

## 30 MAGYAR JETI ZRT. V. HUNGARY

### *Judgment of the ECtHR Concerning the Imposition of Liability for Posting Hyperlinks to Defamatory Content*

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#### **Keywords**

freedom of expression, defamatory content, liability of online press, Article 10 ECHR, hyperlinks

#### **Abstract**

The article aims to introduce the judgment of the ECtHR on the case *Magyar Jeti Zrt. v. Hungary*. Although in this Hungarian case the ECtHR dealt with a special provision of the Hungarian Civil Code that – under the interpretation of the domestic courts – imposes objective liability for posting hyperlinks which lead to third-party online content, the judgment can be considered as a big improvement compared to the previous decisions of the ECtHR concerning the freedom of expression. The judgment offers legal certainty and guidance for journalists who post hyperlinks by determining five relevant questions to be taken into account when deciding whether the liability of a press organ can be established for contents cited from other websites over which they have no control. Becoming the best ECtHR judgment of the year 2018 under the yearly vote announced by Strasbourg Observers blog portal also emphasizes the importance and the relevance of this decision for the digital media.

#### 30.1 INTRODUCTION

On 4 December 2018 the ECtHR delivered its judgment on the case of *Magyar Jeti Zrt. v. Hungary*, which decision was declared to be the best ECtHR judgment of the year 2018 under the yearly vote announced by Strasbourg Observers, a blog portal that aims to raise awareness on the latest judgments of the ECtHR and to assess recent legal, political and social developments in Europe by introducing the case-law of the ECtHR.<sup>1</sup> This category winner case concerned the freedom of expression guaranteed under Article 10 ECHR.

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1 See <https://strasbourgobservers.com/about/>.

Based on Article 10 ECHR, the ECtHR examines three requirements in order to decide whether the interference of the state can be considered as lawful. The three requirements, which justify the restriction on freedom of expression are lawfulness, legitimate aim and necessity in democratic society.<sup>2</sup> When the ECtHR finds that even one of these three requirements were not fulfilled it will hold that freedom of expression under Article 10 ECHR was violated.<sup>3</sup>

However, freedom of expression under Article 10 ECHR is not only a right in itself but is essential for protecting other rights guaranteed by the ECHR, as well. Furthermore, as the ECtHR has already concluded in its early case-law, “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.”<sup>4</sup> Moreover,

“it is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”<sup>5</sup>

In other words, without freedom of expression there is no democratic political process or development of human beings. Thus the function of Article 10 ECHR is to protect any expression, altogether its content disseminated by any individual, group or type of media.<sup>6</sup> As it was first emphasized by the ECtHR in *Lingens v. Austria*, the press is a ‘public watchdog’, thus it has a special status to enjoy the freedom of expression under Article 10 ECHR. The press has an important democratic function when it imparts information and ideas on political issues and opens the way for political and other debates of public interest.<sup>7</sup>

However, the digital environment and the use of new technologies, such as Internet, as a new field of communication affect the work of journalists as well, and the protection of the freedom of expression on the Internet becomes a more and more pertinent issue. Although the Internet expanded the possibilities of the media, it also reproduced the problems of the ‘original’ platform of the media, and created new challenges.<sup>8</sup> Since only

2 Judit Bayer, ‘Az Emberi Jogok Európai Bíróságának 10. cikkkel kapcsolatos joggyakorlatának egyes súlypontjai’, *Állam- és Jogtudomány*, Vol. 58, Issue 4, 2017, p. 120.

3 The same ‘three-part test’ is applied by the ECtHR in cases relating to Articles 8, 9 and 11 as well.

4 *Castells v. Spain*, No. 11798/85, 23 April 1992, para. 42.

5 *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976, para. 49.

6 Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights – A Handbook for Legal Practitioners*, Council of Europe, Strasbourg, 2017, p. 12.

7 Id. p. 87.

8 András Koltay, *Új média, új szerkesztők és a sajtószabadság alapjoga*, HTE MediaNet, Vol. 70, Kecskemét, 2015, p. 10.

a limited number of regulations have been adopted relating to the digital challenges, national and international judges, as well as judges of the ECtHR play an important role in establishing the main standards.<sup>9</sup>

### 30.2 RELEVANT ECtHR CASE-LAW CONCERNING THE FREEDOM OF EXPRESSION

As the ECtHR emphasized it in its early case-law, the right to access to Internet and participating in the information society is inherent in the right to freedom of expression. The ECtHR first pointed out in *Ahmet Yildirim v. Turkey* that

“the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.”<sup>10</sup>

This case set an important precedent relating to the exercise of the right to freedom of expression online, as it was the first case concerning blocking access to Internet, dealing with blocking access to the entire domain of Google sites by a blanket blocking order, since it hosted a website containing content which was deemed offensive to the memory of Atatürk. In its decision the ECtHR noted that “Google Sites is a Google service designed to facilitate the creation and sharing of websites within a group and thus constitutes a means of exercising freedom of expression.”<sup>11</sup> The ECtHR held that there had been a violation of Article 10 ECHR as

“the measure in question produced arbitrary effects and could not be said to have been aimed solely at blocking access to the offending website, since it consisted in the wholesale blocking of all the sites hosted by Google Sites. Furthermore, the judicial review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general.”<sup>12</sup>

In this judgment the ECtHR concluded that if the restrictions on freedom of expression do not meet with the conditions required by Article 10(2) ECHR, freedom of expression

9 Bychawska-Siniarska 2017, p. 108.

10 *Ahmet Yildirim v. Turkey*, No. 3111/10, 18 December 2012, para 54.

