

Dean Spielmann
President
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
France

13 January 2014

Re: Grand Chamber referral in *Delfi v. Estonia* (Application no. 64569/09)

Dear President Spielmann and members of the panel:

We, the undersigned 69 media organisations, internet companies, human rights groups and academic institutions write to support the referral request that we understand has been submitted in the case of *Delfi v. Estonia* (Application No. 64569/09). Signatories to this letter include some of the largest global news organisations and internet companies including Google, Forbes, News Corp, Thomson Reuters, the New York Times, Bloomberg News, Guardian News and Media, the World Association of Newspapers and News Publishers and Conde Nast; prominent European media companies and associations including the European Newspaper Publishers' Association, Sanoma Media Netherlands B.V. and the European Publishers Council; national media outlets and journalists associations from across the continent; and advocacy groups including Greenpeace, the Center for Democracy and Technology and ARTICLE 19.

We understand that the applicant in the above-referenced case has requested that the chamber judgment of 10 October 2013 be referred to the Grand Chamber of the Court for reconsideration. We are writing to endorse Delfi's request for a referral due to our shared concern that the chamber judgment, if it stands, would have serious adverse repercussions for freedom of expression and democratic openness in the digital era. In terms of Article 43 (2) of the Convention, we believe that liability for user-generated content on the Internet constitutes both a serious question affecting the interpretation or application of Article 10 of the Convention in the online environment and a serious issue of general importance.

The case involves the liability of an online news portal for third-party defamatory comments posted by readers on the portal's website, below a news item. A unanimous chamber of the First Section found no violation of Article 10, even though the news piece itself was found to be balanced and contained no offensive language. The portal acted quickly to remove the defamatory comments as soon as it received a complaint from the affected person, the manager of a large private company.

We find the chamber's arguments and conclusions deeply problematic for the following reasons.

First, the chamber judgment failed to clarify and address the nature of the duty imposed on websites carrying user-generated content: what are they to do to avoid civil and potentially criminal liability in such cases? The inevitable implication of the chamber ruling is that it is consistent with Article 10 to impose some form of strict liability on online publications for all third-party content they may carry. This would translate, in effect, into a duty to *prevent* the posting, for any period of time, of any user-generated content that may be defamatory.

Such a duty would place a very significant burden on most online news and comment operations – from major commercial outlets to small local newspapers, NGO websites and individual bloggers – and would be bound to produce significant censoring, or even complete elimination, of user comments to steer clear of legal trouble. The *Delfi* chamber appears not to have properly considered the implications for user comments, which on balance tend to enrich and democratize online debates, as part of the ‘public sphere’.

Such an approach is at odds with this Court’s recent jurisprudence, which has recognized that “[i]n light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.”¹ Likewise, in *Ahmet Yildirim v. Turkey*, the Second Section of the Court emphasised that “the Internet has now become one of the principal means of exercising the right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest”.²

Secondly, the chamber ruling is inconsistent with Council of Europe standards as well as the letter and spirit of European Union law. In a widely cited 2003 Declaration, the Committee of Ministers of the Council of Europe urged member states to adopt the following policy:

“In cases where ... service providers ... store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware ... of their illegal nature.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.”³

The same position was essentially adopted by the European Union through the Electronic Commerce Directive of 2000. Under the Directive, member states cannot impose on intermediaries a general duty to monitor the legality of third-party communications; they can only be held liable if they fail to act “expeditiously” upon obtaining “actual knowledge” of any illegality. This approach is considered a crucial

¹ *Times Newspapers Ltd v. the United Kingdom* (Nos. 1 and 2), Judgment of 10 March 2009, para. 27. See also *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Judgment of 5 May 2011.

² Judgment of 18 December 2012, para. 54.

³ Declaration on freedom of communication on the Internet, 28 May 2003, adopted at the 840th meeting of the Ministers’ Deputies.

guarantee for freedom of expression since it tends to promote self-regulation, minimizes the need for private censorship, and prevents overbroad monitoring and filtering of user content that tends to have a chilling effect on online public debate.

