJEU case law, it would quickly learn that they are both irrelevant in determining the active nature of services (*L'Oréal v eBay* C-324/09, EU:C:2011:474, para 115). This is natural since, without commerce, you cannot have e-commerce with all its benefits for decentralized non-editorial speech. In this respect, it appears inconsistent that the ECtHR on one hand recognizes the refusal to file a preliminary reference to the CJEU as a potential breach of a right to fair trial (*Schipani v Italy* App no. 38369/09), but on the other hand ignores the same injustice in the quality of the legal analysis, even if argued by the parties. Moreover, it should be remembered that even after the ECtHR decision, it is still possible that Estonia be liable for breach of its international obligations, this time, however, for not properly transposing (giving effect to) the E-Commerce Directive (see *Franovich*, C-6/90, EU:C:1991:428).

In its ruling, the Grand Chamber basically confirmed some earlier findings of the First Section. First, it confirmed that non-existence of any remedy against an ISP could infringe the conflicting right (eg right to private life), because such right also imposes a certain obligation on the state to guarantee the effective protection of the right. Simply put, this means that instituting a legal environment entirely excluding intermediaries from any civil liability, such as under Section 230 of the Communication Decency Act in the United States, would not be compatible with the Convention. At the same time, however, the *Delfi* case does not mandate this type of intermediary liability as a part of a right to effective remedy. The fact that some remedy is needed cannot be read as an automatic requirement of the harshest of all—strict liability, which is inherent in the obligation to generally monitor third-party content. Even the court was very cautious to note in this respect that certain circumstances 'may entitle Contracting States', and not oblige them, to impose such liability.

Delfi is thus no contradiction to the E-Commerce Directive's safe harbours. It simply says that the existence of these safe harbours is not indispensable from the human rights perspective.

The part of the decision concerning a right to effective remedy might also be highly significant for intellectual property right holders, whose rights are guaranteed to a certain extent by virtue of Art. 1 of the First Protocol of the Convention. Only recently, the CJEU in *Coty Germany* significantly strengthened their right to third-party information based exactly on the argument of a right to effective remedy (*Coty Germany*, C-580/13, EU:C:2015:485). The court's comment that third-party identity disclosures from internet access providers 'would usually require an injunction by the investigative or judicial authorities and would be subject to restrictive conditions' can also prove to be important for the future interpretation of Article 8(3) of the Enforcement Directive. Although the Directive provides that the information can be collected only upon obtaining an order, some Member States implemented the right as also allowing disclosures without such a safeguard. *Delfi* could potentially limit such implementations of EU law by prescribing a court oversight on the basis of Convention.

The ECtHR claims to adhere to the framework that treats intermediaries hosting user-generated content differently from the traditional media for the purposes of determining their duties and responsibilities. Not even a few paragraphs later, however, the same court refers to its own case law concerning traditional media to justify the shift of risk to the pre-notification phase and thus also its acceptance of a general monitoring obligation. This demonstrates that the court seems to underestimate the importance of the distinction between editorial content of traditional media on one hand, and non-editorial decentralized speech of users on the other. The court wishes to have non-editorial content without fully relinquishing the last bits of editorial control. But if the ECtHR does not fully comprehend the importance of this distinction, there is little hope for the foreseeable future that the less specialized domestic courts will either. After all, *Delfi* can now serve as a trump card to overcome any threat to freedom of expression. It is hoped that the illuminating dissent of judges Sajó and Tsotsoria will prove more convincing in the test of time.

Martin Husovec

Tilburg University, The Netherlands

Email: martin@husovec.eu

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