11 *Id.* para 49.

12 *Id.* paras. 68-69.

under Article 10 ECHR will be violated. On the other hand, the ECtHR also concluded that free speech is not an absolute right, thus it cannot enjoy greater protection than other fundamental rights. However, taking into account the risks carried by the Internet, it is more likely that freedom of expression may be limited on the online platform than in the non-digital environment.<sup>13</sup>

Another important decision on this topic was delivered in *Cengiz and Others v. Turkey*. In this case the ECtHR emphasized the importance of YouTube in the exercise of freedom of expression by observing that “YouTube is a video-hosting website on which users can upload, view and share videos and is undoubtedly an important means of exercising the freedom to receive and impart information and ideas.”<sup>14</sup> In this case the ECtHR held that blocking YouTube violated Article 10 ECHR as

“the authorities should have taken into consideration, among other aspects, the fact that such a measure, by rendering large quantities of information inaccessible, was bound to substantially restrict the rights of Internet users and to have a significant collateral effect.”<sup>15</sup>

As the ECtHR concluded in these two decisions, blocking online services widely used by Internet users (Google Sites and YouTube) as platform for user-generated content that allegedly commit a crime cannot be permitted, as it violates the other users’ right to freedom of expression by rendering them unable to use these services.<sup>16</sup>

In *Kalda v. Estonia*, the ECtHR dealt with granting prisoners’ access to the Internet in particular circumstances. In this case a prisoner was not allowed to access three Internet websites run by the state and the Council of Europe which contained legal information.<sup>17</sup> In this case the ECtHR considered that

“Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners. However, [...] in the circumstances of the case, since access to certain sites containing legal information is granted under Estonian law, the restriction of access to other

13 Oreste Pollicino, ‘European Judicial Dialogue and the Protection of Fundamental Rights in the New Digital Environment: An Attempt at Emancipation and Reconciliation: The Case of Freedom of Speech’, in Sonia Morano-Foadi & Lucy Vickers (eds.), *Fundamental Rights in the EU. A Matter for Two Courts*, Hart Publishing, 2015, p. 106.

14 *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, 1 December 2015, para. 52.

15 Id. para 64.

16 András Koltay, ‘Az internetes kapuőrök és az Emberi Jogok Európai Egyezményének 10. cikke – A sajtószabadság új alanyai’, *Állam- és Jogtudomány*, Vol. 58, Issue 4, 2017, p. 136.

17 *Kalda v. Estonia*, No. 17429/10, 19 January 2016, paras. 6-9.

sites that also contain legal information constitutes an interference with the right to receive information.”<sup>18</sup>

The ECtHR found that security and cost implications as reasons for not allowing the applicant prisoner to access the required Internet sites had not been sufficient to justify this interference, thus Article 10 of ECHR had been violated in this case.<sup>19</sup>

The ECtHR had to deal with cases concerning the liability for online user-generated content as well. In *Delfi v. Estonia*, the domestic courts held liable Delfi AS – a company that run an internet news portal on a commercial basis – for the offensive comments posted by its readers under one of its online articles about a ferry company. According to the decisions of the domestic courts, Delfi AS had to remove the offensive comments.<sup>20</sup> The ECtHR found that the nature of the comments was extreme and the comments were posted in reaction to an article published by Delfi AS on its professionally managed news portal run on a commercial basis. Thus, the domestic courts imposed liability on Delfi AS on relevant and sufficient grounds without the violation of Article 10 ECHR.<sup>21</sup> In other words, in this case the ECtHR found that protecting the reputation of individuals ranks among the objectives that can justify a limitation on freedom of expression.<sup>22</sup>

However, a different conclusion was reached by the ECtHR in *Magyar Tartalomsgálgatók Egyesülete and Index.hu v. Hungary*. In this case a self-regulatory body of Internet content providers and an internet news portal were held liable by the domestic courts for offensive and vulgar online comments posted by their readers on their websites relating to the publication of a critical opinion on the practice of two real estate websites.<sup>23</sup> According to the ECtHR, in this case there had been a violation of Article 10 ECHR, since the exercise of the domestic courts was not balanced properly between the right to freedom of expression of the applicants and the right to respect regarding the commercial reputation of the real estate websites as competing rights. The ECtHR also found that the internet service providers did not operate for profit and the comments did not contain hate speech.<sup>24</sup>

As we can see in these two cases the ECtHR decided on the question of violation of Article 10 ECHR by examining the offensive content of the comments.<sup>25</sup> In other words,

18 Id. para. 45.

19 Id. para. 53.

20 *Delfi AS v. Estonia (GC)*, No. 64569/09, 16 June 2015, paras. 11-32.

21 Id. para. 162.

22 Oreste Pollicino & Marco Bassini, ‘Free Speech, Defamation and the Limits to Freedom of Expression in the EU: A Comparative Analysis’, in Andrej Savin & Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Edward Elgar Publishing, 2014, p. 508.