Thirdly, it follows from the above that the *Delfi* chamber did not thoroughly assess whether the decisions of the Estonian authorities were “prescribed by law” within the meaning of Article 10 § 2. Under the E-Commerce Directive and relevant judgments of the Court of Justice of the European Union (CJEU), it was not unreasonable for Delfi to believe that it would be protected by the “safe harbour” provisions of EU law in circumstances such as those of the current case.⁴ The chamber ruling sets the Court on a potential course of collision with the case law of the CJEU and may also give rise to a conflict under Article 53 of the Convention.

Finally, the chamber ruling is also at odds with emerging practice in the member states, which are seeking innovative solutions to the unique complexities of the Internet. In the UK, for example, the new defamation reforms for England and Wales contain a number of regulations applicable specifically to defamation through the Internet, including with respect to anonymous third-party comments. Simply applying traditional rules of editorial responsibility is not the answer to the new challenges of the digital era. For similar reasons, related among others to the application of binding EU law, a recent Northern Ireland High Court judgment expressly chose not to follow the *Delfi* chamber ruling.⁵

For all these reasons, we strongly urge the Court to accept the applicant’s request for a referral that would allow the Grand Chamber to reconsider these issues, taking into account the points raised by the signatories in this letter. There is no question in our minds that the current case raises “a serious question affecting the interpretation” of Article 10 of the Convention as well as “a serious issue of general importance” (Art. 43).

Sincerely,

Algemene Vereniging van Beroepsjournalisten in België
American Society of News Editors
ARTICLE 19
Association of American Publishers, Inc
Association of European Journalists
Bloomberg
bvba Les Journaux Francophones Belges
Center for Democracy and Technology
Conde Nast International Ltd.

⁴ The CJEU has ruled, with reference inter alia to Article 10 ECHR, that an Internet service provider cannot be required to install a system filtering (scanning) all electronic communication passing through its services as this would amount to a preventive measure and a disproportionate interference with its users’ freedom of expression and information. See *Scarlet v. Sabam*, Case C-70/10, Judgment of 24 November 2011; and *Netlog v. Sabam*, Case C-360/10, Judgment of 16 February 2012.

⁵ *J19 & Anor v Facebook Ireland* [2013] NIQB 113 (15 November 2013), at <http://www.bailii.org/nie/cases/NIHC/QB/2013/113.html>.

Daily Beast Company, LLC
Digital First Media, LLC
Digital Media Law Project, Berkman Center for Internet & Society - Harvard
University
Digital Rights Ireland
Dow Jones
Electronic Frontier Finland
Estonian Newspapers Association (Eesti Ajalehtede Liit)
EURALO (ICANN's European At-Large Organization)
European Digital Rights (EDRi)
European Information Society Institute (EISi)
European Magazine Media Association
European Media Platform
European Newspaper Publishers' Association (ENPA)
European Publishers Council
Federatie van periodieke pers, the Ppress
Forbes
Global Voices Advocacy
Google, Inc.
Greenpeace
Guardian News & Media Limited
Human Rights Center, Ghent University
Hungarian Civil Liberties Union
iMinds-KU Leuven, Interdisciplinary Centre for Law and ICT
Index on Censorship
International Press Institute
Internet Democracy Project
La Quadrature du Net
Lithuanian Online Media Association
Mass Media Defence Center
Media Foundation Leipzig
Media Law Resource Center
Media Legal Defence Initiative
National Press Photographers Association
National Public Radio
Nederlands Genootschap van Hoofdredacteuren
Nederlands Uitgeversverbond (NUV)
Nederlandse Vereniging van Journalisten
Net Users' Rights Protection Association
News Corp.
Newspaper Association of America
North Jersey Media Group, Inc
NRC Handelsblad
Online News Association
Open Media Coalition - Italy
Open Rights Group
Panoptykon
PEN International
PEN-Vlaanderen

Persvrijheidsfonds
Raad voor de Journalistiek
Radio Television Digital News Association
Raycom Media, Inc.
Reporters Committee for Freedom of the Press
Sanoma Media Netherlands B.V.
Telegraaf Media Groep NV
The New York Times Company
Thomson Reuters
Vlaamse Nieuwsmedia
Vlaamse Vereniging van Journalisten
Vrijschrift
World Association of Newspapers and News Publishers