23 *Magyar Tartalomsgálgatók Egyesülete and Index.hu v. Hungary*, No. 22947/13, 2 February 2016, paras. 5-25.

24 Id. paras. 89-91.

25 Bayer 2017, p. 120.

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if the offensive content of the comment goes over a certain limit, the Internet content provider can be held liable for the infringement.<sup>26</sup>

In *Times Newspaper Ltd v. the United Kingdom*, the ECtHR dealt with the responsibility of publishers of internet archives containing materials that violated the right to reputation. During the libel proceedings against the applicant newspaper, it was required to add a notice to both articles in its Internet archive indicating that they were subject to libel litigation.<sup>27</sup> The ECtHR concluded that this requirement had not been disproportionate, thus, there had been no violation of Article 10 ECHR.<sup>28</sup>

The ECtHR had to deal with the question of liability for information obtained from Internet as well. The case of *Editorial Board of Pravoye Delo and Stekel v. Ukraine* concerned defamation proceedings against a local newspaper and its editor-in-chief for publishing a letter downloaded from the internet alleging that senior local officials were corrupt and involved with a criminal gang.<sup>29</sup> In this case the ECtHR found that the domestic courts imposed the applicant's liability without proper legal basis, since

“given the lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet, the applicants could not foresee to the appropriate degree the consequences which the impugned publication might entail. This enables the Court to conclude that the requirement of lawfulness contained in the second paragraph of Article 10 of the Convention was not met.”<sup>30</sup>

As the ECtHR concluded in this decision, states have a positive obligation to create adequate laws for preventing and dealing with online infringements of law, since the Internet cumulates and increases the risk of certain challenges already known before.<sup>31</sup>

As it was introduced, concerning digital challenges the ECtHR has already had to deal with cases relating to the blocking the access to Internet, the liability for online user generated content, the liability for publications on the Internet and the liability for publication of information obtained from the Internet. However, in the case *Magyar Jeti Zrt. v. Hungary* the ECtHR had to deal with a totally different and more complex question: whether someone can be found objectively liable for using hyperlinks to refer to online content over which they have no control at all if this online content later was declared to be

26 Koltay 2017, p. 138.

27 *Times Newspaper Ltd v. the United Kingdom*, Nos. 3002/03 and 23676/03, 10 March 2009, paras. 5-8.

28 Id. para. 49.

29 *Editorial Board of Pravoye Delo and Stekel v. Ukraine*, No. 33014/05, 5 May 2011, paras. 4-20.

30 Id. para. 66.

31 Koltay 2017, p. 136.

unlawful, in other words whether the press organ is objectively liable for the veracity of the contents cited from third parties.

### 30.3 BACKGROUND OF THE CASE IN QUESTION

The applicant of the case before the ECtHR was Magyar Jeti Zrt., a Hungarian company that operates a Hungarian news portal called 444.hu. This news portal publishes approximately 27 articles per day in several topics such as politics, sports, technology and it has approximately 250,000 unique users per day.<sup>32</sup> On 6 September 2013 an article was published on this online news portal about the following incident.

On 5 September 2013 a group of probably drunk football fans who travelled by bus to a football match stopped at an elementary school in Konyár, a Hungarian village, near the Romanian border. The fans got off the bus and started singing while waving flags and throwing beer bottles. Furthermore, they chanted and shouted racist remarks at the mostly Roma students playing outside in the playground of the school. One of the fans even urinated in front of the school building. The teachers took the children inside the school building, and to keep them safe, they made them hide under tables and called the police. After the police arrived, the group got back on the bus and left.<sup>33</sup>

On the same day, the leader of the Roma minority local government in Konyár, Mr. Gy. gave an interview about the incident to Roma Produkciós Iroda Alapítvány, a media outlet focusing mostly on Roma issues. In his interview he accused the Hungarian right-wing political party called Jobbik of the incident and stated that “Jobbik came here [...] they attacked the school, Jobbik attacked it [...] Members of Jobbik, I add, they were members of Jobbik, they were members of Jobbik for sure.” A video of this interview was also uploaded on Youtube.<sup>34</sup>

The applicant company published an article about this incident on the 444.hu news portal under the title “Football fans heading to Romania stopped to threaten gypsy pupils.” The article was written by one of the journalists of the news portal and started with the following paragraphs:

“By all indications, a bus full of Hungarian football fans heading to a Romania-Hungary game left a highway in order to threaten mostly Gypsy pupils at a primary school in Konyár, a village close to the Romanian border. According to our information and witness statements, the bus arrived in the village

<sup>32</sup> *Magyar Jeti Zrt v. Hungary*, No. 11257/16, 4 December 2018, para. 6.

<sup>33</sup> *Id.* para. 7.

<sup>34</sup> *Id.* para. 8.

Thursday morning. The fans were inebriated and started insulting Gypsies and threatening the pupils. Teachers working in the building locked the doors and instructed the smallest children to hide under the tables. Mr. Gy., president of the local gypsy municipality, talked to us about the incident. A phone conversation with Mr. Gy. and a parent has already been uploaded to Youtube.”<sup>35</sup>

As we can read in this extract, in the description of the incident the article referred to the football fans only and the political party Jobbik was not mentioned at all. The article only indicated that a phone conversation with Mr. Gy. and a parent had already been uploaded on Youtube. However, the words “uploaded on Youtube” were highlighted in green and were activated as a hyperlink, which took the readers clicking on it to the Youtube video about the interview with Mr. Gy. Three other websites operated by other media outlets also activated a hyperlink to this Youtube video.

On 13 October 2013 the political party Jobbik started defamation proceedings at Debrecen Regional Court, Hungary. Amongst the eight defendants were Mr. Gy., Roma Produkciós Iroda Alapítvány, Magyar Jeti Zrt. and the other media outlets that activated hyperlinks to the Youtube video. The political party Jobbik claimed that the defendants infringed its right to reputation under Section 78 of the Civil Code not only by naming and accusing Jobbik for the incident but even by creating hyperlinks to the Youtube video.

According to the relevant Hungarian legislation, personality rights such as the right to reputation are protected by the Civil Code and the relevant rules are applicable not only to private individuals but to legal personalities as well. Regarding defamation, the Civil Code states that statements or even the dissemination of a falsehood relating to another person can violate the right to reputation and establish defamation. Untrue statements or giving untrue information influencing the public’s way of thinking about a person violate the right to reputation. In case that these statements or information influencing the public’s way of thinking are not the expression of objective reality, they are in infringement of the right to reputation, regardless of whether they were done in good or bad faith, thus, they can be imputable to the infringer.<sup>36</sup>

#### 30.4 LEGAL PROCEDURES BEFORE THE DOMESTIC COURTS

As we mentioned before, the political party Jobbik brought defamation proceedings before the Debrecen Regional Court against eight defendants including Mr. Gy., Roma Produkciós

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35 Id. para. 9. The full article in Hungarian can be read at <https://444.hu/2013/09/06/romaniaba-tarto-szurkolok-alltak-meg-cigany-diakokat-fenyegetni>.

36 Ferenc Petrik, *A személyiségi jog védelme. A sajtó-helyreigazítás*, HVG-ORAC, Budapest, 2001, p. 89.



Iroda Alapítvány, Magyar Jeti Zrt. and the other media outlets that uploaded the video about the interview with Mr. Gy. or activated hyperlinks to it.

The Debrecen Regional Court found that Mr. Gy. violated the plaintiff's right to reputation in the interview given by Roma Produkciós Iroda Alapítvány and later uploaded on Youtube, by suggesting the untrue impression that the incident on 5 September 2013 in Konyár was committed by the political party Jobbik and that the people who participated in it were members of Jobbik. The regional court also found that the defendants who uploaded this interview containing these false statements, as well as the defendants who disseminated it by activating the hyperlink to the Youtube video violated the political party Jobbik's right to reputation.<sup>37</sup> Thus, the defendants who uploaded the video were obliged to publish an excerpt of the decision of the regional court on their websites, and the other defendants – including Magyar Jeti Zrt. – were obliged to delete the hyperlinks from the articles. Furthermore, Mr. Gy. was also obliged to pay non-pecuniary damages to the political party Jobbik.

In the judgment the regional court pointed out that although Article IX of the Fundamental Law of Hungary protects and guarantees the right to expression, it does not mean that this right is without any restrictions because even while practicing this right, the right to reputation cannot be violated. Relating to Mr. Gy, the regional court found that when he falsely suggested that the political party Jobbik was involved in the incident in Konyár and the participants of the incident were members of Jobbik, defamation was established since the political party Jobbik could be recognized through the content of the interview without any question. With his interview Mr. Gy. falsely conveyed the impression that the political party Jobbik committed a threatening, racist and aggressive act against the Roma students and his statements could negatively influence the public opinion about the political party. Relating to the other defendants, the regional court highlighted that under the relevant sections of the Civil Code, the violation of the right to reputation can be realized not only by making untrue statements but also by publishing or disseminating these untrue statements, regardless of whether it was made in good or bad faith or whether the infringement can be imputable to the person who committed it.<sup>38</sup>

In other words, relating to Magyar Jeti Zrt., the regional court established that when they made the Youtube video available by creating a hyperlink to it, they infringed the plaintiff's right to reputation, because through the hyperlink they publicly disseminated the defamatory statements of Mr. Gy. The regional court also pointed out that, although the defendants who activated hyperlinks to the video published their reports about the incident in the most realistic way and using the available information and presenting all the contradictory opinions – thus, acting with the necessary precision for to the responsible

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37 Debrecen Regional Court 6.P.21.359/2013/24.

38 Id.

practice of their work – under the relevant Hungarian legislation, they are still objectively liable for disseminating the defamatory statements. Since this lack of imputability leads to the lack of subjective liability, these defendants – unlike Mr. Gy. – were not obliged to pay non-pecuniary damages.<sup>39</sup> The regional court concluded that there were four conjunctive conditions to indemnify non-pecuniary damages. The violation of personal rights shall be unlawful, the violation must be imputable to the person who committed the infringement, non-pecuniary disadvantage must be suffered and there must be a causal link between the violation of personal rights and the non-pecuniary disadvantage. In the case of legal persons, non-pecuniary damage includes some kind of non-pecuniary disadvantage or loss in the public opinion about the legal person, in the legal person's participation in its business or in other relations.<sup>40</sup>

Six defendants including Magyar Jeti Zrt. appealed to the Debrecen Regional Court of Appeal claiming that in the interview Jobbik was mentioned not as a political party but as a group of people with anti-Roma ideology. Nevertheless, it had been publicly known that the political party Jobbik embraced anti-Roma ideology and was involved in hatred-inciting activities. The increasing popularity of the political party Jobbik could be linked to its activities relating to this ideology, thus, the content of the interview could not be defamatory to it. Public opinion identified Jobbik more as a collectivity of organizations with anti-Roma ideology than as a political party. The interview contained the opinion of Mr. Gy. that the ideology of participants involved in the incident could be identified as similar to the ideology of the political party Jobbik. Thus, the interview of Mr. Gy. did not contain statements but only opinions which stayed within the framework of freedom of expression. In relation to those defendants who activated hyperlinks to the Youtube video, it was also emphasized that they did not identify with the content of the video, only made it available by creating a hyperlink, which act did not establish dissemination.<sup>41</sup>

The Debrecen Regional Court of Appeal upheld the decision of Debrecen Regional Court. The regional court of appeal did not accept the argument of the defendants that the interview of Mr. Gy. did not contain statements, only opinions, which stayed within the framework of freedom of expression. The regional court of appeal pointed out that statements and opinions must be distinguished as follows.

Claiming that something has happened establishes the statement of facts, which is an objective category having the content of reality, while opinions express an ideology, criticism or way of thinking, which is a subjective category. A statement of fact can be proven true or false. In the case of an opinion, however, this is not possible, since people can merely

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39 Id.

40 Id.

41 Debrecen Regional Court of Appeal Pf.I.20.289/2014/7.

identify with it.<sup>42</sup> Furthermore, statements must be examined by their contents, which must be evaluated in complexity, being aware of the public opinion of the society.<sup>43</sup> When a statement can be evaluated in more than one ways and an injurious meaning may be connected to it, violation of personal rights can be established.<sup>44</sup> Thus, the content of the interview of Mr. Gy. can be qualified as a statement of facts, as it can give the impression to the average audience that the participants of the incident were members of the political party Jobbik.

Regarding the defendants who activated hyperlinks to the Youtube video, the regional court of appeal pointed out that defamation can be realized by making an untrue statement available via a link, even if the disseminator does not identify with the content. Under Section 78 of the Civil Code, dissemination occurs by sharing the information, which makes the content available to anyone and, thus, the disseminator has objective liability.<sup>45</sup> Since dissemination is realized by sharing information, which results in objective liability, it does not matter what the aim of the sharing was, whether it was acted in good or bad faith, what the scope of publicity or the gravity of the infringement was.<sup>46</sup>

Two defendants, including Magyar Jeti Zrt. lodged a petition for review with the Curia of Hungary, arguing in essence that the judgment of Debrecen Regional Court of Appeal restricted the freedom of press in an unnecessary manner, as the defendants only reported on an event of public concern and acted with the necessary precision relating to the journalistic practice. It was maintained that the interview of Mr. Gy. contained opinions and not statements of facts, since the expression “Jobbik” referred to the behavior of the football fans and not to the political party. Dissemination cannot be established, since the defendants did nothing more than fulfil their journalistic obligation of reporting. Furthermore, as the lower-level courts established in their judgments, the reports of the defendants were balanced and in compliance with the journalistic tasks.<sup>47</sup>

The Curia of Hungary upheld the judgment of Debrecen Regional Court of Appeal. It agreed with the lower-level court in that the interview of Mr. Gy. contained statement of facts that linked the political party Jobbik to the incident with the football fans. The lower-level courts had to examine the veracity of this link which should have been proven by the defendants, and which the defendants could not prove.<sup>48</sup> Relating to dissemination, the Curia of Hungary recited its previous decisions,<sup>49</sup> emphasizing that dissemination could

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42 Id.

43 Supreme Court of Hungary PK 12.

44 Budapest-Capital Regional Court of Appeal 2.Pf.20.732/2012/3.

45 Debrecen Regional Court of Appeal Pf.I.20.289/2014/7.

46 Curia of Hungary BH 2013.266.

47 Curia of Hungary Pfv.20.011/2015/3.

48 Id.

49 Curia of Hungary Pfv.II.930/2011/7., Curia of Hungary Pfv.IV.21.968/2012/6.

be realized by sharing information or making it available in a way that anyone could have access to it. Internet is only one possible platform for publishing where dissemination can be realized, meaning that information and facts are shared by computer network. The hyperlink in an article becomes an attachment and it makes the content of the attachment accessible and readable by one click. In case of dissemination the Civil Code established objective liability, regardless of whether the disseminator acted in good or bad faith. The Curia of Hungary held that requiring media outlets not to make accessible any injurious content did not restrict the freedom of press or the freedom of expression, since this requirement was not of the kind which could not be in compliance with journalistic practice.<sup>50</sup>

Magyar Jeti Zrt. lodged a constitutional complaint against the judgment of the Debrecen Regional Court of Appeal under Act CLI of 2011 on the Constitutional Court. The company did not argue that, under Section 78(2) of the Civil Code, even dissemination can establish the violation of the right to reputation. However, judicial practice interpreted this section in a way which resulted in that the press organ was objectively liable for the veracity of the contents cited from third parties. Thus, violation can indeed be established when a press organ reports on an event of unclarified circumstances in an unbiased and balanced way, and in compliance with the journalistic tasks. This interpretation creates an undue burden for the press organs as they could only publish information the veracity of which is beyond any doubt, making it impossible to report on controversial events.<sup>51</sup> Magyar Jeti Zrt. also found the judicial practice unconstitutional, as it did not examine whether the conduct of the press organs was in compliance with the ethical and professional rules of journalism, only the veracity of the disseminated information was examined.<sup>52</sup>

The Constitutional Court dismissed the constitutional complaint, emphasizing that distinction must be made between reports on public figures' press conferences and reports on events, which the press presents according to its own assessment. In the case of public figures' press conferences, if the report was objective and unbiased and if the statement concerned a matter of public interest, the publisher gave the source of the statement and enabled the person to whom the statement was injurious to react, thus, dissemination could not be established, as press organs neither made their own statements nor intended to influence the public opinion with their own thoughts.<sup>53</sup> However, in the case of the football fans, the press report was not about providing up-to-date information on statements of third parties of a public debate or at a press conference, but about summarizing the

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50 Curia of Hungary Pfv.20.011/2015/3.

51 Decision No. 3002/2018. (I. 10.) AB, Reasoning [26].

52 Id. Reasoning [27].

53 Id. Reasoning [75].

contradictory information relating to an event of public interest. Thus, creating a hyperlink to the Youtube video established dissemination.<sup>54</sup>

After exhausting domestic remedies, on 23 February 2016 Magyar Jeti Zrt. lodged an application with the ECtHR arguing that the domestic courts restricted its freedom of expression under Article 10 ECHR by finding it liable for publishing a hyperlink leading to an interview containing defamatory statements.

### 30.5 APPLICATION TO THE ECtHR

Magyar Jeti Zrt. claimed that, although under Section 78(2) of the Civil Code, dissemination of injurious and false content establishes liability, no legislation or case-law can be found that would state that using hyperlinks could be considered as dissemination.<sup>55</sup> It emphasized that the hyperlinks did not convey but merely point to the information, and the domestic courts made their decisions without paying attention to this special aspect of hyperlinks. Establishing objective liability for using hyperlinks would result in the establishment of dissemination even if the hyperlinked website, at a later time, modified its content to defamatory falsehoods that originally were not included.<sup>56</sup> The rule of objective liability as the domestic courts applied it rendered the domestic courts unable to consider the purpose of the dissemination or whether Magyar Jeti Zrt. had acted in good or bad faith. Objective liability rules were incompatible with the case-law of the ECtHR and not necessary in a domestic society.<sup>57</sup> Magyar Jeti Zrt. also claimed that the right to reputation of the political party Jobbik should not have prevailed over the applicant company's right to expression.<sup>58</sup> It emphasized that a greater degree of tolerance to criticism was required from politicians.<sup>59</sup> The applicant company maintained that even domestic courts had found that the report of the applicant company was balanced and in compliance with the ethic and professional rules of journalism. Using a hyperlink in its article had been a technique of reporting which enabled the applicant company not to identify with the content of the Youtube video. Magyar Jeti Zrt. also noted that if the use of hyperlinks were to automatically establish objective liability for defamation, online news portals would be unable to use hyperlinks in their articles, which would restrict the cross-referential system of the Internet and, thus, would restrict the users' access to information.<sup>60</sup>

54 *Id.* Reasoning [77].

55 *Magyar Jeti Zrt. v. Hungary*, No. 11257/16, 4 December 2018, para. 38.

56 *Id.* para. 39.

57 *Id.* para. 41.

58 *Id.* para. 42.

59 *Id.* para. 40.

60 *Id.* para. 43.

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The Hungarian Government maintained that, according to the applicable sections of the Civil Code, defamation could be realized by stating or disseminating an injurious falsehood relating to another person, and that the protection of the personality rights of others, such as the right to reputation, prevailed over the right to freedom of expression.<sup>61</sup> In its view, the applicant company did not act with due care when hyperlinked the Youtube video, as Mr. Gy. used definite terms in the interview that could not be interpreted as an opinion but only as a statement of facts, which allowed for a negative influence on the public opinion about the political party Jobbik. Thus, acting in good or bad faith was irrelevant in establishing the infringement of the political party's right to reputation.<sup>62</sup> It emphasized that distribution could be realized by making unlawful contents accessible in any way, which could impose objective liability on the distributor. This could enable preventing serious violations of human rights without any sanctions. The Government argued that this would mean a limitation of freedom of expression or would impose an undue burden on the publishers.<sup>63</sup> In the view of the Government, the judgments of the domestic courts held a fair balance between the competing rights of the applicant company and the political party Jobbik.<sup>64</sup>

Regarding third-party views, there must be a distinction between using a hyperlink to another website and publishing the content of a linked webpage. Hyperlinks are for navigating readers to a content that had already been published somewhere else, thus, it would be difficult to find or to access to information without hyperlinks. It was emphasized that the content of the linked website could be changed later anytime without the awareness of the user of the hyperlink, thus, establishing liability for third-party content would mean that a wide range of groups could be held liable for content over which they have no control and that would reduce the Internet users' access to information.<sup>65</sup> Using hyperlinks had several benefits for the public interest both on the journalists' and the readers' side. For instance, it allows to deliver content faster, which in turn facilitates the journalistic process and allows readers to check the original content of journalistic sources. It also promotes public debate as information and opinions can be reached and expressed more freely. However, it was also accepted that there could be cases when the liability of journalists could be realized regarding the use of hyperlinks, such as when they refuse to remove a hyperlink which leads to content that was found illegal by a court judgment.<sup>66</sup> It was added that Internet was based on the idea of linking information freely, allowing readers to navigate to and from information, thus, hyperlinks did not serve the purpose of endorsing

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61 Id. para. 45.

62 Id. para. 46.

63 Id. para. 47.

64 Id. para. 49.

65 Id. para. 50.

66 Id. para. 51.

one publication or another. Without using hyperlinks, alternative instructions would be needed so that readers can find more information.<sup>67</sup> In addition, if online publishers were found liable for the linked content, that would impose an undue burden on civil societies and minorities combating racism, thus, strict liability rules would provide protection only for those who are against the minority groups.<sup>68</sup>

### 30.6 JUDGMENT OF THE ECtHR

In its judgment, the ECtHR first noted that there was no dispute between the parties whether there had been an interference by the decisions of the domestic courts relating to the applicant company's freedom of expression stated by Article 10 ECHR. Since such kind of interference can be accepted only if it was prescribed by law, if it had at least one legitimate aim described by Article 10(2) ECHR and if it was necessary in a democratic society, the ECtHR had to examine these criteria in order to decide whether there had been a violation of Article 10 ECHR.<sup>69</sup>

Regarding lawfulness, the applicant company argued that the interference with its freedom of expression would be prescribed by law, since, in its opinion, under Hungarian law it was not foreseeable that dissemination could be realized by posting hyperlinks. However, the Government stated that under the relevant articles of the Civil Code the liability of the applicant company could be established.<sup>70</sup> The ECtHR emphasized that the expression 'prescribed by law' must have a legal basis in domestic law and must be accessible to whom it concerns with foreseeable effects.<sup>71</sup> The ECtHR also noted that concerning the admissibility and limitations of hyperlinks, neither explicit regulation nor case-law could be found in the domestic law and practice.<sup>72</sup>

Relating to legitimate aim, the ECtHR could accept that the interference with the freedom of expression in the present case served the protection of the rights of others as the Government submitted.<sup>73</sup>

In the question whether an interference with freedom of expression can be held necessary in a democratic society, the ECtHR referred to its case-law which established the following fundamental principles. Journalists who report on issues of general interest must act in good faith and on an accurate factual basis. Furthermore, they must provide reliable

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67 Id. para. 53.

68 Id. para. 55.

69 Id. para. 56.

70 Id. para. 58.

71 Id. para. 59.

72 Id. para. 60.

73 Id. para. 62.

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and precise information in compliance with journalistic ethics. Without fulfilling these requirements, Article 10 ECHR cannot be applicable in their case.<sup>74</sup> ECtHR also needs to examine whether the domestic authorities could hold a fair balance in cases when the values guaranteed by the ECHR such as freedom of expression and right to reputation of others are in conflict with each other and need to be protected.<sup>75</sup> Relating to Internet, it was highlighted that it had an important role in providing access to news for the public and in disseminating information. However, the particular nature of Internet makes the risk of violating human rights and freedoms higher compared to the press, thus, the duties and responsibilities of Internet news portals may differ from the duties and responsibilities of traditional publishers. Although in certain cases Internet news portals can be held liable for user-generated content even if they do not publish third-party comments in a traditional way.<sup>76</sup> In its case-law, the ECtHR also dealt with the responsibility of information society service providers (ISSPs) having the function to store information, that is provided by a recipient of their services. The ECtHR found that ISSPs cannot be found liable for content of third parties excepted when they do not remove contents declared to be illegal.<sup>77</sup>

The ECtHR considered that in the present case, it must be examined what the duties and responsibilities of an Internet news portal are in a situation where a hyperlink, that is included in an online article, leads to content, which later was found to be defamatory. Since the domestic courts found the applicant company objectively liable for hyperlinking the defamatory content, the ECtHR had to decide whether the interference in the freedom of expression under Article 10 ECHR was based on sufficient and relevant reasons, and whether it was necessary in a democratic society.<sup>78</sup>

The ECtHR emphasized that the role of hyperlinks was to make information accessible by navigating Internet users from one page to another, thus, linking news and information to each other.<sup>79</sup> For this reason, we must distinguish hyperlinks and traditional acts of publication, since hyperlinks direct Internet users to content that can be found somewhere else on the Internet with the sole purpose to call the attention of the users to the existence of news or information on another website.<sup>80</sup> It was also highlighted as a difference that activating a hyperlink never means to have control over the content of the website where the hyperlink leads and this content can change later anytime. Due to the particularities of hyperlinks, the ECtHR could not agree with the domestic courts, which found that if a

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74 Id. para. 64.

75 Id. para. 65.

76 Id. para. 66.

77 Id. para. 67.

78 Id. para. 69.

79 Id. para. 73.

80 Id. para. 74.



hyperlink disseminated defamatory content it could automatically establish the liability of the person who had activated the hyperlink for the defamatory content.<sup>81</sup>

To decide whether the liability of Magyar Jeti Zrt. as a publisher of a hyperlink that navigated to defamatory content can be established, the ECtHR found the following questions relevant:

“(i) did the journalist endorse the impugned content; (ii) did the journalist repeat the impugned content (without endorsing it); (iii) did the journalist merely put an hyperlink to the impugned content (without endorsing or repeating it); (iv) did the journalist know or could reasonably have known that the impugned content was defamatory or otherwise unlawful; (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?”<sup>82</sup>

Concerning these questions, the ECtHR first noted that the hyperlink in question only linked the article with the Youtube video containing the interview of Mr. Gy. In the article itself there was no further comment nor repetition of any parts of the video. The article did not mention the political party Jobbik at all, only noted that a video about the interview with Mr. Gy. was available on Youtube.<sup>83</sup> Furthermore, the article did not state that the statements in the video were true, it did not approve the hyperlinked content and did not accept any responsibility for it. Thus, the ECtHR concluded that the article did not endorse the content of the Youtube video.<sup>84</sup> The ECtHR also concluded that since the article only posted the hyperlink, it did not repeat any parts of the defamatory content.<sup>85</sup> Relating to the question whether the applicant company knew or could have reasonably known that the hyperlink led to defamatory content, the ECtHR noted that the domestic courts – except the first instance court – did not find this relevant and did not examine it. The ECtHR also pointed out that in the case of politicians and political parties, there are wider limits of acceptable criticism compared to private individuals.<sup>86</sup> For this reason, the ECtHR found that the journalist in the case of Magyar Jeti Zrt. could reasonably assume that the content to which the hyperlink in the article provided access would remain in the acceptable limits of criticism relating to the political party mentioned in the interview.<sup>87</sup> Furthermore, the ECtHR emphasized that since the domestic courts held that hyperlinking resulted in

81 Id. para. 76.

82 Id. para. 77.

83 Id. para. 78.

84 Id. para. 79.

85 Id. para. 80.

86 Id. para. 81.

87 Id. para. 82.

the dissemination of information, which established objective liability, the interpretations and decisions of the domestic courts did not make any balancing possible between the right to reputation of the political party Jobbik and the right to freedom of expression of the Magyar Jeti Zrt., which were the two competing rights in the present case. In the view of the ECtHR, this kind of objective liability could have negative effects on the flow of information on the Internet, as it would make publishers and article authors refrain from using hyperlinks to content over which they could not have any control. Since all of this could have direct, moreover, chilling effects on freedom of expression on the Internet, the ECtHR held that there was a violation of Article 10 ECHR in the case of Magyar Jeti Zrt.<sup>88</sup>

### 30.7 CONCLUSION

Although in the case of *Magyar Jeti Zrt. v. Hungary*, the ECtHR dealt with a special provision of the Hungarian Civil Code, the judgment itself is undoubtedly helpful for journalists to decide whether or not to use hyperlinks to navigate to other content over which they have no control.

In the judgment the ECtHR pointed out that there are four crucial characteristics of hyperlinks to decide whether they establish dissemination. The ECtHR concluded that hyperlinks have (i) a navigational function,<sup>89</sup> (ii) they are referencing tools,<sup>90</sup> furthermore, (iii) hyperlink providers do not exercise control over the content to which a hyperlink leads<sup>91</sup> and last but not least, (iv) hyperlinks do not create new content.<sup>92</sup> Highlighting these specialties, the ECtHR demonstrated a clear understanding of the important role of hyperlinks on the Internet. Contrary to the Hungarian courts, the ECtHR found that dissemination of defamatory information or statements cannot be realized automatically by using hyperlinks. To investigate whether to impose liability for the use of a hyperlink, the ECtHR posted the following five relevant questions to take into account: whether the journalist endorsed the impugned content, whether he repeated it without endorsing it, whether he merely put an hyperlink to the impugned content without endorsing or repeating it, whether he knew or reasonably could have known that the impugned content was defamatory or otherwise unlawful and whether the journalist acted in good faith, respected the ethics of journalism and performed the due diligence expected in responsible journalism.<sup>93</sup>

88 Id. para. 83.

89 Id. para. 73.

90 Id. para. 74.

91 Id. para. 75.

92 Id. para. 75.

93 Id. para. 77.

Providing the aforementioned relevant aspects, the Magyar Jeti Zrt. judgment offered guidance and legal certainty regarding the potential liability for posting hyperlinks to defamatory content. After dealing with cases about blocking the access to Internet, the liability for online user-generated contents, the liability for publications on the Internet and the liability for publication of information obtained from the Internet, the Magyar Jeti Zrt. judgment can be considered as a big improvement compared to the previous judgments of the ECtHR on the freedom of expression concerning digital challenges. Becoming the best ECtHR judgment of the year 2018 under the yearly vote announced by the Strasbourg Observers Blog,<sup>94</sup> it also emphasizes the importance and the relevance of this decision for the digital media.

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94 See <https://strasbourgobservers.com/2019/02/25/the-best-and-worst-ecthr-judgments-of-2018-are/>.